

ONLINE TOBACCO SALES IN CANADA: HOW SHOULD THE LAW DEAL WITH TOBACCO ISSUES?

PATRICK TANI*

INTRODUCTION

The purpose of this paper is to examine how online tobacco product sales are controlled by Canadian regulations. The research was somewhat difficult, however, because there are surprisingly few resources—including legal or academic discussions—specifically dedicated to the regulation of online tobacco sales. This dearth of research reflects the current lack of Canadian legislative attempts to regulate online tobacco sales.

Generally speaking, the current Canadian law focuses on the following regarding tobacco control strategy: 1) efforts to reduce the number of smokers in Canada; 2) an effective way to prohibit youth from accessing tobacco products; and 3) the remuneration of healthcare costs stemming from the consumption of tobacco products (which is somewhat parallel to the efforts to reduce the number of smokers in Canada). Even though the interpretation of current strategies “suggests” that it is illegal in Canada to sell tobacco products online, due to the lack of regulations applicable to online tobacco sales, the Internet remains a useful tool to sell illegal tobacco products.

In fact, it has been said that “Canada is currently among the leaders in tobacco control.”¹ There has been constant debate regarding the tobacco control strategy in the legislature and in Canadian society, but there has been no specific consideration given to *online* tobacco sales. During the research, this paper discovered a hidden indication in Canadian law to prohibit online

* B.A., J.D. (University of Manitoba).

¹ Nathalie Auger & Marie-France Reynault, “The Future of Tobacco Marketing in Canada” (2005) 96:4 *Canadian Journal of Public Health* 278 at 278 [Auger].

sales of “cigarettes,” even though there is no specific legal discussion regarding online tobacco sales in Canada. We will discuss the hidden consideration throughout the paper.

There are definitely more reasons for instituting online tobacco sale regulation than having hidden indications. One reason, for instance, is the argument that some of the current strategies to reduce the number of smokers in Canada or to remunerate healthcare costs through taxes will bring contradictory results, which will increase the volume of illegal or contraband cigarettes. The Internet might serve as the main channel for the sales of such illegal or contraband cigarettes. Indeed, a number of empirical studies have found that increasing taxes will increase the volume of illegal or contraband cigarettes, and increase the number of criminal organizations involved.² Reinterpreting current law to prohibit online tobacco sales will not be sufficient to prevent an online, illegal tobacco market. Therefore, this paper argues that now is the time to actively discuss online tobacco regulations in Canada. As part of this argument, this paper will first examine Canadian law (both civil code and case law), which can be used as a starting point to frame the discussion of online tobacco sales in Canada. This paper will also question the strange justification behind allowing online sales of cigar products, which have negative effects similar to cigarettes.

Issues regarding online tobacco sales must be treated seriously in Canada and it is time to enact legislation accordingly. The recent US legislation, *Prevent All Cigarette Trafficking Act (PACT Act)*,³ can be a lesson to Canadian Parliament as the PACT Act links the US tobacco control strategy to online sales. What Canada needs to do is make a clear policy for online tobacco sales through new legislation.

TOBACCO PRODUCTS IN THE CANADIAN LEGAL SYSTEM

The current Canadian *Tobacco Act*⁴ was enacted in 1997. It replaced the *Tobacco Sales to Young Persons Act* and the *Tobacco Products Control Act*. Some features of the 1997 *Tobacco Act* include regulations in manufacturing tobacco products,⁵ requirements for retailers who sell tobacco products,⁶ and

² Nachum Gabler & Diane Katz, “Contraband Tobacco in Canada: Tax Policies and Black Market Incentives” (Vancouver: Fraser Institute, 2010).

³ *Prevent All Cigarette Trafficking Act of 2009*, Pub L No 111-154, 124 Stat 1087 (2010).

⁴ *Tobacco Act*, SC 1997, c 13.

⁵ *Ibid*, s 5.

⁶ *Ibid*, s 9.

labeling requirements on the packaging of cigarettes.⁷ Furthermore, there are provincial laws that regulate tobacco consumption. In Manitoba for instance, there is the *Non-Smokers Health Protection Act* (which defines smoking areas and display of tobacco products),⁸ the *Tobacco Damages and Health Care Costs Recovery Act* (which establishes rules for the recovery of tobacco-related health care costs),⁹ and the *Tobacco Tax Act* (which defines tobacco products for tax purposes).¹⁰ For the purpose of this paper, many tobacco-related laws in Canada focus on addressing four important problems: 1) unrestricted sales to minors; 2) cheaper cigarettes through tax avoidance and smuggling; 3) unfettered advertising, marketing and promotion; and 4) continued normalization of the tobacco industry and its products.¹¹ Based on these challenges, this paper will be divided into two sections: 1) advertising and unrestricted sales to minors, and 2) cheaper tobacco offered through the Internet.

A) Regulation of Tobacco Advertising – A summary of key cases

Tobacco advertisement has been an important issue in the development of Canadian tobacco control law. One of the most important Canadian cases, before the enactment of the current *Tobacco Act*, is *RJR-MacDonald, Inc. v. Canada (Attorney General)*,¹² which deals with the old *Tobacco Products Control Act*.¹³ The old Act prohibited advertisement of tobacco products, promotion of tobacco products, and sale of tobacco products without printed health warnings. Section 4 of the statute banned almost all advertisement of tobacco products, stating:

(1) No person shall advertise any tobacco product offered for sale in Canada.

(2) No person shall, for consideration, publish, broadcast or otherwise disseminate, on behalf of another person, an

⁷ *Ibid*, s 15.

⁸ *Non-Smokers Health Protection Act*, CCSM 2005, c N92.

⁹ *The Tobacco Damages and Health Care Costs Recovery Act*, SM 2006, c 18.

