

Commentary on

***Promotion of Tobacco Products
and Accessories Regulations
(Prohibited Terms)***

2 May 2011



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SUMMARY RESPONSE

This paper is the response of Physicians for a Smoke-Free Canada to the proposed Promotion of Tobacco Products and Accessories Regulations (Prohibited Terms) which were gazetted on February 19, 2011.

- The proposed measures are necessary but not sufficient to prevent smokers from being deceived about the relative harmfulness of cigarettes
- The proposed regulations are necessary to bring Canada into compliance with the minimum standards of the Framework Convention on Tobacco Control, but are not sufficient to properly implement Canada's FCTC obligations to end deceptive marketing.
- The proposed regulations are necessary to ensure that Canadian health policy is implemented through law, and not through voluntary agreements with the tobacco industry.
- The proposed regulations have been significantly delayed. In the decade since they were first proposed, the industry has adapted its marketing practices to overcome the effect of these regulations.
- The proposed regulations should apply to all tobacco products, not just cigarettes and little cigars.
- We continue to believe that the advice we offered in response to the last iteration of this proposal is a more effective approach, and is attached as part of this submission, as is the policy paper "A Comprehensive Plan to End the 'Light' and 'Mild' Deception".¹

We recommend

- That the government give priority to developing more comprehensive approach, including prohibiting brand extensions, removal of words, numbers or other signifiers of strength.
- That further restrictions on branded accessories be developed. Should a ban on such accessories not be feasible in Canada (we believe it would be consistent with Canada's constitutional principles), then such accessories should be required to carry equivalent health warnings or other labelling restrictions as tobacco products.
- That the government impose a moratorium on new products to prevent the marketing of products designed to circumvent these and other restrictions on package markings.
- That the government develop performance based regulations which require tobacco companies to ensure that smoker are not misled or confused about relative harmfulness of tobacco products.
- That the government support research to explore standardizing the tobacco product to ensure that the smoking experience of some brands does not suggest they are less harmful products.
- That the government restore monitoring of Canadian smokers' perceptions of relative harmfulness of various tobacco products.

¹ See attachments A: Letter to Christine Belle-Isle dated October 2007 and B. "A Comprehensive Plan to End the 'Light' and 'Mild' Deception".

INFORMATION MISSING FROM THE RIAS

The RIAS is biased and incomplete. It establishes four important objectives (protecting Canadians from misleading information, removing competitive advantages of brands that are presented as lighter or milder, replacing voluntary agreements between government and industry with a legal instrument and bringing Canada into compliance with the FCTC). To accomplish these goals, however, the RIAS presents only two options: the status quo, or a ban on the terms 'light' and 'mild.' Neither of these options will achieve the goals of the regulation, and other options are available.

- The government knows that a ban the terms 'light' and 'mild' will not protect Canadians from misleading information.
- The government knows that brands which continue to communicate through descriptors other than light and mild, or through numbers, or through package design, or through colours or other elements, will continue to have a competitive advantage over brands which do not mislead consumers.
- The government knows that FCTC guidelines require stronger action than proposed in this RIAS.

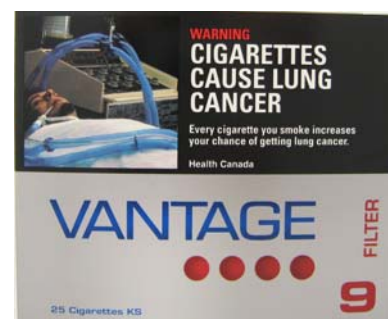
THE GOVERNMENT KNOWS THAT THE PROPOSED MEASURES WILL BE INEFFECTIVE.

- The Canadian government employs some of the most experienced and well informed tobacco control experts in the world. These advisors are well aware that experience in other countries has shown that merely banning the proposed terms is insufficient to eliminate misleading labelling of packaging: As described in a recent article in the journal *Addiction*.²

Despite current prohibitions on the words 'light' and 'mild', smokers in western countries continue to falsely believe that some cigarette brands may be less harmful than others. These beliefs are associated with descriptive words and elements of package design that have yet to be prohibited, including the names of colours and long, slim cigarettes.

- Health Canada researchers have, as we do, access to unpublished research findings from Canadian researchers which quantify the ineffectiveness of a regulation limited to the ban on the proposed terms.

² Beyond light and mild: cigarette brand descriptors and perceptions of risk in the International Tobacco Control (ITC) Four Country. Seema Mutti et al. *Addiction*. Pre-published April 2011.



Numbers are deceptive

THE PROPOSED MEASURES DO NOT IMPLEMENT THE FCTC GUIDELINES

Regulations to fully implement the FCTC guidelines³ would also:

- Implement “effective measures to ensure that tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about the product’s characteristics, health effects, hazards or emissions, including any term, descriptor, trademark or figurative or other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than others.” This would include:
 - Ban on numbers on packages, including those that form part of a trademark, as these create the impression that one brand is less harmful than another.
 - Ban on colours on packages, as these create the impression that one brand is less harmful than another.
 - Ban on sub-variants of brands, as these create the impression that one brand is different than the other, and this difference is likely to be interpreted as health-related.
- To fully implement the FCTC Article 11 Guidelines, Canada should consider (i.e. at least identify as a regulatory option) “measures to restrict or prohibit the use of logos, colours, brand images or promotional information on packaging other than brand names and product names displayed in a standard colour and font style (plain packaging). This may ... address industry package design techniques that may suggest that some products are less harmful than others.”



Colours
and trade
names are
deceptive

³ Available at: http://www.who.int/fctc/guidelines/article_11.pdf

THE GOVERNMENT KNOWS THAT BETTER OPTIONS ARE AVAILABLE.

- Uruguay law (decree #18256) prohibits the use of words such as ‘light’, ‘ultra-light’, ‘mild’ and its Spanish equivalents, as well as banning the use of different colours to identify low tar and ultra low tar versions, as the number of variants of each tobacco brand is restricted to one. This resulted in all low tar and ultra low tar brands being withdrawn from Uruguay, although more high tar and mid-tar brand variants were reintroduced with new brand names. Currently there are only high tar and mid tar cigarettes available in Uruguay.⁴

*The constant advertising from the Ministerio de Salud Pública, states that all types of cigarettes, regardless of tar levels, are equally dangerous. This makes it almost impossible for companies to launch new products with lower tar contents, especially as no advertising is allowed.*⁵

- The government of Australia has recognized that “packaging can create misperceptions about the relative strength, level of tar and health risks of tobacco products” and has prepared draft legislation that would require plain packaging in order to “reduce the ability of the packaging of tobacco products to mislead consumers about the harmful effects of smoking.”⁶

The Australian government also proposes to limit cigarette stick appearance to either plain white or plain white with an ‘imitation cork’ filter tip, and to ban branding, other colours or design features.

