

# TO VAPE, OR NOT TO VAPE

## Electronic Cigarettes and the Ambiguous State of Their Legality in Canada

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### ABSTRACT

The legality of e-cigarettes remains ambiguous in Canada in terms of their use and sale. The question of legality is of relevance due to the widespread and increasing popularity of e-cigarettes. The purpose of this paper is to determine whether any definitive conclusions can be drawn regarding the legality of e-cigarettes in Canada. Deriving an answer to the issue of the legal status of e-cigarettes in Canada involved a careful dissemination of the applicable legislation, Parliamentary materials, Health Canada notices, scientific literature, and general media reports. Ultimately, primary emphasis was placed on applicable and potentially applicable federal legislation due to federal legislation being the only avenue for a comprehensive and national legislative framework for regulating e-cigarettes. The question of legality was approached from a purely legally substantive manner and questions of whether Parliament should or should not allow the use of e-cigarettes were

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\* J.D. (2017). Editor's note: The research in this article is current as of August 2016. The author is aware that legislation to regulate vaping was introduced in the fall of 2016. See: Kristy Kirkup, "Federal Liberals' new vaping bill targets kids, smokers hoping to quit", *The Star* (22 November 2016), online: <<https://www.thestar.com/news/canada/2016/11/22/federal-liberals-new-vaping-bill-targets-kids-smokers-hoping-to-quit.html>>. See Canada, Bill S-5, *An Act to amend the Tobacco Act and the Non-smokers' Health Act and to make consequential amendments to other Acts*, 1st sess, 42nd Parl, 2016 (Bill passed by the Senate with an amendment 1 June 2017, House of Commons First Reading 15 June 2017).

largely avoided. However, normative arguments in this regard inevitably arise, and were addressed tangentially, though they do not comprise a substantial portion of the paper. Coming to a conclusion required separating the question of legality into two components: (1) the legality of commercial use and sale and (2) the legality of personal use.

It was determined that in terms of the commercial use and sale of e-cigarettes, legality remains ambiguous. E-cigarettes can be considered illegal for the purposes of commercial use and sale if they contain nicotine, but are legal if they do not contain nicotine. Regarding personal use, they can be considered legal. However, both of these conclusions come with significant caveats. It was ultimately determined that comprehensive federal legislation would be the most appropriate way of regulating e-cigarettes as the provincial legislation that has been enacted thus far has a very narrow regulatory scope.

Ultimately, as the health effects of these devices become known, it will only be a matter of time before the federal government passes legislation that will add a much stronger sense of certainty to the question of e-cigarette legality.

## I. INTRODUCTION

Electronic cigarettes (“e-cigarettes”) possess a conflicting status in Canadian society. Advocates of the technology advance the safety of the constituent ingredients in e-cigarette liquid; e-cigarettes provide a potential alternative as a tobacco cessation product to assist those who want to quit smoking traditional cigarettes.<sup>1</sup> Critics of e-cigarettes cite the limited research available and that these supposedly safe ingredients have only been shown to be non-toxic in the context of ingestion and not when

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<sup>1</sup> C Bullen et al, “Effect of an electronic nicotine delivery device (e cigarette) on desire to smoke and withdrawal, user preferences and nicotine delivery: randomized cross-over trial” (2010) 19:2 *British Medical J: Tobacco Control* 98 at 102; Riccardo Polosa et al, “Effect of an electronic nicotine delivery device (e-Cigarette) on smoking reduction and cessation: a prospective 6-month pilot study” (2011) 11 *BMC Public Health* 786 at 786; Maciej L Goniewicz, Elena O Lingas & Peter Hajek, “Patterns of electronic cigarette use and user beliefs about their safety and benefits: An internet survey” (2013) 32 *Drug and Alcohol Rev* 133.

vaporized and inhaled.<sup>2</sup> Additionally, they cite fears regarding the growing popularity of another form of nicotine administration.<sup>3</sup>

The legality of e-cigarettes can be at best described as tenuous. Specifically in the Canadian context, the legislation regarding personal use of e-cigarettes is inconsistent across provinces and in some cases, absent entirely.<sup>4</sup> Furthermore, Health Canada has not explicitly authorized the usage of e-cigarette devices and liquid for personal use.<sup>5</sup> Thus, it could be argued that this silence indicates that the selling of these products should be illegal until further action by Parliament is taken. Regardless, e-cigarette vendors do not operate in a clandestine capacity but operate openly and are easily accessible to the public.<sup>6</sup>

There is a lack of adequate scientific research on the health effects of e-cigarettes.<sup>7</sup> Long-term studies on health effects often require decades of longitudinal research. Thus, e-cigarettes are too novel of an entity to have a sufficient body of research behind them to make any definitive conclusions regarding their health effects.<sup>8</sup> Questions arise as to whether e-cigarettes should be classified as tobacco cessation aids under federal health legislation or tobacco products within existing federal and provincial legislation (regarding both commercial and personal use of e-cigarettes). However, when properly understood, e-cigarettes are neither a tobacco cessation aid nor a tobacco product and demand new legislation

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<sup>2</sup> Lauren E Odum, Katie A O'Dell & Jacqueline S Schepers, "Electronic Cigarettes: Do They Have a Role in Smoking Cessation?" (2012) 25 (6) *J of Pharmacy Practice* 611; Ii-Lun Chen, "FDA Summary of Adverse Events on Electronic Cigarettes" (2013) 15 *Nicotine & Tobacco Research* 615.

<sup>3</sup> Canada, Statistics Canada, *Canadian Tobacco, Alcohol and Drugs Survey (CTADS)*, (Ottawa: Health Canada, 2013) [CTADS].

<sup>4</sup> See Section V for a more detailed discussion on provincial e-cigarette legislation.

<sup>5</sup> Canada, Health Canada, *NOTICE To All Persons Interested in Importing, Advertising or Selling Electronic Smoking Products in Canada*, (Ottawa: Health Canada Therapeutic Products Directorate, 27 March 2009), online: <<http://www.hc-sc.gc.ca>> [Health Canada Importation Notice].

<sup>6</sup> A cursory Google Maps search of any major Canadian city followed by the words "e-cigarette" or "vape" will return numerous results.

<sup>7</sup> Andreas D Flouris & Dimitris N Oikonomou, "Electronic cigarettes: miracle or menace?" (2010) 340 *British Medical Journal* 311 at 329.

<sup>8</sup> Peter Hajek et al, "Electronic cigarettes: review of use, content, safety, effects on smokers and potential for harm and benefit" (2014) 109:11 *Addiction* 1801.

to appropriately regulate them from a number of perspectives. Nonetheless, the scientific community largely asserts that they are indubitably safer than traditional cigarettes, though the full extent of their health effects has yet to be determined.<sup>9</sup>

With all the contradicting information, questions thus arise as to the present legal status of e-cigarettes in Canada. It will be seen that there are many variables that influence this question of legality and ultimately, it is not one that can be conclusively determined.

### A. Purpose

The purpose of this paper is to determine the current legal status of e-cigarettes in Canada. The answer to this question differs on whether the product is to be sold commercially or used personally. The question of legality is of relevance due to the widespread and increasing popularity of e-cigarettes. The data from the 2013 Canadian Tobacco, Alcohol and Drugs Survey (CTADS) reveals that: (a) one in five youth (identified as both the 15-19 and 20-24 cohorts in the survey) had tried an e-cigarette;<sup>10</sup> (b) e-cigarette use in Canada has exceeded other forms of traditional tobacco use, including cigars, pipes, and chewing (smokeless) tobacco;<sup>11</sup> (c) in the age category of 15-19, 20.2% have reported ever trying a traditional cigarette, while 19.8% have reported ever trying an e-cigarette (the numbers are less comparable in older age groups).<sup>12</sup> As a result, it can be seen that young individuals increasingly use e-cigarettes.<sup>13</sup> Trends seen in the CTADS indicate that e-cigarette popularity will only increase further.<sup>14</sup> The CTADS also, disconcertingly, reveals that one in five e-cigarette users were unsure about whether there was nicotine in their last e-cigarette.<sup>15</sup> The popularity of the e-cigarettes coupled with the confusion regarding the health effects of e-cigarettes indicate that understanding the legality of these devices is of paramount importance. The fact that there have not

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<sup>9</sup> *Ibid.*

<sup>10</sup> CTADS, *supra* note 3.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

been any comprehensive reports or publications outlining the legality of e-cigarettes from a federal and provincial standpoint results in the question of legality being a pertinent one, especially in the light of growing e-cigarette popularity.

## B. Scope of Discussion

The scope of this paper is limited to the question of current legality in Canada. Federally, there is an absence of legislation pertaining to e-cigarettes. As a result, potential avenues that Parliament may take in legislating on the matter of e-cigarettes will be discussed. Notably, this paper will attempt to avoid any discussion on whether e-cigarettes *should* or *should not* be legal. Additionally, questions regarding whether Parliament should or will legislate on e-cigarettes will not be considered. The paper will proceed on the assumption that the federal government will, eventually, introduce legislation on e-cigarettes. This assumption is based primarily on the prevalence of e-cigarette use in Canada as well as the fact that many provinces have begun to introduce legislation. Furthermore, the provincial legislation that has been introduced is fairly limited in scope, and provincial representatives cite the inevitable introduction of federal legislation as an explanation for this.<sup>16</sup>

## C. Methodology

In determining possible applicable legislation, the methodology used involved examining what legislation is used to regulate new substances and chemicals that are to be administered to the body. Additionally, existing tobacco legislation was examined because e-cigarettes share many similarities, superficially and in terms of general use, to traditional cigarettes (hence, their namesake). Legislation that covered the constituent ingredients of e-cigarettes was examined (nicotine, propylene glycol, and vegetable glycerin) to see whether e-cigarettes could, holistically, apply to that same legislation. Federally, Health Canada has released a series of notices that pertain to e-cigarettes that within them, reference legislation.<sup>17</sup>

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<sup>16</sup> See Section IV for a more detailed discussion on provincial e-cigarette legislation.

<sup>17</sup> Health Canada Importation Notice, *supra* note 5; Canada, Health Products and Food Branch Inspectorate Regional Operational Centre, *Health Canada Advises Canadians Not to Use Electronic Cigarettes*, (Ottawa: Health Canada).

The legislation obtained through the aforementioned general search was then cross-referenced with the legislation cited by Health Canada. Cross-referenced legislation was deemed to be further indicia of applicability, but was not required for a determination of applicability to be made. Throughout this search there were three larger pieces of federal legislation that were deemed to be potentially applicable to e-cigarettes, either as is, or through some amendment procedure: the *Food and Drugs Act*,<sup>18</sup> the *Controlled Drugs and Substances Act*,<sup>19</sup> and the *Tobacco Act*.<sup>20</sup> Within the *Food and Drugs Act* discussion, the Health Canada notices and the *Natural Health Products Regulations*<sup>21</sup> will be given particular attention as well.

Provincial governments have focused exclusively on existing tobacco legislation as a method of regulating e-cigarettes.<sup>22</sup> Every province that has thus far introduced legislation on e-cigarettes has done it under the provincial tobacco legislation.<sup>23</sup> Parliamentary debates regarding the introduction of e-cigarette regulation in provinces also focus on tobacco legislation.<sup>24</sup> As a result, when examining e-cigarette legislation from the provincial perspective, emphasis will be placed solely on the provincial tobacco legislation. Municipal legislation was not included in this consideration.

#### D. Outline of Discussion

The next section, Part II, will provide an overview of what actually constitutes an electronic cigarette and how they compare to traditional cigarettes. This includes a descriptive section on the physical anatomy of e-cigarettes and what components they are made up of. The section will end with a brief discussion of the chemical composition of e-liquid, which is heated within the e-cigarette to produce vapour for inhalation.

The following section, Part III, will involve a deeper analysis of the health effects of e-cigarettes. Each substituent chemical in the composition

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<sup>18</sup> RSC 1985, c F-27 [*Food and Drugs Act*].

<sup>19</sup> SC 1996, c 19 [*Controlled Drugs and Substances Act*].

<sup>20</sup> SC 1997, c 13 [*Tobacco Act*].

<sup>21</sup> SOR/2003-196 [*Natural Health Products Regulations*].

<sup>22</sup> See Section IV for a more detailed discussion on provincial e-cigarette legislation.

<sup>23</sup> See Section IV for a more detailed discussion on provincial e-cigarette legislation.

<sup>24</sup> See Section IV for a more detailed discussion on provincial e-cigarette legislation.

of e-liquid will be separately analysed (nicotine, propylene glycol, and vegetable glycerin). The discussion will primarily revolve around what the latest scientific consensus is on the safety of each of these chemicals, and if available, their safety in the context of inhalation. Ultimately, the scientific literature indicates that nicotine, while highly addictive, has fairly limited negative health effects.<sup>25</sup> On the other hand, propylene glycol and vegetable glycerin have been determined to be demonstrably safe in the context of ingestion, but there is not enough research available regarding inhalation to come to a concrete conclusion.<sup>26</sup>

Part IV will begin the legally substantive, and most important, section of the discussion. The federal legislation will be examined, emphasizing the three aforementioned statutes. Under the *Food and Drugs Act*, it will be noted that Health Canada has attempted to restrict the use and sale of nicotine containing e-cigarette devices, but its ability to enforce such a restriction is fairly dubious.<sup>27</sup> However, the *Food and Drugs Act* would be the most appropriate and most effective avenue for e-cigarette legislation either under the main body of the legislation or under the ancillary *Natural Health Products Regulations*.<sup>28</sup> Additionally, it will be contended that while e-cigarettes could theoretically fall under the purview of the *Controlled Drugs and Substances Act* and the *Tobacco Act*, they are not the most appropriate avenues for effectively regulating e-cigarettes.<sup>29</sup>

Part IV will transition to a discussion on the provincial legislation. A breakdown of each province's status on regulating e-cigarettes will be discussed. It will be seen that provincial governments have been regulating e-cigarettes exclusively within the tobacco legislation.<sup>30</sup> Evidence suggests that this is essentially a stopgap measure in the wait for federal legislation. In light of this information, it will be argued that while the provincial

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<sup>25</sup> See Section III for a more detailed discussion on the health effects of nicotine.

<sup>26</sup> See Section III for a more detailed discussion on the health effects of propylene glycol and of vegetable glycerin.

<sup>27</sup> See Section IV for a more detailed discussion of the *Food and Drugs Act*.

<sup>28</sup> See Section IV for a more detailed discussion of the *Natural Health Products Regulations*.

<sup>29</sup> See Section IV for a more detailed discussion of both the *Controlled Drugs and Substances Act* and the *Tobacco Act*.

<sup>30</sup> See Section IV for a more detailed discussion on provincial e-cigarette legislation.

legislation provides some effective measures for regulating e-cigarettes considering the limited scientific information available on the health effects of these products, the haphazard nature of having differing regulations across provinces makes for a confusing state of the law.<sup>31</sup> As a result, comprehensive federal legislation will be recommended.

Part IV will also cover additional commentary and analysis, largely expounding on and clarifying points made in the preceding two sections. The final subsection of Part IV will contain the final recommendations the paper proposes in consideration of the entire discussion. Ultimately, it will be maintained that comprehensive federal regulation under the *Food and Drugs Act* would be the most effective manner for the regulation of e-cigarettes. Concluding remarks will follow in Part V.