¹⁰ *The Tobacco Tax Act*, CCSM 2008, c T80.

¹¹ Joanna Cohen, Vivian Sarabia & Mary Jane Ashley, "Tobacco Commerce on the Internet: a Threat to Comprehensive Tobacco Control" (2001) 10:4 *Tobacco Control* 364 at 364 [Cohen].

¹² [1995] 3 SCR 199 [*RJR-MacDonald*].

¹³ *Tobacco Products Control Act*, SC 1988, c 20.

advertisement for any tobacco product offered for sale in Canada.¹⁴

The only exception to this ban was for foreign advertisements in foreign publications or foreign broadcasts imported into Canada, which were not primarily intended for the purpose of promoting the sale of tobacco products in Canada.

The Supreme Court of Canada held the advertising provisions of the *Tobacco Products Control Act* were overly restrictive, stating that they resulted in a constitutional violation of freedom of expression. They further held that the justification required by section 1 of the *Canadian Charter of Rights and Freedoms*¹⁵ to save the violation was not established because “no evidence is adduced to show that a partial ban would be less effective than a total ban[.]”¹⁶ As a result of *RJR-MacDonald, Inc.*, the legislation was struck down.

The new *Tobacco Act* gave rise to another landmark case, *Canada (Attorney General) v. JTI-Macdonald Corp.*¹⁷ In the Supreme Court of Canada’s decision, several sections of the *Tobacco Act* were determined to have constitutional issues. First, the tobacco companies argued that the broad definition of “promotion” in section 18(1) and the general ban on promotion in section 19 was so broad that they were forbidden funding for scientific research. Indeed, a brief look at the statute can give the impression that it is somewhat contradictory, because while section 18(2) defines scientific work as depicting tobacco products or tobacco product-related brand elements as an exception to the definition of “promotion,” the exception adds the condition that “no consideration is given directly or indirectly for that use or depiction in the work, production or performance.”¹⁸ Further, section 19 states “[n]o person shall promote a tobacco product or a tobacco product-related brand element except as authorized by this Act or regulations.”¹⁹ Thus, the tobacco companies argued that the statute was unclear on the issue of whether sponsoring scientific work by the tobacco companies is an exception to the prohibition on promotion. The Court held that the statute is clear, rejecting the argument of the tobacco companies. The Court stated that the definition

¹⁴ *Ibid*, s 4.

¹⁵ *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being schedule B to the Canada Act 1982 (UK), 1982, c 11, s 1.

¹⁶ *RJR-McDonald*, *supra* note 12 at para 163.

¹⁷ *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30, [2007] 2 SCR 610 [*JTI-Macdonald Corp*].

¹⁸ *Tobacco Act*, *supra* note 4, s 18(2)(a).

¹⁹ *Ibid*, s 19.

of promotion in section 18 means “commercial promotion directly or indirectly targeted at consumers[.]”²⁰ Thus, sections 18 and 19 “do not prevent the publication of legitimate scientific works funded by tobacco manufacturers.”²¹ Still, the Court made it clear that tobacco companies are “prohibited from paying for a particular brand to be included in a commercial scientific work directed at consumers[.]”²²

Second, the tobacco companies argued that section 20, which bans “false, misleading or deceptive” promotion, as well as promotion “likely to create an erroneous impression about the characteristics, health effects or health hazard of the tobacco product or its emissions” infringes their right to freedom of expression guaranteed by section 2 of the *Canadian Charter*. The Court agreed that section 20 “clearly infringes the guarantee of freedom of expression,” but is still justified under section 1 of the *Charter*. In the decision, the Court made it clear that Parliament’s objective is to protect “public health and consumers,” and the evidence has shown that “the right to invite consumers to draw an erroneous inference as to the healthfulness of a product” will “almost certainly harm” the public health. As a result, the Court concluded that the tobacco companies’ freedom of expression “is of low value” when considering the objective of Parliament.

The tobacco companies also argued that section 22(3), which bans advertisements “that could be construed on reasonable grounds to be appealing to young persons” was too ambiguous since no one has the ability to reveal what actually attracts young people to use tobacco products. The tobacco companies argued that this essentially results in tobacco advertising aimed at anyone, not just young people. The Court decided otherwise, stating, “Parliament cannot be said to have gone further than necessary in blocking advertising that might influence young persons to start smoking.”²³ More specifically, the section “does not impose a total ban on advertising” as

“[i]nformation and brand-preference advertising is permitted, provided that it is not done in places that young persons are likely to frequent or in publications not addressed to adults, and provided that it is not lifestyle advertising or advertising that there

²⁰ *JTI-Macdonald Corp*, *supra* note 17 at para 57.

²¹ *Ibid* at 612.

²² *Ibid* at para 56, 57.

²³ *Ibid* at para 93.

are reasonable grounds to believe that it could be appealing to young people as a group.”²⁴

Furthermore, the Court added that even the ban on “lifestyle advertising” in section 22(3) of the Act constitutes a justified limit on free expression, since there is a rational connection between the section and Parliament’s objective, which is “pressing and substantial.” This section is to be viewed as not forbidding general advertisement, but rather as limiting the style of advertisement. The Court’s justification for upholding sections 24 and 25, which prohibit the use of corporate names in sponsorship promotion and on sports or cultural facilities, is the extension of the justification for banning lifestyle advertisements, as sponsorship promotion is “essentially lifestyle advertising in disguise.”