THE GOVERNMENT HAS HAD MORE THAN A DECADE TO DEVELOP AN APPROPRIATE RESPONSE.

- The current proposal comes after more than a decade of requests, voluntary agreements and failed regulatory initiatives.
- The current proposal comes in the context of tobacco industry legal challenges suggesting the federal government should be held responsible for any damages resulting from consumers being deceived about light cigarettes.⁷ (See timeline on next page)

THE GOVERNMENT HAS ABANDONED NEEDED RESEARCH TO MONITOR SMOKERS PERCEPTIONS OF RELATIVE STRENGTH OF CIGARETTES.

- Health Canada’s monitoring instrument, the Canadian Tobacco Use Monitoring Survey used to ask smokers “What strength of cigarettes do you usually smoke?” Those who smoked light or mild cigarettes were asked if they believed these cigarettes “reduce the risks of smoking without having to actually give up smoking?” ... “reduce the amount of tar you inhale, compared to regular cigarettes?” and “reduce the risk to your health, compared to regular cigarettes?”.
- These questions are no longer included in the CTUMS questionnaire, and other questions are not used to allow for systematic review of smokers perceptions of relative harm in response to tobacco marketing.

⁴ Euromonitor. Cigarettes in Uruguay. August 2010.

⁵ Euromonitor. Cigarettes in Uruguay. August 2010.

⁶ Government of Australia. Consultation Paper. Tobacco Plain Packaging Bill 2011 Exposure Draft. 7 April 2011

⁷ See Imperial Tobacco Canada Ltd. Amended Third Party Claim

<http://www.smoke-free.ca/litigation/US-CDA-Litigation/Canada%20Litigation/Knight/AmendedThird.pdf>

ANNEX:

TIMELINE OF EFFORTS TO END DECEPTIVE MARKETING

January 1999 – Health Canada issues an official advisory, warning consumers that “light” and “mild” tobacco products “have the same potential to be debilitating and lethal as other types of tobacco.” (Consumer Warning)

May 31, 2001 - World No Tobacco Day. Hon. Allan Rock asks tobacco companies to voluntarily remove “light” and “mild” terms from cigarette packages within 100 days, and asks the Ministerial Advisory Council on Tobacco Control to recommend actions in the event the companies do not comply. (Health Canada press release)

8 September 2001 - 100 days pass without the cigarette companies removing misleading descriptors from their packages.

1 November 2001 – The Health Minister Allan Rock releases the findings of the Expert Panel, which advises that regulations under the Tobacco Act be passed to ban the use of the descriptors. (Health Canada press release)
Expert Panel Report

27 November 2001: United States' National Cancer Institute scientific report concludes no benefit from lower tar cigarettes. (Press release)

1 December 2001 – Notice of Intent published in Canada Gazette proposing ban on the terms “light” and “mild”. (Gazette) Deadline for public responses to notice of intent is January 15, 2002.

November 2002: The World Health Organization Scientific Advisory Committee on Tobacco Product Regulation recommended a ban on all misleading health and exposure claims and related packaging. (SACTOB recommendations)

December 2002: Health Canada research shows that 2 of every 3 smokers of 'light' cigarettes switched to light based on the belief that there would be fewer health risks. (Health Canada overview of 2001 CTUMS findings)

May 8, 2003: Lawyers from the Klein Lyons firm file a class action lawsuit against Imperial Tobacco for damages associated with the deceptive trade practice of 'light' labels on cigarette packages. (Statement of Claim)

May 20, 2003: World Health Organization adopts text for a global tobacco treaty, the Framework Convention on Tobacco Control. The treaty calls for an end to all misleading descriptors, including the use of such terms as “low-tar” and “light.” (WHO press release)

June 16, 2003 - Complaint filed by the Non Smokers Rights Association with federal Competition Bureau regarding the deceptive trade practice of labelling cigarettes as “light” or “mild.” (NSRA Press Release)

July 15, 2003: Canada signs the framework Convention on Tobacco Control - but doesn't say when it will ratify the treaty, or whether it will implement the requirement to ban the terms “light” and “mild” (Health Canada Press Release)

September 30, 2003: “Low-tar” and similar misleading terms are banned on all cigarettes sold in the European Union. (EU directive)

April 30, 2004: Imperial Tobacco files its response to the Knight case filed in British Columbia, arguing that it never represented that “light” or “mild” products reduced the risk of disease and that it was the federal government that directed Imperial Tobacco toward “developing and marketing lower delivery products.”

Imperial Tobacco files a “Third Party Notice,” deflecting responsibility for liability in the Knight case to the federal Government. If consumers were misrepresented about “light” and “mild,” cigarettes, ITL states “then the Federal Government breached the standard of care in the operation of its health programmes,” and should pay any damages awarded in this case.

September 14, 2004: Missouri court certifies 'light' class action suit against Philip Morris ("Craft" suit). (news report)

October 14, 2004: The Federal government replies to Imperial Tobacco's Third Party Notice by recommending that the court throw-out the class action suit.

November 26, 2004. Canada ratifies Framework Convention on Tobacco Control, but does not introduce regulations to end deceptive labelling.

January 2005. NSRA leads a motion before the Federal Court of Canada to obtain a court order to compel the Competition bureau to rule on their complaint from June 2003.

February 8, 2005. The Knight Cigarette case is certified, becoming the first Canadian class action suit against tobacco companies to be certified. Certification Decision (67 KB)

June 28, 2007. Supreme Court of Canada upholds Tobacco Act, including its prohibition of promotion or packaging "likely to create an erroneous impression."

July 3, 2007. B.C. courts dismiss the third party claim by Imperial Tobacco Canada against the federal government. (Ruling)

November 9, 2006: The Competition Bureau accepts a voluntary agreement with 3 major tobacco companies to phase out the terms 'light' and 'mild' by July 31, 2007' (Competition Bureau announcement)

July 31, 2007. Competition Bureau reaches agreement with 6 smaller tobacco companies to end the use of "light" and "mild" on their cigarette packaging by December 31, 2007. (Competition Bureau announcement)

August 4, 2007. Health Canada proposes regulations to end the use of the terms 'light' and 'mild'. (Draft Regulations)

December 12, 2009. B.C. Court of Appeals overturns BC Supreme Court ruling, and rules that the third party claim can continue.