## II. WHAT IS AN E-CIGARETTE?

E-cigarettes, despite their name, are quite distinct from traditional cigarettes in how they operate. Traditional cigarettes involve tobacco rolled in a paper wrapper with a filter attached.<sup>32</sup> One end is then lighted and the mass tobacco material burns and the resulting smoke is inhaled.<sup>33</sup> The traditional cigarette is a staple of popular culture and even those who do not smoke are generally aware of how one operates.<sup>34</sup>

Electronic cigarettes are operationally different from traditional cigarettes.<sup>35</sup> Also, devices vary in shape from manufacturer to manufacturer, though the general mode of operation remains similar.<sup>36</sup> All e-cigarettes are battery operated and have a mouthpiece.<sup>37</sup> Attached to the

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<sup>31</sup> *Ibid.*

<sup>32</sup> Jeffrey Wigand, "ADDITIVES, CIGARETTE DESIGN and TOBACCO PRODUCT REGULATION" (2 July 2006), online: A Report To World Health Organization/Tobacco Free Initiative/Tobacco Product Regulation Group <<http://www.jeffreywigand.com/WHOFinal.pdf>> [Wigand].

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> Paul Harrell et al, "Electronic Nicotine Delivery Systems ("E-cigarettes"): Review of Safety and Smoking Cessation Efficacy" (2014) 151:3 *Otolaryngology Head Neck Surg* 381 [Harrell].

<sup>36</sup> *Ibid.*

<sup>37</sup> Pasquale Caponnetto et al, "The emerging phenomenon of electronic cigarettes"

mouthpiece proximally is a component, often cylindrical in shape, which contains the atomizer and liquid reservoir.<sup>38</sup> The liquid reservoir is where the e-cigarette solution (“e-liquid” or “e-juice”) is stored.<sup>39</sup> The atomizer contains a heating element, which heats the liquid, resulting in its vaporization; a fine mist is then released, which is subsequently inhaled.<sup>40</sup> The battery connects to the atomizer distally from the mouthpiece.<sup>41</sup> Additionally, the circuitry required to power the atomizer is contained within this battery compartment.<sup>42</sup> The battery is typically the largest component.<sup>43</sup> Lithium ion batteries are used, measured in milliamp hours, which indicate the strength or capacity of the battery.<sup>44</sup> The larger the capacity of the battery, the longer the e-cigarette can be used in between charges.<sup>45</sup>

Equally important is the liquid that is used with the device. The reservoir in the e-cigarette houses a liquid that provides the chemicals for inhalation.<sup>46</sup> The liquid typically contains nicotine, which can be obtained in varying concentrations.<sup>47</sup> Users report a harsher inhale or “throat hit” with higher nicotine concentrations.<sup>48</sup> The nicotine is either suspended in

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(2012) 6:1 Expert Rev of Respiratory Medicine 63 [Caponnetto]; Menfil Orellana-Barrios et al, “Electronic Cigarettes—A Narrative Review for Clinicians” (2015) 128:7 The American J of Medicine 674 [Orellana].

<sup>38</sup> Orellana, *ibid* at 674.

<sup>39</sup> Konstantinos Farsalinos et al, “Nicotine absorption from electronic cigarette use: comparison between first and new-generation devices” (2014) 4 Sci Rep 1 at 1 [Farsalinos].

<sup>40</sup> Caponnetto, *supra* note 37 at 64.

<sup>41</sup> *Ibid*.

<sup>42</sup> *Ibid*.

<sup>43</sup> *Ibid*.

<sup>44</sup> Orellana, *supra* note 37 at 674.

<sup>45</sup> *Ibid*.

<sup>46</sup> Rachel Grana et al, “E-Cigarettes A Scientific Review” (2014) 129:19 Circulation 1972 at 1972-1973 [Grana].

<sup>47</sup> *Ibid* at 1972.

<sup>48</sup> Z Sanford & L Goebel, “E-cigarettes: an up to date review and discussion of the controversy” (2014) 110:4 W V Med J 10 at 12 [Sanford].

propylene glycol or vegetable glycerin.<sup>49</sup> Commonly, some combination of the two is used.<sup>50</sup>

Additionally, various additives for flavouring are added to the liquid.<sup>51</sup> This results in a variety of flavours that cater to a diverse range of tastes.<sup>52</sup>

Based on their operation it is self-evident that e-cigarettes operate rather differently than traditional cigarettes. The term e-cigarette was coined after the introduction of the original e-cigarette models that were designed to resemble a traditional cigarette.<sup>53</sup> Since this time, manufacturers have diverged from this original blueprint, with most modern e-cigarettes having little resemblance to their tobacco counterparts.<sup>54</sup>

### III. THE HEALTH EFFECTS OF E-CIGARETTES

The negative health effects of traditional cigarettes have been heavily documented and have been essentially ingrained into the wider public consciousness.<sup>55</sup> Inarguably, cigarettes are a cause, source, and contributor of numerous heart and lung diseases.<sup>56</sup> The average cigarette smoker has a

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<sup>49</sup> *Ibid* at 10; Peter Hajek et al, “Electronic cigarettes: a review of use, content, safety, effects on smokers and potential for harm and benefit” (2014) 109:11 *Addiction* 1801 [Hajek].

<sup>50</sup> Hajek, *ibid* at 1803.

<sup>51</sup> Lynne Dawkins & Olivia Corcoran, “Acute electronic cigarette use: nicotine delivery and subjective effects in regular users” (2014) 231:2 *Psychopharmacology* 401 at 402 [Dawkins]; Peyton A Tierney et al, “Flavour chemicals in electronic cigarette fluids” (2015) 10:1136 *Tobacco Control* 1 at 5 [Tierney].

<sup>52</sup> Tierney, *ibid*.

<sup>53</sup> Orellana, *supra* note 37 at 675.

<sup>54</sup> Cristina Russo et al, “Electronic cigarette: a possible substitute for cigarette dependence” (2013) 79:1 *Monaldi archives for chest disease* 12 at 13 [Russo]; Farsalinos, *supra* note 39 at 3.

<sup>55</sup> Centers for Disease Control and Prevention (CDC), “Annual smoking-attributable mortality, years of potential life lost, and economic costs—United States” (2002) 51:14 *Morbidity and Mortality Weekly Reports* 300 at 301 [CDC Smoking Mortality]; Richard Doll et al, “Mortality in relation to smoking: 50 years’ observations on male British doctors” (2004) 328 *British Medical J* 1519 at 1524.

<sup>56</sup> *Ibid*.

life expectancy that is 10-14 years shorter than that of a non-smoker.<sup>57</sup> In the course of a discussion on e-cigarettes, the question that inevitably arises is whether e-cigarettes possess a danger that is comparable to that of traditional cigarettes, as both involve inhalation as a method of nicotine administration.

### A. Nicotine: Monster or Mute

The primary ingredient that results in the addictive nature of tobacco lies in the chemical nicotine.<sup>58</sup> Nicotine acts as an agonist of nicotinic receptors in the peripheral and central nervous systems and is, chemically, a stimulant.<sup>59</sup> However, when administered to humans, signs of both stimulation and depression are observed.<sup>60</sup> The fact that nicotine is typically administered through cigarette smoking makes it difficult to isolate the effects of nicotine alone and this is an issue the scientific community has to contend with.<sup>61</sup>

Due to nicotine being the primary addictive ingredient in both traditional cigarettes and e-cigarettes, intuitively, one may come to the conclusion that e-cigarettes must have a similar toxicity profile to that of traditional cigarettes. However, it must be noted that there exists much public misconception around nicotine. Nicotine, isolated from tobacco, is not responsible for the vast majority of ill effects associated with cigarette smoking.<sup>62</sup> Perhaps surprisingly, the scientific consensus is that nicotine is non-carcinogenic and thus, is not a cancer-causing agent.<sup>63</sup> The carcinogenic properties of traditional cigarettes are a by-product of the combustion and inhalation of the multitude of other chemicals that are found in traditional cigarettes.<sup>64</sup>

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<sup>57</sup> *Ibid.*

<sup>58</sup> Julia Higa de Landoni, "Nicotine" *Inchem* (April 1991), International Programme on Chemical Safety, online: <<http://www.inchem.org>> [Inchem Nicotine].

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

<sup>62</sup> Neal Benowitz, "Pharmacologic Aspects of Cigarette Smoking and Nicotine Addiction" (1988) 232:1 *New England J of Medicine* 1318 at 1318.

<sup>63</sup> *Ibid* at 1323.

<sup>64</sup> *Ibid.*

Nevertheless, simply being non-carcinogenic is far from a conclusive statement of safety. Nicotine may be a promoter of cardiovascular disorders and arrhythmia.<sup>65</sup> Nicotine, as a stimulant, results in an increase in blood pressure and heart rate.<sup>66</sup> Its mechanism of action also results in the elevation of cholesterol levels in the blood stream.<sup>67</sup>

While the health effects of nicotine are often hard to distinguish from that of cigarettes generally, the health effects of isolated nicotine are not entirely unknown. The scientific consensus is that nicotine is far from the most toxic substance in cigarettes. Namely, cigarettes are primarily denounced for their cancer causing properties and various respiratory issues, both of which cannot be attributed to isolated nicotine.<sup>68</sup>

## B. Propylene Glycol: Don't Call it Antifreeze

The e-cigarette liquid that is vaporized and inhaled contains two main ingredients in addition to nicotine: propylene glycol and vegetable glycerin. First, propylene glycol will be examined.

Propylene glycol may sound familiar as an ingredient used in antifreeze and de-icing formulas.<sup>69</sup> This is partially correct. The structurally similar ethylene glycol is the primary chemical ingredient used in antifreeze solvents.<sup>70</sup> However, since propylene glycol also carries the same characteristic of lowering the freezing point of water, it is occasionally used in aircraft de-icing fluid and non-toxic automotive antifreeze.<sup>71</sup>

Though the prospect of inhaling a compound used in antifreeze may sound like an invitation to toxicity and illness, humans actually consume propylene glycol with some regularity without ill effect. In terms of oral consumption, propylene glycol has been approved by the US Food and

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<sup>65</sup> Maricene Sabha et al, "Transdermal nicotine mimics smoking-induced endothelial dysfunction" (2000) 68:2 *Clinical Pharmacology & Therapeutics* 167 [Sabha].

<sup>66</sup> *Ibid* at 170.

<sup>67</sup> Jason Jerry & Gregory Collins, "E-cigarettes: Safe to recommend to patients?" (2015) 82:8 *Cleveland Clinic J of Medicine* 521 at 521-522 [Jerry].

<sup>68</sup> *Ibid* at 522.

<sup>69</sup> Steve Ritter, "What's That Stuff? Aircraft Deicers" (2001) 79:1 *Chemical & Engineering News* 30 [Ritter].

<sup>70</sup> *Ibid* at 31.

<sup>71</sup> *Ibid*.

Drug Administration as a compound that is “generally recognized as safe”.<sup>72</sup> The Food and Drug Administration has approved its usage in frozen desserts, seasonings, flavouring, and nut products.<sup>73</sup> Ice cream, coffee flavourings, and whipped dairy are also commonly consumed products that contain propylene glycol. Furthermore, a toxicology study determined that administering propylene glycol orally to rats resulted in no ill effects when consumed over a period of two years.<sup>74</sup>

Nonetheless, oral administration safety does not necessarily indicate safety when inhaled. Indoor air studies on the usage of inhaling the fumes associated with water-based paints and system cleaners, which contain propylene glycol, resulted in higher incidences of asthma, rhinitis, eczema and general allergies in children.<sup>75</sup> However, this study was not able to effectively isolate for propylene glycol and the authors of the study acknowledge that glycol ethers from the paints and system cleaners are the more likely culprit.<sup>76</sup>

On balance, there is insufficient research available for any conclusive determinations on the effects of inhaling vaporized propylene glycol over an extended period of time.

### C. Vegetable Glycerin

In addition to propylene glycol, vegetable glycerin forms one of the primary ingredients in e-cigarette liquid.<sup>77</sup> Apart from e-cigarettes, vegetable glycerin has been approved by Health Canada for a number of uses in Canada.<sup>78</sup> Similar to propylene glycol, it is also classified by the US Food and Drug Administration as generally safe.<sup>79</sup>

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<sup>72</sup> *Code of Federal Regulations*, 3 FDA tit 21 § 184.1666 (2009) [FDA Regs].

<sup>73</sup> *Ibid.*

<sup>74</sup> IF Gaunt et al, “Long-term toxicity of propylene glycol in rats” (1972) 10:2 *Food and Cosmetics Toxicology* 151.

<sup>75</sup> Hyunok Choi et al, “Common Household Chemicals and the Allergy Risks in Pre-School Age Children” (2010) 5:10 *Public Library of Science* 1 at 3 [Choi].

<sup>76</sup> *Ibid* at 5.

<sup>77</sup> Orellana, *supra* note 37 at 674.

<sup>78</sup> “Chemical Substance – Glycerol” *Drugs and Health Products* (14 September 2015), online: Health Canada <<http://webprod.hc-sc.gc.ca/nhpiddipsn/ingredReq.do?id=197&lang=eng>>.

<sup>79</sup> US, Select Committee on GRAS Substances (SCOGS) Opinion, *Glycerin and*

Common products that contain vegetable glycerin include: meat curing compounds, preserved meats, beverages containing citrus or spruce oils, and various flavourings and baking products.<sup>80</sup> Vegetable glycerin is structurally identical to glycerol and these two terms are often used interchangeably.<sup>81</sup> The sole difference is that glycerol can be derived from animal sources, while vegetable glycerin is only derived from plant sources.

Vegetable glycerin has been classified as non-carcinogenic, non-teratogenic and non-mutagenic.<sup>82</sup> The Chemicals Screening Information Dataset (SIDS) from the United States Environment Program and the Organization for Economic Co-operation and Development, which compiles the latest research available into one data sheet, reveals the toxicity profile and safety of vegetable glycerin for human consumption.<sup>83</sup>

Dermal application is generally recognized as safe, which accounts for the common usage of vegetable glycerin in dental products.<sup>84</sup> It has been recognized as being non-toxic when in contact with skin and is of low acute toxicity in mammals, including humans.<sup>85</sup> Vegetable glycerin is only toxic when consumed in very large quantities, far beyond what would constitute normal human consumption.<sup>86</sup> However, there is no reputable research available regarding the effects of inhalation.<sup>87</sup> The SIDS report simply states that: “No information is available on the acute toxicity of inhaled glycerol”.<sup>88</sup>

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*Glycerides*, online: US Food and Drug Administration <<http://www.fda.gov>> [FDA Glycerin and Glycerides].

<sup>80</sup> “List of Permitted Food Additives with Other Generally Accepted Uses (Lists of Permitted Food Additives)” *Food and Nutrition* (14 April 2015), online: Health Canada <<http://www.hc-sc.gc.ca>>.

<sup>81</sup> Miguel Silva & Paulo Ferreira, *Glycerol: Production, Structure and Applications* (New York: Nova Science Publishers, 2012) at 287.

<sup>82</sup> “Glycerol” *SIDS Initial Assessment Report* (28 March 2002), online: OECD SIDS <<http://www.inchem.org/documents/sids/sids/56815.pdf>> [SIDS Glycerol Assessment Report].

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid* at 14.