Lastly, even though the Court admitted that the requirement in the *Tobacco Products Information Regulations*—that the government’s health warnings occupy at least 50 percent of the principal display surfaces of packages— infringes section 2 of the *Charter*, it was determined that the infringement was justified under section 1 because the benefits flowing from larger warnings outweighed the detriment to the manufacturers’ expressive interest in creative packaging. Furthermore, the court stated that the fact that “many countries require warnings at least as large as Canada’s” also supports the reasonableness of the government’s requirement.²⁵

Even though the above case is not about online tobacco sales, it is an important source for the construction of regulations for online tobacco sales because there have not been many discussions on tobacco sales on the Internet. The Internet has become a part of life for Canadian consumers for more than a decade, thus online advertisements can target everyone, including youth, with the current ease of Internet access, making the online environment tantamount to the offline environment in terms of ease of access.

A recent survey²⁶ shows that Canada is one of the leading nations in terms of Internet usage. For instance, as of 2012, “Canadians continue to lead the world in Internet usage with an average of 45 hours a month spent online[.]” In terms of online shopping, Canadians spent \$15.3 billion dollars online in 2011 alone, and 2010 research showed that eight out of ten

²⁴ *Ibid* at para 92.

²⁵ *Ibid* at para 138.

²⁶ “Canadians lead the world in Internet usage – connecting online to shop, read news, and keep in touch”, *The Vancouver Sun* (4 August 2012) A12.

Canadian households had access to the Internet (more than half of those used more than one type of device to go online). This is a significant increase of Internet users from the 2006 research, which showed that two thirds of Canadian households were using the Internet.²⁷

Such trends indicate that the Internet is now a place of unfettered advertising, marketing, and promotion. A recent study has proven that “higher levels of prior Internet usage (other than shopping) resulted in increased levels of Internet shopping,” and “[t]he more hours a consumer spends surfing, the higher the probability of being exposed to e-buying offers.”²⁸ In other words, cyber space is an easy place for daily shopping, and this in turn makes the Internet extremely attractive for both the selling and advertising of products.

Internet marketing can be in the form of e-mail offers or advertisement through sponsored links. Merely selling a product online can constitute an element of lifestyle advertisement, especially if it is a tobacco product. An observer²⁹ argues that a website alone is one of the most important elements for Internet marketing, as the website itself can help promote the information that the seller is trying to convey, without printing costs for hard copies or postage. Also, even though Internet shopping, unlike traditional shopping, does not provide direct, physical exposure to an item, “the Internet can provide more detailed and updated information in real time” to support decision making. As a result, “e-shoppers appear willing to make decisions with less direct sensory experience prior to purchase than do more traditional shoppers.” If a consumer enjoys shopping online, it can even lead to unplanned purchases.³⁰

These studies suggest selling tobacco products online is illegal in this manner, though unenforced, under the *Tobacco Act*. The perspective of *JTI-Macdonald Corp.* suggests this method is illegal since advertisement is prohibited “when it associates a product with a way of life or uses a lifestyle to evoke an emotion or image that may, by design or effect, lead more people to become addicted or lead people who are already addicted to increase their

²⁷ “Online in Canada”, *Business Wire* (28 Aug 2007), online: Business Wire <<http://www.businesswire.com/news/home/20070828006138/en/Online-Canada>> [Online in Canada].

²⁸ Yehoshua Libermann & Samuel Stashevsky, “Determinants of Online Shopping: Examination of an Early-Stage Online Market” (2009) 26:4 *Canadian Journal of Administrative Sciences* 316 at 320 [Libermann].

²⁹ Chaya Chang, “Internet Marketing” (2005) 31:2 *Qualified Remodeler* at 32.

³⁰ Libermann, *supra* note 28 at 317.

tobacco use.”³¹ Also, section 11 of the *Tobacco Act* prohibits selling “a tobacco product by means of a display that permits a person to handle the tobacco product before paying for it,”³² while section 12(a) prohibits the “furnishing of a tobacco product by means of a device that dispenses tobacco products” unless “the public does not reasonably have access” to the place.³³ Internet shopping can be distinguished from traditional shopping because online stores lack direct exposure to an item as consumers cannot see, touch, smell, or feel the item. Also, online stores lack salesmen which are usually an important element in traditional retail. As a result, if an online tobacco retailer displays images of their tobacco products, like other types of online retailers display images of their products, it may be violating the display prohibitions of the *Tobacco Act* in section 11 and 12(a), and arguably may also be advertising tobacco, which is against section 9 or even section 22(3) of the Act. Various provincial legislations further prohibit the display of tobacco products. In Saskatchewan, for instance, retailers may only display tobacco products on their business premises if the tobacco-related products are not “visible to the public if young persons are permitted access to those premises,”³⁴ and not “visible to the public from the outside of the premises.”³⁵ Indeed, this trend has spread world-wide, as England now follows Canada, Iceland, and Ireland in banning retail cigarette displays, which “will be extended to smaller stores by 2015.”³⁶

Some justifications for the prohibitions on tobacco product displays are analogous to the justification for the prohibitions on tobacco advertisement, considering that displaying tobacco products can constitute a form of “Point of Sale promotions.” Research commenced by the Canadian Cancer Society suggests that the display of tobacco products by the retailers must be prohibited, because:

1) Point of sale (POS) promotions for tobacco products stimulate impulse purchases (including among recent ex-smokers, among occasional smokers, and among teenage experimenters). Given that about one-fifth of smokers are non-daily smokers, and that a

³¹ *JTI-Macdonald Corp*, *supra* note 17 at para 115.

³² *Tobacco Act*, *supra* note 4, s 11.

³³ *Ibid*, s 12(a).

³⁴ *Tobacco Control Act*, ss 2001, c T-14, s 6(3).

³⁵ *Ibid*, s 6(4).

³⁶ Department of Health, “Tobacco displays in shops to end from today” GOV UK (April 6, 2012) online: GOV UK <<https://www.gov.uk>>.

considerable proportion of youth are experimenters or are at risk of experimenting, this is significant.