February 19, 2011. Health Canada again proposes regulations to end the use of the terms 'light' and 'mild.' (Draft Regulations).

February 24, 2011. Supreme Court hears appeals related to third party notice. Judgement is reserved.

A COMPREHENSIVE PLAN TO END THE 'LIGHT' AND 'MILD' DECEPTION.

January 2005



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A comprehensive plan to end the 'light' and 'mild' deception.

For over thirty years, Canadian tobacco companies have deceived smokers into thinking that 'light' cigarettes are less harmful than 'regular' cigarettes. They have designed their cigarettes and their cigarette packaging and marketing to perpetuate this deception.

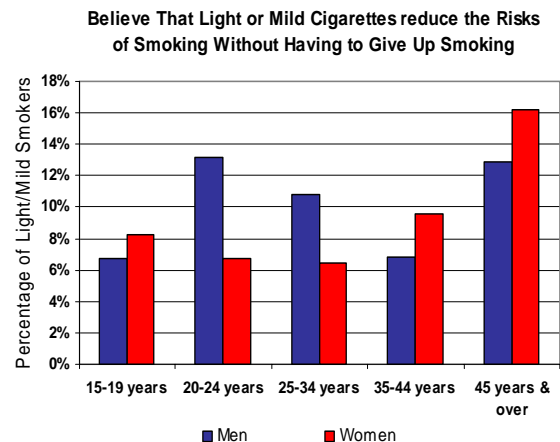
For over twenty years, Health Canada has known that the measurements of tar, nicotine and other compounds produced by smoking machines do not reflect the amount of harmful substances inhaled by real smokers. For over six years, Health Ministers and the department have admitted that this deception is harming Canadians, but have done nothing to stop change the way tobacco companies use packaging marketing and cigarette design to deceive smokers.

For over ten years, health groups have been calling for an end to the deception and have called on Health Canada to use its regulatory power to ban deceptive packaging and labelling and have called on the Competition Bureau and other consumer protection bodies to intervene.

Many Canadians still believe that these cigarettes are less harmful, even though governments and other health authorities have cautioned that this is not the case. More than 600,000 Canadians who smoke so-called 'light' and 'mild' cigarettes believe that they will get less tar from these cigarettes.¹

To protect consumers, Health Canada must **ban each of the deceptive practices** used by tobacco companies, including:

1. The use of misleading brand descriptors that falsely convey differences in 'strength,' such as 'light,' 'ultra-light,' 'mild,' 'ultra-mild,' 'smooth,' etc.
2. The use of misleading colours and packaging elements that falsely convey differences in strength, such as the use of lighter colours or more white space to falsely imply that these products are less harmful.
3. The display of numbers on packages that falsely convey differences in the amount of compounds inhaled between brands or sub-brands of cigarettes, and that fail to tell consumers how much they are inhaling.
4. The marketing and display of cigarettes in ways that falsely conveys distinctions between types of cigarettes.
5. The use of brand extensions (several types of one brand of cigarettes) that falsely convey distinctions between types of cigarettes.
6. The use of cigarette designs that falsely convey a smoking experience of 'reduced-strength', and that facilitate changes in smoking behaviour that are unperceived or barely perceived by the smoker.



Health Canada surveys show that the light and mild deception harms many smokers

Step 1: Ban misleading brand descriptors

Health Canada's continued delays in banning the use of the terms 'light' and 'mild' have become cause for wide concern. More than three years have passed since a previous Minister of Health requested tobacco companies to voluntarily remove these labels, and subsequently issued a notice of his intent to implement regulations requiring them to do so.

Other countries have not been so slow to take this important first step. Since September 30, 2003 the European Union has required its (now) 25 member states to ensure that "texts, names, trade marks and figurative or other signs suggesting that a particular tobacco product is less harmful than others shall not be used on the packaging of tobacco products."² Brazil and Israel have introduced similar provisions.³

Canada recently ratified the global tobacco treaty, the Framework Convention on Tobacco Control, which requires that parties to the treaty:

*"ensure that tobacco product packaging and labelling do not promote a tobacco product by any means that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These may include terms such as "low tar", "light", "ultra-light", or "mild";"*⁴

Tobacco industry tactics in the countries which have banned terms suggest that additional measures are necessary.

The companies have attempted to subvert the purpose of the European and Brazilian regulations by introducing colour-coding to replace the newly-banned terms. Red is most often used to convey "full strength", blue to convey "light," silver to convey "extra light" and green to convey menthol.

The tobacco companies' willingness to continue communicating false differences in their brands illustrates why it is necessary to ban the use of misleading descriptors, but that doing *only* this is not sufficient to end the deception.



In Europe and Brazil, tobacco companies replaced words like 'light' with colour coding.

Step 2:

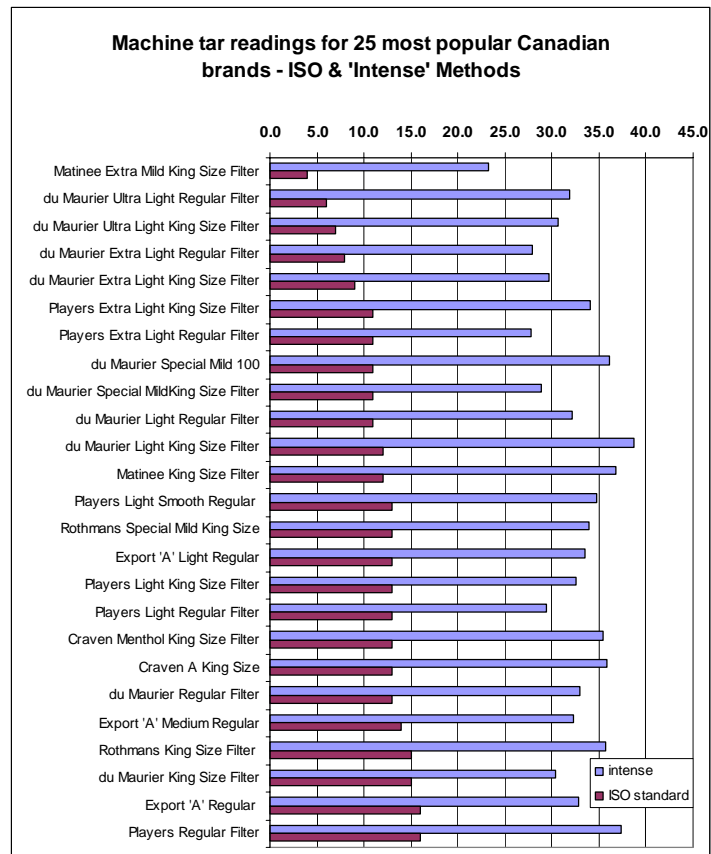
Remove misleading numbers from cigarette packages

In 1976, Canada's tobacco companies adopted a voluntary code to display ratings for tar and nicotine content of their cigarettes. The same year, the first 'light' brand (Players' Light) was introduced. It quickly became the best-selling brand. In 1989, the first federal laws on cigarette labelling came into effect, and the formerly voluntary listing on packages of tar, nicotine and carbon monoxide became mandatory. In 2000 the government imposed new requirements that other compounds also be disclosed, and that a second machine measurement also be used.⁵ The first method (ISO or FTC) was developed by tobacco companies, the second was adapted from the first by Health Canada and intended to show a more 'realistic' measurement of smoker exposure.