This results in vegetable glycerin occupying a similar status of ambiguity as propylene glycol. Both compounds have been generally recognized as safe for human oral consumption, but there is a notable absence of research regarding the safety of these compounds when administered via inhalation. Furthermore, the only way to truly garner the health effects of these compounds in the context of e-cigarettes would be to conduct longitudinal studies. However, given the relative recentness of the technology,<sup>89</sup> it will likely take some time before any definitive conclusions can be drawn regarding the safety of long term inhalation of vaporized propylene glycol and vegetable glycerin. Until that time, e-cigarette safety cannot be established with any certainty.

#### D. The Chemical Conundrum: A Summary

The uncertainty that exists regarding the health effects of e-cigarettes has resulted in a tension that is reflected in the legislative landscape.<sup>90</sup> The chemical nicotine is definitively the most controversial ingredient used in e-cigarettes.<sup>91</sup> Since traditional cigarettes function as the most widely used delivery mechanism for nicotine, nicotine is primarily associated with cigarettes.<sup>92</sup> However, the primary ills caused by cigarette smoking (respiratory distress and lung cancer) are not caused by nicotine alone. Most of the research compiled and cited does not recognize nicotine as being completely harmless; it is highly physically addictive and does have a variety of associated side effects.<sup>93</sup> Nonetheless, nicotine in isolation is a safer alternative to traditional cigarettes.<sup>94</sup> But due to the equalization between nicotine and traditional cigarettes, one might reasonably assume that e-cigarettes must be of comparable harm to that of traditional cigarettes. This characterization is made more irrational when considering the fact that e-cigarette users can operate their devices with e-liquid that

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<sup>89</sup> “Electronic Atomization Cigarette,” US Patent No. 2007267031, (22 November 2007).

<sup>90</sup> To be discussed in the next section, Part IV.

<sup>91</sup> This can be explained by Health Canada’s stance on e-cigarettes. Please see Section IV, where Health Canada’s position is discussed as it relates to the *Food and Drugs Act*.

<sup>92</sup> Inchem Nicotine, *supra* note 58 at 4.1.

<sup>93</sup> Please see discussion starting on p 309.

<sup>94</sup> Jerry, *supra* note 67 at 522.

does not contain nicotine, or varying concentrations of nicotine.<sup>95</sup> This includes levels that are much lower than those seen in traditional cigarettes.<sup>96</sup> Thus, there is a possible misconception held by the general public regarding the use of e-cigarettes due to the equalization between the harms of traditional cigarettes and nicotine. This misconception is further compounded by the general ignorance of the fact the e-liquids do not even necessarily contain nicotine.<sup>97</sup>

In addition, vegetable glycerin and propylene glycol are, curiously, given much less attention than nicotine.<sup>98</sup> In actuality, these are the two substances that require further research in the context of inhalation. While there is no research that definitively states this, this incongruence may be due to the fact that propylene glycol and vegetable glycerin are substances that have already been approved and recognized as generally safe for human consumption and ingestion.<sup>99</sup> Furthermore, propylene glycol and vegetable glycerin do not have the stigma of traditional cigarettes associated with them.<sup>100</sup>

These tensions regarding e-cigarettes, the constituent components of e-liquid and traditional cigarettes are further reflected in the legislative attempts at regulating e-cigarettes. The next section will focus on the legislation and potential legislation that pertains to e-cigarettes. However, the aforementioned tensions and misunderstandings are fundamental to understanding the legislative landscape of e-cigarettes in Canada.

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<sup>95</sup> Caponnetto, *supra* note 37 at 64.

<sup>96</sup> Farsalinos, *supra* note 39 at 1.

<sup>97</sup> Caponnetto, *supra* note 37 at 64.

<sup>98</sup> The reason for which nicotine is often deemed the most frequently highlighted ingredient in e-cigarettes can be explained by Health Canada's stance on e-cigarettes. Health Canada's position as it relates to the *Food and Drugs Act* is discussed in further detail below.

<sup>99</sup> FDA Regs, *supra* note 72, § 184.1666; FDA Glycerin and Glycerides, *supra* note 79.

<sup>100</sup> Traditional cigarettes do not contain propylene glycol or vegetable glycerin, see Reinskje Talhout et al, "Hazardous Compounds in Tobacco Smoke" (2011) 8:2 International J of Environmental Research and Public Health 613.

## IV. THE LEGISLATIVE LANDSCAPE REGARDING E-CIGARETTES IN CANADA

### A. Overview

The legislative landscape regarding e-cigarettes in Canada is mired in ambiguity. This is simply a result of the absence of legislation and the confusion on how to appropriately categorize electronic cigarettes. Questions arise as to whether they should be classified as tobacco cessation aids or tobacco products. However, an understanding of e-cigarettes reveals that they really are, in fact, neither a tobacco cessation aid nor a tobacco product and thus demand new legislation to appropriately regulate them.

Much of the following discussion will revolve around the e-cigarette notices published by Health Canada. Health Canada is a federally regulated department whose mandate is maintaining and improving the general health of Canadians.<sup>101</sup> The Minister of Health is tasked with the duty of overseeing the department.<sup>102</sup> As a result, Health Canada's responsibilities pertain directly to the issue of e-cigarettes due to the questions that arise regarding the health effects of these products.

Health Canada and the Minister of Health are responsible for the administration and enforcement of a variety of legislation and regulations that pertain directly to the issue of the health of Canadians.<sup>103</sup> The *Food and Drugs Act* (including the *Natural Health Products Regulations*, which is enabled by the *Food and Drugs Act*), *Controlled Drugs and Substances Act* and *Tobacco Act* were all deemed to be acts that could potentially be used to regulate e-cigarettes and are all administered by the Minister of Health and Health Canada.<sup>104</sup>

Health Canada releases notices and advisories to Canadians outside any explicit statutory scheme. While these notices and advisories are not

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<sup>101</sup> Canada, Ottawa: Health Canada, *Mission, Values, Activities* (2011), online: <[www.hc-sc.gc.ca/](http://www.hc-sc.gc.ca/)> [Health Canada Mission].

<sup>102</sup> *Ibid.*

<sup>103</sup> For a list of acts for which Health Canada is responsible, see: "List of Acts and Regulations" (12 June 2015) *Health Canada*, online: <[www.hc-sc.gc.ca](http://www.hc-sc.gc.ca/)> [List of Acts and Regulations Administered by Health Canada].

<sup>104</sup> *Ibid.*

federal legislation per se, Health Canada can enforce these notices and advisories by virtue of the statutorily derived powers of the Minister of Health and the *Food and Drugs Act*.<sup>105</sup> The *Department of Health Act*<sup>106</sup> grants the Minister of Health the ability to enforce any mandate “...relating to the promotion and preservation of the health of the people of Canada not by law assigned to any other department, board or agency of the Government of Canada”.<sup>107</sup> As a result, Health Canada’s notices and advisories will provide an initial starting point for the discussion of the legality of e-cigarettes from a federal perspective.

The discussion will begin with the notices and advisories of Health Canada. Health Canada’s ability to enforce these notices is derived from the *Food and Drugs Act* and the *Department of Health Act*.<sup>108</sup> After a discussion on the notices and advisories of Health Canada, the *Food and Drugs Act*, *Controlled Drugs and Substances Act* and *Tobacco Act* will be discussed in more detail. Additionally, the *Natural Health Products Regulations* was also deemed a pertinent piece of legislation that will be discussed. The *Natural Health Products Regulations* are consolidated regulations enabled by the *Food and Drugs Act*.<sup>109</sup>

## B. Federal Legislation

### 1. *Food and Drugs Act*

The *Food and Drugs Act* is a federal act that regulates the approval, sale, importation, exportation, and general transport of food, drugs, cosmetics, and therapeutic devices.<sup>110</sup> The act is administered and enforced by Health Canada and the Minister of Health.<sup>111</sup>

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<sup>105</sup> The powers of the Minister of Health can be found at: *Food and Drugs Act*, *supra* note 18, ss 12, 13, 21.1, 21.2, 21.3, 21.6, 22; List of Acts and Regulations Administered by Health Canada, *supra* note 103.

<sup>106</sup> SC 1996, c 8 [*Department of Health Act*].

<sup>107</sup> *Ibid*, s 4(1).

<sup>108</sup> *Food and Drugs Act*, *supra* note 18, ss 12, 13; *Department of Health Act*, *supra* note 106, ss 2, 4.

<sup>109</sup> *Natural Health Products Regulations*, *supra* note 21, s 1.

<sup>110</sup> *Food and Drugs Act*, *supra* note 18.

<sup>111</sup> *Food and Drugs Act*, *ibid*, ss 12, 13; *Department of Health Act*, *supra* note 106, ss 2, 4.

i. **Health Canada: No Market Authorization**

The absence of explicit legislation regarding e-cigarettes makes the determination of what statutory mechanisms apply to their usage and sale difficult.<sup>112</sup> Nonetheless, Health Canada has issued advisories, warnings, and recommendations regarding the use and sale of e-cigarettes in Canada.<sup>113</sup> Health Canada has confirmed that e-cigarettes remain unregulated in Canada and have not received market authorization.<sup>114</sup> Market authorization is a process by which Health Canada assesses products in terms of safety, efficacy and quality before they are authorized for sale in Canada. The Health Canada website states: “Prior to being given market authorization, a manufacturer must present substantive scientific evidence of a product’s safety, efficacy and quality as required by the *Food and Drugs Act and Regulations*”.<sup>115</sup>

Health Canada’s requirement of market authorization is derived from s. 30 of the *Food and Drugs Act*.<sup>116</sup> Pursuant to s. 30(1)(r) the Minister of Health may establish criteria for the determination of market approval.<sup>117</sup> Section 30.2(2) allows the Minister of Health to subject market authorization to any condition he or she deems appropriate.<sup>118</sup>

According to Health Canada in a notice dated March 2009:

Electronic smoking products (i.e., electronic products for the vaporization and administration of inhaled doses of nicotine including electronic cigarettes, cigars, cigarillos and pipes, as well as cartridges of nicotine solutions and related products) fall within the scope of the Food and Drugs Act. All of these products **require market authorization prior to being imported, advertised or sold in Canada**. Market authorization is granted by Health Canada following successful review of scientific evidence demonstrating safety, quality and efficacy with respect to the intended purpose of the health product. This evidence is provided

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<sup>112</sup> Canada, House of Commons, Standing Committee on Health, *Vaping: Toward a Regulatory Framework for E-Cigarettes*, (March 2015) (Chair: Ben Lobb) [E-Cigarette Committee Report].

<sup>113</sup> *Ibid.*

<sup>114</sup> *Ibid.*

<sup>115</sup> Canada, *Health Canada*, “Drugs and Health Products: Drug Products” (30 July 2015), online: <<http://www.hc-sc.gc.ca>>.

<sup>116</sup> *Food and Drugs Act*, *supra* note 18, s 30.

<sup>117</sup> *Ibid*, s 30(1)(r).

<sup>118</sup> *Ibid*, s 30.2(2).

by the sponsor seeking market authorization. To date, no electronic smoking product has been authorized for sale by Health Canada. [Emphasis added]<sup>119</sup>

Before the discussion continues, it is first prudent to understand how this notice interfaces with the *Food and Drugs Act*.

**ii. Health Canada: Applicability of the *Food and Drugs Act***

The *Health Canada* notice states that the *Food and Drugs Act* captures electronic smoking products. Sections 9, 20, and 30 of the *Food and Drugs Act* cover drugs and devices, which presumably, e-cigarettes would fall under:

9(1) No person shall label, package, treat, process sell, or advertise **any drug** in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.<sup>120</sup>

(2) A drug that is not labeled or packaged as required by, or is labeled or packaged contrary to, the regulations shall be deemed to be labeled or packaged contrary to subsection (1).<sup>121</sup>

20(1) No person shall label, package treat, process, sell or advertise **any device** in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its design, construction, performance, intended use, quantity, character, value, composition, merit or safety.<sup>122</sup>

(2) A device that is not labeled or packaged as required by, or is labeled or packaged contrary to, the regulations shall be deemed to be labeled or packaged contrary to subsection (1).<sup>123</sup>

30. (1) The Governor in Council may make regulations for carrying the purposes and provisions of this Act into effect, an, in particular, but without restricting the generality of the foregoing may make regulations

(b) respecting

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<sup>119</sup> Health Canada Importation Notice, *supra* note 5.

<sup>120</sup> *Food and Drugs Act*, *supra* note 18, s 9(1).

<sup>121</sup> *Ibid*, s 9(2).

<sup>122</sup> *Ibid*, s 20(1).

<sup>123</sup> *Ibid*, s 20(2).

(i) the labelling and packaging and the offering, exposing and advertising for sale of food, drugs, cosmetics and devices,

(iii) the sale or the conditions of sale of any, food, **drug**, cosmetic or **device**, and

(iv) the use of any substance as an ingredient in any food, **drug**, cosmetic or **device**.<sup>124</sup> [*Emphasis added*]

Interestingly, when the definitions for “drug” and “device” are examined under the act, they do not appear to correspond to e-cigarettes. The act defines a “drug” as:

“drug” includes any substance or mixture of substances manufactured, sold or represented for use in

(a) the diagnosis, treatment, **mitigation or prevention of a disease**, disorder or abnormal physical state, or its symptoms, in human beings or animals,

(b) restoring, correcting or modifying organic functions in human beings or animals, or

(c) disinfection in premises in which food is manufactured, prepared or kept;<sup>125</sup> [*Emphasis added*]

The act defines a “device” as:

“**device**” means an instrument, apparatus, contrivance or other similar article, or an *in vitro* reagent, including a component, part or accessory of any of them, that is manufactured, sold or represented for use in

(a) **diagnosing, treating, mitigating or preventing a disease, disorder or abnormal physical state**, or any of their symptoms, **in human beings** or animals,

(b) restoring, modifying or correcting the body structure of human beings or animals or the functioning of any part of the bodies of human beings or animals,

(c) diagnosing pregnancy in human beings or animals,

(d) caring for human beings or animals during pregnancy or at or after the birth of the offspring, including caring for the offspring, or

(e) preventing conception in human beings or animals;<sup>126</sup> [*Emphasis added*]

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<sup>124</sup> *Ibid*, s 30(1)(b).

<sup>125</sup> *Ibid*, s 2.

It is readily apparent that e-cigarettes are not sold or represented in a manner relating to the diagnosis or treatment/prevention/mitigation of disease,<sup>127</sup> correcting organic function or body structure, disinfection, or in pregnancy/contraception treatment and diagnosis.<sup>128</sup> Under the existing definitions provided by the *Food and Drugs Act*, it would seem that e-cigarettes do not actually fall under the act.<sup>129</sup> However, there is a provision for new drugs that would clearly capture e-cigarettes: Division 8 of the *Food and Drug Regulations*.<sup>130</sup> E-cigarettes would theoretically fall under this classification, as s. C.08.001 states:

For the purposes of the Act and this Division, “new drug” means

(a) a drug that contains or consists of a substance, whether as an active or inactive ingredient, carrier, coating, excipient, menstruum or other component, that has not been sold as a drug in Canada for sufficient time and in sufficient quantity to establish in Canada the safety and effectiveness of that substance for use as a drug;

(b) a drug that is a **combination of two or more drugs**, with or without other ingredients, and **that has not been sold in that combination** or in the proportion in which those drugs are combined in that drug, **for sufficient time and in sufficient quantity to establish in Canada the safety and effectiveness** of that combination and proportion **for use as a drug**; or

(c) a **drug**, with respect to which the manufacturer prescribes, recommends, proposes or claims a use as a drug, or a condition of use as a drug, including dosage, **route of administration**, or duration of action and **that has not been sold for that use or condition of use in Canada, for sufficient time and in sufficient quantity to establish in Canada the safety and effectiveness of that use or condition of use of that drug.**<sup>131</sup> [*Emphasis added*]

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<sup>126</sup> *Ibid.*

<sup>127</sup> Perhaps an argument could be made that e-cigarettes, as an alternative to traditional cigarettes can mitigate/prevent disease. However, this would be analogous to stating that any harmful drug could mitigate/prevent disease if used instead of an even more harmful drug. Furthermore, e-cigarettes have not been recognized for any medical purposes. Please see Section III for more information on the health effects of e-cigarettes.