2) Point of sale promotions weaken the resolve of ex-smokers to remain smoke-free. The highly visible presence of cigarettes provides an extremely large temptation for an individual craving nicotine. Just one purchase can turn an ex-smoker back into a daily smoker.³⁷

It might be argued that online product displays do not have the same nexus as a retail scenario. However, the power of sales promotions should be emphasized as motivating people to purchase tobacco products coincidentally, even though it was not the initial purpose of consumers' store visitation. If displaying tobacco products online leads an internet user to purchase tobacco products, online display can be argued within the boundary of point of sales promotions. Indeed, a 2001 study in the US regarding online tobacco sales indicates that smoking-related websites tend to "glamourize tobacco use," and there is a "relation between online advertising and tobacco consumption."³⁸ If online retailers are allowed to display images of tobacco products, while traditional stores are not, an issue of fairness may arise.

Moreover, even if the online retailers remove the tobacco product images from their websites, the ease of access to tobacco products online may still violate the *Tobacco Act*, especially since the Internet can be an unrestricted area for minors. Indeed, "[t]he prevention of sales to minors is a key component of a comprehensive tobacco control strategy," and, at the same time, it has been reported that "Canadian children and youth's access to the Internet is now almost universal."³⁹ More specifically, even in the early 2000s, Canadian youth were the most frequent Internet users. Many warned that "Canadian youth are putting themselves at risk as they explore the Internet, often with little or no supervision."⁴⁰ Indeed, one study researched children who visited adult chat rooms and found that 85 percent of children visiting adult chat rooms were unsupervised when they used the Internet. With the significant increase in the number of Internet connections for single-family households with unmarried children under age 18 (91.1 percent

³⁷ Canadian Cancer Society, "Rationale Supporting a Total Ban on Tobacco Displays and Signage at Point of Sale: A Brief submitted to Manitoba Health" (A brief submitted to Manitoba Health, May 2002) [unpublished].

³⁸ Cohen, *supra* note 11 at 365.

³⁹ Catherine Swift, "Canadian children and youth are not always wise and responsible online" *ATA News* 36:16 (2002) at 8.

⁴⁰ *Ibid.*

in 2009),⁴¹ allowing the sale of tobacco online is contrary to the goal of preventing tobacco sales to minors, as online tobacco sales can appeal to young people.

As mentioned previously, the Supreme Court of Canada, in *JTI-Macdonald Corp.*, justified section 22(3) of the *Tobacco Act*, which bans advertisements that could be construed on reasonable grounds to be appealing to young persons. The Court held that it is “completely unrealistic to claim that tobacco advertising does not target people under 19 years of age,” because “most smokers begin as teenagers,” and “tobacco advertising serves to recruit new smokers, especially adolescents.”⁴² Regarding the argument that the section is ambiguous, the Court held that, looking at the French version of the text, the person making the assessment would not need to be as certain of their actual existence as would be the case in the criminal context. More specifically, in paragraph 84 of the decision, the Court states:

The suggestion in the English version that there be reasonable grounds but that the person assessing them need not be entirely certain about them seems to involve a contradiction in terms. If reasonable grounds exist, it is hard to imagine how one could be in doubt about them. The French version avoids this difficulty: one must have reasonable grounds to conclude that the advertising “could be” appealing to young persons. This captures the idea that the reasonable grounds exist but that there may be doubt about whether in fact young persons would find the advertising appealing. Read thusly, the phrase serves the purpose of relieving the prosecutor of proving that a particular advertisement in fact was appealing to one or more young persons.⁴³

Furthermore, unlike traditional shops where an employee can screen a minor’s attempt to purchase tobacco products, an Internet retailer does not have such protection. Internationally speaking, one of the most used screening systems to protect young Internet users from accessing websites not intended for children is the South Korean real name system. In South Korea, all residents receive a resident registration number, which is thirteen digits. The number includes “digits about the person’s date of birth, gender and

⁴¹ Statistics Canada, “Internet use by individuals, by selected characteristics” online: Statistics Canada <<http://www.statcan.gc.ca/tables-tableaux/sum-som/101/cst01/comm35a-eng.htm>>.

⁴² *JTI-Macdonald Corp.*, *supra* note 17 at para 13.

⁴³ *Ibid* at para 84.

birth place.”⁴⁴ As a result, South Korean Internet users must submit their real name and resident registration number to identify whether the consumer is a legal adult. Since there is no such identification system in North America, the South Korean system can be an option to attempt to regulate Internet tobacco sales. Still, other problems remain, such as privacy issues. An observer⁴⁵ notes that the privacy threat is vital and very real, considering personal information, including names and resident registration numbers, of 20 million Korean Internet users were leaked from 25 sites in March 2010. Also, such a system is not immune from manipulation, as the site cannot detect if a minor uses an adult’s identification.

Thus, with the current e-commerce system in Canada, merely selling tobacco products online (without images) may still be illegal because of section 22(3) of the *Tobacco Act*, because even a display of information must not be “done in places that young persons are likely to frequent or in publications not addressed to adults.”⁴⁶ If online retailers are not caught by section 22(3), they still must deal with the prohibition of displaying tobacco products in retail shops. Traditional stores can use curtains to hide their products, but such tools are difficult to implement online.

The Parliament of Canada’s main goal in its tobacco control strategy is to prevent “young people from taking up smoking and becoming addicted to tobacco.”⁴⁷ The purpose of the prohibition on displaying tobacco products is to prevent youth access. These goals cannot be met while online tobacco sales exist considering the number of young people using the Internet (especially without supervision). This leads to the conclusion that banning online tobacco sales is legally unavoidable.

