

Respecting Parliament and Protecting Health

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Introduction

This is a response to Health Canada's [consultation](#) on the mandated legislative review of our *Tobacco and Vaping Products Act*.

As background, I was the first lawyer in the world to work fulltime on legal policy measures to reduce the carnage of cigarette smoking. I have played a key role on a very wide range of measures directed at that goal, including aligning tobacco tax policy with health goals, greatly restricting advertising and promotion of cigarettes, ensuring smokefree environments, reducing points of sale for tobacco products, requiring detailed package health information, holding cigarette companies to account for misfeasance and malfeasance, and promoting a consistent rational public health approach to issues of substance use.

I have worked with, and drafted and reviewed reports, academic papers, briefing documents and legislation, for a wide range of countries and organizations and testified before legislative committees across Canada as well as before both Houses of the US Congress and many other national legislative bodies. My work encompasses reports of the World Health Organization, World Bank, Pan-American Health Organization, the US Surgeon General and US National Cancer Institute, and numerous publications in peer reviewed journals including, on issues relevant to this consultation, [The New England Journal of Medicine](#) and the [Journal of the American Medical Association](#).

I have received many awards and wide recognition for my work. I have also spoken at hundreds of meetings, conferences, and seminars, and published numerous papers, on the issue of the application of harm reduction principles to tobacco control. My longstanding interest in the huge potential of tobacco harm reduction includes the drafting of s.17(a) of the 1988 Tobacco Products Control Act:

17. The Governor in Council may make regulations

(a) exempting a tobacco product from the application of sections 4 and 7 where, in the opinion of the Governor in Council, that product is likely to be used as a substitute for other tobacco products and poses less risk to the health of users than those other products;

My publications on the application of public health principles to tobacco and nicotine policy include a wide range of articles over many years. Several, like the JAMA article, significantly predate the advent of vaping products. Others are out in the past year. The principle has remained constant. Cigarette smoking

is an extraordinarily toxic means of obtaining nicotine; something known since at least the work of Professor Michael Russell in the 1970s, and the recognition that ‘people smoke for the nicotine but die from the tar’.

Examples of my publications with specific relevance to this consultation, in addition to those mentioned, and all of which I ask be part of this submission, are the following.

Rethinking Nicotine: The Role of Public Health Law in Ending an Epidemic, David Sweanor and Adam Houston, [Ottawa Law Review, Vol. 47, No. 2, 2016](#)

Young or adult users of multiple tobacco/nicotine products urgently need to be informed of meaningful differences in product risks. Lynn Kozlowski and David Sweanor. Available [here](#).

Withholding differential risk information on legal consumer nicotine/tobacco products: The public health ethics of health information quarantines. Lynn Kozlowski and David Sweanor. Available [here](#).

Tobacco harm reduction: how rational public policy could transform a pandemic. David Sweanor, Philip Alcabes, Ernest Drucker. Available [here](#).

Statement of Conflicts

I have no financial conflicts of interests with entities with a commercial interest in any tobacco or nicotine product. Nor, and at least equally important, do I have any financial conflict of interest with entities including Bloomberg Philanthropies and related organizations, or other entities, that promote an abstinence-only agenda, oppose harm reduction measures for people who smoke cigarettes, pursue a ‘tobacco-free world’, or otherwise stray from rational public health principles.

Comments in Response to the Consultation

Respect for Parliament

As the people of Ukraine fight, suffer and die in pursuit of democratic principles it is incumbent on Canadians to show respect for our own democratic principles.

This Health Canada consultation document fails to do so, and that is a fundamental flaw that needs to be addressed in this consultation.

The Parliament of Canada made its intentions clear. This is a mandated legislative review of the *Tobacco and Vaping Products Act*:

PART VII.1 Review of the Act

60.1 (1) The Minister must, three years after the day on which this section comes into force and every two years after that, undertake a review of the provisions and operation of this Act.

Implicit in that section of the law is that the review is not skirted by misdirecting comments through leading questions. Nor a failure to clearly inform Canadians that the review covers all aspects of the law. Nor by any perfunctory dismissal of public comments as evidently occurred with the consultation on nicotine levels in vaping products. Respect for Parliament requires a thorough review.