<sup>128</sup> *Food and Drugs Act*, *supra* note 18, ss 9, 20, 30.

<sup>129</sup> *Ibid.*, s 2.

<sup>130</sup> CRC c 870, s C.08.001 [*Food and Drug Regulations*].

<sup>131</sup> *Ibid.*, s C.08.001.

While all three of these provisions could theoretically be applied to e-cigarette solutions, subsections C.08.001(b) and (c) would be the most appropriate provisions.<sup>132</sup> E-cigarettes would be appropriate for subsection (b) due to the fact that nicotine, propylene glycol, and vegetable glycerin have never been sold when combined, and the interactive effects of the various components are worthy of research and investigation.<sup>133</sup>

Subsection (c) can be deemed as applicable primarily due to the method of administration.<sup>134</sup> While nicotine has been studied when inhaled over extended periods of time in the context of cigarettes, the research on the effects of nicotine when isolated is more limited.<sup>135</sup> Additionally, there is a very little scientific documentation that pertains to the effects of propylene glycol and vegetable glycerin when inhaled daily over an extended period of time.<sup>136</sup> While propylene glycol and vegetable glycerin are approved for usage in fog machines, normally seen at music concert venues and performances, typical usage of a fog machine does not amount to inhalation for hours a day over a period of years and thus, the two are incomparable.<sup>137</sup> Nonetheless, the explicit definition for “drug” as provided for by the act does not cover e-cigarettes.<sup>138</sup> Presumably, any “new drug” pursuant to s. C.08.001 of the *Food and Drug Regulations* would still have to satisfy the “drug” definition as set out in the act.<sup>139</sup>

Based on this fact, it is unclear under what statutory provision Health Canada is making its claim that e-cigarettes fall under the *Food and Drugs Act*.<sup>140</sup> However, there is broad power and discretion granted to the Minister of Health and Governor in Council pursuant to s. 30(1) of the

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<sup>132</sup> *Ibid*, ss C.08.001(b), (c).

<sup>133</sup> *Ibid*, ss C.08.001(b), (c); Hajek, *supra* note 49 at 1803.

<sup>134</sup> *Food and Drug Regulations*, *supra* note 130, s C.08.001(c).

<sup>135</sup> Inchem Nicotine, *supra* note 58.

<sup>136</sup> Sanford, *supra* note 48 at 12; Orellana, *supra* note 37 at 678.

<sup>137</sup> Ontario, Ontario Ministry of Labour, “Fog and Smoke Safety Guideline for the Live Performance Industry in Ontario” *Health and Safety* (August 2005), online: <<http://www.labour.gov.on.ca>>.

<sup>138</sup> *Food and Drugs Act*, *supra* note 18, s 2; *Food and Drug Regulations*, *supra* note 130, s C.08.001.

<sup>139</sup> *Food and Drugs Act*, *ibid*, s 2; *Food and Drug Regulations*, *ibid*, s C.08.001.

<sup>140</sup> Health Canada Importation Notice, *supra* note 5 .

*Food and Drugs Act* and s. 4 of the *Department of Health Act* that enable Health Canada and the Minister of Health to demand market authorization for any product not covered by other legislation that pertains to the health of Canadians.<sup>141</sup> This general, catch-all, power of the Minister derived from the *Food and Drugs Act* would certainly enable the Minister to regulate the sale of e-cigarette devices. This is the only conceivable way by which e-cigarettes fall within the scope of the *Food and Drugs Act*.

### iii. Health Canada: Enforcement of Importation and Sale

Based on this power, Health Canada has made some effort in enforcing its notice. Based on the absence of market authorization, there have been a series of “[recommendations] for refusal” at the Canada-United States border for 741 shipments of electronic cigarettes and numerous (the actual number remains unspecified) cease and desist notices to retail outlets.<sup>142</sup> However, in consideration of the entirety of the shipments of e-cigarette devices and associated paraphernalia, this number is, comparatively, minuscule.<sup>143</sup>

Canada is able to enforce these “[recommendations] for refusal” by virtue of the administrative document titled “The Import and Export Policy for Health Products Under the *Food and Drugs Act* and its *Regulations* (POL-0060)”.<sup>144</sup> The administrative document functions to provide an avenue of enforcement for non-compliance with the *Food and Drugs Act*.<sup>145</sup> Since e-cigarettes have not been given “market authorization”, they can be deemed to be non-compliant with the *Food and Drugs Act*.<sup>146</sup> Based on this noncompliance, Health Canada can restrict importation by

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<sup>141</sup> *Food and Drugs Act*, *supra* note 18, s 30(1); *Department of Health Act*, *supra* note 106, s 4.

<sup>142</sup> E-Cigarette Committee Report, *supra* note 112.

<sup>143</sup> This can be inferred from the Statistics Canada CTADS Report: Statistics Canada CTADS, *supra* note 3.

<sup>144</sup> Canada, Health Canada, Drugs and Health Products, *Import and Export Policy for Health Products under the Food and Drugs Act and its Regulations* (POL-0060), (Ottawa: Health Canada, 2010), online: <<http://www.hc-sc.gc.ca>> [Health Canada Import and Export Policy].

<sup>145</sup> *Ibid.*

<sup>146</sup> Health Canada Importation Notice, *supra* note 5.

virtue of the “Import and Export Policy”.<sup>147</sup> The restriction of importation is exercised by the “recommendations for refusal”.<sup>148</sup>

The Import and Export Policy differs whether the unauthorized importation of a health product is for personal use or commercial use (note that e-cigarettes can be considered unauthorized due to the absence of market authorization).<sup>149</sup> The Policy states: “Health Canada will take actions to prevent the importation of health products that are known to pose a risk to health or for which enforcement actions have been taken domestically”.<sup>150</sup> However, e-cigarettes are not known to pose a risk to health, but rather, their health effects are unknown.<sup>151</sup> Perhaps, that is where the “recommendation” for refusal comes into play.<sup>152</sup> Without being able to confirm the dangerous nature of e-cigarettes absolutely, Health Canada will not take definitive actions to prevent importation. If individuals are importing a product that has not been market authorized by Health Canada for personal use, they can do so, subject to the following restrictions: “A single course of treatment or a 90-day supply based on the directions for use, whichever is less, of a health product as long as the product does not contain a substance listed in Schedule F of the *Food and Drugs Regulations*”.<sup>153</sup> Additionally, the products must be in the original retail packaging with all labels attached.<sup>154</sup>

Health Canada distinguishes personal from commercial use, by stating in the Import and Export Policy:

Larger volumes [sic] shipments, multiple repeat shipments of the same product within short periods of time (<3 months), shipments accompanied by or associated with materials to be used for advertising or promotion, and/or

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<sup>147</sup> Health Canada Import and Export Policy, *supra* note 144.

<sup>148</sup> Health Canada Import and Export Policy, *ibid*; Health Canada Importation Notice, *supra* note 5.

<sup>149</sup> Health Canada Import and Export Policy, *ibid*.

<sup>150</sup> *Ibid*.

<sup>151</sup> See discussion on the health effects of e-cigarettes above at Section III.

<sup>152</sup> E-Cigarette Committee Report, *supra* note 112.

<sup>153</sup> Health Canada Import and Export Policy, *supra* note 144.

<sup>154</sup> *Ibid*.

shipments that indicate a Canadian business is involved in the transaction, will be considered commercial shipments and the relevant requirements will apply.<sup>155</sup>

Pursuant to s. 5.1 of the Import and Export Policy, “all health products imported for sale in Canada must meet the requirements of the *Food and Drugs Act* and its *Regulations* at the time of importation [...]”.<sup>156</sup>

With respect to the “cease and desist notice”, it is a function of Health Canada’s enforcement of the “Import and Export Policy”.<sup>157</sup> In an absence of market authorization, illegal importation can be enforced using a “cease and desist notice”. Presumably, non-compliance can result in police enforcement of the policy. However, these notices do not speak to criminal sanctions being available to impose on those in violation.<sup>158</sup>

It is important to note that within the Health Canada notice, references are made exclusively to inhaled vapour containing nicotine.<sup>159</sup> Thus, the argument could be made that e-cigarette solutions that are composed of propylene glycol and vegetable glycerin, absent nicotine, would theoretically escape Health Canada’s restrictions on sale. This notion appears to be in concordance with the general sale of e-cigarette items. However, one would have to locate a vendor that specializes solely in selling e-cigarettes to find devices and solutions that use and contain nicotine.<sup>160</sup> The Canadian Medical Association agrees with this sentiment, stating in a submission to the House of Commons:

Health Canada issued a warning in 2009 about the potential dangers and the fact that e-cigarettes had not been fully evaluated for safety, quality and efficacy. The sale of e-cigarettes containing nicotine is currently illegal in Canada under the Food and Drugs Act regulations though they can still be purchased in the US or over the Internet. However, those that... do not contain nicotine may legally be sold in Canada under the same regulation.<sup>161</sup>

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<sup>155</sup> *Ibid.*

<sup>156</sup> *Ibid.*

<sup>157</sup> *Ibid.*

<sup>158</sup> *Ibid* (it can be inferred that such sanctions are not available).

<sup>159</sup> Health Canada Importation Notice, *supra* note 5.

<sup>160</sup> “E-cigarette ignites debate, sales, in Winnipeg”, *CTV News Winnipeg* (5 February 2014), online: CTV <<http://winnipeg.ctvnews.ca>> [CTV E-Cigarette Sales Article].

<sup>161</sup> “Canadian Medical Association Submission to the House of Commons Study on E-Cigarettes”, *Canada Medical Association* (27 November 2014), online: <<https://www.cma.ca/Assets/assets->

Furthermore, it can certainly be surmised that this focus on nicotine is fueling much of the confusion in the legislation. E-cigarette devices can be used with or without nicotine; thus, the sale of the devices themselves is not captured by the Health Canada restriction.<sup>162</sup> E-cigarette solutions are easy to self-manufacture (a cursory Google search will provide numerous “do it yourself” guidelines for making “e-juice”), which is likely why many vendors carry electronic cigarette solutions that are developed in house and are able to easily skirt the “recommendation for refusal” when importing items that are not market authorized (and non-compliant) with the *Food and Drugs Act*.<sup>163</sup> The emphasis on nicotine and the disregard for propylene glycol and vegetable glycerin results in Health Canada’s prohibition being a prohibition in name only, as it is essentially impossible to enforce with any consistency. Furthermore, the scientific literature indicates that nicotine is the one ingredient that has seen significant research and whose health effects with respect to inhalation are widely known.<sup>164</sup> Propylene glycol and vegetable glycerin are the two substances where the scientific literature is notably silent with respect to inhalation. It is intriguing, and perhaps disconcerting, that Health Canada has ignored these two primary ingredients in e-cigarette solutions.

It should also be noted that this notice only applies to the marketing, sale, and distribution of these devices and not the personal usage. Based on this, there are no restrictions on personal usage and if private establishments do not indicate that they restrict the usage of e-cigarette devices on their premises then the individuals could, surprisingly, use them indoors. This aligns with Health Canada’s allowance of the personal use of items that have not been market authorized.<sup>165</sup>

Nonetheless, despite this apparent allowance of personal use, on March 27, 2009, Health Canada has issued a warning titled *Health Canada*

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library/document/en/advocacy/submissions/CMA-Submission-House-of-Commons-Health-Committee-E-Cigarettes.pdf>.

<sup>162</sup> Health Canada Importation Notice, *supra* note 5; Harrell, *supra* note 35 at 383.

<sup>163</sup> As an example: “How to Make e-Juice - Welcome to your DIY adventure” *NicVape*, 2016, online: *NicVape* <<http://www.nicvape.com/How-To-Make-e-Juice>>.

<sup>164</sup> Inchem Nicotine, *supra* note 58.

<sup>165</sup> Canada, Health Products and Food Branch Inspectorate Regional Operational Centre, *Health Canada Advises Canadians Not to Use Electronic Cigarettes* (27 March 2009) (Ottawa: Health Canada) [Health Canada E-Cigarette Advisory].

*Advises Canadians Not to Use Electronic Cigarettes*.<sup>166</sup> The term “advises” is suggestive that Health Canada does not have any legally binding power to enforce this. In this document, Health Canada only explicitly prohibits commercial use, and not personal use, stating:

Persons importing, advertising or selling electronic cigarette products in Canada must stop doing so immediately. Health Canada is providing information to interested stakeholders on how to apply for the appropriate market authorizations and establishment licenses.<sup>167</sup>

This advisory is, after all, only an advisory.<sup>168</sup> In terms of personal use, Health Canada is merely “advising Canadians not to purchase or use electronic smoking products, as these products may pose health risk and have not been fully evaluated for safety, quality and efficacy by Health Canada”.<sup>169</sup> Thus, it cannot be seen as being legally binding for personal use. However, this reinforces the notion that in terms of commercial use, the importation and sale of e-cigarettes is prohibited.

#### iv. *Natural Health Products Regulations*

The *Natural Health Products Regulations* are a set of regulations under the *Food and Drugs Act* that have the purpose of regulating natural health products.<sup>170</sup> As a result, these regulations are administered by the Minister of Health and are under the enforcement purview of Health Canada.<sup>171</sup> As the Health Canada notice does not address the *Natural Health Products Regulations*, this section was included separately from the larger *Food and Drugs Act* section.<sup>172</sup> The *Natural Health Products Regulations* offer an alternative avenue for the potential regulation of e-cigarettes.

The *Natural Health Products Regulations* has guidelines for determining whether a device is medical in nature, determining its safety and efficacy, and how it is to be regulated.<sup>173</sup> The provisions of this legislation capture

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<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> *Natural Health Products Regulations*, *supra* note 21, s 2.

<sup>171</sup> *Ibid.*, Preamble.

<sup>172</sup> Health Canada Importation Notice, *supra* note 5.

<sup>173</sup> *Natural Health Products Regulations*, *supra* note 21, s 2(1).

various tobacco cessation products, such as nicotine gum, patches, or mists.<sup>174</sup> Tobacco cessation products are somewhat similar to e-cigarettes, in that they are both primarily a delivery mechanism for nicotine.<sup>175</sup> Therefore, by logical extension, the *Natural Health Products Regulations* could apply to e-cigarettes.