International legal trends also support this conclusion. The World Health Organization’s *Framework Convention on Tobacco Control*, which Canada ratified in 2004, mandates a comprehensive ban on tobacco advertising, promotion, and sponsorship,⁴⁸ and also institutes a ban on sales to and by minors. It also requires each party to “adopt and implement effective legislative, executive, administrative or other measures at the appropriate government level to prohibit the sales of tobacco products to

⁴⁴ Hiroyuki Suzuki, “Empirical Analysis of Internet Identity Misuse: Case Study of South Korean Real Name System” 10 Proceedings of the 6th ACM workshop on Digital identity management 27 at 27.

⁴⁵ *Ibid.*

⁴⁶ *JTI-Macdonald Corp*, *supra* note 17 at para 92.

⁴⁷ *Ibid* at para 87.

⁴⁸ *World Health Organization Framework Convention on Tobacco Control*, 21 May 2003, 2302 UNTS 229, art 13.

persons under the age set by domestic law, national law or eighteen.”⁴⁹ Even though the United States is not a party of the Convention, the US takes a stronger attitude than Canada, both politically and legally, in terms of restricting online sales of tobacco products. Indeed, President Barack Obama signed the *Prevent All Cigarette Trafficking Act (PACT Act)* on March 31, 2010.⁵⁰ The purpose of the Act is to regulate the sale of tobacco products (more specifically, cigarettes) over the Internet and through postal mail. The PACT Act, for instance, requires Internet and mail-order purchasers, and the person who signs to accept delivery of the shipment, to provide proof of identity in the form of a valid, government-issued identification bearing a photograph of the individual. This is to ensure that the person receiving the order is at least the minimum age required for the legal purchase of tobacco products.⁵¹ The main focus of the Act, however, is on regulations for the taxing of online tobacco sellers.

B) Tobacco Tax Regulations and Cheaper Tobacco through the Internet

Price control of tobacco products is one of the key elements in Canada’s tobacco control strategy. One reason price control is important is because “young people are particularly price sensitive,”⁵² which can mean that a lower price of tobacco products can be more appealing to some tobacco consumers. In general, many online retailers save costs by maintaining their business online, thereby reducing their number of employees, store maintenance costs, etc. As a result, online stores can reduce their prices. In fact, recent research shows that buying online “can cost four times less than in shops.”⁵³ If consumers are able to purchase cheaper cigarettes online, these cheaper tobacco products can be appealing to youths.

In Canadian law, one of the most important elements of tobacco price control and tax policy is public health. Indeed, Canada’s free health care system suffers from the increased costs associated with the consumption of cigarette products. There have been many attempts to seek a

⁴⁹ *Ibid*, art 16.

⁵⁰ Kurt Ribisl, Rebecca S Williams & Ziya Gizlice, “Effectiveness of State and Federal Government Agreements with Major Credit Card and Shipping Companies to Block Illegal Internet Cigarette Sales” (2011) 6:2 Public Library of Science Journals 1 at 6.

⁵¹ PACT Act, *supra* note 3 § 2A(B)(4)(a).

⁵² Cohen, *supra* note 11 at 364.

⁵³ Arthur Martin, “Buying online can cost four times less than in shops”, *Daily Mail*, (17 September 2012) 31.

reimbursement of public health costs from the consumption of tobacco. In the recent case of *R. v. Imperial Tobacco Canada Ltd.*,⁵⁴ the Supreme Court of Canada held that the tobacco industry must pay damages to the British Columbian government for tobacco-related health care costs, and the federal government is not required to reimburse the tobacco industry for the damages.

In an earlier decision in 2004, the Federal Court of Canada stated that one of the legislative purposes of the *Tobacco Act* is in “response to a national health problem of substantial and pressing concern—to protect the health of Canadians, to reduce health care costs attributable to smoking and to have the tools to better inform Canadians about the perils of smoking.”⁵⁵ British Columbia’s *Tobacco Damages and Health Care Costs Recovery Act* authorizes an action by the government of British Columbia against a manufacturer of tobacco products for the recovery of health care expenditures incurred by the government in treating individuals exposed to those products. In 2005, the Supreme Court of Canada held:

Here, the cause of action that is the pith and substance of the Act serves exclusively to make the persons ultimately responsible for tobacco-related disease suffered by British Columbians – namely, the tobacco manufacturers who, through their wrongful acts, caused those British Columbians to be exposed to tobacco – liable for the costs incurred by the government of British Columbia in treating that disease. There are thus strong relationships among the enacting territory (British Columbia), the subject matter of the law (compensation for the government of British Columbia’s tobacco-related health care costs) and the persons made subject to it (the tobacco manufacturers ultimately responsible for those costs), such that the Act can easily be said to be meaningfully connected to the province.⁵⁶

Indeed, it has been reported that “some 45,000 Canadians die from tobacco-related illnesses every year,”⁵⁷ and the Supreme Court of Canada has held that “smoking is the leading public health problem in Canada.”⁵⁸ The cost of treating tobacco-related diseases varies by province, but it consumes a large portion in all provincial fiscal health budgets. (For instance, the cost of

⁵⁴ 2011 SCC 42, 3 SCR 45.

⁵⁵ *Imperial Tobacco Canada Ltd v Canada (Minister of Health)*, 2004 FC 236, FCJ No 281 at para 85.

⁵⁶ *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49, 2 SCR 473, at para 37.

⁵⁷ *JTI-Macdonald Corp*, *supra* note 17 at para 13.

