Improving Bill S-5, An Act to amend the Tobacco Act and the Non-smokers’ Health Act and to make consequential amendments to other Acts

A Submission to the Senate Standing Committee on Social Affairs, Science and Technology

April 10, 2017
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Canadian Cancer Society
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Introduction

The Canadian Cancer Society supports Bill S-5, and applauds its introduction. At the same time, Bill S-5 can be improved. This brief outlines recommended amendments to Bill S-5. The first four pages of the brief provide a descriptive summary of the amendments. Subsequent pages provide legislative text for the amendments.

Summary of Recommended Amendments to Bill S-5

Tobacco-related amendments

1. **Ban all tobacco manufacturer incentive/sales promotions targeting tobacco retailers** (eg bonuses for achieving sales volume targets; sports and entertainment tickets; incentives for participating in sales promotion programmes; chances to win vacations; and all other incentive promotions). This type of tobacco industry marketing tactic is significant. However, Quebec has had a legislated ban in force since November 26, 2016.

2. **Ban all remaining tobacco brand-stretching, that is using tobacco brands on non-tobacco goods and services.** For example, tobacco brand names/logos on lighters/matches would no longer be allowed. Allowing tobacco logos on non-tobacco goods is promotion, and undermines plain packaging. Quebec has banned brand-stretching since 1998. There are now more than 100 countries that have banned tobacco brand-stretching.

3. **Establish regulatory authority to restrict promotion within the tobacco trade (manufacturers-wholesalers-retailers).** At present, promotions within the tobacco trade are completely exempt from the Act pursuant to s.18(2)(c) of the Act. Bill S-5 contains a mechanism to require companies to report on promotions within the tobacco trade, but there is no mechanism to regulate such promotions based on the information reported. To fill this gap, Bill S-5 should be amended to establish regulatory authority to restrict advertising and promotion within the tobacco trade. For example, regulations could prohibit lifestyle advertising within the tobacco trade – lifestyle advertising is a frequent current practice being used in trade publications. These trade promotions are reaching thousands and thousands of employees of retailers and wholesalers, who may be consumers or potential consumers of tobacco products. Quebec banned lifestyle advertising through 2016 legislative amendments.
4. **Ban menthol and cloves in all tobacco products** (instead of the federal provision banning menthol in only cigarettes, most cigars and blunt wraps, but not other tobacco products, which creates a loophole). Several provinces have banned menthol and cloves in all tobacco products. Both menthol and cloves can be considered a local anesthetic and thus can be identified for distinct treatment across all tobacco products.

5. **Establish regulatory authority to require health warnings on**
   a) **cigarettes and tobacco products themselves** (as Bill S-5 provides for vaping products, and as recommended for consideration in international guidelines under the WHO FCTC)
   b) **on water pipe equipment** (as Turkey has required, and as recommended for consideration in international guidelines under WHO FCTC)

6. **Clarify that regulatory authority over the packaging includes the ability to prohibit specific brand names, such as those associated with a lifestyle.** This would follow the recent (January 30, 2017) example in France where brand names such as Vogue, Fine, Corset, Allure and Slims were prohibited.

7. **Ban cigarette cases** (such as metal tins/containers in which cigarettes can be placed). These are typically sold empty, and depict no health warnings. Such cases undermine plain packaging as they could be stylish or depict attractive images, or potentially brand names, graphics and logos. Cigarette cases can also be used to facilitate consumer purchases of contraband – for example, contraband cigarettes, in a baggie or otherwise, could be transferred to the cigarette case. Cigarette cases are frequently sold in dollar stores and in many convenience stores.

8. **Provide that information reported to Health Canada is to be publicly disclosed, unless the regulations provide otherwise.** Bill S-5 provides regulatory authority to require that reports provided to Health Canada by tobacco and vaping companies be publicly disclosed. This amendment would reverse the presumption – instead of the current Bill S-5 provision that reported information is to be publicly disclosed if required by regulation, the amendment would provide that all reported information is to be publicly disclosed unless the regulations provide otherwise. Future regulations could have differential treatment for information reported before and after Bill S-5 comes into force.

9. **Establish regulatory authority to increase the minimum age in the future.** The current federal minimum age is 18. Six provinces and one territory have a minimum age of 19. In the US, California, Hawaii and more than 220 municipalities (including New York City, Boston, Chicago, St. Louis, and Cleveland) have a minimum age of 21. Increasing the minimum age to 21 was included in the Health Canada consultation document for the new Federal Tobacco Control Strategy published February 22, 2017. Establishing regulatory authority would provide a mechanism to implement a minimum age of 21.

10. **Provide that packages shipped through online sales must indicate on the outside that the package contains tobacco products or vaping products, as the case may be.** This
measure would help curb youth access through online sales. A parent would clearly understand the contents of the package received through home delivery.

11. Establish **regulatory authority** for the government to apply some or all of the provisions of the Act to **herbal (non-tobacco) water pipe products**. Quebec legislation already does this. The new European Union **Tobacco Products Directive** does this in part (articles 21, 22). In particular, there is a need to regulate non-tobacco herbal products intended for waterpipe smoking, such as advertising/promotion, packaging and labelling, sales to minors, flavours, and other measures. This would not apply to marijuana as separate legislation is intended.

