



CONSUMERS' ASSOCIATION OF CANADA

Association des consommateurs du Canada

September 1, 2021

Tobacco Products Regulatory Office
Tobacco Control Directorate
Controlled Substances and Cannabis Branch
Health Canada
150 Tunney's Pasture Driveway
Ottawa, Ontario
K1A 0K9
Email: hc.pregs.sc@canada.ca

Dear Sir or Madam:

On behalf of the Consumers' Association of Canada (CAC), please find below comments in response to the *Order Amending Schedules 2 and 3 to the Tobacco and Vaping Products Act (Flavours)*, published in the *Canada Gazette, Part 1*, on June 19.

The CAC remains firmly opposed to the prohibition approach of Health Canada when it comes to flavoured vaping products. This approach eliminates consumer choice, threatens to drive vapers back to smoking, and is inconsistent with the policy applied to other products, like alcohol and cannabis. Also, in perhaps the most egregious aspect of the draft regulation, Health Canada openly admits it ignored the previous feedback on this proposal offered by consumers. That is a horrible precedent we cannot ignore.

CAC Supports Harm Reduction

The CAC has previously detailed its strong belief that consumers should have access to safer or reduced harm products, regardless of the product in question. There is a sizeable body of evidence suggesting vaping products are a safer alternative for smokers than cigarettes. Therefore, we believe it is imperative that consumers have relatively easy access to those products, recognizing that things like age, marketing and other such restrictions must be applied.

The CAC recently passed the following resolution that will continue to guide our efforts with regard to vaping products as a reduced harm option:

CAC should advocate to governments that consumers should have the choice to engage in vaping and government should not create barriers to prevent that choice and remove restrictions. Science indicates that vaping is the only thing that effectively reduces smokers/smoking.

Who is Being Consulted?

The CAC wrote to the Health Minister in May 2021 regarding proposals for the further regulation of flavoured vaping products. That letter detailed five questions regarding Health Canada's consultation process on this issue: were vapers consulted; was the importance of flavours to vapers as a means to stop smoking taken into consideration; is the Government

concerned about prohibitions on flavours leading vapers to resort to the unregulated black market; is Health Canada able to contemplate a public health policy that consists of something other than banning products; and is Health Canada aware of the conflicts of interest involving those lobbying for regulations to undermine vaping, most notably pharmaceutical companies and their allies in the tobacco control community.

Based on the draft regulations published in *Canada Gazette, Part I* on June 18 that severely restrict vaping product flavours, it seems the answer to at least four of these questions is no: vapers were not consulted (and in fact ignored); the importance of flavours to help vapers quit smoking was ignored; Health Canada is indeed incapable of conceiving of public health policy beyond product bans; and Health Canada seems to have given preference to the views of the pharmaceutical and public health lobbyists who have the most blatant conflicts on this issue. The only question Health Canada does seem to acknowledge is that its proposed prohibitions risk driving vapers to the black market, though no solution is offered to prevent that.

Consumers Were Ignored

In the June 19 Gazette notice, Health Canada reports it received over 24,000 submissions to its earlier consultation, “including nearly 23,000 postcards and almost 1,450 template emails from people who vape,” versus “288 unique responses from a variety of stakeholders, 100 template submissions from health professionals, health organizations and the general public.”

The draft regulations state that “excluding postcard responses, 66% were supportive of further restrictions” (emphasis added). Therefore, Health Canada seems to have ignored the more than 24,000 responses it received from vapers – who are the people most impacted by the regulation. Moreover, in calculating the purported 66% support, Health Canada seemingly includes letter-writing campaigns from “health professionals,” but not vapers themselves.

That seems to be an egregious and blatant attempt to distort the numbers to show support for restrictions. It also shows overt bias and discrimination against the general public in favour of letter writing initiatives from “health professionals.” This is profoundly anti-democratic and discriminatory. Are Canadian consultations only open to those with a professional designation? That Health Canada apparently takes this perspective – and puts it in writing – is unconscionable.

The regulations later note that “none of the postcard submissions supported further flavour restrictions.” Therefore, if they had been included in Health Canada’s tally, it would seem that 95% or more of respondents to the earlier consultation opposed restrictions, rather than the 66% Health Canada claims support it. This is a purposefully misleading portrayal of the submissions by Health Canada. Furthermore, it would seem that 100% of the vapers who responded opposed flavour restrictions, which ought to be relevant for a regulation targeting vaping.