It should not be necessary to point out how serious it is to disrespect the Parliament of Canada via a perfunctory and biased review, nor the importance of a truly thorough review when [Health Canada reports](#) that cigarette smoking causes the deaths of 39,000 Canadians annually, and, somewhat confusingly, also attributes 48,000 annual deaths in the consultation document.

With such death tolls, entirely due to the unnecessary inhalation of toxic smoke to obtain nicotine, a detailed review of the law is in order as a matter of great priority, and that should have been reflected in the consultation document.

Reviewing the Legislation

1) The Purpose of the Law

Parliament gave the legislation a purpose section, and any review should focus on whether it is being followed.

The [Tobacco and Vaping Products Act](#) defines its purpose as dealing with tobacco caused death and disease, and the sections on vaping are to support that objective and prevent vaping leading to tobacco use.

Purpose of Act

- **4** (1) The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and to protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases.

Vaping products

- (3) The purpose of this Act with respect to vaping products is to support the objectives set out in subsection (1), to prevent vaping product use from leading to the use of tobacco products by young persons and non-users of tobacco products

In fact, and as the consultation document acknowledges, at page 7:

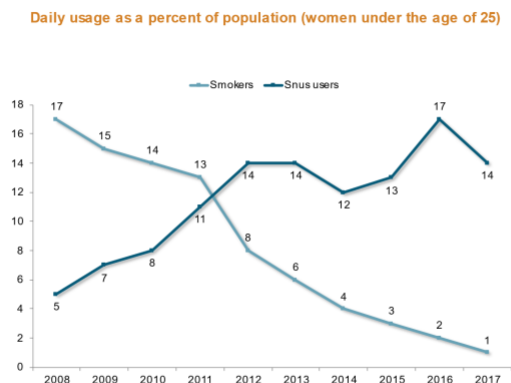
There have also been concerns that an increase in youth vaping may lead to increases in youth smoking rates in Canada. However, recent data, presented below, suggests that, thus far, this has not been the case. Smoking rates, for both youth and adults, continue to decline and are at an all-time low. The prevalence of daily smoking among youth aged 15 to 19 years was so low (small sample size) that it was considered to be 'unreportable' in 2020.

Indeed, the operation of this law has not followed its designated purpose. It is required to be focused on protecting the health of Canadians from diseases caused by tobacco use (almost exclusively due to smoking) with measures on vaping being secondary to that goal and designed to facilitate it.

Instead, Health Canada accepted the sort of moral panic about gateway effects that have long since been dismissed by the Department when made about safer drug supplies, clean needles, safe injection sites, decriminalized cannabis, sex education and a myriad of other issues where abstinence advocates invariably make the same argument.

This focus on a discredited gateway theory is, itself, extraordinary. It is a theory clearly shown to be erroneous in the data on cigarette smoking among young people in Canada and the US in the presence of vaping, but also long shown to not be the case in countries such as Sweden and Norway as very-low-risk snus replaced cigarettes prior to this Act ever being written. As with Canada, [US teen cigarette smoking has plummeted](#) to almost unmeasurable levels coinciding with the arrival of vaping.

Norway illustrates why Health Canada should have been more circumspect about the arguments from those who by design or default are protecting cigarettes by arguing risk reduction strategies cause gateway effects:



Source: Statistics Norway/The Norwegian Directorate of Health.

The basic premise of the attacks on vaping has been shown to be incorrect. The result is that anti-vaping measures that protected the cigarette market by hampering switching will have added to the devastating number of the “numerous debilitating and fatal diseases” caused by cigarette smoking, and the prevention which are the primary Parliament-enunciated purpose of the law.

Meanwhile, the law has made it illegal to accurately communicate relative risk information to Canadians who smoke cigarettes as part of a supposed effort to prevent Canadians from being misled about the health hazards of using tobacco and vaping products. That helps explain Canadians now being terribly misled about the relative hazards of smoking and vaping. For instance, the [Canadian Tobacco and Nicotine Survey 2019 survey](#) found that only 4.3% of Canadians identified vaping as being much less hazardous than smoking.

