Legislative Summary **LS-648E**

BILL C-32: AN ACT TO AMEND THE TOBACCO ACT

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LEGISLATIVE HISTORY OF BILL C-32

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	26 May 2009	First Reading:	17 June 2009
Second Reading:	3 June 2009	Second Reading:	**16 September 2009**
Committee Report:	17 June 2009	Committee Report:	**1 October 2009**
Report Stage:	17 June 2009	Report Stage:	
Third Reading:	17 June 2009	Third Reading:	**6 October 2009**

Royal Assent: **8 October 2009**

Statutes of Canada **2009, c. 27**

N.B. Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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BACKGROUND

Bill C-32, An Act to amend the Tobacco Act, was introduced by the Minister of Health, the Honourable Leona Aglukkaq, in the House of Commons on 26 May 2009**, and it received Royal Assent on 8 October 2009**. The bill amends existing provisions in the *Tobacco Act* and introduces new provisions relating to, among other things, little cigars, additives in tobacco products, and the advertising of tobacco products.

A. The Tobacco Products Control Act and the Tobacco Act

The *Tobacco Products Control Act* came into force on 1 January 1989.(1) The purpose of the Act was set out in section 3:

> 3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
>
> (b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
>
> (c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both houses of Parliament, receive Royal Assent, and come into force.

(1) *Tobacco Products Control Act*, S.C. 1988.

The *Tobacco Products Control Act* prohibited almost all tobacco advertising, with very limited exceptions. That Act was challenged in *RJR-MacDonald Inc*. v. *Canada (Attorney General)* on the basis that it infringed the right to freedom of expression,(2) which is protected under section 2(*b*) of the *Canadian Charter of Rights and Freedoms*. The *Tobacco Products Control Act* was struck down by the Supreme Court of Canada in that decision in 1995. Five of the nine justices found that the advertising prohibitions in the Act violated section 2(*b*) of the Charter and that the infringement was not justified under section 1. The four other justices agreed that the prohibitions violated section 2(*b*), but would have allowed the legislation to stand as the infringement was justified under section 1.

In response to the 1995 Supreme Court of Canada decision, the *Tobacco Act*(3) was introduced. The purpose of that Act, which came into force in 1997, is similar to that of the *Tobacco Products Control Act*:

> PURPOSE
>
> Purpose of Act
>
> 4. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (*a*) to protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
>
> (*b*) to protect young persons and others from inducements to use tobacco products and the consequent dependence on them;
>
> (*c*) to protect the health of young persons by restricting access to tobacco products; and
>
> (*d*) to enhance public awareness of the health hazards of using tobacco products.

As was the case with the *Tobacco Products Control Act*, a number of the *Tobacco Act*'s provisions, including restrictions on advertising, were challenged on the basis that they infringed the right to freedom of expression under the Charter. The Supreme Court of Canada ruled unanimously that all of the challenged provisions of the *Tobacco Act* infringed the right of freedom of expression under section 2(*b*) of the Charter but were justified under section 1.(4)

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(2) *RJR-MacDonald Inc*. v. *Canada (Attorney General)*, [1995] 3 S.C.R. 199.

(3) *Tobacco Act*, S.C. 1997, c.13.

(4) *Canada (Attorney General)* v. *JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610, 2007 SCC 30.

B. The Issues That Bill C-32 Proposes to Address

1. Little Cigars

Evidence suggests that little cigars, or cigarillos, are increasing in popularity among younger smokers.(5) Health Canada had initially proposed regulating little cigars, which have historically been considered cigars and not cigarettes, under the *Tobacco (Access) Regulations*(6) by adding a definition of little cigars and prescribing the minimum number of little cigars that could be sold at a time.(7) This was thought to be necessary because while the existing *Tobacco Act* prescribes a minimum number of cigarettes that can be sold at a time, there is no provision relating to the number of little cigars that can be sold at a time.(8) This has meant that little cigars have been sold as single units at a low cost. Health Canada carried out a consultation on the proposal to amend the *Tobacco (Access) Regulations* between 30 May 2008 and 30 July 2008.(9)

2. Flavoured Tobacco Products

In recent years, there has been an increase in the use of flavours and additives to products such as little cigars and blunt wraps (a sheet or tube made of tobacco that is used to roll cigarette tobacco). The use of certain flavours, such as fruit and chocolate, in tobacco products is believed to induce youth to smoke.

3. Advertising Geared to Youth

Concerns have been raised that advertisements for new tobacco products that have been appearing in entertainment magazines, including in free, widely distributed publications, have been targeting youth.(10) Under section 17 of the *Tobacco Reporting Regulations*,

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(5) Health Canada, Tobacco Control Programme, "A Proposal to Regulate Little Cigars under the *Tobacco (Access) Regulations*: A Consultation Paper," May 2008, p. 1.