12. **Establish regulatory authority to require tobacco manufacturers to report on funding and activities related directly or indirectly to influencing federal policy related to tobacco control.** This would help document activities that are really of a public relations nature. This would also assist Canada in implementing Article 5.3 of the FCTC by documenting tobacco industry efforts seeking public influence.

13. **Prohibit the sale of multi-packs at a reduced price** (eg “duo packs”, two packages wrapped with an elastic sold at a price lower than if the two packages were sold separately.). This amendment would confirm what had been Health Canada’s interpretation of the existing section 29 of the Act (that “cash rebate” prohibits multi-pack discount pricing) and thus respond to an unanticipated court decision that disagreed with Health Canada’s interpretation (*Larny Holdings*, 2002).

14. **Amend Non-smokers’ Health Act to create regulatory authority to ban smoking in specific outdoor areas in federally regulated places,** eg within a certain distance of entrances to federal buildings; a beach, picnic area or children’s playground in a national park; (various provinces have done so)

**Technical amendment**

15. The **proposed new definition of “tobacco product”** would exclude raw leaf tobacco intended for consumer sale. Raw leaf tobacco is specifically mentioned in the current definition in the *Tobacco Act*, as well as in current package warning regulations. Reference to raw leaf tobacco should be maintained in the definition.

**Vaping product amendments**

16. **Establish regulatory authority to further restrict vapour product advertising and promotion**, including both location and content restrictions. Such regulatory authority already exists for tobacco, as well as under the *Food and Drugs Act*. The government needs the flexibility to respond to marketplace developments regarding advertising and promotion, but at present Bill S-5 contains no mechanism that would enable the government to respond. The government intends that Bill S-5 have flexibility to strengthen advertising and promotion restrictions, but no such flexibility is found in the current drafting of the bill.
17. **Provide that vapour product advertising may only be information advertising or brand preference advertising.** This is the approach for tobacco. This seems to be what the government intends, but this is not explicitly stated given the drafting style in the bill. While the current bill bans lifestyle advertising, there is no provision that states that only information or brand preference advertising is allowed.

18. **Remove provision that allows lifestyle advertising in bars and in publications sent to an adult.** There is no need for and should never be lifestyle advertising (e.g., associating with fashionability, status, masculinity, femininity, etc.). This is especially the case in a bar, where the consumption of alcoholic beverages may mean that individuals have reduced inhibitions.

19. There should be a **ban on all brand-stretching of vapour products**, that is vapour product brand names and logos should not appear other products and services, such as T-shirts, baseball hats, backpacks, etc.

20. **Restrict permitted vaping product incentive promotions (e.g. price discounts) to specialty vaping product retail stores.** At present, Bill S-5 would permit extensive incentive promotions for vaping products in places where young people did not have access, namely gifts, bonuses, premiums, cash rebates, games, draws, lotteries or contests. Such promotions would be allowed in bars, casinos, specialty vape stores and other places where young persons under 18 did not have access. This should be amended such that the only place where incentive promotions would be allowed would be inside specialty vape stores, and that the only allowed incentive promotions would be monetary bonuses, premiums, and cash rebates, and providing a vaping product in consideration of the purchase of another vaping product. At present Bill S-5 would allow draws and contests for individuals to win beach vacations, access to invitation-only parties, and tickets to rock concerts or sports events, among other examples – such promotions should not be allowed.

21. **Establish restrictions on the location of vapour product advertising to match the provisions restricting tobacco advertising.** At present, the bill contains no such restrictions. Right now under the bill, such advertising could even appear on television, on TV commercials during children’s cartoons, on billboards outside elementary schools, at a local ice rink where peewee hockey is played, etc.

**Consequential amendments**

22. There will need to be some consequential amendments to sections that authorize regulations (such as s.33 of the Act), to some of the offence sections in the enforcement part of the Act (sections 43 to 47), and to the coming into force section (section 80).
Legislative Text of Proposed Amendments
Ban manufacturer promotional incentives paid to tobacco retailers

Amendment

That Bill S-5, in Clause 35, be amended by replacing lines 27 to 28 on page 20 with the following:

(2) Paragraphs 29(a) to (e) of the Act are replaced by the following:

Sales promotions
29 (1) No manufacturer or retailer shall

That Bill S-5, in Clause 22, be amended by adding after line 2 on page 21 the following:

Sales promotions
29 (2) No manufacturer shall offer rebates, gratuities or any form of benefit related to the sale or the retail price of a tobacco product to a retailer or distributor or to an employee of a retailer or a distributor.

(Note: this amendment renumbers section 29 of the Act as section 29(1) and adds subsection 29(2). Note that an amendment to s. 18(c) of the Act is needed to accompany this amendment.)

Rationale
This amendment (the new s.29(2)) would ban all tobacco manufacturer promotional incentives to tobacco retailers (eg bonuses for achieving sales volume targets; chances to win vacations; tickets to rock concerts or sports events; and all other incentive promotions). There is no justification for such promotional tactics. Quebec has had such a provision in force since November 26, 2016.

Here is the relevant excerpt from the Quebec Tobacco Control Act:

21.1. A manufacturer or distributor of tobacco products is prohibited from offering rebates, gratuities or any other form of benefit related to the sale or the retail price of a tobacco product to operators of tobacco retail outlets, including their employees.

