Written Submissions re An Act to amend the Tobacco Act and the Non-smokers’ Health Act and to make consequential amendments to other Acts (Bill S-5)

To: Senate Standing Committee on Social Affairs, Science and Technology

Submission on behalf of Cambridge LLP
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Summary

The Tobacco and Vaping Products Act (“Bill S-5”) provides a regulatory framework for vaping products. Bill S-5 has not yet been proclaimed in force but has passed a second reading. We have concerns regarding the constitutional validity of Bill S-5.

Jurisdiction over health matters is shared between both levels of Government. Vaping devices are a relatively new product. An absence of federal regulation has led to regulatory vacuum that has been filled by the provinces, leading to inconsistent approaches including by heavy handed attempts at imposing severe legal restrictions by provinces like Quebec and Ontario. In the interests of consistency of approach with other lawful products that are sold in Canada and to avoid a regulatory patchwork, the entry of a federal regulator in principle is to be welcomed. It will be much more efficient to address the complex issues fully and fairly with one government instead of ten.

Canada embraces both evidence based policy making and the public health principle of harm reduction. The Honourable Senators are among the guardians of the Charter Rights of all Canadians, including the right of all adult Canadians to make important health decisions for themselves guaranteed by section 7 of the Charter.

All legislation is presumptively constitutionally valid until a Court rules that it is invalid. The Senate should not pass a law that it believes to be constitutionally inform, leaving the judicial branch of government to correct the problem created.

The Facts

Electronic Cigarettes

In general an electronic cigarette is a battery-powered vaporizer, which simulates the feeling of smoking, but without burning tobacco. The three main types of e-cigarettes are cigalikes, eGos, and

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1 The authors are partners in the law firm Cambridge LLP. Both have appeared in the Supreme Court of Canada arguing Charter issues and have long been active volunteers in health related charities. Although Cambridge LLP acts for the Canadian Vaping Association (CVA), this brief reflects the views of the authors and is not submitted on behalf of the CVA.
MODs. Their use is commonly called “vaping”. The user activates the e-cigarette by taking a puff or pressing a button. They are often cylindrical, but come in many variations. Some look like traditional cigarettes. Most are reusable but there are also disposable versions called first generation cigalikes. There are also second, third, and fourth generation devices.

Instead of cigarette smoke, the user inhales an aerosol, commonly called vapor. E-cigarettes typically have a heating element that atomizes a liquid solution known as e-liquid. E-liquids usually, but not always, contain propylene glycol, glycerin, nicotine, and flavorings.

Nicotine is a highly addictive stimulant found in tobacco. Smoking tobacco is known to have a wide variety of negative health effects, although there are many harmful substances in tobacco smoke other than nicotine. Nicotine addiction is one of the important reasons that many smokers find it difficult to quit smoking. Strategies aimed at reducing smoking of tobacco have been an important part of Canadian public health efforts for many decades.

An important philosophy or strategy in Canadian public health for many years has been the concept of “harm reduction”. It has a long and successful history in the fight against HIV transmissoin, for example. This approach recognizes that while abstinence from use of a harmful product may be the ideal and ultimate goal, encouraging strategies that reduce but do not eliminate harm are desirable in the public interest. The importance of harm reduction as a public health strategy was recognized by the Supreme Court of Canada in the Insite case. ²

Harm reduction strategies have been pursued in connection with smoking tobacco in Canada. In particular, nicotine has been available in other delivery systems, including chewing gum and patches, for some time. However, the popularity of these products among smokers seeking to cut back on their smoking pales in comparison with the demand for the new vaping product which more closely emulate the user experience of tobacco smoking while singificantly reducing the harmful effects.

There is evidence that e-cigarettes can be part of a harm reduction strategy and to help people quit smoking, but they have a potential to be part of the strategy to decrease tobacco related death and disease. They have been endorsed in this way by the Royal Society for Public Health in the UK. Other nicotine replacement products are safer than e-cigarettes. It is abundantly clear, however, that many Canadian adults who want to cut back on smoking tobacco much prefer vaping to nicotine gum or other such products that have long been available in Canada.