This raises the question of whether e-cigarettes should be classified as natural health products. The administration of nicotine in the form of gums, mists, inhalers, and lozenges are classified as such with the objective of assisting individuals in quitting smoking.<sup>176</sup> However, these tobacco cessation products do not have a recreational use component.<sup>177</sup> E-cigarettes have a large and active subculture that does not use the products as a tobacco cessation device, but rather as recreational products.<sup>178</sup> Similarly, traditional cigarettes are not classified as a natural health product, even though they are responsible for the administration of nicotine.<sup>179</sup> Regardless, further research would have to be done on the efficacy of e-cigarettes as tobacco cessation products before any definitive conclusions can be drawn.

The *Natural Health Products Regulations* are considered to be under the *Food and Drugs Act*, and thus, e-cigarette products would also be subject to the compliance regulations of the *Food and Drugs Act*.<sup>180</sup> It has been determined from the aforementioned discussion that e-cigarettes are not in compliance with the *Food and Drugs Act* for commercial purposes.

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<sup>174</sup> “Chemical Substance – Nicotine” *Drugs and Health Products* (18 April 2016), online: Health Canada <<http://webprod.hc-sc.gc.ca/nhp/ndipsn/singredReq.do?id=383&lang=eng>>.

<sup>175</sup> “Tobacco Cessation Products” *FDA 101* (30 August 2015), online: US Food and Drug Administration <<http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm198176.htm>> [FDA Tobacco Cessation Products].

<sup>176</sup> *Ibid.*

<sup>177</sup> *Ibid.*

<sup>178</sup> Ellen Meier & Theodore Wagener, “E-cigarettes: More Frenemy than Enemy” (2014) *The Addictions Newsletter* 19.

<sup>179</sup> This is seemingly obvious, but it is worth noting that cigarettes do not have any recognized medicinal uses. See: Wigand, *supra* note 32.

<sup>180</sup> *Natural Health Products Regulations*, *supra* note 21, Preamble, 1.

However, the *Natural Health Products Regulations* does provide a potential avenue for regulation.

## 2. *Controlled Drugs and Substances Act*

The *Controlled Drugs and Substances Act* (“CDSA”) is federal legislation that is focused on drug control, particularly, narcotics, heavily regulated and illegal substances.<sup>181</sup> The act has a list of all prohibited drugs and substances,<sup>182</sup> and various punishments associated with either possession<sup>183</sup> or trafficking.<sup>184</sup> Violations of the CDSA are primarily criminal in nature.<sup>185</sup> The Minister of Health and Health Canada administer the act itself, with enforcement provided by law enforcement services pursuant to s. 11 of the act.<sup>186</sup>

While much of the opposition to e-cigarettes calls for strict regulatory frameworks to be implemented regarding their usage and sale, there has been virtually no literature on viewpoints that call for the strict illegality of their sale and/or usage.<sup>187</sup>

While the aforementioned Health Canada notice results in the prohibition of e-cigarette devices containing nicotine in the commercial context, there are no provisions included in the notice that provide any measure of punitive disincentives for violating these provisions.<sup>188</sup> While there were some measures taken in preventing shipments and the sending of cease-and-desist letters, the true impact of these measures can be ascertained as being fairly minuscule.<sup>189</sup>

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<sup>181</sup> *Controlled Drugs and Substances Act*, *supra* note 19, Preamble. The theme of the Act is clear by this introductory statement: “An Act respecting the control of certain drugs, their precursors and other substances and to amend certain other Acts and repeal the Narcotic Control Act in consequence thereof”.

<sup>182</sup> *Controlled Drugs and Substances*, *supra* note 19, schedules I-VIII.

<sup>183</sup> *Ibid*, s 4.

<sup>184</sup> *Ibid*, s 5.

<sup>185</sup> *Ibid*, s 13 (“Sections 489.1 and 490 of the *Criminal Code* applicable”).

<sup>186</sup> *Ibid*, ss 2, 11; Health Canada Mission, *supra* note 101.

<sup>187</sup> No literature, news articles, or opinions were found, which call for the strict illegality of e-cigarettes. The consensus is for government regulation.

<sup>188</sup> Health Canada Importation Notice, *supra* note 5; Health Canada Import and Export Policy, *supra* note 144.

<sup>189</sup> Health Canada Importation Notice, *ibid*; Health Canada Import and Export Policy,

Nonetheless, there has been virtually no movement to outright legalize e-cigarettes. This also seems unlikely to happen, as it would require fairly significant amendments to the *Controlled Drugs and Substances Act*. Nicotine, propylene glycol, and vegetable glycerin are all regulated in some form or another excluding the context of e-cigarettes, and are legal substances.<sup>190</sup> These compounds are not mentioned in the *Controlled Drugs and Substances Act*.<sup>191</sup>

It should also be noted that the Health Canada notice suggests that e-cigarettes are to be classified as a new drug under Division 8, Part C of the *Food and Drug Regulations*.<sup>192</sup> Pursuant to s. 58 of the *Controlled Drugs and Substances Act*, if there is any direct contradiction, discrepancy, or inconsistency between the *Food and Drugs Act* and the *Controlled Drugs and Substances Act*, the *Controlled Drugs and Substances Act* will prevail.<sup>193</sup> As it stands, however, e-cigarettes are not mentioned explicitly in either act.

Based on the discussion by Health Canada and in Parliament, the health concerns of e-cigarettes, while certainly deserving of further investigation, is a far cry from the severe societal impacts of the narcotics included in the *Controlled Drugs and Substances Act*.<sup>194</sup> As a result, e-cigarettes would be out of the purview of criminal legislation.

### 3. Tobacco Act

The sale and production of tobacco products are regulated federally under the *Tobacco Act*.<sup>195</sup> The act's defined purpose is to address the concern of tobacco on the health of Canadians, particularly, young

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*ibid.*

<sup>190</sup> Please see Section III for a more detailed discussion of nicotine, propylene glycol and vegetable glycerin.

<sup>191</sup> *Controlled Drugs and Substances Act*, *supra* note 19, schedules I-VIII. Note: These schedules contain a list of prohibited substances, separated by "Classes", to designate the severity of the criminal offence for possessing or trafficking said substance.

<sup>192</sup> Health Canada Importation Notice, *supra* note 5; Health Canada Import and Export Policy, *supra* note 144.

<sup>193</sup> *Controlled Drugs and Substances Act*, *supra* note 19, s 58.

<sup>194</sup> *Controlled Drugs and Substances Act*, *ibid* , s 48(1). Please see *Criminal Code*, RSC 1985, c C-46, ss 463, 464, 465 [*Criminal Code*] for punishments.

<sup>195</sup> *Tobacco Act*, *supra* note 20, s 4.

Canadians.<sup>196</sup> The act is administered by the Minister of Health and Health Canada.<sup>197</sup>

In the absence of federal legislation explicitly pertaining to e-cigarettes, there have been calls to regulate e-cigarettes like their analog brethren, traditional cigarettes.<sup>198</sup> In a special commission by Parliament on e-cigarettes, they had recommended amending existing tobacco legislation to account for e-cigarettes.<sup>199</sup> This approach is also echoed by legislation enacted by select provinces to include e-cigarettes in their provincial tobacco legislation, which will be discussed later.<sup>200</sup> This section pertains exclusively to the federal *Tobacco Act*.

However, e-cigarettes have not been captured by the *Tobacco Act*, and by its own definitions, do not qualify as a tobacco product.<sup>201</sup> The *Tobacco Act* would have to undergo fundamental amendments to include e-cigarettes in its mandate. However, looking at the purpose and scope of the *Tobacco Act*, it is not clear whether this would be the most appropriate avenue for the federal government to legislate on e-cigarettes.

The *Tobacco Act* defines tobacco products as follows:

Tobacco product means a product composed in whole or in part of tobacco, including tobacco leaves and any extract of tobacco leaves. It includes cigarette papers, tubes and filters but does not include any food, drug or device that contains nicotine to which the *Food and Drugs Act* applies.<sup>202</sup>

Based on the definition of tobacco products in the act, it is clear that the legislature had not envisioned that the *Tobacco Act* capture e-cigarettes, nor did it appear to be their purpose or intention.<sup>203</sup> E-cigarettes aficionados refer to traditional cigarettes as “analogs” largely to reinforce

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<sup>196</sup> *Ibid*, s 4.

<sup>197</sup> *Ibid*, s 2.

<sup>198</sup> E-Cigarette Committee Report, *supra* note 112.

<sup>199</sup> *Ibid*.

<sup>200</sup> See p 333 for a more detailed discussion on the provincial legislation; See also: Helen Branswell, “Health Canada slow to regulate e-cigarettes” *Global News* (13 May 2015), online: <<http://globalnews.ca/news/1994306/health-canada-slow-to-regulate-e-cigarettes/>>.

<sup>201</sup> *Tobacco Act*, *supra* note 20, s 2.

<sup>202</sup> *Ibid*.

<sup>203</sup> *Ibid*.

the distinction between the two.<sup>204</sup> Traditional cigarettes are “analog” in the sense they have no electronic component.<sup>205</sup>

The components outlined in the definition (the cigarette paper, tube, and filter) are completely absent in electronic cigarettes.<sup>206</sup> The act makes no mention of atomizers, coils, cotton, reservoirs, etc. (components in e-cigarettes), or even references them indirectly.<sup>207</sup> Furthermore, the act explicitly states that any device that contains nicotine to which the *Food and Drugs Act* applies is not to be subject under the act.<sup>208</sup> In fairness, the *Tobacco Act* was enacted before the very existence of e-cigarettes, so clearly, e-cigarettes would be absent in the text of the legislation. Nonetheless, e-cigarettes are sufficiently distinct from traditional cigarettes such that the *Tobacco Act* would not be able to capture them in their current incarnation and would have to undergo significant amendment to comprehensively regulate e-cigarette devices.<sup>209</sup>

The reason that individuals jump to tobacco legislation as a means of grappling with e-cigarettes is likely the result of the superficial similarity in how both electronic and traditional cigarettes operate, and the primary purpose of nicotine administration. Electronic cigarette proponents are, by and large, opposed to the notion of regulating electronic cigarettes as tobacco products, simply because the health effects, while not fully understood at this point in time, are considered by health experts to be less detrimental than those of traditional cigarettes and other tobacco products.<sup>210</sup>

Granted, there is an intuitive sense in prohibiting e-cigarettes wherever tobacco use is prohibited. That is the primary objective of the Commission’s Report. An amendment that adds e-cigarettes to the *Tobacco*

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<sup>204</sup> Rachel Kornfield, “What is an Analog Cigarette?” *Health Media Collaboratory* (15 April 2015), online: University of Illinois Institute for Health Research and Policy <<http://www.healthmediacollaboratory.org/what-is-an-analog-cigarette>> [What is an Analog Cigarette].

<sup>205</sup> *Ibid.*

<sup>206</sup> Orellana, *supra* note 37 at 674; *Tobacco Act*, *supra* note 20, s 2.

<sup>207</sup> Orellana, *ibid* at 674–675; *Tobacco Act*, *ibid.*

<sup>208</sup> Orellana, *ibid* at 674–675; *Tobacco Act*, *ibid.*

<sup>209</sup> Orellana, *ibid* at 674–675; *Tobacco Act*, *ibid.*

<sup>210</sup> Grana, *supra* note 46 at 12.

Act would largely achieve this objective, as many provinces have already adopted similar measures.<sup>211</sup> The only issue is that provinces have amended existing tobacco legislation as a half-measure in the absence of a more comprehensive federal regulation.<sup>212</sup> As will be discussed later, e-cigarettes have many factors that would be difficult to legislate in the context of tobacco legislation. However, the *Tobacco Act* would not be the most appropriate avenue for comprehensive e-cigarette regulation due to the terminology used in the legislation.

#### 4. *Summary of Federal Legislation*

Under the Minister of Health's broad powers of enforcement and discretion derived from the *Food and Drugs Act* for the maintenance and benefit of the health of Canadians, the Health Canada 2009 March notice can be deemed sufficient indication that e-cigarettes are not in compliance with the *Food and Drugs Act*.<sup>213</sup> This is despite the fact that there is no explicit language in the *Food and Drugs Act* that pertains to e-cigarettes or manages to capture e-cigarettes.<sup>214</sup>

This absence of compliance can more specifically be referred to as the fact that e-cigarettes have not been granted market authorization. Market authorization refers to the importation and selling of these products. Health Canada enforces importation and selling by virtue of the administrative document titled "Import and Export Policy", which is designed as an enforcement mechanism of the *Food and Drugs Act*.<sup>215</sup> Due to this policy, Health Canada can issue recommendations for refusal at the US-Canada border as well as cease and desist letters to vendors that manage to obtain e-cigarettes.<sup>216</sup>

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<sup>211</sup> E-Cigarette Committee Report, *supra* note 112.

<sup>212</sup> See p 333 for a more detailed discussion on the provincial legislation.

<sup>213</sup> *Food and Drugs Act*, *supra* note 18, ss 12, 13; Health Canada Importation Notice, *supra* note 5; Health Canada Import and Export Policy, *supra* note 144 .

<sup>214</sup> *Food and Drugs Act*, *ibid*, s 2.

<sup>215</sup> Health Canada Importation Notice, *supra* note 5; Health Canada Import and Export Policy, *supra* note 144 .

<sup>216</sup> Health Canada Import and Export Policy, *ibid*; E-Cigarette Committee Report, *supra* note 112.

Health Canada's enforcement pertains solely to commercial sales.<sup>217</sup> In terms of personal use, it should be noted that Health Canada has simply "advised" Canadians not to purchase e-cigarettes for personal use.<sup>218</sup> Thus, e-cigarettes can be regarded as illegal for commercial importation by virtue of the *Food and Drugs Act*, but legal for personal use.<sup>219</sup>

If the federal government does decide to regulate e-cigarettes, the *Natural Health Products Regulations* provides an avenue for regulating e-cigarettes if they capture a medical purpose. If research is released revealing that e-cigarettes can function as tobacco cessation devices, this may be a reasonable avenue of regulation.<sup>220</sup> However, the *Natural Health Products Regulations* would not be adequate in regulating the recreational nature of e-cigarette use. For that to occur, there would need to be more significant amendments to the *Food and Drugs Act* or new regulations under the *Food and Drugs Act*. Alternatively, the federal *Tobacco Act* offers another avenue of regulation and would be in concordance with how provincial legislatures have dealt with electronic cigarettes.<sup>221</sup> However, this would require significant amendment to the *Tobacco Act* as e-cigarettes do not fall within the purpose of the act and are not tobacco products. The *Controlled Drugs and Substances Act* was deemed to be inapplicable to e-cigarettes and offers very little prospect of effective e-cigarette regulation.

Ultimately, the most effective method by which the federal government can enforce e-cigarettes is by amending the *Food and Drugs Act*, or drafting new regulations under the *Food and Drugs Act* to contend with e-cigarettes.

## C. Provincial Legislation

### 1. Overview

In the absence of federal legislation, many provinces have exercised their own jurisdiction to enact legislation on e-cigarettes. Much of the activity has been recent and involves regulating e-cigarettes in a similar

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<sup>217</sup> Health Canada Importation Notice, *supra* note 5 .

<sup>218</sup> Health Canada E-Cigarette Advisory, *supra* note 165.

<sup>219</sup> *Food and Drugs Act*, *supra* note 18, ss 12, 13.

<sup>220</sup> *Natural Health Products Regulations*, *supra* note 21.