For the purposes of this section, a manufacturer or distributor of tobacco products includes the mandatary or representative of the manufacturer or distributor or a person or partnership that is controlled by or that controls the manufacturer or distributor.

21.1. Il est interdit à un fabricant ou à un distributeur de produits du tabac d’offrir à l’exploitant d’un point de vente de tabac, y compris à un préposé, des ristournes, des gratifications ou toute autre forme d’avantage liés à la vente d’un produit du tabac ou à son prix de vente au détail.

Pour l’application du présent article, un fabricant ou un distributeur de produits du tabac comprend son mandataire, son représentant ou toute personne ou société dont il a le contrôle ou qui le contrôle.
Ban tobacco brand-stretching by removing remaining exemptions

Amendment

That Bill S-5, in Clause 34, be amended by replacing lines 29 to 34 on page 19 and lines 1 to 21 on page 20 with the following:

34 Sections 26, 27 and 28 of the Act are replaced by the following:

Brand element — thing or service

27 No person shall furnish or promote a tobacco product if any of its brand elements is displayed on a thing, other than a tobacco product or an accessory, or is used with a service,

Rationale

This amendment would extend the partial restrictions on brand-stretching to a ban on brand-stretching. (Brand-stretching is using tobacco logos on non-tobacco goods, such as T-shirts and lighters.) With the amendment in place, no longer would tobacco logos or brand names be allowed on lighters and matches. Quebec has had a ban on brand-stretching without exemption in place since 1998.

The presence of branded lighters and matches would undermine plain packaging. The tobacco industry is increasingly placing branded lighters and matches on counter top displays in tobacco retail outlets. Such promotion reinforces and maintains brand imagery.

The existing exemption in the Tobacco Act that allows some brand-stretching was adopted in 1997. A lot has changed since 1997. In particular, the FCTC was approved in 2003 with an obligation on Parties to implement a comprehensive ban on tobacco promotion, which includes a ban on brand-stretching. There are at least 109 countries/jurisdictions that have adopted bans on brand-stretching, as documented in a 2015 report by the Canadian Cancer Society, “Tobacco Brand-Stretching: International Compilation of Legislative Extracts”.

It is noted that the partial restrictions on tobacco sponsorship in the Tobacco Act in 1997 were replaced with a full ban on tobacco sponsorship in 1998 (effective in 2003) in part as a result of the evolving international environment which saw more jurisdictions implementing full bans on tobacco sponsorship.

Below are examples of branded lighters and matches that have been available on the Canadian market (almost all have been available in 2016, though the Vogue lighter was noticed on the market in recent years.) Also below are images of promotional counter top displays of branded lighters.
du Maurier lighter on counter top display, 2016

Belmont lighter on counter top display, 2016

Lighter

Lighter (2016)

Matches (2016)
**Promotions within the tobacco product trade and vaping product trade**

**Amendments**

That Bill S-5, in Clause 23, be amended by adding after line 14 on page 16 the following:

(2.1) **Paragraph 18(2)(c) of the Act is replaced by the following:**

(c) subject to the Act and regulations, a promotion by a tobacco grower or a manufacturer that is directed at tobacco growers, manufacturers, persons who distribute tobacco products or retailers but not, either directly or indirectly, at consumers.

That Bill S-5, in Clause 23, be amended by replacing line 32 on page 16 with the following:

(c) subject to the Act and regulations, a promotion by a manufacturer that is directed at

**Rationale**

At present, the *Tobacco Act* does not apply to promotions within the tobacco trade (manufacturers-wholesalers-retailers). Bill S-5 has a provision that would authorize regulations for companies to report on expenditures and activities for promotion within the tobacco trade. However, there also needs to be regulatory authority to adopt restrictions on promotion within the tobacco trade. For example, the companies are using lifestyle advertising to promote cigarettes, such as the Vogue advertisement below. Such branded advertising undermines plain packaging by perpetuating brand imagery. There are many individual smokers, ex-smokers and potential smokers who work at retailers and wholesalers across the country. Some of these employees would be underage teenagers, especially in the retail setting.

Under the proposed amendment above, there would be regulatory authority to restrict promotions within the trade for both tobacco products and vaping products. Quebec legislative amendments adopted in 2016 already ban lifestyle advertising within the tobacco trade.
Ban menthol and cloves in all tobacco products

Amendment

That Bill S-5, in Clause 68, be amended by adding after line 24 on page 41 the following:

(3) Schedule 1 to the Act is amended in item 1 in column 1 by repealing the following text:

– menthol (CAS 89-78-1)
– l-menthol (CAS 2216-51-5)
– l-menthone (CAS 14073-97-3)

(4) Schedule 1 to the Act is amended by adding the following after item 1.1:

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<thead>
<tr>
<th>Column 1</th>
<th>Column 2</th>
<th>Column 3</th>
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<tbody>
<tr>
<td>1.2</td>
<td>Additives that have anesthetic properties including</td>
<td>tobacco products</td>
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<tr>
<td></td>
<td>menthol (CAS 89-78-1)</td>
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<td>l-menthol (CAS 2216-51-5)</td>
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<td>cloves</td>
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Rationale