2) Misleading Canadians About Risks of Tobacco Products

The legislation specifies:

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

This section of the law prevents Canadians who smoke cigarettes from getting information on differential risks that could save their lives. In so doing it raises clear Charter violations on both free speech and the right to life. It is beyond question that cigarette smoking is massively more hazardous than non-combustion tobacco products such as Swedish snus and US moist snuff. This point is well articulated by leading health and medical bodies, and referenced in my above-mentioned publications. It was also so very widely known in the scientific literature at the time the law was drafted, and thus this section of the law should never have been included. In this mandated review it needs to be highlighted and corrected.

This will not be news to Health Canada. Among others, I have highlighted this flaw throughout the course of the adoption and implementation of this law. Including in [national Canadian media](#).

The same issue arises in the case of heated tobacco products. These products avoid combustion and have also been shown to be very acceptable substitutes for lethal cigarettes. In Japan, where the products first gained traction, the correlation of the sales of these products with the decline in cigarette sales is dramatic, and something on which I have [published](#), along with Cummings and Nahhas. The graph in that paper is dramatic. Overall, the introduction of this substitute for cigarettes is associated with Japan having reduced cigarette sales by an astounding 40+% in just a few years, easily exceeding anything any major country has ever achieved in such a short period of time.

Subsequently, other markets are also showing a very significant uptake of these products, as shown in slide 19 of the recent Philip Morris International first quarter results for 2022:



It is important to keep in mind that this data is only for the heated products from one company, and that it also fails to show the impact of other non-combustible alternatives to cigarettes. Also, that there is a pressing need to understand substitution effects more fully. But it is well established that substitution of products and behaviours plays a huge role in attaining public health goals (clean needles, safer drug supply, sanitary food and water, safer sexual practices, etc.), and Health Canada relies on such strategies across a broad range of areas when seeking to reduce harms.

Yet the legislation now under review makes it illegal for the marketers of such products to tell people who smoke cigarettes of harm reduction options, and hugely limits the ability to market such products. Health Canada also neglects to convey sufficient information about such options to allow empowerment of Canadians who smoke cigarettes to make better personal health decisions. This approach is an excellent way to protect far-more-lucrative cigarettes from being replaced by lower risk alternatives. As in so much of this Act, it is protecting cigarette companies rather than public health.

Not only does this the law prevent accurate information getting to Canadians whose lives literally depend on receiving it. It also effectively kills the market for makers of products such as Swedish snus or heated tobacco. Canada is an unwelcoming market for risk reducing alternatives to cigarettes. It would be akin to having dealt with 'unsafe at any speed' automobiles by prohibiting any company from accurately telling consumers about safety features. Had our country prevented the promotion of harm reduction in automotive design we would, as we currently see resulting from our current nicotine policies, have additional thousands of annual preventable deaths. What was known about product risk differentials at the time of the *Tobacco Products Control Act* in 1988 did not change. Tragically, Health Canada's receptivity to risk reduction did.

But this legislative shortcoming is worse than that. It gives totally unjustified legal protection from product liability claims to cigarette companies. It is a complete defence to any claim that the companies failed in their duty to adequately inform their customers of the nature, extent, and amelioration of the risks associated with their product choices. The cigarette company defence to having said nothing by way of life saving information they had a common law duty to provide, they can truthfully claim, is that a statute of the Government of Canada made it illegal for them to tell the truth. It overrides their common law duties. This is a huge gift to the cigarette business, and at a huge cost to the wellbeing of Canadians who use nicotine.

I have been very active in my career in holding cigarette companies to account for failure to empower their customers to make informed personal health decisions. My work on that subsequently played an important role in lawsuits that put the companies into bankruptcy proceedings. To simply give these companies a get-out-of-court-free card, despite the hundreds of thousands of premature deaths caused by their cigarettes, is unconscionable. As would be a failure to highlight and seek to correct this flaw in a legislatively mandated review.

3) Misleading Canadians about the risks of Vaping Products

In seeking to promote health, Health Canada accepts the orientation of the WHO's [Ottawa Charter of Health Promotion](#). People can only make as good a decision as the information and options available to them allows. We seek to 'meet people where they are', understand their lived experience and empower them to make better personal health decisions. Access to information is hugely important.

Then there is this law, undermining exactly that orientation:

Health benefits

- **30.43** (1) Subject to subsection (3) and the regulations, no person shall promote a vaping product, including by means of the packaging, in a manner that could cause a person to believe that health benefits may be derived from the use of the product or from its emissions.