Most of the harm caused by tobacco smoking is caused by the combustion of tobacco, not by the ingestion of nicotine. E-cigarettes often involve ingestion of nicotine in vapour, but never involve inhaling deadly tobacco smoke. There can be no scientific doubt: E-cigarettes are substantially less harmful than smoking. E-cigarette vapor contains fewer toxic substances than cigarette smoke. It also has lower concentrations of potential toxic substances than cigarette smoke, and is less

² Canada v. PHS Community Services Society [2011] 3 SCR 134
harmful to users and bystanders. Indeed, there is no scientific evidence at all of harm to bystanders. As these products are relatively new, no longitudinal studies are available and long term effects are unknown. This is not a good enough reason to deny Canadians who are smoking the choice of insufficient reason to choose to use a product that current evidence overwhelming shows is much better for their health than smoking tobacco (a pursuit that is harmful but remains quite legal for adults in Canada despite the terrible harms to users and society).

Hon. Chantal Petitclerc, member of Parliament and sponsor of the Bill, said in her speech to move the second reading of Bill S-5, “On the other hand, while scientific evidence is evolving, it is clear that vaping products may bring some public health benefits if they reduce tobacco-related death and disease by helping smokers quit or switch to a likely less harmful source of nicotine.

... But as one of my colleagues told me on this point, perfection is the enemy of the good, and vaping products seem to be emerging as a likely less harmful alternative.

Since I became the sponsor of this bill, I have had many citizens writing me and telling me stories of how, after trying everything from patches to hypnosis, vaping products were the only thing that worked for them. Their touching stories seem to match with the emerging science.”

The product is marketed to existing tobacco smokers as a safer alternative to smoking and as a possible aid to reducing smoking – harm reduction. We do not suggest that vaping devices are harmless or that they should be available to children. Restrictions on sale to minors are sensible and have been validly enacted by provinces. Many lawful products can be used illegally, including automobile and planes. This Bill must be viewed in the proper context: lawful use by adults.

Smoking tobacco is the single largest cause of negative health consequences in Canada, with enormous cost to our publicly funded health care system. Other techniques for achieving harm reduction may have reached their saturation point, and as the Royal Society notes, vaping has become a popular alternative for consumers.

**Canada’s Constitution and Constitutional Challenges**

Canada has a written constitution, and is also governed by unwritten constitutional principles. The constitution is the fundamental law of Canada. It constrains the actions of Canadian Governments. If a law is enacted by government that violates the constitution, it may be declared invalid and unenforceable by the Courts.

Although Canada’s constitution is complex, there are two relevant aspects of our constitution for present purposes.

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3 Hon. Chantal Petitclerc’s speech re: Tobacco Act, Non-smokers’ Health Act, (December 13, 2016)
At Confederation, Canada was created as a federal state. Federalism is a cornerstone of our constitution.

Under the Constitution Act 1867, law-making authority was divided between Canada’s federal government and the provincial governments. Many law-making areas fall under the exclusive jurisdiction of one level of government or the other. If the other level of government purports to enact a law within the other level of government’s exclusive authority, that law may be found by a court to be ultra vires (“beyond the powers”) that government, invalid and inoperative.

The Constitution Act 1867 divided the areas of law-making responsibility between the governments based on topics known as “heads of power”. Section 91 sets out the federal powers and section 92 sets out the provincial powers. For example, criminal law making powers was assigned exclusively to the federal government.

There are two broad heads of power applicable to each level of government, in addition to the specific named heads of power. The Federal Parliament may enact laws for the “peace, order and good government of Canada”, commonly referred to as POGG. Provincial Legislatures may enact laws affecting “Property and Civil Rights.”

Interestingly, “health” is not an enumerated head of power under the Constitution Act 1867. As the Supreme Court has recognized in connection with regulating tobacco, health is an overlapping area of jurisdiction under our constitution. Laws may be validly enacted by both levels of government, depending on the context. The federal government has long regulated food, drugs, medical devices and tobacco products based on its criminal law power and POGG. The provincial government has also exercised law-making power relating to health issues. Age of consent laws for smoking and alcohol consumption, for example, have long been enacted by provinces under their “property and civil rights” power.