This amendment would ban menthol and cloves in all tobacco products. This would be an improvement over the current federal provision to come into force October 2, 2017 banning menthol in only cigarettes, most cigars and blunt wraps, but not other tobacco products). A loophole is created by not banning menthol in all tobacco products. For example, menthol “pipe tobacco” has been introduced in Alberta and in Ontario to get around the ban on menthol cigarettes. Menthol is still allowed in roll-your-own tobacco and cigarette papers, among other tobacco products. Several provinces have banned menthol and cloves in all tobacco products. Both menthol and cloves can be considered a local anesthetic and thus can be identified for distinct treatment across all tobacco products. Although it would be preferable to ban all flavours in all tobacco products, this amendment would be an improvement over current federal provisions.
Regulatory authority to require health warnings on cigarettes and other tobacco products, and on water pipe equipment

Amendments

That Bill S-5, in Clause 20, be amended by replacing line 34 on page 13 with the following:

product or water pipe equipment unless the product and the package containing it displays, in the

That Bill S-5, in Clause 22, be amended by replacing line 24 on page 15 with the following:

(a) respecting the information that must appear on tobacco products and water pipe equipment and on to-

Rationale

This amendment would establish regulatory authority to potentially require in the future health warnings on cigarettes and tobacco products themselves and on water pipe equipment. Bill S-5 provides regulatory authority to require warnings directly on vaping products. There is no reason why similar regulatory authority should not also apply to tobacco products.

For warnings on cigarettes themselves, this is recommended for consideration in international guidelines under the WHO FCTC. This is also supported by recent research in New Zealand coinciding with New Zealand’s consideration of plain packaging.

For warnings on water pipe equipment, this is something that Turkey has required though has not fully implemented. This is also something recommended for consideration in international guidelines under WHO FCTC). Here is the relevant excerpt from guidelines to implement Article 11 (tobacco packaging and labelling) of the FCTC:

11. Parties should consider introducing other innovative measures regarding location, including, but not limited to, requiring health warnings and messages to be printed on the filter overwrap portion of cigarettes and/or on other related materials such as packages of cigarette tubes, filters and papers as well as other instruments, such as those used for water pipe smoking.

Water pipe smoking is on the increase among youth in Canada. Water pipe smoking is often done by individuals without seeing the package that contains the water pipe tobacco product – as a result it is important that there be the potential to require a health warning directly on water pipe equipment.
The full current wording of subclause 20(1) is as follows, shown with the proposed amendment (the addition of the word “and” on the final line is an amendment currently in Bill S-5):

**20 (1) Subsection 15(1) of the Act is replaced by the following:**

**Information — sale of tobacco products**

15 (1) No manufacturer or retailer shall sell a tobacco product or water pipe equipment unless the product and the package containing it displays, in the prescribed form and manner, the information required by the regulations about the product and its emissions, and about the health hazards and health effects arising from the use of the product and from its emissions.

Here is Clause 21 of Bill S-15 that provides regulatory authority to require health warnings on vaping products directly as well as on packaging for vaping products:

**21 Section 16 of the Act is replaced by the following:**

**Information — sale of vaping products**

15.1 (1) No manufacturer or retailer shall sell a vaping product unless the product and the package containing it display, in the prescribed form and manner, the information required by the regulations about the product and its emissions and about the health hazards and health effects arising from the use of the product and from its emissions.

Here is clause 22 of Bill S-15, which provides regulatory authority for warnings, including warnings directly on vaping products (in paragraph (a), the underlined “tobacco product” and “about” are amendments already found in the bill:

**22 Paragraph 17(a) of the Act is replaced by the following:**

(a) respecting the information that must appear on tobacco products and water pipe equipment and on tobacco product packages and in leaflets about tobacco products and their emissions and about the health hazards and health effects arising from the use of the products and from their emissions;

(a.1) respecting the information that must appear on vaping products or on vaping product packages and in leaflets or on tags about vaping products and their emissions and about the health hazards and health effects arising from the use of the products and from their emissions;

(a.2) respecting, for the purposes of section 15.3, the manner of displaying or providing information, including the form and placement of the information;
Regulatory authority to prohibit specified brand names

Amendment

That Bill S-5, in Clause 44, be amended by replacing lines 37 to 41 on page 27 with the following:

(a.1) for the purposes of paragraph 20.1(b), prohibiting the use of terms, expressions, logos, symbols or illustrations in order to prevent the public from being deceived or misled with respect to the health effects or health hazards of tobacco products or their emissions;

Rationale

This amendment would clarify that regulations may prohibit attractive brand names as a technique to undermine plain packaging. France requires plain packaging. In France, on January 30, 2017, the government announced that certain brand names would no longer be allowed, including Vogue, Corset, Fine, Allure, Paradiso, Punch, Café crème, Slims and Superslims. By deleting the words indicated in the amendment above, the regulations could ban brand names or other terms for purposes that go beyond a deceptive or misleading nature.