<sup>221</sup> *Tobacco Act*, *supra* note 20, s 2.

manner to traditional cigarettes. This has been done in an attempt to address two primary concerns: (1) the effects of second-hand vapour in the absence of concrete scientific evidence of legal effects and (2) the potential effects of minors engaging in e-cigarette use.<sup>222</sup> This second point is in regards to national and provincial efforts to dissuade individuals from adopting smoking and fears that e-cigarette popularity may undermine such efforts.

Most provinces have enacted some form of legislation, and they are all largely similar in how they operate.

### i. Manitoba

There is legislation in Manitoba that directly pertains to the use of e-cigarettes. The act is titled the *The Non-Smokers Health Protection Amendment Act (E-Cigarettes)* and was passed on November 5, 2015.<sup>223</sup>

The act essentially amends previous public tobacco use legislation to include e-cigarettes.<sup>224</sup> It restricts e-cigarette usage to open public spaces.<sup>225</sup> Basically, this bill attempts to only allow e-cigarette usage to where traditional cigarettes have been allowed to be used.<sup>226</sup> The mischief the bill attempts to address is the usage of e-cigarettes indoors, where second hand vapours can be easily inhaled by non-smokers.<sup>227</sup>

The act was proposed in the 4<sup>th</sup> session of the 40<sup>th</sup> Legislature.<sup>228</sup> It came largely in response to critics regarding the safety of e-cigarettes and concerns regarding their usage indoors and around children.<sup>229</sup> The act defines e-cigarettes and e-cigarette solutions (called “e-substance”) as

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<sup>222</sup> These concerns have largely been brought up by provincial politicians and in Parliamentary debates. This notion will be discussed in further detail throughout the rest of the section.

<sup>223</sup> *The Non-Smokers Health Protection Amendment Act (E-Cigarettes)*, SM 2015, c 36 [*The Non-Smokers Health Protection Amendment Act*].

<sup>224</sup> *Ibid.*

<sup>225</sup> *The Non-Smokers Health Protection Act*, s 2(1.1), as amended by SM 2015, c 36, s 4(2).

<sup>226</sup> *The Non-Smokers Health Protection Act*, s 2(2), as amended by SM 2015, c 36, s 4(3).

<sup>227</sup> *Ibid*, s 5.

<sup>228</sup> *Ibid.*

<sup>229</sup> Health Canada Import and Export Policy, *supra* note 144; Steve Lamber, “Manitoba to put in rules for e-cigarettes”, *Global News* (28 May 2015), online: Shaw Media <<http://globalnews.ca/news/2023371/manitoba-to-put-in-rules-for-e-cigarettes/>>.

products that contain a power source and heating element designed to vaporize the e-substance for inhalation or use.<sup>230</sup> Additionally, the provisions specifically state that they apply “regardless of whether the... liquid or gas contains nicotine”.<sup>231</sup> This particular statement overcomes one of the primary shortcomings of the Health Canada notice by being cognizant of the fact that some of the recreational use of e-cigarettes involves e-cigarette solutions that do not contain nicotine.<sup>232</sup> However, as a protection mechanism, the act does not allow for the usage of any substance in the e-cigarette solution that is captured by the *Controlled Drugs and Substances Act*.<sup>233</sup> This provision was likely drafted to account for slight modifications that can be made to e-cigarette devices that allow them to vaporize marijuana for inhalation.<sup>234</sup>

The act has a provision for no e-cigarette use in enclosed places, including: an enclosed public place, an indoor workplace, a group living facility, a public vehicle or a vehicle used in the course of employment, while carrying two or more employees.<sup>235</sup> Nonetheless, there are provisions allotted to allow for designation of e-cigarette rooms.<sup>236</sup> The act also prohibits the advertising or promotion of e-cigarettes

(a) in any place or premises in which vapour products are sold; (b) in any place or premises to which children are permitted access; (c) on an outdoor sign of any type, including (i) a billboard or portable sign, or (ii) a sign on a bench, vehicle, building or other structure; or (d) inside a building or other structure or vehicle

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<sup>230</sup> *Ibid*, s 3.

<sup>231</sup> *Ibid*, s 3.

<sup>232</sup> *Ibid*, s 3; Health Canada Importation Notice, *supra* note 5.

<sup>233</sup> *The Non-Smokers Health Protection Amendment Act*, *supra* note 223, s 3.

<sup>234</sup> Stephanie Pappas, “Teens Use E-Cigarettes to Vape Pot”, *LiveScience* (7 September 2015), online: Purch <<http://www.livescience.com/52106-teens-ecigarettes-vape-pot.html>>; Meghan Neal, “If You Think E-Cigs are Controversial, Wait Until E-Joints Flood the Market”, *Motherboard* (11 July 2014), online: VICE <<http://motherboard.vice.com/read/if-you-think-e-cigs-are-controversial-wait-until-e-joints-flood-the-market>>; Liam Davenport, “High School Students Using e-Cigarettes to Vape Cannabis”, *MedScape* (9 September 2015), online: WebMD <<http://www.medscape.com/viewarticle/850726>>.

<sup>235</sup> *The Non-Smokers Health Protection Act*, s 2(1.1), as amended by SM 2015, c 36, s 4(2).

<sup>236</sup> *The Non-Smokers Health Protection Amendment Act*, *supra* note 223, s 3.

if the advertisement or promotion is visible from outside the building, structure or vehicle.<sup>237</sup>

While proponents of e-cigarettes may decry the supposed restraint on individual liberty this amendment offers, it likely would not have a large impact on the majority of users. There has not been much in the way of e-cigarette advertising as is, likely due to the absence of any real legislation on the matter, and fears from e-cigarette vendors from attracting attention to themselves.<sup>238</sup> Also, in light of the less than conclusive health effects, it does not appear to be highly unreasonable to restrict the usage to areas where traditional cigarettes are smoked. There has been very little in the way of research regarding the potential effects of second-hand e-cigarette smoke. In light of the current state of the scientific literature, this does appear to be a reasonable response by the Manitoba legislature.

## ii. Ontario

Many establishments that seek to ban e-cigarette usage on their premises in Ontario have been citing the *Smoke-Free Ontario Act*<sup>239</sup> as being a justification for the prevention of e-cigarette usage indoors.<sup>240</sup> The *Smoke-Free Ontario Act* prohibits smoking in the following locations: enclosed public places, enclosed workplaces, schools, buildings surrounding private school, common areas in apartments or condominiums, child care centres, home child care centres, early years programs, and reserved seating in sports/entertainment venues.<sup>241</sup>

The primary issue with relying on the *Smoke-Free Ontario Act* to prohibit e-cigarette smoking is that the provisions of the act do not

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<sup>237</sup> *Ibid*, s 13.

<sup>238</sup> While e-cigarette advertising expenditures have increased in the States, there is no information available pertaining to whether the same is true in Canada. Anecdotally, it is suggested that there is virtually no advertising regarding e-cigarettes in Canada. See: Annice Kim, Kristin Arnold & Olga Makarenko, "E-cigarette Advertising Expenditures in the U.S., 2011-2012" (2014) 46:1 Am J Prev Med 409 at 410.

<sup>239</sup> SO 1994, c10 [*Smoke-Free Ontario Act*].

<sup>240</sup> "Official Records for 3 March 2015" *Legislative Assembly of Ontario*, online: Ontario Government <[http://www.ontla.on.ca/web/house-proceedings/house\\_detail.do?Date=2015-03-03#P45\\_2777](http://www.ontla.on.ca/web/house-proceedings/house_detail.do?Date=2015-03-03#P45_2777)>.

<sup>241</sup> *Smoke-Free Ontario Act*, *supra* note 239, s 9.

encompass e-cigarettes.<sup>242</sup> The act specifically pertains to tobacco.<sup>243</sup> As the legislation stands, e-cigarettes are not classified as tobacco products.<sup>244</sup> This makes intuitive sense, as e-cigarettes do not contain any actual tobacco products.<sup>245</sup>

Furthermore, David Jensen, from the Ontario Health Ministry has expressly stated, “The act doesn’t apply to e-cigarettes”.<sup>246</sup> As a result, an establishment cannot truly rely on the provisions of the *Smoke-Free Ontario Act* to enforce e-cigarette prohibitions on their premises. However, private venues can certainly adopt their own set of restrictions and rely on voluntary compliance, which is currently how many Ontario based establishments are enforcing their prohibitions.<sup>247</sup> For example, Air Canada prohibits the usage of e-cigarettes on their planes.<sup>248</sup> It should be noted that when private establishments have their own set of prohibitions, the government will not issue fines or penalties to individuals in violation of these prohibitions.

There currently is legislation in the Ontario legislature that pertains to e-cigarette restrictions, entitled the *Electronic Cigarettes Act*, which amends the *Smoke-Free Ontario Act*.<sup>249</sup> The bill was first heard in the legislature on November 24, 2014 and ultimately received Royal Assent on May 28, 2015.<sup>250</sup> The bill will be phased in two components.<sup>251</sup>

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<sup>242</sup> *Smoke-Free Ontario Act*, *supra* note 239. Note: this noted after doing a reading of the entire legislation, as a result, no specific provisions were cited.

<sup>243</sup> *Smoke-Free Ontario Act*, *ibid*, ss 1, 2.

<sup>244</sup> *Ibid*, s 1.(1).

<sup>245</sup> Harrell, *supra* note 35 at 381.

<sup>246</sup> Jenny Yuen, “E-cig users don’t have to fear smoking police: Province”, *Ottawa Sun* (5 July 2015), online: PostMedia <<http://www.ottawasun.com/2015/07/05/e-cig-users-dont-have-to-fear-smoking-police-province>> [Ottawa Sun Ontario Health Ministry Article].

<sup>247</sup> *Ibid*.

<sup>248</sup> *Ibid*.

<sup>249</sup> *Electronic Cigarettes Act*, SO 2015, c7 [*Electronic Cigarettes Act*].

<sup>250</sup> “Bills and Lawmaking: Current Parliament” (28 May 2015), *Legislative Assembly of Ontario*, online: <[http://www.ontla.on.ca/web/bills/bills\\_current.do?locale=en](http://www.ontla.on.ca/web/bills/bills_current.do?locale=en)> [Legislative Assembly of Ontario].

<sup>251</sup> *Ibid*.

The *Electronics Cigarette Act* has a comprehensive definition of what constitutes an e-cigarette for the purposes of the legislation.<sup>252</sup> The act states that an e-cigarette is:

A vaporizer or inhalant-type device, whether called an electronic cigarette or any other name, that contains a power source and heating element designed to heat a substance and produce a vapour intended to be inhaled by the user of the device directly through the mouth, whether or not the vapour contains nicotine.<sup>253</sup>

The definition here is largely analogous to the Manitoba *Non-Smokers Health Protection Amendment Act*.<sup>254</sup> Notably, it also contains with it the provision that the act applies whether or not the vapour contains nicotine.<sup>255</sup> Again, this overcomes this biggest obstacle with the Health Canada provisions, which rely on the presence of nicotine.<sup>256</sup> The fact that e-cigarettes can be used with or without nicotine allows e-cigarette vendors and users to bypass the Health Canada notice.<sup>257</sup> Interestingly, the Ontario provision does not have a requirement that the substance be in accordance with the *Food and Drugs Act*.<sup>258</sup> This is likely due to the fact that e-cigarette use is fairly common even in the absence of compliance with the *Food and Drugs Act*, and the Ontario government sought to regulate e-cigarette usage even in the absence of compliance.

A noteworthy distinction between the Ontario *Electronics Cigarette Act* and the Manitoba *Non-Smokers Health Protection Amendment Act* is that the Manitoba Act contains a provision that accounts for illicit substances caught by the federal *Controlled Drugs and Substances Act* while the Ontario provision does not.<sup>259</sup> While this likely will not have any profound practical implications (since a substance that is prohibited under the *Controlled Drugs and Substances Act* would be prohibited regardless of whether they were found in an e-cigarette solution or not), the Manitoba

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<sup>252</sup> *Ibid.*

<sup>253</sup> *Electronic Cigarettes Act*, *supra* note 249, s 1.(1).

<sup>254</sup> *The Non-Smokers Health Protection Amendment Act*, *supra* note 223.

<sup>255</sup> *Electronic Cigarettes Act*, *supra* note 249 s 1.(1).

<sup>256</sup> Health Canada Importation Notice, *supra* note 5.

<sup>257</sup> *Ibid.*

<sup>258</sup> *Electronic Cigarettes Act*, *supra* note 249.

<sup>259</sup> *Electronic Cigarettes Act*, *ibid*; *The Non-Smokers Health Protection Amendment Act*, *supra* note 223, s 3.

legislation simply provides an additional safety mechanism and measure of clarity regarding what ingredients can be used in the e-cigarette solutions.<sup>260</sup> It should be noted that none of these provincial legislative attempts at regulating e-cigarettes try to define what constitutes e-cigarette solution. While e-cigarette solution is traditionally composed of vegetable glycerin, propylene glycol, nicotine, and flavourings, there is nothing to ensure that other ingredients cannot be used. The Manitoba legislation takes a small step in clarifying ingredients by prohibiting substances that are listed in the *Controlled Drugs and Substances Act*, while this provision is absent in the Ontario legislation.<sup>261</sup>

Overall, the Ontario legislation, like its Manitoba counterpart, seeks to regulate the usage and sale of e-cigarettes, and little more. Its fundamental purpose is to restrict e-cigarette usage in public spaces in a similar fashion as tobacco cigarettes. In light of inconclusive evidence surrounding the health effects of e-cigarettes and e-cigarette second-hand vapours, this legislation is reasonable in its mandate.

### iii. British Columbia

In British Columbia the *Tobacco Control Amendment Act* which seeks to address the growing popularity of e-cigarettes by restricting their usage in a manner similar to that of traditional cigarettes was passed on April 14, 2015.<sup>262</sup> The introduction of the amendments resulted in a name change of the *Tobacco Control Act* to the *Tobacco and Vapour Products Control Act*.<sup>263</sup>

British Columbia Health Minister, Terry Lake, stated: “More and more young people are using e-cigarettes... This legislation will limit the exposure to children of the possible dangers of e-cigarette vapour and the potential that e-cigarettes have to normalize smoking behaviour”.<sup>264</sup> In

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<sup>260</sup> *The Non-Smokers Health Protection Act*, *ibid*, s 3; *Controlled Drugs and Substances Act*, *supra* note 19, s 58.

<sup>261</sup> *The Non-Smokers Health Protection Amendment Act*, *ibid*, s 3.

<sup>262</sup> Bill 14, *Tobacco Control Amendment Act*, 4th Sess, 40th Parl, British Columbia, 2015 [*Tobacco Control Amendment Act*]; “Bills” Legislative Assembly of British Columbia, online: Government of British Columbia <<https://www.leg.bc.ca/legislation/bills.htm>> [Legislative Assembly of British Columbia].

<sup>263</sup> *Tobacco Control Amendment Act*, *ibid*, s 1.

<sup>264</sup> *Ibid*.