The second relevant part of the constitution is the Canadian Charter of Rights and Freedoms.

Section 2(b) of the Charter guarantees freedom of expression:

2. Everyone has the following fundamental freedoms:

....

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;⁴

Because this Bill restricts important personal choices by adults it may also infringe the “liberty interest”, section 7 of the Charter:

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⁴ Canadian Charter of Rights and Freedoms, s 2(b), Part I of the Constitution Act, 1962, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.⁵

No rights are unlimited. Pursuant to section 1 of the Charter, all rights under the Charter can be limited by law:

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.⁶

Any federal law can be challenged in the Federal Court (or the Superior Courts of any province). The onus is on the party challenging the law to demonstrate that it is ultra vires, or that it infringes freedom of speech. If the law or a section of the law is found to be ultra vires, it is struck down. The federal government may attempt to enact another law but it would have to be substantially different from the one struck down to avoid being struck down again.

If the law or section of the law is not found to be ultra vires, it may still be possible to prove that a particular provision infringes the Charter right to free speech under section 2(b). If that is proved, the onus shifts to the federal government to demonstrate with evidence that the infringement is reasonable and demonstrably justified in a free and democratic society. If they fail to do so, the provision will be declared invalid. It is not unusual in that type of situation for the Court to suspend the declaration of invalidity for a period of time to allow the government an opportunity to replace the offending law with a less restrictive alternative that does not violate the Charter.

In this case, we draw your attention to two issues with Bill S-5 that in our opinion would lead to a successful court challenge:

1. The prohibition of promotion and display provisions of Bill S-5 constitute an infringement of freedom of expression under section 2(b) of the Canadian Charter of Rights and Freedoms, which is not justified under section 1 of the Charter; and
2. Canadians have a fundamental right to make important health choices, and few illness prevention choices could be more important than the choice to reduce tobacco smoking. Because it restricts that choice unnecessarily, Bill S-5 violates section 7 of the Canadian Charter of Rights and Freedoms, which guarantees the right to life, liberty, and security of the person.

Recommendations to the Committee

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⁵ Canadian Charter of Rights and Freedoms, s 7, Part I of the Constitution Act, 1962, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11
⁶ Canadian Charter of Rights and Freedoms, s 1, Part I of the Constitution Act, 1962, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11
Freedom of Speech is Infringed by the Proposed Legislation

Section 2(b) protects freedom of speech and expression. Commercial speech has been found by our courts to be entitled to a lower level of protection than other forms of speech, such as political speech.\textsuperscript{7} However, it is still entitled to protection.\textsuperscript{8} Several sections appear to infringe free expression, such as Section 20.1(a) and (b), 30.21, and 30.43(2), which prohibit the use of packaging that could cause a person to believe that the product or its emissions are less harmful than other tobacco products or their emissions, the use of terms, expressions, logos, symbols or illustrations that are prohibited by the regulations, the promotion of a vaping product through a testimonial or endorsement, promoting a vaping product by comparing its effects on health to tobacco’s effects on health, unless it is authorized under the \textit{Food and Drugs Act}.

The aforementioned provisions are overbroad and clearly infringe section 2(b) of the Charter. For example, a prohibition on comparison of the effects of a vaping product on health to tobacco’s effect on health is a clear violation of the freedom of expression as it prohibits the exchange of even truthful information that may assist the public in making an informed choice.

Revised section 21(1) prohibits the promotion of a tobacco product through a testimonial or endorsement.

Section 23(2) prohibits the sale of a tobacco product that is packaged contrary to the Act or regulations, in addition to the existing prohibition of packaging a tobacco product in a manner not permitted by the regulations. Section 30.1 prohibits the advertising of a vaping product, a vaping product-related brand element, or a thing that displays a brand element if there are reasonable grounds to believe it could appeal to young persons.

Section 24(2) prohibits the use of a brand element or name in promotional material related to the person, entity, etc. Section 24(1) also prohibits promotion of a tobacco product-related brand element or the manufacturer’s name “in a manner that is likely to create an association between the brand element or the name and a person, entity, event, activity or permanent facility.”