For reference, the proposed new paragraph 20.1(b), found in Clause 27 of Bill S-5, states:

Comparison and prohibited elements
20.1 No person shall promote a tobacco product, including by means of the packaging, (a) in a manner that could cause a person to believe that the product or its emissions are less harmful than other tobacco products or their emissions; or (b) by using terms, expressions, logos, symbols or illustrations that are prohibited by the regulations.
**Ban cigarette cases**

**Amendment**

That Bill S-5, in Clause 20, be amended by adding after line 17 on page 14 the following:

**Cigarette case**

(3) No person shall sell a cigarette case or other container not containing tobacco products that has the purpose of carrying tobacco products.

**Rationale**

This amendment would ban cigarette cases (such as metal tins/containers in which cigarettes can be placed). These are typically sold empty, and depict no health warnings. Such cases undermine plain packaging as they could be stylish or depict attractive images, or potentially brand names, graphics and logos. Cigarette cases can also be used to facilitate consumer purchases of contraband – for example, contraband cigarettes, in a baggie or otherwise, could be transferred to the cigarette case. Cigarettes are often sold in dollar stores, and in some convenience stores, as well as other tobacco retailers.

Some other countries ban cigarette cases. For example, here is an excerpt from a Decree in Djibouti that bans cigarette cases (Decree No. 2008/0183/PR/MS Specifying the Manner in Which Statements Are to Be Printed that Must Appear on the Outside Covering of Packages and Wrapping of Tobacco Products):

*Article 20*: It is prohibited to sell a case or other empty container which has the purpose of carrying tobacco products.

*Article 20*: Il est interdit de vendre un étui ou autre contenant vide qui a pour objet de porter les produits de tabac.
Cigarette cases on display in a dollar store in Cardinal, Ontario, December 17, 2016

du Maurier Synchro (capsule) cigarettes (r) with empty cigarette case (l)
Provide that information reported to Health Canada is to be publicly disclosed unless regulations provide otherwise

Amendments

That Bill S-5, in Clause 9, be amended by replacing lines 10 and 11 on page 6 with the following:

6.2 The Minister shall make available to the public, in the prescribed manner and within the prescribed time, unless the regulations prescribe otherwise.

That Bill S-5, in Clause 11, be amended by replacing lines 27-28 with the following:

(d.02) prescribing exempting, for the purposes of section 6.2, information that the Minister must make available to

That Bill S-5, in Clause 12, be amended by replacing lines 21 and 22 on page 8 with the following:

7.6 The Minister shall make available to the public, in the prescribed manner and within the prescribed time, unless the regulations prescribe otherwise.

That Bill S-5, in Clause 12, be amended by replacing lines 25-26 with the following:

(i) prescribing exempting, for the purposes of section 6.2, information that the Minister must make available to

Rationale

These amendments would provide that information reported to Health Canada is to be publicly disclosed, unless the regulations provide otherwise. Bill S-5 provides regulatory authority to require that reports provided to Health Canada by tobacco and vaping companies be publicly disclosed. This amendment would reverse the presumption – instead of the current Bill S-5 provision that reported information is to be publicly disclosed if required by regulation, the amendment would provide that all reported information is to be publicly disclosed unless the regulations provide otherwise.
Clauses 9 and 11 would not come into force for one year to give the government time to adopt regulations.

Here is the full text of the excerpts from clauses 9 and 11 that would be amended by these amendments:

**Clause 9 (excerpt)**

**6.2** The Minister shall make available to the public, in the prescribed manner and within the prescribed time, unless the regulations otherwise prescribe, information that is required by the regulations about tobacco products, their emissions and any research and development related to tobacco products and their emissions.

**Clause 11 (excerpt)**

(d.02) prescribing exempting, for the purposes of section 6.2, information that the Minister must make available to the public, including information referred to in paragraphs (c) and (c.1);

**Clause 12 (excerpts)**

7.6 The Minister shall make available to the public, in the prescribed manner and within the prescribed time, unless the regulations prescribe otherwise,

(i) prescribing exempting, for the purposes of section 7.6, information that the Minister must make available to the public, including information referred to in paragraphs (c) and (d);
**Regulatory authority to increase minimum age**

**Amendment**

That Bill S-5, in Clause 19, be amended by adding after line 13 on page 13 the following:

(a.01) amending the definition of *young person* in section 2 and amending sections 8 and 9 by replacing “eighteen” and “18” with a higher age;

**Rationale**

This amendment would establish regulatory authority to potentially increase the minimum age in the future. The current federal minimum age is 18. Six provinces and one territory have a minimum age of 19. In the US, California, Hawaii and more than 220 municipalities (including New York City, Boston, Chicago, St. Louis, and Cleveland) have a minimum tobacco age of 21. Increasing the minimum age to 21 was included in the Health Canada consultation document for the new Federal Tobacco Control Strategy published February 22, 2017. Establishing regulatory authority would provide a mechanism to implement a minimum age of 21.
Package indication for online sales to discourage youth access

Amendment

That Bill S-5, in Clause 15, be amended by deleting “and” in line 13, by replacing the period in line 19 with “;and”, and by adding after line 19 on page 11 the following:

(c) indicated prominently on any package exterior that the package contains tobacco products or vaping products, as applicable.