We must stress again that Health Canada be required to consult with the consumers most impacted by a proposed regulation. For example, the data cited by Health Canada in the consultation shows that adult vapers most prefer fruit-flavoured products, yet Health Canada is seeking to ban these. How does that make sense, especially for a reduced harm product? It’s as if Health Canada wants to purposefully undermine the vaping product market – which makes

sense when you consider the Department ignored consumers during the earlier consultation, but listened to anti-vaping advocates from the public health community.

More Smoking?

In explaining the draft regulations and the decision taken to prohibit most flavoured products, Health Canada acknowledges that its proposed regulation is very likely to drive some vapers back to smoking and/or prevent some smokers from switching to vaping.

This may be the most baffling move by a public health department in recent memory: crafting a regulation that will lead to more smoking. It would be one thing to naïvely undermine the concept of harm reduction with an ill-conceived regulation; to do it knowingly is contemptible.

With this admission made in writing in the *Canada Gazette*, it is stunning to believe this draft regulation made it through the Cabinet and Treasury Board review process, and it calls into question the whole nature of Health Canada policy-making. When the Department that is supposed to craft policies to reduce smoking brings forward a regulation it acknowledges is likely to lead to more smoking, the plot has clearly been lost and, once again, it begs the question how we ended up at this point.

It just doesn't make sense.

The answer seems to lie, once again, with the groups Health Canada listens to, which are mainly anti-vaping advocates from the public health community. With all due respect, these are not people who care about smokers or vapers; they are a militant group of activists who believe a world is possible in which there is no smoking or vaping. Perhaps that world will exist some day, but it does not at this time. Therefore, these groups should have no more say in vaping regulation than vapers themselves.

Move Beyond Prohibition

Given the rather stunning failure of prohibition in the 1930s, it is remarkable that Health Canada continues to promote the policy today, because that is, effectively, what the regulations propose in seeking to ban almost all flavoured vaping products. Moreover, the public health lobby is already mounting a vociferous campaign for the prohibition to be extended to mint and menthol, and we fully expect Health Canada and/or its politicians to eventually cave in to that lobbying.

The CAC has heard from hundreds of vapers that flavours are important to them as they try to leave smoking behind. Therefore, if flavours help people quit smoking, they must remain available. That tends to lead to a discussion on what type of flavours should be allowed. It is our understanding that Federal regulations already ban flavours deemed appealing to youth, but that those restrictions are not being enforced. It does strike one as quite baffling that regulations are already in place to address the issue of flavours, but those are not being enforced, but then Health Canada wants to bring in even more regulation to ban more flavours, which may also not get enforced.

It just doesn't make sense.

Adopting a prohibition approach also demonstrates a complete lack of thinking on the part of Health Canada. It is a “feel good” policy rather than an effective one. For if it was effective, surely Health Canada would support flavour bans for alcohol and cannabis products, since youth drinking and cannabis use are as prevalent as youth vaping, if not more so. However, for those two products governments seem content to use means other than a ban to deal with youth use. Therefore, why is the solution to youth vaping a flavour ban? Flavours either appeal to youth or they do not. You cannot say they do for vaping but not for alcohol and cannabis.

It just doesn't make sense.

Black Market Concerns

The CAC remains very concerned that the proposed prohibition will lead vapers to the black market. Health Canada should recall that prior to the pandemic, there was media and public health hysteria around vaping-related illness. It turns out that was caused by black market products mixed with illicit substances. Therefore, driving consumers to the black market would seem to be highly unwise public health policy.

Moreover, the *Canada Gazette* notice acknowledges the concern that the draft regulations could create a black market for flavoured vaping products. However, no solution is offered and Health Canada simply states it will monitor the market. The notice is also silent on how to address consumers ordering black market products from the international online market.

Finally, there is a very real risk that vapers accustomed to flavours will try to mix their own products at home. We understand this could pose serious health risks. Therefore, we are forced to question once again why Health Canada would propose a regulation that could have more serious health risks than exist today.

