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LEGISLATIVE SUMMARY

Bill S-5:
An Act to amend the Tobacco Act and the Non-smokers' Health Act and to make consequential amendments to other Acts

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

Legislative Summary of Bill S-5
(Legislative Summary)

Publication No. 42-1-S5-E

Ce document est également publié en français.

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LEGISLATIVE SUMMARY OF BILL S-5: AN ACT TO AMEND THE TOBACCO ACT AND THE NON-SMOKERS' HEALTH ACT AND TO MAKE CONSEQUENTIAL AMENDMENTS TO OTHER ACTS

1 BACKGROUND

Bill S-5, An Act to amend the Tobacco Act and the Non-smokers' Health Act and to make consequential amendments to other Acts[1] (short title: *Tobacco and Vaping Products Act*) was introduced in the Senate on 22 November 2016 by Senator Peter Harder. The bill proposes amendments that would implement a legislative framework under the *Tobacco Act* for vaping products.

It was referred to the Standing Senate Committee on Social Affairs, Science and Technology on 9 March 2017. The Senate committee studied the bill from 5 to 13 April 2017 and reported it back to the Senate on 2 May 2017 with amendments and observations.[2] The bill was passed by the Senate with an amendment on 1 June 2017 and was introduced in the House of Commons on 15 June 2017. **It was debated at second reading and referred to the House of Commons Standing Committee on Health on 30 January 2018. The bill was reported with amendments by that committee on 20 March 2018[3] and concurred in by the House of Commons on 27 April 2018. A message was sent to the Senate with the amendments, which were concurred in on 10 May 2018. The bill received Royal Assent on 23 May 2018.**

A "vaping product" is defined in clause 3(3) of the bill as

> (a) a device that produces emissions in the form of an aerosol and is intended to be brought to the mouth for inhalation of the aerosol;
>
> (b) a device that is designated to be a vaping product by the regulations;
>
> (c) a part that may be used with those devices; and
>
> (d) a substance or mixture of substances, whether or not it contains nicotine, that is intended for use with those devices to produce emissions.
>
> It does not include devices and substances or mixtures of substances that are excluded by the regulations, tobacco products or their accessories.

Among other things, the bill:

- prohibits the sale of vaping products (as defined in the bill) to minors, including sending a vaping product to a minor;
- prohibits the promotion of vaping products containing flavours that appeal to youth;
- requires manufacturers to submit information about a vaping product to the Minister of Health before the product can be sold;

- restricts advertising of vaping products; and
- increases penalties for tobacco-related offences.

The bill also introduces provisions to permit the implementation of plain packaging requirements for tobacco products.

1.1 Tobacco Legislation in Canada

Laws relating to tobacco control have been enacted at both the provincial and the federal levels. At the federal level, the *Tobacco Act*[4] replaced the *Tobacco Products Control Act* (1989) in 1997. The purpose of the *Tobacco Act* is set out in section 4 of that Act:

> 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.

The *Non-smokers' Health Act*[5] has been in force since 1988. Its purpose is reflected in its long title, *An Act to regulate smoking in the federal work-place and on common carriers and to amend the Hazardous Products Act in relation to cigarette advertising*. The statute imposes prohibitions and restrictions on the use of tobacco products in federally regulated work places.

1.2 Vaping Products

The World Health Organization (WHO) provides the following description of nicotine-containing vaping products, which it refers to as "electronic nicotine delivery systems" or "ENDS":

> 3. ENDS, of which electronic cigarettes are the most common prototype, deliver an aerosol by heating a solution that users inhale. The main constituents of the solution by volume, in addition to nicotine when nicotine is present, are propylene glycol, with or without glycerol and flavouring agents.
>
> 4. Although some ENDS are shaped to look like their conventional tobacco counterparts (e.g. cigarettes, cigars, cigarillos, pipes, or hookahs), they also take the form of everyday items such as pens, USB memory sticks, and larger cylindrical or rectangular devices.
>
> 5. Battery voltage and unit circuitry differences can result in considerable variability in the products' ability to heat the solution to an aerosol and, consequently, may affect delivery of nicotine and other constituents, and may contribute to the formation of toxicants in the emissions.[6]

Vaping products, principally electronic cigarettes (e-cigarettes) and the accessories that are marketed along with them, are subject to the *Food and Drugs Act*[7] and the *Food and Drug Regulations*[8] only if the products contain more nicotine than the limit in the list of prescription drugs published by Health Canada.[9] The list specifies that nicotine "in a form to be administered orally by means of an inhalation device delivering 4 milligrams or less of nicotine per dosage unit" is not considered a prescription drug.