Yet, it comes after this provision:

False promotion

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

It is beyond question that there is a health benefit from people who smoke cigarettes substituting a non-combustion alternative such as vaping. This has been thoroughly detailed in numerous high quality reports and recently been reinforced by a [commentary](#) by 15 of the past-presidents of the Society for Research on Nicotine and Tobacco.

The legislation, while specifically stating an intention to prevent false, misleading or deceptive information immediately thereafter mandates it.

That should be a key issue to highlight and resolve in this mandated review.

Yet, it is worse.

The legislation bans free speech on the relative risks of vaping compared to cigarette smoking, subject to regulations specifically authorizing what can be said. This approach of 'all speech is illegal except for what the government specifically allows' is clearly at odds with the principles of free speech in our Charter, and more broadly in a liberal democracy. Yet it became part of the law and was not specifically highlighted as in need of review.

Then it gets worse still.

Health Canada has never authorized any statements on relative risks. So, having passed a law that prohibits truthful speech other than what Health Canada will specifically mandate as acceptable, Health

Canada has never authorized anything. This makes illegal the provision of entirely accurate, life saving, information by, for instance, someone working in a vape shop when dealing with a person who smokes cigarettes and who is wondering about any potential health advantages in switching. The result is a Sophie's Choice for many Canadians – obey the law and know the person who seeks the information could die as a result, or tell the truth and face jail time. In Canada. In 2022. It's appalling.

Once again, this is very protective of the cigarette business and perpetuates the epidemic of cigarette caused death and disease at the cost of Canadians' physical and civic wellbeing.

4) Canadians are Fundamentally misled.

The legislation and regulations enacted thereunder seem designed to misinform Canadians and protect the cigarette business rather than public health. Survey data from Health Canada itself shows this is what has resulted.

The law has made it illegal to accurately communicate relative risk information to Canadians who smoke cigarettes as part of a supposed effort to prevent Canadians from being misled about the health hazards of using tobacco and vaping products. Health Canada has also stood silent in the face of an onslaught of misinformation from groups opposed to risk reduction strategies and ongoing moral panics that are hyped by media. Canadians are, in large part due to this law and to Health Canada ignoring, misrepresenting or downplaying information on relative risks, terribly misled about the relative hazards of smoking and vaping. For instance, the [Canadian Tobacco and Nicotine Survey 2019 survey](#) found that only 4.3% of Canadians identified vaping as being much less hazardous than smoking.

That sort of data should be recognized as a major public health crisis given the death and disease toll. It would be akin to finding only a similar proportion believed driving while sober or avoiding fentanyl-laced drugs or getting covid vaccines significantly reduced hazards.

The evidence on this law and its implementation points squarely to it adding to, rather than tackling, the carnage of cigarette smoking. Which means it is having an impact that is the opposite of its specified purpose. In any meaningful review this needs to be confronted.

5) Health Canada and EVALI

EVALI not only was not caused by nicotine vaping, but it could also not have been. This has been known since almost the beginning of the scare and is fully explained in a [detailed recent analysis](#) by Clive Bates.

Yet Health Canada, despite having had this issue repeatedly brought to their attention, continues to stoke fears, and dissuade Canadians who smoke cigarettes from significantly reducing risks by switching. As the Department [continues to use 'EVALI'](#) to say:

The cause or causes of cases in Canada is still under investigation.

Canadians concerned about the health risks related to vaping should consider refraining from using vaping products.

Yet, this is Health Canada's mandate, as stated in the consultation document:

Health Canada is the federal department responsible for helping the people of Canada maintain and improve their health.

Health Canada's own research shows that Canadians hugely underestimate the risk differential between cigarettes and vaping. The legislative initiative under review authorized the Department to focus on the numerous fatal and debilitating diseases caused by cigarette use and to act on vaping only insofar as it assisted that overarching goal. Yet in practice Health Canada continues to misinform the public about EVALI, and to tell those at an extraordinary risk of death or debilitating illnesses because of cigarette smoking that they should "consider refraining from using vaping products."

6) Go to Where the Puck is Going to Be

This legislation has failed to consider the dynamic nature of the nicotine market and the need and interest of Canadians who smoke cigarettes to find acceptable alternatives. There are many products that can deliver nicotine but are not tobacco products, vaping products or pharmaceutical products. New products are being constantly developed as disruptive technology hits the CDN\$1 trillion global cigarette market. [Lucy](#), a nicotine gum, being only one of recent examples.