It is now well established that the machine readings shown on cigarette packages (both the historic and recent measurements) have little relationship to how much an individual actually smokes. Yet many smokers believe that the numbers on the side of the package can provide a guide to how much smoke they will inhale.⁶

The development by Health Canada of a second test method was helpful in illustrating that the apparent differences between brands under one system had little relationship to the differences under a second system. By requiring the results of both tests to be shown on each cigarette package, they have provided smokers with more information, but there is no evidence that this information has been helped smokers understand that there is no relationship between those values and their own smoke exposure.

While smokers are likely to inhale toxic substances in amounts somewhere between the lowest number and the highest number on the side of the package, there is about a threefold difference between these numbers and there is no way of knowing how much a given smoker will inhale. The information is thus, at best, useless and, at worst, dangerously deceptive to individual consumers.



Canadian cigarette packages must now display readings from two machine tests. The dark bars are the standard test developed by tobacco companies, the light bars are the 'intense' method developed by Health Canada.

Neither of these values do not help smokers understand how much they are inhaling and help continue the deception that some cigarettes are less harmful than others.

Step 3: Ban deceptive package imagery

Tobacco companies have developed package imagery to reinforce the deception that leads smokers to think that some brands are less harmful than others.

As the industry's own studies put it:

*"a pack not only generates powerful independent images, but also provides important and predictable cues or suggestions about the type of smoke which may be expected from a cigarette contained in such a pack, and even the type of person who might typically smoke such cigarettes."*⁷

Canada's largest tobacco company, Imperial Tobacco/BAT researched how package design affected the perceived strength of their products, that is to say they measured how the package reinforced the deception that there were differences in the strength/harmfulness of their products.

"Brand name does have connotations which may shift product perception. However the more important influences appear to be the product itself and the pack in which it is presented."

*Subjective evaluation can be manipulated by imagery variables."*⁸

We have learnt that tar level isn't the only determinant of strength. Other main contributors would be the qualifier (strong, medium light), packaging and other elements that contribute to the trademark image. A good illustration of this is Player's Medium versus Player's Light; the tar level of these two brands is practically identical (14 vs 13) - yet in image terms, they are perceived to be significantly different on strength (6.4 versus 5.1)."

*When we position our brands, we use all the tools to place the brands at the desired position in relation to the parent and the competition."*⁹

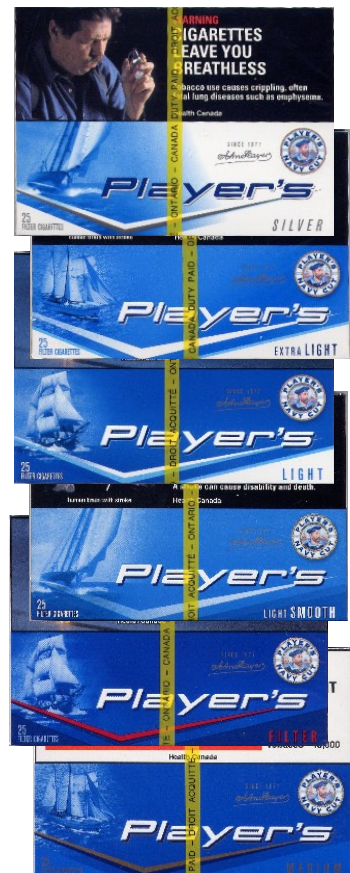
The current package of Player's cigarette brand family shows how imagery in the form of:

- different styles of boats
- different intensities of the chevron
- different amount of white on the package
- different descriptors, and
- different intensities of blue

are combined to convey deceptive differences within the brand.

Imperial Tobacco says it does this to help smokers "navigate the tar spectrum"¹⁰ That is to say, they admit that they intend smokers to believe that there is a difference between brands.

Eliminating only the descriptors (i.e. 'light', 'smooth,' and 'silver') would not eliminate the deception. The use of colours, imagery and other devices that contribute to the deception must also be banned.



Step 3: Ban brand extensions

In the tobacco market, a 'brand extension' is a model of cigarettes that is sold under the same brand name but which produces a different reading on smoking machines.

Imperial Tobacco, for example, markets six brand extensions in its du Maurier family, eight brand extensions in its Player's family and eight versions of Matinee.

Tobacco companies began to introduce 'brand extensions' in the 1970s to allow them to promote 'light' cigarettes to smokers who felt they should quit, but who could be encouraged to keep smoking if there was a 'healthier' cigarette available.¹¹ By using the same brand name, the companies found they could capitalize on the imagery they had already developed for that trademark.¹²

If smokers are faced with multiple types of cigarettes under one brand name they can be expected to look for and find differences in those brands, and to ascribe a meaning to those differences. Because these cigarettes were marketed to convey a hierarchy of 'strength'/harmfulness, this will be the meaning that smokers ascribe to any within-brand distinctions.

Tobacco companies recently showed in Europe how quickly brand extensions allow them to use new descriptors (like colours) to convey deceptive health information.

As the pictures of currently available Player's brands shows, Canadian cigarette brand families are already colour-coded. Removal of the misleading words only and not the associated imagery would not sufficiently reduce the deception.

BAT/Imperial Tobacco Canada's three major brand families

du MAURIER
du MAURIER Light
du MAURIER Extra Light
du MAURIER Ultra Light
du MAURIER Special Mild
du MAURIER Edition

Player's Plain
Player's Filter
Player's Medium
Player's Light
Player's Light Smooth
Player's Extra Light
Player's Silver
Player's Special Blend)

Matinée
Matinée Extra Mild
Matinée Menthol
Matinée Select
Matinée Silver
Matinée Slims
Matinée Slims Menthol
Matinée Ultra Mild

Step 5: Ban deceptive cigarette designs

It is not only by marketing their cigarettes with terms like 'light,' deceptive machine readings and package designs and brand extensions that tobacco companies have deceived smokers into thinking that some cigarettes are less harmful than others. The cigarettes themselves have been designed to create and sustain this deception.