Rationale

This amendment provides that packages shipped through online sales must indicate on the outside that the package contains tobacco products or vaping products, as the case may be. This measure would help curb youth access through online sales. A parent would clearly understand the contents of the package received through home delivery.
Regulatory authority to apply Tobacco Act to herbal products for smoking

Amendment

That Bill S-5, in Clause 53, be amended by adding after line 10 on page 36 the following:

Regulations
(3) The Governor in Council may make regulations providing that any provision of this Act or the regulations applies to designated herbal products for smoking.

Definition
(4) In subsection (3), “herbal product for smoking” means a product based on plants, herbs or fruits which contains no tobacco and that can be consumed via a combustion process;

Rationale

This amendment would authorize possible future regulations that would result in herbal water pipe products, herbal cigarettes or other such products to be subject to all or part of the Tobacco Act and regulations. This would not apply to marijuana, as marijuana will be covered by separate legislation.

Quebec has done this since 2008 for its legislation by adopting the following provision in the Regulation under the Tobacco Control Act:

1. For the purposes of the Tobacco Control Act (chapter L-6.2), any product that does not contain tobacco and is intended to be smoked is considered to be tobacco.

The EU Tobacco Products Directive provides:

2(15) ‘herbal product for smoking’ means a product based on plants, herbs or fruits which contains no tobacco and that can be consumed via a combustion process;

[...]

Article 21

Herbal products for smoking
1. Each unit packet and any outside packaging of herbal products for smoking shall carry the following health warning:
‘Smoking this product damages your health.’
2. The health warning shall be printed on the front and back external surface of the unit packet and on any outside packaging.
3. The health warning shall comply with the requirements set out in Article 9(4). It shall cover 30 % of the area of the corresponding surface of the unit packet and of any outside packaging. That proportion shall be increased to 32 % for Member States with two official languages and to 35 % for Member States with more than two official languages.
4. Unit packets and any outside packaging of herbal products for smoking shall not include any of the elements or features set out in Article 13(1)(a), (b) and (d) and shall not state that the product is free of additives or flavourings.

Article 22
Reporting of ingredients of herbal products for smoking

1. Member States shall require manufacturers and importers of herbal products for smoking to submit to their competent authorities a list of all ingredients, and quantities thereof that are used in the manufacture of such products by brand name and type. Manufacturers or importers shall also inform the competent authorities of the Member States concerned when the composition of a product is modified in a way that affects the information submitted pursuant to this Article. The information required under this Article shall be submitted prior to the placing on the market of a new or modified herbal product for smoking.

2. Member States shall ensure that the information submitted in accordance with paragraph 1 is made publicly available on a website. The Member States shall take the need to protect trade secrets duly into account when making that information publicly available. Economic operators shall specify exactly which information they consider to constitute a trade secret.
Regulatory authority for manufacturer reporting on funding of external recipients

Amendments

That Bill S-5, in Clause 9, be amended by replacing line 32 on page 5 with the following:

sale or not, and about funding to external recipients.

That Bill S-5, in Clause 9, be amended by replacing line 9 on page 6 with the following:

lations about tobacco products and their emissions, and about funding to external recipients.

That Bill S-5, in Clause 9, be amended by replacing line 15 on page 6 with the following:

sions, and about funding to external recipients.

That Bill S-5, in Clause 11, be amended by replacing line 8 on page 7 with the following:

brand elements, and about activities related to influencing federal tobacco control policy.

Rationale

This amendment would establish regulatory authority to require manufacturers to report on funding and activities related directly or indirectly to influencing federal tobacco control policy. This would help document activities that are really of a public relations nature. This would also assist Canada in implementing Article 5.3 of the FCTC by documenting tobacco industry efforts seeking public influence. Here is the existing clause 9 of Bill S-5, along with the recommended amendments.

9 Section 6 of the Act is replaced by the following:

Information required from manufacturer

6 (1) Every manufacturer shall submit to the Minister, in the prescribed form and manner and within the prescribed time, information that is required by the regulations about tobacco products, their emissions and any research and development related to tobacco products and their emissions, whether the tobacco products are for sale or not, and about activities related to influencing federal tobacco control policy.

Supplementary information

(2) The Minister may, subject to the regulations, request supplementary information relating to the information referred to in subsection (1), and every manufacturer shall submit the requested information in the form and manner and within the time specified by the Minister.
Public disclosure by manufacturer
6.1 Every manufacturer shall make available to the public, in the prescribed form and manner and within the prescribed time, information that is required by the regulations about tobacco products and their emissions, and about activities related to influencing federal tobacco control policy.

Public disclosure by Minister
6.2 The Minister shall make available to the public, in the prescribed manner and within the prescribed time, information that is required by the regulations about tobacco products, their emissions and any research and development related to tobacco products and their emissions, and about activities related to influencing federal tobacco control policy.

Non-application
6.3 Sections 6.1 and 6.2 do not apply in respect of tobacco products that have never been for sale in Canada.

Here is the existing Clause 11(3) of Bill S-5:

(3) Paragraphs 7(c) and (c.1) of the Act are replaced by the following:
(c) prescribing information that manufacturers must submit to the Minister about tobacco products and their emissions, including sales data and information on market research, product composition, ingredients, materials, health effects, hazardous properties and brand elements, and about activities related to influencing federal tobacco control policy;
(c.1) prescribing information that manufacturers must submit to the Minister about research and development related to tobacco products and their emissions, including information on market research, product composition, ingredients, materials, health effects, hazardous properties and brand elements;
Prohibit the sale of multi-packs at a reduced price

Amendment

That Bill S-5, in Clause 35, be amended by adding line 2 on page 21 the following:

Cash rebates
(3) For the purpose of paragraph (a) of subsection (1), “cash rebate” includes the sale of multiple unit packs, other than packaged in a carton, at a price that is lower than if the packages were sold individually.