(6) *Tobacco (Access) Regulations*, SOR/99-93.

(7) Health Canada, Tobacco Control Programme (2008).

(8) Ibid., p. 3.

(9) Health Canada, "Little Cigars – Access," http://www.consultations.hc-sc.gc.ca/public-consult/consultations/calendar-calendrier/consultation_e.php?id=176.

(10) See, for example, Roger Collier, "Cigarette ads return to Canadian magazines," *Canadian Medical Association Journal*, 12 February 2008, p. 384; and William Marsden, "Latest campaign has anti-smoking groups fuming," *The Leader-Post* [Regina], 28 December 2007.

manufacturers are required to report information related to their advertising to Health Canada.[11] For example, if a tobacco product is advertised in a publication, the manufacturer must indicate every province in which the publication was distributed, the dates of the advertisement, and the total cost of the advertisement (section 17(1)). Section 22(2)(*b*) of the *Tobacco Act* allows certain forms of tobacco advertising in publications that have an adult readership of at least 85%. However, it is unclear how and if a publication is required to demonstrate that adults comprise at least 85% of its readership. Health Canada has stated that "the tobacco industry has been taking full advantage of [this exception to advertising restrictions]."[12]

DESCRIPTION AND ANALYSIS

Bill C-32 contains 18 clauses and a schedule. In addition to technical and consequential amendments, and the inclusion of new definitions, the bill:

- creates a schedule that lists a number of additives that are prohibited in certain tobacco products;
- prohibits the sale of certain tobacco products that contain certain additives;
- amends the information that tobacco manufacturers must provide to the minister;
- amends packaging requirements relating to certain tobacco products;
- repeals the provision that permits the promotion of a tobacco product by means of information advertising or brand-preference advertising in publications that have an adult readership of not less than 85%; and
- establishes penalties relating to the new prohibitions.

The bill does not amend the following parts of the *Tobacco Act*: Part III (Labelling), Part V (Enforcement), Part V.1 (Laying of Proposed Regulations) and Part VII (Agreements).

The following sections provide a summary overview of selected clauses contained in the bill.[13]

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(11) *Tobacco Reporting Regulations*, SOR/2000-273.

(12) Health Canada, "Backgrounder – An Act to amend the *Tobacco Act*," http://www.hc-sc.gc.ca/ahc-asc/media/nr-cp/_2009/2009_78bk1-eng.php.

(13) For reasons of clarity, discussion relating to clauses of the bill will also refer to the particular sections of the Act referred to in a particular clause, as the majority of clauses in the bill amend or replace several different sections of the existing *Tobacco Act*.

A. Title and Definitions (Clauses 1–2)

Clause 1 provides that the alternative title for the bill is the *Cracking Down on Tobacco Marketing Aimed at Youth Act*. Clause 2 repeals the definition of "package" in section 2 of the Act, and adds definitions for the following terms: "additive," "blunt wrap," "ingredient" and "little cigar." **The amendments to section 2 will come into force 180 days after the date of Royal Assent.**

B. Governor in Council's Powers (Clause 3)

Clause 3 of the bill adds a new section 2.1(1) that authorizes the Governor in Council to make regulations prescribing any tobacco product to be a "little cigar." **This section will come into force 180 days after the date of Royal Assent.**

C. Prohibition – Manufacture and Sale (Clauses 4–5)

Clause 4 adds a new section 5.1, which prohibits the use of additives listed in column 1 of the new schedule in the manufacture of tobacco products listed in column 2 of that schedule (new section 5.1(1)), although it does allow for the use of colouring agents to depict a trademark on a tobacco product "or to display a marking required under this or any other Act of Parliament or of the legislature of a province or for any other prescribed purpose" (new section 5.1(2)). New section 5.1 comes into force 180 days after the bill receives Royal Assent. Ninety days after the coming into force of new section 5.1, clause 5 of the bill, which creates a new section 5.2, will prohibit the sale of such a tobacco product.

D. Information Required From Manufacturers (Clauses 6–7)

Clause 6 of the bill amends the existing section 6 of the *Tobacco Act* that requires manufacturers to provide information about a product and its emissions to the minister. The new section 6(1) adds the requirement to submit information relating to any research and development related to tobacco products, and also qualifies that the information is to be submitted whether or not the tobacco products are for sale. New section 6(2) authorizes the minister to request supplementary information from manufacturers. Clause 7 creates a new section 6.1 that prohibits manufacturers from manufacturing or selling a tobacco product unless they have submitted all information relating to the product's composition and ingredients to the minister. **Section 6.1 will come into force on a day to be fixed by an order of the Governor in Council.**