Modern cigarettes are made with highly ventilated paper and filters. Originally, this was thought to dilute the smoke with air, and thus reduce the amount of smoke inhaled. In fact, it merely allowed smokers to control the dilution, and to easily adjust the amount of smoke they inhaled so that they received the right dose of nicotine at the right puff (smokers will try to get more nicotine out of the first puffs of a cigarette than out of the last ones).

Because smokers have to inhale more deeply to get the dose of nicotine they crave, the cigarette gives the impression of being 'lighter.' The smoke from a ventilated cigarette is less dense, but smokers forget that because they inhale more of it they are actually getting the same amount of toxic substances. The smoking sensation perpetuates the impression.¹³ The adjustment of smoking is called 'compensation,' and these cigarettes are designed to be 'compensatable.'

This is, by way of analogy, similar to the drinkers' experience: a one-ounce shot of scotch tastes 'stronger' than a one-ounce shot of rum mixed with fruit juice, but they both have equal alcohol effects).

Recent research suggests that the modern cigarette is a defective design, in the same way that a car that explodes is a defective design.

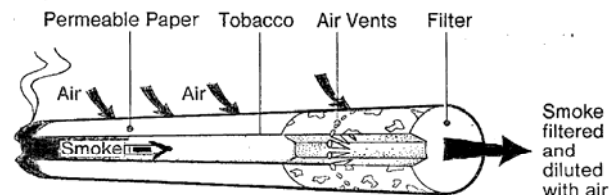
Health Canada can use its existing powers in section 5 of the Tobacco Act to demand that tobacco companies stop using deceptive cigarette designs and that they start making cigarettes less compensatable.

There are dozens of ways that cigarette design can be manipulated to make cigarettes compensatable. Attempts to regulate one or more design features may result in companies subverting the intent of the regulation by devising alternate ways to make cigarettes compensatable.

**Researchers are now calling for an end to filter-ventilation
(see Kozlowski, reference 13)**

Filter ventilation is a nearly ubiquitous design feature in cigarettes. Smokers increase puff volume, number of puffs, and number of cigarettes smoked, and block filter vents to compensate for the smoke yields of lower tar cigarettes as measured by standard smoking machine tests.

This paper explains the complex role of filter ventilation in compensatory smoking as seen in industry documents and published research. Ventilation is found to cause lighter taste, promote larger puffs, and, with heavy ventilation, promote behavioural blocking of vents. Filter vents are judged to be a defective, misleading design feature. Policy and regulation of cigarettes needs to attend to the problems of filter ventilation.



A better strategy would be to require by regulation of overall performance standards that achieve the desired effect.

One example of a performance-based regulation to reduce compensatability would be to require that there be no more than a 50% difference between the two types of current machine readings (the ISO method and Health Canada's intense method) for each brand.

Health Canada should concurrently set performance-based regulations to reduce the elasticity of cigarette brands (elasticity is a specific dimension of compensatability, which allows smokers to get proportionately more nicotine from a cigarette when they increase the amount they inhale).

Step 6: Support regulatory requirements with good health programming

In addition to banning these deceptive practices of the tobacco industry, Health Canada can help ensure that Canadians are no longer deceived by:

- integrating messages about product design and marketing into its communication activities.
- making public which tobacco products are ‘identical’ (the government is provided with a list of identical products currently sold under different brand names, but has made the decision to keep this information secret).

Du Maurier light, for example, is identical to Matinee, but the different packaging and marketing results in some smokers thinking that it is “stronger”.

- Banning retail displays. Tobacco companies display packages in ways which communicate false distinctions.
- Using consumer protection law to hold tobacco companies accountable for deceptive marketing.

A staged approach to implementation of this comprehensive plan to end the deception

Some parts of this plan have already benefited from more reflection and research than others. In particular, steps 4 and 5 have not received much attention to date, and could well benefit from being more carefully researched, as part of the preparation for the introduction of effective regulation.

Accordingly, the following schedule is suggested for the adoption of regulations to implement the six steps in this comprehensive plan.

2005

- Step 1: Ban misleading brand descriptors
- Step 2: Remove misleading numbers from cigarette packages
- Step 3: Ban deceptive package imagery
- Step 6: Support regulatory requirements with good health programming

2006

- Step 4: Ban brand extensions

2007

- Step 5: Ban deceptive cigarette designs

Background:

Chronology of court and government actions on 'Light and Mild' cigarettes since 2000.

January 24, 2001: The government of British Columbia (under Premier Ujjal Dosanjh) re-filed a lawsuit against the tobacco industry. The lawsuit includes claims that the industry "sold 'light' cigarettes as an alternative to give false reassurance to smokers who were concerned about their health – even though these cigarettes deliver about the same amount of tar and nicotine as regular cigarettes." ([B.C. statement of claim](#))

May 31, 2001: World No Tobacco Day. Hon. Allan Rock asks tobacco companies to voluntarily remove "light" and "mild" terms from cigarette packages within 100 days, and asks the Ministerial Advisory Council on Tobacco Control to recommend actions in the event the companies do not comply. ([Health Canada press release](#))

21 August 2001: Environics reports that two-thirds of Canadian support ending the use of "light" on cigarette labels. ([Environics news release](#))

8 September 2001: 100 days pass without the cigarette companies removing misleading descriptors from their packages. ([Imperial Tobacco's response](#))

1 November 2001 – The Health Minister Allan Rock releases the findings of the Expert Panel, which advises that regulations under the *Tobacco Act* be passed to ban the use of the descriptors. ([Health Canada press release](#))

27 November 2001: United States' National Cancer Institute scientific report concludes no benefit from lower tar cigarettes. ([Press release](#))

1 December 2001: Notice of Intent published in Canada Gazette proposing ban on the terms "light" and "mild". ([Gazette](#)) Deadline for public responses to notice of intent is January 15, 2002..