E-cigarettes first appeared on the market in Canada in 2007.[10] In response to rising concerns about the health risks of e-cigarettes, Health Canada issued an advisory in March 2009 emphasizing that any product containing nicotine needs to be authorized for sale in Canada and that at that time none of the e-cigarettes had received approval from the department.[11]

A number of provinces and municipalities have regulated – or are in the process of regulating – electronic cigarettes, whether or not they contain nicotine.[12]

1.2.1 The World Health Organization and Vaping Products

Vaping products have been the subject of discussion at the Conference of the Parties (COP) to the WHO Framework Convention on Tobacco Control (FCTC). A discussion paper prepared by WHO in 2014 summarized the debate with respect to ENDS as follows:

> ENDS are the subject of a public health dispute among bona fide tobacco-control advocates that has become more divisive as their use has increased. Whereas some experts welcome ENDS as a pathway to the reduction of tobacco smoking, others characterize them as products that could undermine efforts to denormalize tobacco use.[13]

WHO discussions and recommendations on this subject also include products that are used to inhale substances that do not contain nicotine as "electronic non-nicotine delivery systems," or "ENNDS." In September 2014, at the sixth session of the COP, a decision was adopted, and states parties were invited to take measures with respect to ENDS/ENNDS to:

- prevent use by non-smokers and youth;
- minimize potential health risks to users and others who might be exposed to emissions;
- prevent the use of unproven health claims; and
- "protect tobacco-control activities from all commercial and other vested interests related to ENDS/ENNDS, including interests of the tobacco industry."[14]

1.2.2 The United States and Vaping Products

In August 2016, a United States Food and Drug Administration Rule[15] came into effect that deemed nicotine-containing vaping products (referred to in the Rule as "electronic nicotine delivery systems," or "ENDS") to be tobacco products for the purpose of the *Federal Food, Drug, and Cosmetic Act*.[16]

1.2.3 The House of Commons Standing Committee on Health's Report, *Vaping: Towards a Regulatory Framework for E-Cigarettes*

In September 2014, the Minister of Health requested that the House of Commons Standing Committee on Health undertake a study of the risks and benefits of e-cigarettes. The committee heard evidence on several points:

- the potential health risks to individuals who use e-cigarettes;
- risks to bystanders;
- that e-cigarettes may be less harmful than other nicotine products;
- that e-cigarettes may be helpful with smoking cessation;
- that e-cigarettes could have a "gateway effect," meaning that children and non-smokers might start using e-cigarettes and then progress to smoking cigarettes; and
- that e-cigarettes could renormalize tobacco use, including smoking.

In March 2015, the committee issued its report, *Vaping: Towards a Regulatory Framework for E-Cigarettes*,[17] recommending that the Government of Canada work with all stakeholders to establish a legislative framework for e-cigarettes, either by amending the *Tobacco Act* or by introducing new legislation. The committee noted that there was "widespread agreement among witnesses that insufficient evidence exists to reach a clear conclusion with respect to health risks or benefits associated with the use of electronic cigarettes."[18] A number of the issues that the committee recommended be addressed in the legislative framework are included as part of Bill S-5, including:

- prohibiting "the sale of electronic cigarettes or other electronic nicotine delivery systems to persons under the age of 18";[19]
- prohibiting unproven health claims about vaping products;
- restricting the advertising and promotion of vaping products; and
- prohibiting cross-branding of vaping products and tobacco products.

1.3 Plain Packaging

Plain packaging for tobacco products has been discussed in Canada and around the world for decades. As WHO explains, the goals of plain packaging are as follows:

1. reducing the attractiveness of tobacco products;
2. eliminating the effects of tobacco packaging as a form of advertising and promotion;
3. addressing package design techniques that may suggest that some products are less harmful than others; and
4. increasing the noticeability and effectiveness of health warnings.[20]

Plain packaging involves prohibiting or restricting the use of colours, brand elements, logos and other design elements on tobacco packaging and could require that the package shape and format be standardized.

As early as the mid-1980s, organizations, including the Canadian Medical Association, the National Council on Tobacco or Health (now the Canadian Council for Tobacco Control) and the Non-Smokers' Rights Association advocated for plain packaging.

In 1994, the House of Commons Standing Committee on Health undertook a study on plain packaging. In June of that year the committee issued a report entitled *Towards Zero Consumption – Generic packaging of tobacco products*, in which it recommended that "the federal government establish the legislative framework to proceed with plain or generic packaging of tobacco products."[21]

In May 1995, Health Canada released a report on generic packaging prepared by the Expert Panel established by the department. The report suggested that the health warnings on tobacco products might be perceived as more credible when included on plain packaging.[22] The issue was not pursued further at that time, possibly because of the 1995 Supreme Court of Canada decision in *RJR-MacDonald Inc. v. Canada (Attorney General)*,[23] which struck down the *Tobacco Products Control Act*, requiring the federal government to table new tobacco legislation during this period.

In recent years, a number of countries have introduced measures to require plain packaging for tobacco products. Australia was the first to adopt plain packaging legislation in 2011. Since that time, plain packaging requirements have been introduced or implemented in the United Kingdom, France, Hungary, New Zealand, Ireland, Norway, Slovenia, Chile, Uruguay, Thailand, Singapore, Belgium, Romania, Finland, Turkey and South Africa.[24] The European Union adopted a directive in April 2014 that allows member states to require plain packaging on tobacco products.[25] Plain packaging measures have been challenged by tobacco companies, in part on the basis that they violate international trade agreements.