E. Regulations Relating to Tobacco Products (Clause 8)

While clause 8(1) replaces most of section 7 of the Act, new sections (*a*), (*b*) and (*c*) are very similar to the existing sections (*a*), (*b*) and (*c*). One key difference between the new and the existing sections is that the authority to make regulations prescribing substances that may not be added to tobacco products has been removed from section (*a*) (presumably because that is now addressed in new section 5.1 [clause 4]). Another key difference is that section (*c*), which authorizes the making of regulations prescribing information that must be submitted to the minister about tobacco products and their emissions, has been expanded to include the authority to prescribe information that must be submitted on market research and health effects. Clause 8(1) also adds new sections (*c.1*), which allows for the making of regulations prescribing information that manufacturers must submit about research and development related to tobacco products and their emissions, (*c.2*), which allows for the making of regulations respecting requests for supplementary information, and (*c.3*), which allows for the making of regulations respecting the new section 6.1 prohibiting the manufacture or sale of a tobacco product unless all required information has been submitted to the minister (clause 7).

F. Amending the Schedule (Clause 9)

Clause 9 creates a new section 7.1, which authorizes the Governor in Council to amend the proposed schedule by adding, amending or deleting either the name or description of an additive or tobacco product (section 7.1(*a*)) or a reference to all tobacco products, with or without exceptions (section 7.1(*b*)). **Section 7.1 will come into force 180 days after the date of Royal Assent.**

G. Minimum Number of Products in Package (Clause 10)

Clause 10 broadens the existing section 10 (relating to prohibiting the sale of cigarettes unless they are packaged in a minimum number) to specify the minimum number of cigarettes, little cigars or blunt wraps per package that can be imported for sale in Canada, or that can be packaged, distributed or sold. Other tobacco products cannot be imported for sale in Canada, or packaged**,** distributed or sold unless they are sold in a package that contains at least the prescribed portions, number or quantity of the tobacco product (clause 10(2)). **Section 10 will come into force 180 days after the date of Royal Assent.**

H. Advertising (Clause 11)

Clause 11 repeals section 22(2)(*b*), which permits the advertising of a tobacco product by means of information advertising or brand-preference advertising in publications that have adult readerships of not less than 85%.

I. Packaging (Clause 12)

Clause 12(1) adds a new section 23.1(1), which prohibits a person from packaging a tobacco product listed in column 2 of the proposed schedule in a manner that suggests that it contains an additive listed in column 1. New section 23.1(1) comes into force 180 days after the bill receives Royal Assent. Ninety days after the coming into force of new section 23.1(1), clause 12(2) of the bill, which adds a new section 23.1(2), will prohibit a person from selling such a tobacco product.

J. Accessories (Clause 13)

To be consistent with the repeal of existing section 22(2)(*b*) (clause 11, advertising), clause 13 amends existing section 26(2) to prohibit the promotion of an accessory that displays a tobacco-product-related brand element except in the prescribed manner and form and in a publication or place described in sections 22(2)(*a*) and (*c*).

K. Packaging and Promotion Offences and Summary Conviction Offences (Clauses 14–16)

Clause 14(1) adds a new section 43.1, which provides that every manufacturer who contravenes new section 5.1(1) (prohibition of using additives listed in column 1 of the schedule to manufacture tobacco products listed in column 2) or 23.1(1) (prohibition of packaging a tobacco product listed in column 2 of the schedule in a manner that suggests that it contains an additive listed in column 1) is guilty of an offence and is liable on summary conviction to a maximum fine of $300,000 or to a maximum of two years' imprisonment or both. New section 43.1 comes into force 180 days after the bill receives Royal Assent.

Ninety days later, clause 14(2) of the bill will replace that section with a new version, bearing the same number (43.1). The new version will add references to the offence relating to the sale of a tobacco product listed in column 2 of the schedule containing additives listed in column 1 of the schedule, as provided for in new section 5.2(1), and the offence relating

to the sale of a tobacco product listed in column 2 of the schedule that is packaged in a manner that suggests that it contains an additive listed in column 1, as provided for in new section 23.1(2). Also coming into at that time is new section 43.2, which establishes that every retailer who contravenes section 5.2(1) or section 23.1(2) is guilty of an offence and liable on summary conviction to a maximum fine of $50,000.

Clause 15 amends the existing section 44 of the Act to include references to new sections 6(1) (requirement to provide information relating to research and development) and 6(2) (requirement to provide supplementary information). Contravening those provisions will carry the same penalty as the other provisions referred to in the existing section 44 of the Act, namely a maximum fine of $50,000, a maximum of six months' imprisonment or both.