British Columbia, the medical community largely applauded the legislation.<sup>265</sup> The Canadian Paediatric Society has stated:

The Canadian Paediatric Society welcomes the Government of British Columbia's regulation of e-cigarettes. This legislation will protect the health of children and youth from the well-established harmful effects of nicotine as well as the toxic by-products of 'vaping'... British Columbia's leadership on this issue will complement their current tobacco control efforts in providing clean air not only for children and youth but also all residents of the province.<sup>266</sup>

The legislation operates in a largely similar manner to the aforementioned Ontario and Manitoba acts.<sup>267</sup> The amendments in place will restrict the sale of e-cigarettes in public establishments, school premises, and indoor workplaces and public areas.<sup>268</sup> In addition, provisions have been put in place to allow the health authority to designate smoking areas.<sup>269</sup>

The *Tobacco Control Amendment Act* defines an e-cigarette as:

(a) A product or device, whether or not it resembles a cigarette, containing an electronic or battery-powered heating element capable of vapourizing an e-substance for inhalation or release into the air; (b) a prescribed product or device similar in nature or use to a product or device described in paragraph (a).<sup>270</sup>

The act also defines the e-cigarette solution, referred to as an "e-substance" as:

....A solid, liquid or gas (a) that, on being heated, produces a vapour for use in an e-cigarette, regardless of whether the solid, liquid or gas contains nicotine, and (b) that is not a controlled a substance within the meaning of the *Controlled Drugs and Substances Act* (Canada).<sup>271</sup>

It is clear, once again, that unlike the Health Canada notices, the British Columbian provincial legislation stretches beyond concerns around nicotine. Because of the unknown health effects of long-term

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<sup>265</sup> *Ibid.*

<sup>266</sup> *Ibid.*

<sup>267</sup> *Tobacco Control Amendment Act*, *supra* note 262; *Non-Smokers Health Amendment Act*, *supra* note 223; *Electronic Cigarettes Act*, *supra* note 249.

<sup>268</sup> *Tobacco Control Amendment Act*, *ibid*, s 3.1.

<sup>269</sup> *Ibid*, ss 5-7.

<sup>270</sup> *Ibid*, s 2.

<sup>271</sup> *Ibid.*

propylene glycol and vegetable glycerin inhalation, it does make intuitive sense to draft the legislation in such a broad manner (in respect to the components in the e-liquid).

Like the Manitoba legislation, there is a clear provision that no substance that is subject to the *Controlled Drugs and Substances Act* is to be used in the formulation of the e-cigarette solution.<sup>272</sup> This further highlights the absence of such a provision from the Ontario legislation.

Otherwise, the legislation has no provisions worthy of particular examination and is largely analogous to the aforementioned Ontario and Manitoba acts.

#### iv. Saskatchewan

Saskatchewan currently has no pending or enacted legislation regarding e-cigarettes.<sup>273</sup> Saskatchewan's Health Minister has established that the province is awaiting direction from the federal government before any provincial progress will be made.<sup>274</sup>

A ministry spokesperson has stated, "We are monitoring Health Canada's approach to these products... As e-cigarettes are relatively new products, more research is needed to evaluate both positive and negative health impacts associated with their use."<sup>275</sup> This lack of inertia has been criticized by the Canadian Cancer Society, which has stated: "[It's] discouraging... We're seeing communities in Saskatchewan concerned about electronic cigarettes and the impact on kids... We don't understand why the province would be reluctant to address this problem."<sup>276</sup>

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<sup>272</sup> *Ibid.*

<sup>273</sup> "Bills" Legislative Assembly of Saskatchewan, online: Government of Saskatchewan <<http://www.legassembly.sk.ca/legislative-business/bills/>>.

<sup>274</sup> Kevin O'Connor, "Vape shops popping up around Saskatchewan", *CBC News* (4 September 2015), online: CBC Radio-Canada <<http://www.cbc.ca>>.

<sup>275</sup> Tim Ireland, "Sask. Sticks with wait-and-see approach as B.C. moves to restrict e-cigarettes", *CTV News Regina* (6 March 2015), online: Bell Media <<http://regina.ctvnews.ca/sask-sticks-with-wait-and-see-approach-as-b-c-moves-to-restrict-e-cigarettes-1.2267375>> [CTV Saskatchewan Ministry Article].

<sup>276</sup> *Ibid.*

As a result, the Canadian Cancer Society has ensured it will continue lobbying the Saskatchewan legislature for legislation that would restrict the use of e-cigarettes in Saskatchewan.<sup>277</sup>

In light of the confusing stance taken by Health Canada and the absence of comprehensive research on the health effects of e-cigarettes, it is difficult to criticize this so-called “wait-and-see” approach that the Saskatchewan legislature is taking. To clarify, Health Canada’s emphasis on nicotine and commercial enterprises has done little to quell the growing popularity of e-cigarettes in Canada. As a result, the Saskatchewan legislature is awaiting more comprehensive legislation from the federal government.

#### v. Alberta

The province of Alberta, similarly to Saskatchewan, has yet to enact any legislation pertaining to e-cigarette use and sale.<sup>278</sup> However, there have been a series of municipal bylaws enacted throughout the province that restrict the use of electronic cigarettes.<sup>279</sup>

Alberta’s patchwork of municipal bylaws prohibiting public use of e-cigarettes results in a confusing state of the law. Users already have to be wary of their e-cigarettes use when travelling from province to province, and now travelling within Alberta means being subject to differing regulations too. However, Stephen Mandel, the Health Minister of Alberta has stated that he intends to put provincial regulations in place as soon as possible.<sup>280</sup>

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<sup>277</sup> *Ibid.*

<sup>278</sup> “Bills and Amendments” *Legislative Assembly of Alberta*, online: Government of Alberta <[https://www.assembly.ab.ca/net/index.aspx?p=bills\\_home](https://www.assembly.ab.ca/net/index.aspx?p=bills_home)>.

<sup>279</sup> City of Red Deer, by-law No 3345/2005, *Smoke Free Public Places and Work Places*; “Smoking” *The City of Edmonton*, online: City of Edmonton <[http://www.edmonton.ca/bylaws\\_licences/bylaws/smoking.aspx](http://www.edmonton.ca/bylaws_licences/bylaws/smoking.aspx)>; “Bylaws related to Smoking” *The City of Calgary* (29 September 2015), online: The City of Calgary <<http://www.calgary.ca/CSPS/ABS/Pages/Bylaws-by-topic/Smoking.aspx>>; City of Calgary, by-law No 57M92, *To Repeal and Replace Bylaw Number 15M85*.

<sup>280</sup> Matt Dykstra, “Alberta Health Minister Mandel talks e-cigarette regulation”, *Edmonton Sun* (30 September 2014), online: PostMedia <<http://www.edmontonsun.com/2014/09/30/alberta-looks-to-ban-flavoured-tobacco-cigarettes>>.

#### vi. Quebec

Quebec enacted Bill 44 (*An Act to bolster tobacco control*), on November 26, 2015.<sup>281</sup> Similarly to the other provincial enactments, Bill 44 restricts the use of e-cigarettes in public areas. Quebec's Junior Minister for Public Health, describes the bill as follows: "You won't be able to smoke anywhere you smoke a real cigarette. You won't be able to smoke in a restaurant. You'll have to be nine metres from the door...All the laws that are there for regular cigarettes, you're going to have to respect that".<sup>282</sup>

The bill is otherwise unremarkable or distinguishable in any significant way from the provincial legislation discussed prior.

#### vii. Nova Scotia

Nova Scotia has enacted two pieces of legislation to contend with e-cigarettes.<sup>283</sup>

In May of 2015, the *Tobacco Access Act* was amended such that e-cigarettes were to be treated by vendors as they would traditional cigarettes, which includes: keeping them out of view, unless the store only sells e-cigarettes; keeping minors excluded from entry; no point of sale promotion; no signage or advertising outside the store; no selling to minors; and no selling in pharmacies and other locations where tobacco sales are prohibited.<sup>284</sup>

However, adult Nova Scotians (individuals 19 and older) will continue to have full access to e-cigarette products. Interestingly, there are no restrictions in place on where e-cigarettes are to be used within the *Tobacco*

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<sup>281</sup> Bill 44, *An Act to bolster tobacco control*, 1st Sess, 41st Leg, Quebec (assented to 26 November 2015).

<sup>282</sup> "Quebec tables bill to crack down on e-cigarettes", (5 May 2015), *CBC News Montreal*, online: CBC Radio-Canada <<http://www.cbc.ca/news/canada/montreal/quebec-tables-bill-to-crack-down-on-e-cigarettes-1.3062346>>.

<sup>283</sup> Bill 60, *An Act to Amend Chapter 12 of the Acts of 2002, the Smoke-free Places Act, and Chapter 14 of the Acts of 1993, the Tobacco Access Act*, 2nd Sess, 62nd Gen Assem, Nova Scotia, 2014 (assented to 20 November 2014) [Bill 60]; Bill 90, *An Act to Amend Chapter 14 of the Acts of 1993, the Tobacco Access Act*, 2nd Sess, 62nd Gen Assem, Nova Scotia, 2015 (assented to 11 May 2015) [Bill 90].

<sup>284</sup> See "Healthy Communities: Tobacco Control: Amendments to Tobacco Legislation" *Nova Scotia Canada* (3 June 2015), online: <<http://novascotia.ca/dhw/healthy-communities/tobacco-act-amendments.asp>>; Bill 60, *ibid*; Bill 90, *ibid*.

Access Act.<sup>285</sup> However, the *Smoke-Free Places Act*, also amended in May of 2015, includes a list of areas and establishments where e-cigarettes cannot be used.<sup>286</sup>

That being said, the Nova Scotian Government Health and Wellness branch has stated: “We are urging the federal government to address quality and safety concerns by regulating these products nationally”.<sup>287</sup> It also moderated concerns of e-cigarette users by confirming that “while e-cigarettes are being treated like regular cigarettes in retail settings, they will not be taxed as a tobacco product”.<sup>288</sup>

It is clear that these amendments to the *Tobacco Access Act* and the *Smoke-Free Places Act* were relatively minor measures in regulating e-cigarettes, and that the province is waiting for the federal government to take further action.

#### viii. Newfoundland and Labrador

On June 7, 2016, the House of Assembly of Newfoundland and Labrador gave Royal Assent to Bill 35, *An Act to Amend the Smoke-Free Environment Act, 2005 and The Tobacco Control Act*.<sup>289</sup>

Similar to the aforementioned legislation, the act purports to prohibit the use of e-cigarettes in places where traditional cigarettes are banned (namely, indoor public places and workplaces).<sup>290</sup> It also ensures that one must be of legal age to purchase e-cigarettes and associated paraphernalia.<sup>291</sup> Also of note is that the act provides e-cigarette vendors an exemption from the promotion and display restrictions placed upon

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<sup>285</sup> *Tobacco Access Act* (amended) SNS 1993, c 14.

<sup>286</sup> See *Smoke-free Places Act (amended)* SNS 2002, c 12, s 5(1). The current version in force since 31 May 2015.

<sup>287</sup> “Healthy Communities: Tobacco Control: Amendments to Tobacco Legislation” (3 June 2015), *Nova Scotia Canada*, online: Province of Nova Scotia <<http://novascotia.ca/dhw/healthy-communities/tobacco-act-amendments.asp>>.

<sup>288</sup> *Ibid.*

<sup>289</sup> Bill 35, *An Act to Amend the Smoke-Free Environment Act, 2005 and The Tobacco Control Act*, 1st Sess, 48th Gen Assem, Newfoundland and Labrador (assented to 7 June 2016).

<sup>290</sup> *Ibid.*

<sup>291</sup> *Tobacco and Vapour Products Control Act*, SNL 1993 Chapter T-4.1, s 4(2).

traditional cigarettes such that, as long as the products are not visible from outside the store, they can be fully visible once inside.<sup>292</sup>

#### ix. Prince Edward Island

On July of 2015, the Prince Edward Island legislature passed a bill, *An Act to Amend the Smoke-free Places Act*, which, in the spirit of the other provincial legislation passed, seeks to restrict the sale and use of e-cigarettes in a manner similar to that of traditional tobacco.<sup>293</sup> The bill restricts the use of e-cigarettes to locations where smoking is already permissible, they cannot be in plain sight in retail locations, and selling to minors is prohibited. It was given Royal Assent on July 10, 2015.<sup>294</sup>

Prince Edward Island Minister of Health, Doug Currie, has stated that “They’ll [e-cigarettes] be treated the exact same as normal tobacco products. They’ll be restricted”.<sup>295</sup>

The legislation largely mirrors the analogous legislation passed in other provinces. Currie claims an aggressive timeline is being pursued regarding implementation.<sup>296</sup>

#### x. Northwest Territories, Yukon and Nunavut

There is currently no pending or enacted legislation in the Canadian territories pertaining to e-cigarettes.<sup>297</sup>

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<sup>292</sup> *Ibid*, s 4.2(2)(b).

<sup>293</sup> “Progress of Bills” *Legislative Assembly of Prince Edward Island*, online: Legislative Assembly of PEI <<http://www.assembly.pe.ca/bills/onebill.php?session=1&generalassembly=65&number=9>>; Bill 9, *An Act to Amend the Smoke-free Places Act*, 1st Sess, 65th Gen Assem, Prince Edward Island, 2015 [Bill 9].

<sup>294</sup> Bill 9, *ibid*.

<sup>295</sup> “E-cigarette, flavoured tobacco laws coming to PEI”, *CBC News Prince Edward Island* (10 June 2015), online: CBC Radio-Canada <<http://www.cbc.ca/news/canada/prince-edward-island/e-cigarette-flavoured-tobacco-laws-coming-to-p-e-i-1.3107777>> [CBC PEI E-Cigarette Article].

<sup>296</sup> *Ibid*.

<sup>297</sup> “Bills and Legislation” *Legislative Assembly of the Northwest Territories*, online: Northwest Territories Legislative Assembly <<http://www.assembly.gov.nt.ca/documents-proceedings/bills>>; “Progress of Bills” *Yukon Legislative Assembly*, online: Yukon Legislative Assembly <<http://www.legassembly.gov.yk.ca/progressofbills.html>>; “Bills and Legislation” *Nunavut Maligaliurvia*, online: Legislative Assembly of Nunavut

xi. **New Brunswick**

There is currently no pending or enacted legislation in the Canadian territories pertaining to e-cigarettes. However, New Brunswick's deputy chief medical officer of health has asserted that the province should enact legislation pertaining to the use and control of e-cigarettes.<sup>298</sup>

## D. Additional Commentary and Analysis

### 1. *The Federal Perspective*

Based on the preceding analysis of the various legislative schemes across Canada that attempt to grapple with the burgeoning popularity of e-cigarettes, one cannot be faulted for feeling inundated with various legislative approaches, but no clear answers. The persistent amongst us may ask, is the use and sale of e-cigarettes legal or illegal?

The answer is far from definitive and it ultimately depends on one's definition of what constitutes illegality. But rather than descend down the philosophical rabbit hole of notions of illegality and legality, a more pragmatic approach will be taken here.

In the federal context, e-cigarette devices and solutions that contain nicotine are unapproved and unauthorized pursuant to the *Food and Drugs Act* for commercial purposes. Thus, they can be identified as illegal in the commercial context, but not the personal context. This ambiguity stems from the fact that the Health Canada notice does not have any binding force with regards to personal use and is not a part of any formal legislation. Until e-cigarette devices and solutions are approved and authorized under the *Food and Drugs Act*, they will not be formally recognized as legal devices and substances.<sup>299</sup> Health Canada's relative stasis on this issue is rather surprising, but based on the frequent referral to the *Food and Drugs Act* in the Health Canada notice, it can be surmised

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<<http://www.assembly.nu.ca/bills-and-legislation>>.