January 2002: Brazil bans use of "any type of descriptor, on the packaging or in advertising material, such as: classes (s), ultra low tar, low tar, smooth, light, soft, leve, moderate tar, high or any others that could induce consumers to an erroneous interpretation as to the tar contained in cigarettes." ([Brazilian regulation](#))

November 2002: [The World Health Organization Scientific Advisory Committee](#) on Tobacco Product Regulation recommended a ban on all misleading health and exposure claims and related packaging. ([SACTOB recommendations](#))

December 2002: Health Canada research shows that 2 of every 3 smokers of 'light' cigarettes switched to light based on the belief that there would be fewer health risks. ([Health Canada overview of 2001 CTUMS findings](#))

December 10, 2002: The European Court of Justice rejected a tobacco industry challenge to the EU directive banning the terms 'light' and 'mild', 'low-tar', etc. ([Court ruling](#))

December 13, 2002: The Quebec Superior Court upheld the federal Tobacco Act against an industry claim of unconstitutionality. The law allows the federal government to regulate how cigarettes are labelled. ([Justice Denis' ruling](#))

March 21, 2003: Illinois judge Nicholas Byron rules in favour of a class action suit against Philip Morris for the sale of 'light' cigarettes (the "Price" suit). He ordered the company to pay US\$10 billion in damages and said that "the course of conduct by Philip

Morris related to its fraud in this case is outrageous, both because Philip Morris' motive was evil and the acts showed a reckless disregard for the consumers' rights."

May 8, 2003: Lawyers from the Klein Lyons firm file a class action lawsuit in the name of Kenneth Knight against Imperial Tobacco for damages associated with the deceptive trade practice of 'light' labels on cigarette packages. ([Statement of Claim](#))

May 20, 2003: World Health Organization adopts text for a global tobacco treaty, the Framework Convention on Tobacco Control. The treaty calls for an end to all misleading descriptors, including the use of such terms as "low-tar" and "light." ([WHO press release](#))

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September 30, 2003: "Low-tar" and similar misleading terms are banned on all cigarettes sold in the European Union. ([EU directive](#))

February 2004: The Australian government announces that it will abandon the use of machine tests as they "bear no relation to what smokers actually ingest." ([Press release](#))

April 30, 2004: Imperial Tobacco files its response to the Knight case filed in British Columbia, arguing that it never represented that "light" or "mild" products reduced the risk of disease and that it was the federal government that directed Imperial Tobacco toward "developing and marketing lower delivery products."

Imperial Tobacco files a "Third Party Notice," deflecting responsibility for liability in the Knight case to the federal Government. If consumers were misrepresented about "light" and "mild," cigarettes, ITL states "then the Federal Government breached the standard of care in the operation of its health programmes," and should pay any damages awarded in this case.

August 16, 2004: Massachusetts court certifies a class action suit ("Aspinall" suit). "We conclude that a class action is not only an appropriate method to resolve the plaintiff's allegations, but, pragmatically, the only method whereby purchasers of Marlboro Lights in Massachusetts can seek redress for the alleged deception," Justice John M. Greaney wrote in the majority opinion.

September 14, 2004: Missouri court certifies 'light' class action suit against Philip Morris ("Craft" suit). ([news report](#))

October 14, 2004: The Federal government replies to Imperial Tobacco's Third Party Notice by recommending that the court throw-out the class action suit.

December 2, 2004. Health Minister Ujjal Dosanjh announces that Canada is among the first 40 countries to ratify the Framework Convention on Tobacco Control. The treaty is scheduled to come into effect on February 27, 2004. ([press release](#))

January 10, 2005. Non-Smoker's Rights Association seeks an application for judicial review to compel the Competition Bureau to rule on its complaint regarding the 'light' deception. ([press release](#))

References

- 1 Canadian Tobacco Use Monitoring Survey, (CTUMS), 2003.
- 2 European Union Directive on the Manufacture, Presentation and Sale of Tobacco Products. http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_194/l_19420010718en00260034.pdf
- 3 Brazil Resolution - RDC n. 46, of March 28, 2001 http://www.anvisa.gov.br/eng/tobacco/rdc_46.htm
- 4 World Health Organization. Framework Convention on Tobacco Control, Article 11. http://www.who.int/tobacco/fctc/text/en/fctc_en.pdf accessed January 2005.
- 5 Health Canada. Tobacco Products Information Regulations, June 2000. http://www.hc-sc.gc.ca/hecs-sesc/tobacco/legislation/prop_may_13.html#toxic
- 6 need to find reference
- 7 The Influence of Brand Identification and Imagery on Subjective Evaluation of Cigarettes. Report No. RD 1752-C R.P. Ferris. Guildford via HC 202, beginning page 102227170
- 8 Imperial Tobacco Canada. A summary of Brand imagery studies on Canadian products. Research Report No. 183. 402374210
- 9 Letter from Don Brown to Ulrich Herter (BAT industry head), 1993 page 202200796
- 10 Imperial Tobacco's response to Health Canada's regulatory notice of December 1, 2001.
- 11 Bob Bexon, "Post Lights" <http://www.hlth.gov.bc.ca/guildford/pdf/013/00001365.pdf>
- 12 Imperial Tobacco. Switching Analysis, 1991.
- 13 L T Kozlowski and R J O'Connor. Cigarette filter ventilation is a defective design because of misleading taste, bigger puffs, and blocked vents. Tob. Control, Mar 2002; 11: 40 - 50.



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October 17, 2007

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Dear Mme Belle-Isle,

We wish to provide some comments on the draft tobacco control regulations entitled *Promotion of Tobacco Products and Accessories Regulations (Prohibited Terms)* published in the August 4, 2007 issue of *Canada Gazette Part I*.

On May 31, 2001, the Honourable Allan Rock asked tobacco companies to voluntarily remove "light" and "mild" terms from cigarette packages within 100 days and asked his Ministerial Advisory Council to recommend actions in the event the companies did not comply. The tobacco companies did not comply within 100 days and the Ministerial Advisory Council issued recommendations calling for a far more comprehensive approach to ending all the deception on cigarette packaging and related promotions. The tobacco companies, once they had figured out how to adapt their marketing practices did voluntarily agree to end the use of the word 'light' and 'mild' on packages. This agreement was accompanied by marketing campaigns directed to retailers and consumers to ensure that the deception continues. (An example of JTI-Macdonald's communication is shown below).

Now, more than 2200 days after the Minister of Health's May 31, 2001 announcement, the proposal to codify in regulation that which the tobacco industry has largely already done can most charitably be described as too little, too late.

The draft regulations propose to prohibit the use of a few words on packages when much, much more is needed to end the tobacco companies' long-standing practices of consumer deception.



MISREPRESENTATION OF THE POSITION OF PHYSICIANS FOR A SMOKE-FREE CANADA AND OTHER HEALTH AGENCIES

The Regulatory Impact Analysis Statement accompanying the draft regulations states:

"The Canadian Coalition for Action on Tobacco Control [sic], the Non-Smokers' Rights Association, Physicians for a Smoke-Free Canada and the Canadian Cancer Society have each presented submissions calling for the removal of 'light' and 'mild' from tobacco product packaging."