Finally, clause 16 adds a new section 44.1, which provides that every manufacturer who contravenes section 6.1 (prohibition of manufacturing or selling a tobacco product unless all required information has been submitted to the minister) is guilty of an offence and liable on summary conviction to a maximum fine of $50,000, a maximum of six months' imprisonment or both. **Section 44.1 will come into force on a day to be fixed by an order of the Governor in Council.**

L. Schedule (Clause 17)

Clause 17 amends the Act by adding the schedule in relation to new section 5.1 (clause 4) after the existing section 66. **The schedule will come into force 180 days after the date of Royal Assent.**

M. Coming Into Force (Clause 18)

Clause 18 sets out the varying coming into force dates related to certain clauses of the bill. For clarity, some of the coming into force dates have been referenced above in conjunction with the description of relevant clauses.[14]

(14) **Whenever the coming into force information is not included in the text, the clause comes into force upon Royal Assent.**

COMMENTARY

For the most part, the response to the introduction of Bill C-32 has been positive. The Canadian Lung Association, the Canadian Cancer Society, and the Heart and Stroke Foundation have all expressed support for the bill.(15) There has been, however, some criticism of the bill by individual tobacconists and tobacco importers, who contend that the bill is not needed, and that restricting legal access to flavoured little cigars will result in youth using contraband products instead.(16)

While members of Parliament were generally supportive of Bill C-32, many raised the concern that the bill did not address the issue of contraband tobacco. Health Canada officials who appeared before the House of Commons Standing Committee on Health during its review of the bill clearly stated that the issue of contraband tobacco was outside of the scope of the *Tobacco Act*.

During the Health Committee's review of the bill as well as during House of Commons debate, it was also suggested that the bill should prohibit smokeless flavoured tobacco products, and that menthol should be included in the schedule of prohibited additives. Witnesses opposing the bill who appeared before the Health Committee argued that there was no research supporting a ban on flavoured tobacco and that such a ban might increase the demand for contraband tobacco products.

One witness suggested that the amendment that removed the ability to advertise in publications that have an adult readership of at least 85% was unnecessary, and that instead the existing provision should be properly enforced.

Finally, a concern was raised that the manner in which the provisions relating to prohibited additives were drafted precluded the use of some ingredients commonly employed in the manufacture of non-flavoured tobacco products. In response to this concern, a government amendment to the schedule was introduced during the Health Committee's clause-by-clause consideration of the bill. Adopted by the committee, the amendment was concurred in by the House of Commons at report stage.

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(15) See, for example, The Canadian Press, "Ottawa banning flavoured tobacco meant to entice youth," *The Guelph Mercury*, 27 May 2009, and André Picard, "Ottawa vows to ban cigarillo 'kiddie packs,'" *The Globe and Mail* [Toronto], 27 May 2009.

(16) See, for example, Alyssa Noel, "Fight on for flavoured smokes: Tobacconist launches campaign with e-mail blitz to politicians in bid to stop banning bill," *The Edmonton Sun*, 30 May 2009; and Meagan Fitzpatrick, "Flavoured tobacco going up in smoke"? *The Ottawa Citizen*, 26 May 2009.

Health Canada officials stated that they would continue to study the issue of smokeless flavoured tobacco products and would report back to the Health Committee on how best to respond.

Bill C-32 proceeded to the Senate, where some additional issues and concerns were raised before the Standing Committee on Social Affairs, Science and Technology concerning the bill's potential impact with regards to traditional US blended non-flavoured tobacco products (US blends).

US blends, such as Winston, Camel and Gauloises, use burley tobacco, which is bitter, so ingredients are added to make them more palatable. However, the additives do not result in distinguishable flavours, and US blends are not aimed at young people. By comparison, Canadian manufacturers predominately use Virginia flue-cured tobacco, which is naturally sweeter than burley tobacco, so additives are not used to sweeten non-flavoured cigarettes. Some witnesses supported the overall intent of Bill C-32 but raised concerns that banning the use of additives would inadvertently prohibit the sale of US blends in Canada. Health Canada officials responded that Bill C-32 would not result in a ban on burley tobacco but only some of the ingredients added to it. Further, they testified this would only impact 0.5% of the retail sales market in Canada.

Other witnesses expressed concern that the proposed prohibition on the use of additives would force the closure of companies in Canada that manufacture US blended cigarettes. They gave as an example the Rothmans Bensons & Hedges factory in the city of Québec, which employs 300 people and manufactures US blended cigarettes for export to other countries. Health Canada officials clarified that the proposed prohibition would not preclude the manufacture of tobacco products that could not be sold in Canada for export to other countries.

Finally, a witness raised a concern that Bill C-32 is inconsistent with Canada's international trade obligations under the North America Free Trade Agreement and the World Trade Organization because it is unnecessarily restrictive on trade, and bans ingredients other than those considered to be appealing to youth. Health Canada officials indicated that the bill is consistent with international trade obligations.