⁵⁸ *Ibid.*

treating tobacco-related illness in Manitoba alone is more than 100 million dollars a year.⁵⁹)

Some attempts have also been made to reduce the number of smokers through tobacco price control. It has been shown that “each 10% increase in price leads to a 4.5% decrease in tobacco consumption for the general population.”⁶⁰ Canadian lawmakers were prompted to use tobacco taxes by health officials and the anti-smoking lobby in a quest to reduce the number of smokers.⁶¹ An unfortunate side effect of increasing tobacco taxes is the strengthening of black markets for contraband cigarettes.⁶² An observer criticized increased tax on tobacco products as part of tobacco control strategies, claiming that the contraband tobacco market “will continue to grow, smokers will continue to consume contraband cigarettes, and the policy objectives of Canada’s tobacco tax regime will go unfulfilled.”⁶³

Meanwhile, RCMP and the Criminal Intelligence Service Canada have identified five primary sources of contraband tobacco:

- Cigarettes unlawfully manufactured on Aboriginal territories in the United States that border Canada (primarily the Akwesasne reserve).
- Cigarettes lawfully manufactured in the United States, purchased primarily in relatively low-tax states (such as North Carolina and West Virginia), and smuggled into Canada.
- Tobacco products manufactured under counterfeit brand names (primarily in China).
- Tobacco products designated for sale on Native reserves (and thus exempt from federal and provincial excise taxes) that are diverted to the black market.
- Tobacco products stolen from convenience stores or cargo trucks carrying tobacco shipments.⁶⁴

A report in Canada revealed that “85% of all cigarettes sold tax-free by the Squamish Nation in British Columbia were diverted to buyers who then resold the product to non-natives for profit.”⁶⁵

⁵⁹ Steve Lambert, “Manitoba joins provinces battling tobacco companies for health-care costs” *Canadian Press NewsWire* (17 Mar 2006).

⁶⁰ “Contraband Tobacco” (Brochure published by Non-Smokers Rights Association, Spring 2009) online: Non-Smokers’ Rights Association & Smoking and Health Action Foundation <<http://www.nsr-aadnf.ca>>.

⁶¹ Gabler, *supra* note 2 at 38.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ *Ibid* at 5-6.

⁶⁵ Cohen, *supra* note 11 at 364.

Even though the Internet has been identified as a channel of selling contraband tobacco in Canada,⁶⁶ there has not been a legislative step towards the Act specifically dedicated to online tobacco sales. Thus, the recent steps taken by the United States to prevent the Internet from being a channel for the sales of contraband tobacco should be a motivation to enact such “Canadian” tools at the national level. The United States PACT Act aims mainly to prevent illegal cigarette sales online because Congress found that “the sale of illegal cigarettes and smokeless tobacco products significantly reduces federal, state, and local government revenues, with Internet sales alone accounting for billions of dollars of lost federal, state, and local tobacco tax revenue each year,”⁶⁷ and “the sale of illegal cigarettes and smokeless tobacco over the Internet, and through mail, fax, or phone orders, makes it cheaper and easier for children to obtain tobacco products.”⁶⁸ Prohibiting the shipment of all cigarettes and smokeless tobacco items through the United States Postal Service,⁶⁹ the Act also tries to solve the tax issues by forcing Internet retailers to collect state and local taxes prior to delivering cigarettes in interstate sales.⁷⁰ Also, violations of the Act are punishable by criminal penalties of up to three years in prison, or civil penalties.⁷¹ These penalties exceed those of the *Jenkins Act*.

The *Jenkins Act*,⁷² which was passed in 1949, required an interstate cigarette retailer to register with states in which it advertised or sold cigarettes, and to file a report with the state tax administrator providing the quantity of cigarettes sold to a customer, as well as the customer's name and address so that States can “use these reports to seek tax payments directly from customers.”⁷³ With the growing power of the Internet, the *Jenkins Act* was not a perfect tool to collect from online sellers,⁷⁴ and the PACT Act sought to improve on the *Jenkins Act* features by implementing requirements such as tax collection before delivery, banning the shipment of cigarette products by the

⁶⁶ Royal Canadian Mounted Police, “RCMP 2010 Contraband Tobacco Statistics” (14 June 2011) online: Royal Canadian Mounted Police <<http://www.rcmp-grc.gc.ca/ce-da/tobac-tabac/stats-eng.htm>>.

⁶⁷ PACT Act, *supra* note 3 at § 1 (b)(1).

⁶⁸ *Ibid.*, § 1(b)(4).

⁶⁹ *Ibid.*, § 3 Treatment of cigarettes and smokeless tobacco as nonmailable matter.

⁷⁰ *Ibid.*, § 2(d)(1)(a).

⁷¹ *Ibid.*, § 3 Penalties.

⁷² *Jenkins Act*, 15 USC § 375.

⁷³ Christopher Buente, “Enforcement of State and Local Tobacco Excise Taxes after Heimi Group” (2010) Colum Bus L Rev 529 at 532.

⁷⁴ “Selling Cigarettes Online”, *Worldlawdirect* (1 February 2011), online: Worldlawdirect <<http://www.worldlawdirect.com/article/3332/selling-cigarettes-online.html>>.

postal service, and increased penalties for violations. An observer notes the effect of the amendment as follows:

Regardless of the impacts the legal changes may have, the changes the Act makes to the logistics of shipping seem likely to have a real effect. Increasing the cost and difficulty of shipping cigarettes alone should reduce the rate of online evasion by limiting supply. High-volume retailers in particular will be forced to switch to minor private carriers, limiting sales.⁷⁵