<sup>298</sup> Bobbi-Jean MacKinnon, "E-cigarette regulations needed, says N.B Health officer", *CBC News New Brunswick* (15 January 2014), online: CBC Radio-Canada <<http://www.cbc.ca/news/canada/new-brunswick/e-cigarette-regulations-needed-says-nb-health-officer-1.2497778>>.

<sup>299</sup> Health Canada Importation Notice, *supra* note 5; *Food and Drugs Act*, *supra* note 18; Health Canada Import and Export Policy, *supra* note 144.

that this piece of legislation would be the most likely avenue for legislation.<sup>300</sup>

It is highly unlikely that the federal government would make the usage of e-cigarettes illegal and criminal under the *Controlled Drugs and Substances Act*.<sup>301</sup> The fact that e-cigarette vendors operate openly with relative ease suggests that this is not an issue that demands such staunch prohibitions. Also, despite the provincial reliance on tobacco regulation, Health Canada has made no mention of the *Tobacco Act* in its various publications and notices on electronic cigarettes and associated paraphernalia. While this is hardly a conclusive statement, the *Food and Drugs Act* seems to be the primary avenue of potential legality for e-cigarettes in Canada as recreational devices.<sup>302</sup>

If conclusive research is released that reveals that e-cigarettes can work as an effective tobacco cessation product, then the federal government may regulate the devices and solutions under the *Natural Health Products Regulations* of the *Food and Drugs Act* as well.<sup>303</sup>

Nonetheless, the extent of Health Canada's notice in terms of practical applications, have only resulted in the occasional "recommendation of refusal" for border shipments.<sup>304</sup> The RCMP or municipal police will not be enforcing a Health Canada notice, as they have no real statutorily defined mandate to do so.<sup>305</sup>

However, it must be noted that this Health Canada notice is only applicable in terms of the marketing, sale, and distribution of e-cigarettes.<sup>306</sup> Consequently, this illegality only impacts commercial

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<sup>300</sup> Health Canada Importation Notice, *ibid*; *Food and Drugs Act*, *ibid*; Health Canada Import and Export Policy, *ibid*.

<sup>301</sup> *Controlled Drugs and Substances Act*, *supra* note 19.

<sup>302</sup> Health Canada Importation Notice, *supra* note 5; *Food and Drugs Act*, *supra* note 18; Health Canada Import and Export Policy, *supra* note 144.

<sup>303</sup> *Food and Drugs Act*, *ibid*; *Natural Health Products Regulations*, *supra* note 21; Health Canada Importation Notice, *ibid*.

<sup>304</sup> *Food and Drugs Act*, *ibid*; *Natural Health Products Regulations*, *ibid*; Health Canada Importation Notice, *ibid*; Health Canada Import and Export Policy, *supra* note 144.

<sup>305</sup> Health Canada Importation Notice, *ibid*; Health Canada Import and Export Policy, *ibid*; *Food and Drug Act*, *ibid*.

<sup>306</sup> Health Canada Importation Notice, *ibid*; Health Canada Import and Export Policy, *ibid*; *Food and Drugs Act*, *ibid*.

institutions.<sup>307</sup> There is essentially a void, federally, regarding the personal use of e-cigarettes. As such, personal use can be regarded as legal, for the time being. This is solely based on the absence of any comments, indication, notice, application, or legislative initiative regarding the personal use of e-cigarettes from a federal body.

It should also be made clear that the *Food and Drugs Act*, as exemplified in the Health Canada notice, only applies to e-cigarette devices that contain nicotine.<sup>308</sup> E-cigarette devices that do not contain nicotine are not subject to this prohibition. The issue with the distinction made by Health Canada is that the e-cigarette devices that use and do not use nicotine are the same, as the devices are compatible with e-cigarette solutions that contain varying concentrations of nicotine, including zero. Thus, vendors can easily import e-cigarette devices. While e-cigarette solutions containing nicotine are unapproved, they can easily be manufactured in-house using constituent ingredients.<sup>309</sup> Furthermore, the “recommendation for refusal” means that many imports of nicotine containing e-cigarette solution are still entering Canada.<sup>310</sup> This notion is supported in the Parliament of Canada Committee Report on e-cigarettes, which states:

Despite seizures at the border and letters to retail outlets in violation of such regulations, most witnesses agreed that current regulatory efforts are not restricting access to electronic cigarettes containing nicotine... As devices containing nicotine and those without nicotine may look identical, witnesses noted it is not possible to know how many users of electronic cigarettes are inhaling vapour containing nicotine.<sup>311</sup>

It is important to note that the Committee Report is incorrect in one key respect. There is no distinction between devices that use nicotine and those that do not.<sup>312</sup> The exact same e-cigarette devices can be used with e-

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<sup>307</sup> Health Canada Importation Notice, *ibid*; Health Canada Import and Export Policy, *ibid*; *Food and Drugs Act*, *ibid*.

<sup>308</sup> Health Canada Importation Notice, *ibid*; *Food and Drugs Act*, *ibid*.

<sup>309</sup> Health Canada Importation Notice, *ibid*; Health Canada Import and Export Policy, *supra* note 144; *Food and Drugs Act*, *ibid*.

<sup>310</sup> Health Canada Importation Notice, *ibid*; Health Canada Import and Export Policy, *ibid*; *Food and Drugs Act*, *ibid*.

<sup>311</sup> E-Cigarette Committee Report, *supra* note 112.

<sup>312</sup> Orellana, *supra* note 37 at 675.

liquid with any concentration of nicotine, including zero.<sup>313</sup> Otherwise, the statement is accurate.

Based on the fact that Health Canada, a federal body, explicitly prohibits against the marketing, sale, and distribution of e-cigarette solutions containing nicotine, but has no real mechanism of enforcing such a position, it is difficult to appreciably define the legal status regarding commercial operations of e-cigarettes in Canada.<sup>314</sup> The fact that there is no real culpability (in terms of fines or imprisonment) for violating Health Canada's notice may lead some to argue that it is legal. Ultimately, it would be fair to say that one can market, distribute and sell e-cigarette products with the only fear being potential seizure of imported goods.<sup>315</sup> The effect of this is that e-cigarettes cannot be classified in the commercial context as legal, but they are not expressly illegal either (absent nicotine). Unfortunately, a close examination of the federal bodies and legislation reveals that the answer ultimately, from the federal perspective, remains ambiguous. All we can say conclusively is that e-cigarettes, federally, are illegal if they contain nicotine in the commercial context. They are legal for personal use only. It is also unclear if they are legal or illegal in the commercial context absent nicotine. The evidence seems to suggest that they would be legal in the commercial context absent nicotine, but it is difficult to make any conclusive statements with the information available.

## 2. *The Provincial Perspective*

The question of legality in terms of the provincial legislation varies quite significantly from province to province. Saskatchewan and the territories have no legislation on the subject of e-cigarettes.<sup>316</sup> In the case of Saskatchewan, and what also likely applies to the territories, it is a wait-and-see approach.<sup>317</sup> This means that these provinces and territories are waiting for the federal government to rule on the matter before taking

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<sup>313</sup> *Ibid* at 675.

<sup>314</sup> Health Canada Importation Notice, *supra* note 5; Health Canada Import and Export Policy, *supra* note 144; *Food and Drug Act*, *supra* note 18.

<sup>315</sup> Health Canada Importation Notice, *ibid*; Health Canada Import and Export Policy, *ibid*; *Food and Drugs Act*, *ibid*.

<sup>316</sup> Please see above for a more detailed discussion on the provincial legislation.

<sup>317</sup> CTV Saskatchewan Ministry Article, *supra* note 275.

further action. As an example, Deanne Crothers (the former Healthy Living and Seniors Minister who drafted the Manitoba legislation) had stated: “It certainly would have been easier for us to have those kind of (federal) regulations in place, but I think many other people in the same position that I’m in are frustrated by waiting too long”.<sup>318</sup>

The provinces of British Columbia, Manitoba, Ontario, Quebec, Prince Edward Island, Newfoundland and Nova Scotia have all enacted similar provincial legislation.<sup>319</sup> While Alberta has not enacted provincial legislation, three municipalities (Calgary, Edmonton and Red Deer) have adopted municipal regulations that essentially mimic the provincial legislation enacted in other provinces.<sup>320</sup> While there are slight differences between these legislative schemes, the way their legislation functions is essentially the same. They have adopted the tactic of amending the provincial tobacco legislation to include e-cigarette devices and solutions.

The mischief being targeted by these provincial schemes is to restrict exposure to second hand vapour for those that do not smoke or vape. In the absence of these legislative schemes, one would be free to use their e-cigarette devices virtually anywhere. A second concern being targeted is the exposure of these devices to minors. Restricting e-cigarette use to locations only where traditional cigarette use is allowed restricts exposure of e-cigarettes to minors, the same way traditional cigarettes are restricted. This way, the provincial governments hope that minors will not adopt the use of e-cigarettes. Interestingly, the provincial legislative schemes avoid the nicotine versus non-nicotine dichotomy that has served as the focal point for the Health Canada e-cigarette importation prohibitions.<sup>321</sup> E-cigarette use in these provinces is restricted to where traditional cigarettes can be used, regardless of the nicotine content of the devices.

The effect of the legislation to ban e-cigarette usage wherever normal tobacco usage is prohibited results in a compelling revelation. The

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<sup>318</sup> Steve Lamber, “Manitoba set to join list of provinces limiting use of electronic cigarettes” *The Globe and Mail* (28 May 2015), online: Philip Crawley <<http://www.theglobeandmail.com/news/national/manitoba-set-to-join-list-of-provinces-limiting-use-of-electronic-cigarettes/article24677834/>>.

<sup>319</sup> Please see above for a more detailed discussion on the provincial legislation.

<sup>320</sup> *Supra* note 279.

<sup>321</sup> Health Canada Importation Notice, *supra* note 5; Health Canada Import and Export Policy, *supra* note 144.

indication that e-cigarette use is illegal wherever tobacco usage is illegal means that the corollary must be true: e-cigarette use is legal wherever tobacco use is legal. Without the latter being true, the legislation would be rendered nonsensical. This also leads to the contention that the provinces that have not legislated on the matter allow e-cigarette use, essentially, indiscriminately. Otherwise, why would the other provinces have to explicitly prohibit e-cigarette use in any location that tobacco use is prohibited?

Thus, from a provincial perspective, one could convincingly argue that the personal use of e-cigarette is legal. In terms of the marketing, distribution and sale, the provinces are largely deferring to the Health Canada notice. As a result, e-cigarette vendors will have no difficulty selling e-cigarette devices because the Health Canada restrictions have very little enforcement mechanisms and can easily be circumvented.

### *3. Criticisms and Recommendations*

Throughout the discussion there have been notable omissions in the consideration of e-cigarette legislation. Health Canada's emphasis on nicotine, a fairly well-understood compound, can be criticized since propylene glycol and vegetable glycerin are the compounds that require further study.<sup>322</sup> These latter two compounds do not have well-understood health effects in the context of long-term inhalation and should instead compromise the bulk of Health Canada's concerns.<sup>323</sup>

Additionally, all e-cigarette devices are grouped in one amalgamated category.<sup>324</sup> Any individual with a cursory understanding of e-cigarettes knows that the devices vary considerably.<sup>325</sup> There are devices that are roughly double the size of a cigarette that are designed to mimic the action of smoking tobacco, which is the type of device that is continually referenced in the government materials on e-cigarettes.<sup>326</sup> Additionally,

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<sup>322</sup> Health Canada Importation Notice, *ibid*; Health Canada Import and Export Policy, *ibid*.

<sup>323</sup> Please see section III for a more detailed analysis on the chemicals propylene glycol and vegetable glycerin.

<sup>324</sup> One can consult any federal or provincial legislation and find that e-cigarettes are defined very broadly.

<sup>325</sup> Orellana, *supra* note 37 at 675.

<sup>326</sup> *Ibid* at 674-675.

there are devices that require lithium ion batteries larger than those found in cellular phones that produce huge plumes of vapour that can obscure an entire room.<sup>327</sup> In terms of fears regarding second hand vapour, distinctions need to be made between a small puff of vapour and large bellowing clouds. Legislators would have to control for the voltage, wattage, amperage, coil resistance, and battery size to ensure that the devices meet an acceptable specification for safety. Accounting for these factors in any government commissioned research would also be largely beneficial to the e-cigarette community as a whole.

In the same vein, e-cigarette solutions are also treated as one entire lump sum category. Practically speaking, essentially all e-cigarette solutions contain vegetable glycerin, propylene glycol, flavourings and nicotine, but without controlling for the ingredients in the legislation, it could allow for a variety of components of questionable safety to be incorporated.<sup>328</sup> As an example, there have been concerns raised about the safety of using cinnamon as a flavouring compound, because reports have revealed cinnamon in e-cigarette solution can damage the lungs.<sup>329</sup> If the legislature regulated the ingredients, instead of simply referring to the “e-cigarette substance” as one single category, it would greatly alleviate many of the fears associated with e-cigarettes. This is assuming that each ingredient has been tested for safety and undergoes an approval process.

The growing popularity of e-cigarettes means that the Federal Government, inevitably, must respond to growing concerns while acknowledging the popularity and strong support of the product. Recognizing that e-cigarette devices and solutions can be assembled and developed in numerous different ways would be the strongest step in effectively and safely regulating these products. This would put Canada at the forefront of e-cigarette regulation and use in a manner that will likely satisfy critics and proponents of e-cigarettes.

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<sup>327</sup> *Ibid.*

<sup>328</sup> *Ibid* at 674.

<sup>329</sup> TR Rowell et al, “Select E-Cigarette Flavors Alter Calcium Signaling, Cell Viability And Proliferation in Lung Epithelia” (2015) B37 American Thoracic Society Journals 289 at 290.

## V. CONCLUSION

It is clear that e-cigarettes harbor an enigmatic status in Canadian society. Following a thorough examination of the current legislation, the legality of e-cigarettes still remains tenuous. However, both proponents and critics can agree that some measure of effective regulation would be beneficial to all parties involved.

The federal government has been startlingly silent on the issue, and while Health Canada's notices have attempted to provide some measure of clarity, they have only served to further muddy the waters.<sup>330</sup> In the absence of federal legislation, provincial governments have simply amended their varying tobacco acts to incorporate e-cigarettes, and to appease those who fear the consequences of second-hand vapour.<sup>331</sup>

Nonetheless, the lack of scientific research may be the determining factor in this absence of legislation. As more and more studies become released on this ever-growing phenomenon, the legislature will have a stronger foundation in formulating legislation that protects and serves those who are on both sides of the issue of e-cigarettes. However, the government must be wary not to ignore the incredibly diverse array of devices and ingredients that go under the banners of e-cigarettes and "e-juice". While the debate may never truly be settled, if the legislature can account for these differences amongst devices and solutions, an effective middle-ground can certainly be reached.

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<sup>330</sup> Health Canada Importation Notice, *supra* note 5; Health Canada Import and Export Policy, *supra* note 144.

<sup>331</sup> Please see Section IV for a more detailed discussion on the provincial legislation.