Section 30.41 prohibits the promotion of 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 the young.

Section 30.44 prohibits the promotion of a vaping product, including by means of the packaging, if there are reasonable grounds to believe that the promotion could discourage tobacco cessation or encourage the resumed use of tobacco products.

Section 30.45(1) prohibits packaging a vaping product in a manner that is contrary to the provisions of this Act or of the regulations.

\textsuperscript{7}Ibid., at Para 175
Section 30.48(1) prohibits displaying on a vaping product or its package, information or images that could appeal to young persons that suggest the product is flavoured, or selling a product that has such information or images. This section also prohibits promoting a vaping product using information or images that suggest the product contains an ingredient that is prohibited and listed on Schedule 2, or selling a product that has such information or images.

Section 21(1), 23(2), 24(1) & (2), 30.41, 30.44, 30.45(1) and 30.48(1) all appear to control or prohibit expression. Accordingly, there can be no doubt they infringe section 2(b).

No right or freedom is absolute, however. Pursuant to section 1 of the Charter, all rights and freedoms may be limited by government if the restrictions can be justified. The real question is whether the limits defined by this law are, in the language of section 1, reasonable and demonstrably justified in a free and democratic society. The justification analysis under section 1 is known as the Oakes test after the case where it first appeared. The analysis has two stages. The second stage further has three components.

The first stage examines the objective of the legislation to determine if it is important enough to justify limiting the right in question. The Act’s objective must be: “an objective related to concerns which are pressing and substantial in a free and democratic society.”

The second stage of the analysis is called the proportionality test. The Act must survive each of the three steps in the analysis to be upheld:

*First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance”.*

The first question is whether the objective of the law is sufficiently important to justify some limits on Charter rights. Protecting youth and public health will meet that test. This part of the test is usually met.

We turn to the three aspects of the second stage of the test. The first question is whether the impugned provisions are rationally connected to the purposes of the law. The key question is to identify the purpose of the law. If the law is aimed at protecting youth, the restrictions on sale and on use in a vehicle containing children are rational. However, there is no clear rationale linking protecting youth and the other restrictions. The provinces have properly prohibited sale to minors.

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*R. v. Mader’s Tobacco Store Ltd. 2013 CarswellNS 270, at Para 17*
If the objective of the impugned provisions is to protect the public from potential harm, the
impugned provisions are not rationally connected to the legislation. It is difficult to understand
rationally how certain “flavours” in vaping products are harmful. Why prohibit flavouring but permit
nicotine? Likewise, it is not rational to prohibit the comparison on health effects of vaping as
against tobacco. Prohibition on sharing of scientific information is not rational. The impugned
provisions appear to fail the rational connection test as they appear to be arbitrary, unfair or based
on irrational considerations.

The next issue is whether the rights are infringed as minimally as necessary in the circumstances.
The impugned provisions currently involve many blanket prohibitions and will fail under the
minimum impairment branch of the Oakes test. Although the Court will allow some leeway among
reasonable alternatives, the courts have found that absolute prohibitions will be hard to justify. This
legislation is overbroad in several respects. Finally, there is the question of whether the benefits
achieved outweigh the deleterious effects. While all of the tests under section 1 are evidence
 driven, that is especially true of this final aspect of the analysis. The harms here are not just to
freedom of expression. Smokers who are looking for harm reduction alternatives will have their
rights curtailed and their health injured by these restrictions, as they will be denied access to life
saving information. The overbroad provisions do not serve to protect the youth who are, in any
case, prohibited from purchasing the product. Hon. Chantel Petitclerc herself has admitted that
“vaping products may bring some public health benefits if they reduce tobacco-related death and
disease by helping smokers quit or switch to a likely less harmful source of nicotine.”

Given that all forms of vapor are regulated, including pure steam products that have been used to
promote good health for decades, and given that the health concerns appear speculative, it seems
unlikely that the federal government will be able to meet this test.