Anti-Vaping Lobbying

As detailed in our May 2021 letter to the Minister, the endless barrage of media coverage and government regulation seems to suggest health groups and the pharmaceutical industry have been lobbying against vapour products, which are a threat to the pharma monopoly on smoking cessation products. Many of those same pharma companies are in turn generous donors to anti-tobacco health groups, which may explain why these groups take such a bizarre position opposing vapour products.

For example, why on earth is the Canadian Cancer Society lobbying against vapour products all across Canada? There is no link between vapour products and cancer in any of the studies we have seen, while there is a clear link between cigarettes and cancer. Therefore, the Cancer Society should be lobbying in favour of vapour products and making it easier for smokers to switch, not harder. In fact, cancer organizations in other countries have come out in favour of vaping, which puts the actions of the Canadian Cancer Society further into question.

The CAC also wishes to draw attention to a video on YouTube¹ by Dr. John Oyston, titled “The American Lung Association is lying about vaping.” It is a brilliant deconstruction of the misinformation being spread about vapour products by the organization and the inconsistencies

¹ <https://www.youtube.com/watch?v=OfZR9XOKkxE>

with its mission statement. Dr. Oyston then asks why the American Lung Association would take this position, advising it is important to “follow the money.” He notes that Johnson & Johnson, the maker of Nicorette and other smoking cessation products, funds the largest health charity in the U.S., which in turn is one of the largest donors to the American Lung Association. Dr. Oyston concludes that vaping is a threat to the bottom line of the pharma industry, thereby putting the Association in a conflict because “vaping is bad business for one of its largest sources of funding.”

The CAC does not have the resources to validate these claims. However, it may explain why groups that should be embracing vapour products as a harm reduction tool are instead lobbying so strenuously against them. It may also explain the growing gulf between the position of harm reduction experts like Dr. Oyston and the lobbying of certain health groups.

Unfortunately, here in Canada, the public health groups seem to control Health Canada and we end up with the potentially disastrous prohibition regulations published on June 19.

Alternative Approaches

For all the reasons outlined above, the CAC feels Health Canada’s proposed flavour regulation is at best severely misguided, and at worst a looming public health disaster. Therefore, we strongly encourage the Department to come up with alternative approaches, with three seemingly simple ones available, all of which are based on the premise that the problem to be addressed is youth vaping.

1. *Enforce existing laws.* It is already illegal for youth to purchase a vapour product. Moreover, many of the types of flavours often cited as being attractive to youth are already prohibited by existing regulation. Therefore, the simplest solution would seem to be to enforce existing laws. It also makes no sense to suggest bringing in new laws will have any impact if the existing ones are not being enforced.
2. *Restrict certain products to age-controlled retail environments.* Provinces like BC, Ontario and Saskatchewan have introduced regulations that restrict sales of vaping products based on degree of youth access. For example, Ontario and Saskatchewan allow tobacco, mint and menthol flavours to be sold in any retail location, whereas other flavours can only be sold in age-restricted premises. BC restricts the sale of all flavours other than tobacco to age-restricted stores. While not an ideal outcome in terms of consumer access, this is at least a better approach than prohibition.
3. *Allow a limited number of flavours beyond tobacco, mint and menthol.* If point #1 above does not allow Health Canada to appease anti-vaping lobbyists in the public health community, perhaps another option is to create a limited list of approved flavours that takes into account the clear adult preferences – namely to include fruit flavours. Having a list of 8-10 permitted flavours would at least give adult consumers choice and accommodate their preferences.

In closing, many of the measures being considered for vapour products would have significant negative affects on the rights of consumers and on public health. Some may also be unconstitutional. Therefore, the burden of proof falls upon the Government to justify these measures that strike a severe blow to the consumer right to access harm reduction products. We do not believe the information posted in *Canada Gazette, Part 1* on June 19 meets that standard.

Therefore, the draft regulations should be shelved in favour of the alternative approaches listed in this submission. Furthermore, Health Canada must begin to acknowledge consumer voices on this issue, and must not repeat the shameful behaviour of the earlier consultation when consumer voices were ignored. We will not sit quietly if that happens.

In the meantime, rest assured that the CAC will continue to vocally advocate for the right of consumers to access their preferred products, especially on a matter as critical as harm reduction.

Sincerely,

A handwritten signature in cursive script, appearing to read "Bruce Cran".

Bruce Cran
President