By omission, this statement misrepresents the advice that Health Canada has received on many occasions from health groups, expert groups, its own Ministerial Advisory Council and the Supreme Court of Canada during the last six years.

Here are just a few examples of advice offered to Health Canada by various groups over the years on this issue.

August 28, 2001:

Findings of the International Expert Panel on Cigarette Descriptors

"We conclude that a complete prohibition of the use of deceptive descriptors such as 'light' and 'mild' on cigarette packaging and marketing is necessary to ensure that past deception is redressed and ongoing deception is prevented. In addition, in order to prevent future deception, the regulations should also restrict the use of other words, colours or devices that result in an erroneous perception of a difference in health risks and/or tar/nicotine deliveries. To be effective, these regulations should be accompanied by a substantial education component to correct this dangerous and persistent misperception and by a mechanism to implement further measures if warranted."

Sept 7, 2001: Ministerial Advisory Council on Tobacco Control – Misleading Cigarette Descriptors: Recommendations

"After convening an international expert panel and considering the 'light' and 'mild' issue, the Ministerial Advisory Council made the following recommendations:

- *Cigarette descriptors such as 'light' and 'mild' are a major public health problem that have already contributed to the deaths of thousands of Canadians. To reduce tobacco-caused illness and death, this problem must be corrected as quickly and as effectively as possible.*
- *An end to the 'light' and 'mild' deception can only be achieved through a complete ban on misleading descriptors, accompanied by appropriate public education efforts.*
- *The government must ensure that other terms and devices that have a similarly misleading effect, or that could have a misleading effect, are eliminated rapidly or are not allowed onto the market at all.*
- *The evidence base justifies strong, effective and rapid government action to correct the 'light' and 'mild' deception.*
- *The Minister should opt for the quickest and most effective route to achieve the public health objective. It is our considered opinion that new regulations under the Tobacco Act are the best course of action.*
- *Public education on the 'light' and 'mild' issue should focus specifically on the nature and the causes of the deception."*

January 31, 2005: Physicians for a Smoke-Free Canada. A Comprehensive Plan to End the 'Light' and 'Mild' Deception

"The following schedule is suggested for the adoption of regulations to implement the six steps in this comprehensive plan.

2005

- *Step 1: Ban misleading brand descriptors*
- *Step 2: Remove misleading numbers from cigarette packages*
- *Step 3: Ban deceptive package imagery*
- *Step 6: Support regulatory requirements with good health programming*

2006

- *Step 4: Ban brand extensions*

2007

- *Step 5: Ban deceptive cigarette designs"*

November 9, 2006: Physicians for a Smoke-Free Canada. News release: Anti-smoking group slams voluntary agreement reached with tobacco companies.

In a news release issued on the occasion of the voluntary agreement that the big tobacco companies reached with the Competition Bureau, Physicians for a Smoke-Free Canada reiterated its call for a comprehensive plan to end tobacco industry deception and also suggested that plain packaging be added to the comprehensive plan.

"PSC recommends that the government now implement a comprehensive set of measures to reduce deceptive cigarette marketing, and ban each of the deceptive practices used by tobacco companies, including:

- 1. The use of misleading brand descriptors that falsely convey differences in 'strength,' such as 'light,' 'ultra-light,' 'mild,' 'ultra-mild,' 'smooth,' etc. (This is contained in today's voluntary agreement)*
- 2. The use of misleading colours and packaging elements that falsely convey differences in strength, such as the use of lighter colours or more white space to falsely imply that these products are less harmful.*
- 3. The display of numbers on packages that falsely convey differences in the amount of compounds inhaled between brands or sub-brands of cigarettes, and that fail to tell consumers how much they are inhaling.*
- 4. The marketing and display of cigarettes in ways that falsely conveys distinctions between types of cigarettes.*
- 5. The use of brand extensions (several types of one brand of cigarettes) that falsely convey distinctions between types of cigarettes.*

6. The use of cigarette designs and related packaging that falsely convey a smoking experience of 'less hazardous' smoking, while in reality they are inhaling just as much poison as ever.

The implementation of this set of measures would be facilitated, the group suggests, by implementing plain or generic packaging."

To suggest that the measures proposed in the regulatory statement is supported by health groups is like saying that a diet of stale bread is supported by Health Canada's Food Guide. Removing misleading descriptors is a necessary, but not a sufficient, measure to end the deception.

THE LEGAL ROAD IS CLEARED FOR HEALTH CANADA TO DO MUCH MORE.

On June 28, 2007, the Supreme Court of Canada upheld the Tobacco Act, 1997 against a challenge by the multinational tobacco companies operating in Canada. In its ruling, the Court firmly rejected a tobacco industry challenge to section 20 of the *Tobacco Act* which says that packaging cannot be "likely to create an erroneous impression about the characteristics, health effects or health hazards of the tobacco product or its emissions." In its ruling, the Supreme Court had harsh words for the tobacco industry practice of using package terms to reassure smokers:

"61 The s. 1 inquiry into the justification of the ban imposed by s. 20 of the Act must be set in the factual context of a long history of misleading and deceptive advertising by the tobacco industry. The creative ability of the manufacturers to send positive messages about a product widely known to be noxious is impressive. In recent years, for example, manufacturers have used labels such as "additive free" and "100% Canadian tobacco" to convey the impression that their product is wholesome and healthful. Technically, the labels may be true. But their intent and effect is to falsely lull consumers into believing, as they ask for the package behind the counter, that the product they will consume will not harm them, or at any rate will harm them less than would other tobacco products, despite evidence demonstrating that products bearing these labels are in fact no safer than other tobacco products. The wording chosen by Parliament in s. 20 and its justification must be evaluated with this context in mind. Parliament's concern was to combat misleading false inferences about product safety and to promote informed, enlightened consumer choice.

62 The specific objection is to the phrase "or that are likely to create an erroneous impression" in s. 20. The manufacturers argue that this phrase is overbroad and vague, and introduces subjective considerations. How, they ask, can they predict what is "likely to create an erroneous impression"? The words false, misleading or deceptive, used as legal terms, generally refer to objectively ascertainable facts. If "likely to create

an erroneous impression” adds something to “false, misleading or deceptive”, as presumably was Parliament’s intent, what is it?