What the PACT Act suggests to Canadian lawmakers is clear: it is time to consider the Internet as a potential outlet for contraband tobacco. Undoubtedly, a discrepancy will arise if Canadian authorities exercise their usual tobacco tax power as a tobacco control strategy because this will lead to an increase in contraband sales. However, Canada, like the US, is a country that maintains a good nation-wide Internet environment with huge numbers of Internet users. As pointed out by the US Congress, ignoring the Internet's potential for contraband tobacco sales ignores the possibility that Canada's tobacco control strategy through taxation can be easily sidestepped. Indeed, the sales of illegal tobacco products can harm government revenues, health care benefits, and can even promote youth access to tobacco products. Moreover, illegal tobacco products sold cheaply online may put lawful traditional retailers at a disadvantage because of their higher prices. Even though Canadian law prohibits mailing tobacco items to different provincial jurisdictions, there are no safeguards in place to prevent a situation where a trafficker decides to sell cheap illegal tobacco products online within a single jurisdiction. Furthermore, even though this paper has argued that the Canadian law has a currently unenforced legal basis to prohibit online tobacco sales, there is an ambiguity on the legality of online "cigar" sales in Canada, which will be discussed in the following section.

AMBIGUITY REGARDING ONLINE TOBACCO SALES IN CANADA

One of the most active online tobacco sales in Canada is of Cuban cigars. While the sales of Cuban cigars online is not on the magnitude of illegal tobacco trafficking, as of November 2012 a simple Google search of the keyword "Cuban Cigar" reveals many online retailers based in Canada. The result being many retailers are Canadians may be partially due to the fact that

⁷⁵ Buente, *supra* note 73 at 581-582.

Cuban products are banned in the United States. The “presence of a communist or latter day socialist dictatorship in Cuba since 1959”⁷⁶ has led the United States to institute a near-total embargo against Cuba through legislation such as the *Trading with the Enemy Act*,⁷⁷ *Cuban Democracy Act*,⁷⁸ *Cuban Asset Control Regulations*,⁷⁹ and *Cuban Liberty and Democratic Solidarity Act of 1996*.⁸⁰ As a result, Cuban cigars are not available for purchase in the US, despite their world-wide name value.⁸¹ This makes Canada a good option for purchasing a Cuban cigar because it is the only other developed state with a nation-wide online environment in North America.

The Americans’ purchase of Cuban cigars in Canada is sometimes a topic in the Canadian media, as demonstrated by the coverage of former California governor Arnold Schwarzenegger purchasing Cuban cigars during his visit to Canada.⁸² The legal availability of Cuban cigars in Canada motivates Canadian retailers to target international customers.

However, the legality of online cigar sales in Canada is unclear. The biggest reason behind the existence of current Canadian online cigar retailers is the exclusion of cigars from the scope of the *Tobacco Act*. The *Tobacco Act* limits its application to “little cigars” which “ha[ve] a cigarette filter or weighs no more than 1.4g, excluding the weight of any mouthpiece or tip.”⁸³ Seemingly without reason, the Act does not include general cigars within its scope.

Thus, the *Tobacco Act* creates confusion because its definition of “tobacco products” differs from other federal legislation. For instance, the federal *Excise Act* includes general cigars in the definition of “tobacco products”: “tobacco product means manufactured tobacco, packaged raw leaf tobacco or cigars.”⁸⁴ Also when we consider the fact that a cigar is regulated under many of the provincial tobacco-related acts, (*Tobacco Tax Act*⁸⁵ in Manitoba, for example) the exclusion of cigars from the *Tobacco Act* is a controversial matter.

⁷⁶ Scott Fairley, “Between Scylla and Charybdis: The U.S. Embargo of Cuba and Canadian Foreign Extraterritorial Measures Against It” (2010) 44:9 *International Lawyer* 887 at 887.

⁷⁷ 12 USC § 95a.

⁷⁸ 22 USC § 6001.

⁷⁹ 31 CFR Part 515.

⁸⁰ 22 USC § 6021.

⁸¹ Jeremy Lee, “Cuban Cigars”, *Marketing* (21 July 2010) 19.

⁸² Katie Daubus, “Arnold enjoys Cuban cigar” *Calgary Herald* (01 June 2007) A4.

⁸³ *Tobacco Act*, *supra* note 4, s 2 “little cigar”.

⁸⁴ SC 2002, c 22, s 2.

⁸⁵ *Tobacco Tax Act*, *supra* note 10.

Conversely, the *Tobacco Act* describes the definition of tobacco products as:

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.⁸⁶

General cigars, including the famous Cuban cigars, are made out of tobacco leaves,⁸⁷ and the *Food and Drugs Act*⁸⁸ does not apply to cigar products, thus, the Act's limitation to "little cigars" is difficult to comprehend.

Considering the fact that the negative health effects from the consumption of cigars are not much different from the negative effects from the consumption of cigarettes, the exception of cigar products from the *Tobacco Act* becomes even more perplexing, as it contradicts the principles the Act is designed to address. Indeed, the population of cigar consumers cannot be easily ignored, a recent survey⁸⁹ in Canada found that approximately 16.7 percent of all Canadians (approximately 4.7 million people) are current smokers, and cigars are the most popular tobacco product other than cigarettes. Additionally, four percent of Canadians reported that they smoked a cigar in the past 30 days.⁹⁰ Thus, the law needs to be clear in addressing why cigars are allowed to be sold online, while cigarettes are not.

One way cigars differ from cigarettes is price. Because cigars are more expensive than cigarettes, the price itself may limit the access of youth to cigar products. This argument loses credibility in light of the *Canadian Tobacco Use Monitoring Survey* by Health Canada, which found that eight percent of all Canadian cigar smokers were "under the legal age to purchase tobacco in their province of residence."⁹¹ Many current online cigar retailers, however, do not even ask the shopper's legal age before allowing entrance onto their

⁸⁶ *Tobacco Act*, *supra* note 4, s 2.

⁸⁷ Lee, *supra* note 81.