But the Canadian regulatory framework is not fit for purpose in dealing with such products. Health Canada continues to divide nicotine products into two categories: tobacco and vaping products, and pharmaceutical products. Low risk consumer products that could alleviate much of the health burden of cigarette smoking are ignored. It is as if a child who is sorting cut-outs into a pile for squares and one for circles is confronted by a triangle.

Perhaps the best example is the category known as 'modern oral' products, led by Zyn, which is manufactured by Swedish Match. This category has grown quickly, increasing from 150 million cans to 270 million cans globally in 2021 according to a February 21 analysis from Barclays Bank. It has already taken more than 2% of the US nicotine market, and in excess of 10% in some parts of that country. Sales, as reported by Nielsen and confirmed by Wall Street stock analysts, continue to grow very significantly (I have proprietary reports that can be made available to Health Canada if warranted). It is a small oral pouch consumer product with no tobacco that meets consumer needs adequately enough to be able to replace a significant portion of the cigarette market. The full potential of such an alternative to cigarettes (and vaping, and other products) is not yet fully known but appears to be very significant. Yet it is only one of many innovative products coming to the global market.

Canada lacks any viable regulatory system that could allow such consumer products to be available to people who smoke cigarettes. When so many lives are on the line, and such products are clearly meeting the needs of many people in other countries who would otherwise smoke cigarettes, this is a serious shortcoming of the law, and should be addressed in the review. Failure to act shows the relative lack of concern for Canadians who smoke. They are dying at the rate of 4,000 a month from cigarettes. We need only consider the response were an effective covid intervention similarly hampered by a lack of a viable pathway to market to see the extraordinary disinterest in empowerment of Canadians who smoke cigarettes.

7) Consistency within Health Canada's Approach to Mental Health and Addictions

Health Canada's Tobacco Directorate, in dealing with this law and its overall approach to tobacco and nicotine, is acting out of step with the overall orientation of the Department on mental health and addictions.

While the rest of the department seeks to engage with people with lived and living experience, the Tobacco Directorate discounted or ignored tens of thousands of submissions from Canadian vapers on the misguided initiative to reduce nicotine levels in vaping products.

While stigma is rightly eschewed in dealing with other public health issues, it is pursued with gusto when dealing with people who use nicotine. An example being the huge graphic warnings (which I initially helped secure) without clear and viable steps that people who smoke cigarettes can take to deal with the risks. Where are the messages in cigarette packages informing people who smoke of safer alternatives? Where are the information campaigns telling these Canadians how to reduce their risks? The social psychology of stigmatizing fear-based messages is clear, and ignored. An issue explained well in this New York Times bestseller book:

Noah J. Goldstein, Steve J. Martin and Robert B. Cialdini: **Yes! 50 secrets from the science of persuasion**. Profile Books, 2007

Point #8: "Does fear persuade or does it paralyze?" It is found on pages 35-37 of the book. Here are relevant extracts:

From page 35:

For the most part, research has demonstrated that fear-arousing communications usually stimulate recipients to take action to reduce the threat. This general rule has one important exception, however: when the fear-producing message describes danger but the recipients are not told of clear, specific, effective means of reducing the danger, they may deal with the fear by 'blocking out' the message or denying that it applies to them. As a consequence, they may indeed be paralysed into taking no action at all.

From page 37:

In the case of public service officials, merely painting a gruesome picture of the impact of dangerous behaviours, such as smoking, having unprotected sex and drunk driving, may also be ineffective – or even backfire – if unaccompanied by a good plan of action.

Harm reduction is a key part of the approach the Department now takes on opioids, cannabis, and other forms of substance use. Yet on nicotine, where the number of users is much greater, the death and disease toll far higher and the potential for risk reduction so dramatic, the Department fails to endorse it. Yet, many of the Canadians at risk from cigarettes are the same people at risk from other drugs and the same people dealing with neurodiversity issues. It is not consistent, or acceptable, to have policies whereby they will be stigmatized, discounted, misinformed and prevented from protecting themselves with respect to nicotine use while Canada follows public health principles on other issues.