Rationale
This amendment would prohibit the sale of multi-packs at a reduced price (eg “duo packs”, two packages wrapped with an elastic sold at a price lower than if the two packages were sold separately.). This amendment would confirm what had been Health Canada’s interpretation of the existing section 29 of the Act (that “cash rebate” prohibits multi-pack discount pricing) and thus respond to an unanticipated court decision that disagreed with Health Canada’s interpretation (Larny Holdings, 2002).

Here is the existing section 29 of the Act, along with the current amendments included S-5 (these are underlined in the following):

29. No manufacturer or retailer shall:
(a) provide or offer to provide any consideration, for the purchase of a tobacco 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;
(b) furnish or offer to furnish a tobacco product without monetary consideration or in consideration of the purchase of a product or service or the performance of a service; or
(c) furnish or offer to furnish an accessory that displays a tobacco product-related brand element without monetary consideration or in consideration of the purchase of a product or service or the performance of a service.
**Non-smokers’ Health Act – Regulatory authority to restrict smoking in specified outdoor areas**

**Amendment**

That Bill S-5, in Clause 82, be amended by adding after line 12 on page 47 the following:

(2.1) The definition *work space* in subsection 2(1) of the Act is replaced by the following:

*work space* means any indoor or other enclosed space in which employees perform the duties of their employment, and includes any adjacent corridor, lobby, stairwell, elevator, cafeteria, washroom or other common area frequented by such employees during the course of their employment, and includes an outdoor space prescribed by regulation. *(lieu de travail)*

That Bill S-5, in Clause 84, be amended by adding after line 6 on page 48 the following:

(a.2) designating any outdoor space for the purpose of the definition of *work space*;

**Rationale**

This amendment would create regulatory authority to ban smoking in specific outdoor areas in federally regulated places, such as within a certain distance of entrances to federal buildings; or a beach, picnic area or children’s playground in a national park. As one example, regulations could ban smoking on Cavendish Beach in PEI, a national park.

A growing number of provinces have implemented such an approach. This amendment would ensure that similar action is taken within federal jurisdiction.
Technical amendment regarding definition of “tobacco product”

Amendment

That Bill S-5, in Clause 3, be amended by replacing lines 25 to 30 on page 2 with the following:

*tobacco product* means a product *made composed* in whole or in part of tobacco, *including* tobacco leaves, *and* includes papers, tubes and filters *intended* for use with that product, *a device*, other than a water pipe, that is necessary for the use of that product and the parts that may be used with the device. (*produit du tabac*)

Rationale

The amendment wording above (highlighted in grey, to distinguish from the existing amendments in Bill S-5) puts back raw leaf tobacco for consumer sale as part of the definition of tobacco product. This is excluded in the Bill S-5 definition, even though the *Tobacco Product Information Regulations* specifically include a warning requirement for raw leaf tobacco for consumer sale. The proposed amendment to the definition above retains the previous wording of “composed” in whole or in part of tobacco, instead of “made” from tobacco, given that raw leaf tobacco is not “made” from tobacco.

Here is the current definition of tobacco product in the *Tobacco Act*:

*tobacco product* means a product composed in whole or in part of tobacco, including tobacco leaves and any extract of tobacco leaves. It includes cigarette papers, tubes and filters but does not include any food, drug or device that contains nicotine to which the *Food and Drugs Act* applies. (*produit du tabac*)

Here is the wording of the definition of tobacco product as currently found in Bill S-5:

*tobacco product* means a product *made* in whole or in part of tobacco *and* includes papers, tubes and filters *intended* for use with that product, *a device*, other than a water pipe, that is necessary for the use of that product and the parts that may be used with the device. (*produit du tabac*)
Establish regulatory authority to further restrict vapour product advertising and promotion

Amendment

That Bill S-5, in Clause 36, be amended by adding before line 1 on page 27 the following:

Promotion prohibited by regulations

30.73 No person shall promote a vaping product by means of a promotion prohibited by the regulations.

Rationale

This amendment would establish regulatory authority to further restrict vapour product advertising and promotion, including both location and content restrictions. Such regulatory authority already exists regarding tobacco under the Tobacco Act, as well as for products under the Food and Drugs Act. The government needs the flexibility to respond to marketplace developments regarding advertising and promotion, but at present Bill S-5 contains no mechanism that would enable the government to respond. The government intends that Bill S-5 have flexibility to strengthen advertising and promotion restrictions, but no such flexibility is found in the current drafting of the bill.
Limiting vapour product advertising to only information advertising or brand preference advertising

Amendment

That Bill S-5, in Clause 36, be amended by adding after line 33 on page 21 the following:

Advertising
(3) No person shall advertise a vaping product, a vaping product-related brand element or a thing that displays a vaping product-related brand element unless the advertising is information advertising or brand preference advertising.