Conclusion: Sections 20.1(a) and (b), 30.21, and 30.43(2) of Bill S-5 infringe section 2(b) of the
Charter. The infringement is not justified under section 1 of the Charter, with the possible
exception of section 5 regarding health care facilities in light of the proposed regulation. A Court
would strike these provisions as inoperative. However, sections 21(1), 23(2), 24(1) & (2), 30.1,
30.41, 30.44, 30.45(1) and 30.48(1) while infringing section 2(b), may or may not be justified
under section 1 of the Charter and therefore, may not be struck.

Life, Liberty and Security

Section 7 of the Charter states that

“everyone has the right to life, liberty and security of the person and the right not to be
deprived thereof except in accordance with the principles of fundamental justice.

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10 R. v. Mader’s Tobacco Store Ltd. 2013 CarswellNS 270, at Para 17
11 Hon. Chantel Petitclerc’s speech re: Tobacco Act, Non-smokers’ Health Act, (December 13, 2016)
In order to show a violation of section 7, the claimant has to show that the law interferes with, or deprives them of their life, liberty or security of the person. After the claimant has shown that s. 7 is engaged, then they have to show that the deprivation was not in accordance with the principles of fundamental justice.  

Evidence shows that E-cigarettes are an effective harm reduction tool, which has been improved upon over the years.

Bill S-5 threatens the ability of cigarette smokers to switch to less harmful e-cigarette technologies by denying them access to accurate information about the products, including health information about their harms and benefits. This in turn threatens the ability of Canadian smokers to maximize the public health benefits of encouraging The Supreme Court of Canada in Canada (Attorney General) v. PHS Community Services Society13, ruled that the federal government would have to renew a Controlled Drug and Substances Act exemption for the Insite drug injection clinic in Vancouver.

The city established Insite, which was a supervised injection site, to deal with the health crisis presented by drug addicts in an area with a marginalized population. The Federal Minister of Health exempted drug users and staff within Insite from liability of prosecution for possession or trafficking controlled substances under ss. 4(1) and 5(1) of Controlled Drugs and Substances Act (CDSA). The exemption from Canada’s criminal laws allowed intravenous drug users to inject illicit drugs while under the supervision of the clinic’s medical staff without being arrested. In that case, the federal government ignored the evidence that the exemption reduced harms that are associated with such intravenous drug use and the Federal Government refused to renew the exemption.

The clinic brought an action against the government. The Supreme Court found that Insite reduced the risks associated with a harmful activity, saved lives and improved the health of people who used drugs at Insite’s facility. The removal of the exemption deprived drug users of the option of a less harmful way to satisfy their addictions.

Ultimately the Supreme Court ruled that the Health Minister had ignored evidence of the fact that the exemption reduced the harms associated with unsupervised intravenous drug use, consequently the refusal to renew the exemption violated section 7 of the Charter. Denying the exemption was an arbitrary denial of section 7 rights that had disproportionately negative effects on their health.

Moral disapproval is no substitute for evidence. Therefore, non-evidence based restrictions on sale and use of e-cigarettes would violate section 7 of the Charter. Tobacco smoking kills far more Canadians than heroin injection. Cigarette users have the same right as injection drug users not to have their access to life-saving harm reduction alternatives unduly restricted. Bill S-5, in our

12Carter v Canada (Attorney General) 2015 SCC 5 at para 55
13Supreme Court in Canada (Attorney General) v. PHS Community Services Society 2011 SCC 44
submission, will be found to be overbroad and found to ignore the benefits of e-cigarettes in such a way that limits the rights of potential claimants in a manner that does not comply with section 7 of the Charter.

Conclusion: Bill S-5 is overbroad and violates section 7 of the Canadian Charter of Rights and Freedoms.

As a law firm committed to the principle of harm reduction and good health choices for all Canadians, we request that further consultations and discussions be engaged in with the various stakeholders and industry associations that support vaping with a view to ensuring the overreach referred to in this submission is remedied.

There is a clear need and place for federal recognition and regulation of vaping. This is also a real opportunity for Canada to take the lead on the crucial principle of Harm Reduction, internationally.

We encourage you to seize this opportunity and get this legislation done right.