⁸⁸ RSC,1985, c F-27.

⁸⁹ Jessica Reid & David Hammond, *Tobacco Use in Canada: Patterns and Trends* (Waterloo: Propel Centre for Population Health Impact, 2012).

⁹⁰ *Ibid* at 2.

⁹¹ Health Canada, "Canadian Tobacco Use Monitoring Survey" (2011), online: Health Canada <<http://www.hc-sc.gc.ca>>.

website, and there are no legal tools to force the retailers to limit underage access.

RECOMMENDATION TO ENACT A LAW DEDICATED TO THE CONTROL OF ONLINE TOBACCO SALES

The fact that no one has officially questioned the perplexing legal loophole allowing online cigar retailers reflects how Canada's tobacco control strategy is blind to online commerce. It seems that the necessity of increased strategies relating to online sales of tobacco products has been overshadowed by more pressing issues in Canadian Parliament and legal academia. Nevertheless, Canada already has a huge number of Internet users, and there is even an empirical study suggesting that "[e]njoyment of shopping online is ... likely to increase intentions to continue shopping online, even for unplanned purchases."⁹² Also, a recent survey⁹³ indicates that "nearly half of Canadian smokers (45.2%) reported purchasing cigarettes from a cheaper source in the past 6 months," and, even though it is small, the Internet has been counted as one of the cheaper "sources" for Canadian smokers. It is possible that the current number of online illegal tobacco traffickers in Canada is too small to be considered a current threat. However, as shown in the recent US enactment of the *PACT Act*, online tobacco trafficking may already be a threat in Canada. By ignoring this entire aspect of tobacco sales, the Canadian government is overlooking the illegal online tobacco trafficking that may already be occurring.

Efforts have recently been made by provincial legislation to stamp out illegal tobacco, such as Bill 186 in Ontario: *Supporting Smoke-Free Ontario by Reducing Contraband Tobacco Act*.⁹⁴ The Bill, in order to actively regulate illegal tobacco products, increases the penalty for unregistered tobacco sellers, importers, and for illegal, unmarked cigarettes. This is a positive step as such legislation can be a tool to counteract the side effects of federal tobacco taxes, by striking back at illegal tobacco traffickers. However, unlike the *PACT Act*, which recognizes the threat of online cigarette trafficking, Canadian laws still ignore such threats.

As previously mentioned, as the number of Internet users and illegal cigarette traffickers increase in Canada, it is increasingly viable for illegal

⁹² Libermann, *supra* note 28 at 321.

⁹³ *Ibid* at 45.

⁹⁴ 2nd Sess, 39th Leg, Ontario, 2011 (assented to 1 June 2011), SO 2011, C15.

cigarette traffickers to use the Internet as an outlet. Thus, now is the time for Canadian policy and lawmakers to adjust tobacco control policy accordingly. It is astounding that no one has officially questioned the legality of online cigar retailers. This fact alone shows the lack of effort to regulate online tobacco sales in Canada.

Having said that, this paper does not argue that Canadian law needs to prohibit all tobacco products, including cigars. A new act could still allow the sale of tobacco products so long as principles such as the prohibition of advertisements remain in place. A new act must clearly indicate what is allowed online and what is unlawful. Viewed from the legal history of Canadian tobacco regulations, cigars should be treated the same as other tobacco products. If tobacco products may be sold online, at least within each provincial jurisdiction, the law must clearly enforce a tool to screen for underage purchasers. Such tools could include mandating the use of strict signs to prohibit access to youths before opening the actual online store, and scientifically further efforts to contravene an effective screening system to prohibit the youths from accessing the online tobacco retailers. Also, like the PACT Act, the new law should require a person who delivers the tobacco products to check the age of the receiver. Additionally, like the PACT Act, enforcing the collection of taxes before delivery, whenever tobacco products are sent, corresponds to tobacco tax policy and the need to decrease online illegal tobacco traffickers. The new Act could also impose price regulation specific to online tobacco sales. Once the government enacts such a law, online tobacco sales will no longer be an overlooked issue in Canada. Armed with an effective and constitutional law, the Canadian government can be ready to combat the wrongful use of the Internet to sell illegal tobacco products.

CONCLUSION

This paper has reviewed some of the Canadian laws regarding tobacco control strategy. The review has included case law, and Canadian legislation, which is an important part in the history of Canadian tobacco-related laws. Still, the research was a difficult process because there is limited academic and political discussion available concerning online tobacco sales in Canada. As a result, the research also had to explore the PACT Act, which shows the recent legislative efforts to control online tobacco sales in the United States. Indeed, such a lack of resources and lack of legislative efforts surrounding online tobacco sales in Canada is one of the findings of this

paper, which urges that the current tobacco control strategy be amended to reflect the development of cyberspace.

The lack of attention to the issue of online tobacco sales means that Canada is not ready for the potential threat of illegal tobacco trafficking. Additionally, the current loopholes applying to cigars create a gap in policy because the negative effects of cigars mimic the negative effects of cigarettes. Thus it is time for Canada to discuss the tobacco laws, clarify the ambiguities regarding online tobacco sales, and be ready to address illegal tobacco trafficking.

It has been said that “Canada is currently among the leaders in tobacco control”.⁹⁵ Canadians are also among the leaders of the world in terms of Internet usage.⁹⁶ Having said that, it is rather peculiar to find that legal research about online tobacco sales in Canada was sparse. It is time for Canadian legislation to take the online environment into account in its tobacco control strategies. Canada should not be a difficult place to research online tobacco sales laws; rather, it should be a role model for foreign researchers to develop their own online tobacco control strategies.

⁹⁵ Auger, *supra* note 1.

⁹⁶ *Online in Canada*, *supra* note 27.