Definitions
(4) The definitions in this subsection apply in this section.
brand-preference advertising means advertising that promotes a tobacco product by means of its brand characteristics. (publicité préférentielle)
information advertising means advertising that provides factual information to the consumer about
(a) a product and its characteristics; or
(b) the availability or price of a product or brand of product. (publicité informative)

Rationale

This amendment would provide that vapour product advertising may only be information advertising or brand preference advertising. This is the approach for tobacco. This seems to be what the government intends, but this is not explicitly stated given the drafting style in the bill. While the current bill bans lifestyle advertising, there is no provision that states that only information or brand preference advertising is allowed. The definitions above for “brand-preference advertising” and “information advertising” are the same as currently found in s.22 of the Tobacco Act.
Remove provision that allows vapour product lifestyle advertising in bars and in publications sent to an adult

Amendment

That Bill S-5, in Clause 36, be amended by striking lines 26 to 33 on page 21.

Rationale

This amendment would remove the provision that allows vapour product lifestyle advertising in bars and in publications sent to an adult. There is no need for and should not be lifestyle advertising (e.g., associating with fashionability, status, masculinity, femininity, etc.). This is especially the case in a bar, where the consumption of alcoholic beverages may mean that individuals have reduced inhibitions.

The provision currently in Bill S-15 (that would be deleted by this amendment) states:

Exception
(2) Subject to the regulations, a person may 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 that is in
(a) a publication that is addressed and sent to an adult who is identified by name; or
(b) places where young persons are not permitted by law.
**Ban on brand-stretching of vapour products**

**Amendment**

That Bill S-5, in Clause 36, be amended by adding after line 34 on page 26 the following:

**Trademarks on non-vapour product goods**

30.72  (1) No manufacturer of vapour products who is entitled to use any trademark in association with those products, and no person acting with the concurrence or acquiescence of such a manufacturer or importer, shall
(a) apply the trademark, in any form in which it appears on packages of the product that are sold in Canada, to any article other than a vapour product or a package or container in which a vapour product is sold or shipped, or
(b) use the trademark in any such form for the purpose of advertising any article other than a vapour product or any service, activity or event, notwithstanding that the manufacturer or importer is, but for this Act, entitled to use the trademark in association with that article, service, activity or event.

**Sale of non-vapour product goods**

(2) No person shall sell or offer for sale or expose for sale any article, other than a vapour product or a package or container in which a vapour product is sold or shipped, that bears a trademark of a vapour product in any form in which it appears on packages of the vapour product that are sold in Canada.

**Definition**

(3) In this section, trademark includes any trademark whether or not it is registered or registrable as such under the Trademarks Act, and any recognizable variation thereof.

**Rationale**

This amendment would ban on all brand-stretching of vapour products, that is vapour product brand names and logos should not appear other products and services, such as T-shirts, baseball hats, backpacks, etc.

The above wording is based on section 8 of the previous *Tobacco Products Control Act*. 
Restrictions on the type and location of permitted incentive promotions

Amendment
That Bill S-5, in Clause 36, be amended by replacing lines 18 to 34 on page 22 and lines 1-3 on page 23 with the following:

Sales promotions
30.6 (1) No manufacturer or retailer shall
(a) offer or provide any consideration, direct or indirect, 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, 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.

Exception
(2) Clause (1)(a) does not apply to a monetary bonus, premium or cash rebate offered or provided in an enclosed specialty vaping product retail store to which young persons do not have access.

Exception
(3) Clause (1)(b) does not apply in an enclosed specialty vaping product retail store to which young persons do not have access if the product purchased is a vaping product.

Rationale
This amendment would restrict permitted incentive promotions (e.g., price discounts) to specialty vaping product retail stores. At present, Bill S-5 would permit extensive incentive promotions for vaping products in places where young people did not have access, namely gifts, bonuses, premiums, cash rebates, games, draws, lotteries or contests. Such promotions would be allowed in bars, casinos, specialty vape stores and other places where young persons under 18 did not have access. This should be amended such that the only place where incentive promotions would be allowed would be specialty vape stores, and that the only allowed incentive promotions would be monetary bonuses, premiums, and cash rebates, and providing a vaping product in consideration of the purchase of another vaping product. At present Bill S-5 would allow draws and contests for individuals to win beach vacations, access to invitation-only parties, and tickets to rock concerts or sports events, among other examples—such promotions should not be allowed.

Here is the current wording of the relevant excerpt of Clause 36 in Bill S-5:

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.
Restrict location of vapour product advertising

Rationale

This amendment would establish restrictions on the location of vapour product advertising to match the provisions restricting tobacco advertising. At present, the bill contains no such restrictions. Right now under the bill, such advertising could even appear on television, on TV commercials during children’s cartoons, on billboards outside elementary schools, at a local ice rink where minor hockey is played, etc. For tobacco products, permitted advertising is allowed in direct mail to identified adults, on signs in bars, and at retail. Provincial legislation allows displays of vaping products and other information provision in specialty vape shops.
Consequential amendments (regulatory authority, enforcement and coming into force sections)

There will need to be some consequential amendments to sections that authorize regulations (such as s.33 of the Act), to some of the offence sections in the enforcement part of the Act (sections 43 to 47), and to the coming into force section (section 80).