63 *The answer is that the phrase “likely to create an erroneous impression” is directed at promotion that, while not literally false, misleading or deceptive in the traditional legal sense, conveys an erroneous impression about the effects of the tobacco product, in the sense of leading consumers to infer things that are not true. It represents an attempt to cover the grey area between demonstrable falsity and invitation to false inference that tobacco manufacturers have successfully exploited in the past.*

64 *The industry practice of promoting tobacco consumption by inducing consumers to draw false inferences about the safety of the products is widespread. This suggests that it is viewed by the industry as effective. Parliament has responded by banning promotion that is “likely to create an erroneous impression”. This constitutes a limit on free expression. The only question is whether the limit is justified under s. 1 of the Charter.*

65 *Parliament’s objective of combating the promotion of tobacco products by half-truths and by invitation to false inference constitutes a pressing and substantial objective, capable of justifying limits on the right of free expression. Prohibiting such forms of promotion is rationally connected to Parliament’s public health and consumer protection purposes.*

66 *The impugned phrase does not impair the right of free expression more than is necessary to achieve the objective. The words false, misleading or deceptive do not do the work assigned to the additional phrase, “likely to create an erroneous impression”. Nor is it easy to find narrower words that would accomplish that task. The exact wording of the impugned phrase appears in the English version of Art. 11(1)(a) and 13(4)(a) of the WHO Framework Convention on Tobacco Control. The French version uses almost identical wording. The Convention mandates the use of such language in parties’ national law, subject to the application of domestic constitutional principles. At least three other Canadian statutes use similar wording: the Food and Drugs Act, R.S.C.1985, c. F-27, s. 5(1); the Radiation Emitting Devices Act, R.S.C. 1985, c. R-1, s. 5(1); the Animal Pedigree Act, R.S.C. 1985, c. 8 (4th Supp.), s. 64. These examples lend weight to the conclusion that the ban on promotion “likely to create an erroneous impression” is not overbroad or vague, but on the contrary, falls within a range of reasonable alternatives.*

67 *I would reject the manufacturers’ claim that the French wording “susceptible de créer une fausse impression” is significantly broader than*

the English “likely to create an erroneous impression”. “Susceptible” is not equivalent to the English “susceptible”; it is often used as the equivalent of “likely”, including in the WHO Convention. When the English and French versions of the statute are considered together, the meaning is clear.

68 *Finally, the impugned phrase meets the requirement of proportionality of effects. On the one hand, the objective is of great importance, nothing less than a matter of life or death for millions of people who could be affected, and the evidence shows that banning advertising by half-truths and by invitation to false inference may help reduce smoking. The reliance of tobacco manufacturers on this type of advertising attests to this. On the other hand, the expression at stake is of low value — the right to invite consumers to draw an erroneous inference as to the healthfulness of a product that, on the evidence, will almost certainly harm them. On balance, the effect of the ban is proportional.*

69 *I conclude that the ban on false promotion, and particularly on promotion “likely to create an erroneous impression”, is justified under s. 1 of the Charter as a reasonable limit on free expression and that s. 20 of the Tobacco Act is constitutional.”*

This 2007 Supreme Court Decision should give Health Canada confidence to implement a comprehensive plan to ban all practices by the tobacco industry that can reasonably be described as have the effect of *“inducing consumers to draw false inferences about the safety of the products.”*

RECOMMENDATIONS:

Accordingly, in the light of previous recommendations to Health Canada and the June 28, 2007 Supreme Court Decision, we recommend the following course of action:

- 1. Withdraw the regulatory proposal of August 4, 2007**
- 2. Publish a new comprehensive regulatory proposal as soon as possible in the *Canada Gazette Part 1*, one which would effectively end tobacco industry deceptive practices.**

Such a regulation would include, at the minimum, the following elements:

- **A ban on brand extensions.** The creation of “brand families” serves to induce consumers to draw false inferences about a hierarchy of harmfulness among different members of “brand families. Tobacco companies should be limited to just one family member per brand name.
- **A ban on deceptive cigarette designs.** The widespread use of ventilation holes on cigarette filters is one cigarette design factor that

induces consumers to draw false inferences about the harmfulness of the product. Ventilation holes on cigarette filters should be prohibited. Other cigarette design features that could also lull consumers into thinking the cigarettes are less hazardous than they really are is elasticity. In this case elasticity refers to the increase in nicotine yield per cigarette for a given increase in puff volume. Sales should not be permitted of cigarette brands with a “reward for effort ratio” (the ratio of increase in nicotine yield to increase in puff volume) if the 95% confidence intervals on a two-tailed test of the estimate of this ratio includes 1.0. Regulatory power should also be reserved to permit the rapid prohibition of other deceptive design features as they are discovered.

- **A requirement for tobacco products to be sold in plain packaging.**
Plain packaging would remove most opportunities for tobacco companies to draw false inferences about the relative safety of tobacco products. If such a measure were to be introduced, care should be taken to ensure the specifications for plain packaging included at least the following elements:
 - All legal requirements for information on tobacco packages would continue to be met.
 - No brand descriptors to be allowed.
 - The numerical information about yields of toxic substances now appearing on packages has been found by consumers to be confusing and uninformative. It should be removed. However, new, more salient and informative information about the poisonous nature of tobacco products would be required on the packages.
 - Except for the health and toxicity information, all packages should be the same neutral grey or brown colour and no deceptive or potentially deceptive information, colours or imagery of any kind would be allowed.
 - The name of each brand would appear on each package in a standard unappealing typeface.

3. **Support these new regulatory requirements with complementary programming and regulatory and legislative measures**

In addition to banning these deceptive practices of the tobacco industry, Health Canada can help ensure that Canadians are no longer deceived by:

- integrating messages about product design and marketing into its communication activities.

- making public which tobacco products are 'identical' (the government is provided with a list of identical products currently sold under different brand names, but has made the decision to keep this information secret. Du Maurier light, for example, is identical to Matinee, but the different packaging and marketing results in some smokers thinking that it is "stronger".
- banning retail displays. Tobacco companies display packages in ways which communicate false distinctions.
- using consumer protection law to hold tobacco companies accountable for deceptive marketing.

The government's regulatory proposal of August 4, 2007 offers little or no public health benefit. Our proposal for a more comprehensive approach to ending consumer deception about the tobacco products they consume would actually end the deception.

In addition our proposal is consistent with previous recommendation made by Physicians for a Smoke-Free Canada and other health agencies; it is consistent with the June 27, 2007 decision of the Supreme Court of Canada, and it would bring into compliance with Article 13.4(a) of the *Framework Convention on Tobacco Control*.

I hope our proposals can be given serious consideration.

Yours sincerely,

A handwritten signature in cursive script that reads "Neil E. Collishaw".

Neil E. Collishaw
Research Director