In November 2015, the Canadian federal Minister of Health, Jane Philpott, was given a mandate to "introduce plain packaging requirements for tobacco products."[26] Bill S-5, while not including explicit provisions that prohibit packaging other than plain packaging, includes language permitting the implementation of a new regulatory framework that would require plain packaging. As a Health Canada backgrounder on plain packaging states, the new *Tobacco and Vaping Products Act* will "provide the flexibility to support implementation of a range of options such as standardized colour, font and finish, and prohibitions on promotional information and brand elements, such as logos."[27]

2 DESCRIPTION AND ANALYSIS

Bill S-5 contains two parts and three schedules.

Part 1 is divided as follows:

- clauses 1 through 70 contain amendments to the *Tobacco Act*;
- clauses 71 through 76 contain consequential amendments to the *Food and Drugs Act*, *An Act to amend the Tobacco Act* and the *Canada Consumer Product Safety Act*;
- clause 77 replaces references to the *Tobacco Act* in other laws and regulations with references to the *Tobacco and Vaping Products Act*;
- clauses 78 and 79 contain coordinating amendments; and
- clause 80 contains the coming-into-force provisions.

Part 2 of the bill contains amendments to the *Non-smokers' Health Act* (clauses 81 to 85).

Rather than examining each provision, the description and analysis that follow focus on the substantive changes resulting from the bill.

2.1 AMENDMENTS TO THE *TOBACCO ACT* (CLAUSES 1 TO 70)

2.1.1 TITLES, INTERPRETATION, GOVERNOR IN COUNCIL'S POWERS, AND PURPOSE (CLAUSES 1 TO 5)

Clause 1 of the bill establishes the long title of the Act, and clause 2 sets the short title, which is *Tobacco and Vaping Products Act*.

Clause 3(1) amends a number of definitions contained in section 2 of the existing *Tobacco Act* to include a reference to vaping products, and clause 3(3) adds a definition of "vaping product" (see section 1 of this Legislative Summary).

Clause 3(3) also moves the definition of "lifestyle advertising"[28] from section 22(4) of the current *Tobacco Act* into section 2 of the Act.

Clause 4 of the bill amends the Governor in Council's regulation-making authority contained in section 2.1 of the Act in part by adding the authority to:

- designate a device to be a vaping product; and
- designate a device, a substance or mixture of substances to not be a vaping product.

Clause 5 of the bill amends the purpose section of the Act (section 4) to establish separate purposes for tobacco products and vaping products. In relation to tobacco products, new section 4(2)(c) adds "to prevent the public from being deceived or misled with respect to the health hazards of using tobacco products" to the existing purpose (which is described in section 1.1 of this Legislative Summary). With respect to vaping products, new section 4(3) adds provisions whose aim is, in part, to prevent the "gateway effect" by which the use of vaping products by youth and non-smokers might lead to tobacco smoking.

2.1.2 PART I: TOBACCO PRODUCTS (CLAUSES 6 TO 11)

Clause 7(2) repeals section 5.1(2) of the Act, which provides an exception to the prohibition against the use of certain additives for the "use of a colouring agent to depict a trade-mark on a tobacco product or to display a marking[29] required under this or any other Act of Parliament or of the legislature of a province or for any other prescribed purpose." The substance of this section is captured in new section 5.3(3) (added through clause 8).

Unless a marking is authorized by regulations or is required by provincial legislation, the manufacture or sale of a tobacco product that displays a marking is prohibited (clause 8, adding sections 5.3(1) and 5.3(2)).

Clause 9 of the bill amends the provisions relating to information that the Minister of Health can request from manufacturers in relation to tobacco products:

- The information must be submitted in the prescribed form (new sections 6(1) and 6(2)).
- For supplementary information, the minister can specify the form, manner and timeframe in which the information must be provided (new section 6(2)).
- Manufacturers (new section 6.1) and the minister (new section 6.2) must make prescribed information about tobacco products and their emissions available to the public.
- The minister is required to make prescribed information about research and development related to tobacco products and their emissions available to the public (new section 6.2).

Under clause 10, manufacturers are prohibited from selling a tobacco product unless the prescribed information has been submitted to the minister (new section 6.01).

Clause 11 amends the regulation-making authority of the Governor in Council by adding the authority to make regulations relating to "the sensory attributes" of tobacco products and their emissions, the concentrations of substances in them, and the "dimensions, weight, components and performance of the products" (amended section 7(a)).

Under clause 11, regulations can also be made in relation to the following:

- tobacco product markings (new section 7(b.1));
- information about tobacco products and emissions (amended section 7(c)) and about research and development (amended section 7(c.1)) that manufacturers must provide to the minister;
- the suspension of the sale of a tobacco product where the prescribed information has not been submitted to the minister (amended section 7(c.3)); and
- prescribing the information that has to be made publicly available by manufacturers (new section 7(d.01)) and the minister (new section 7(d.02)).

2.1.3 PART I.1: VAPING PRODUCTS (CLAUSES 12 AND 13)

Clause 12 adds Part I.1 "Vaping Products" to the *Tobacco Act*. The provisions contained in new Part I.1 are very similar to the provisions relating to tobacco products. For example:

- a manufacturer can only manufacture or sell a vaping product in accordance with the regulations (new section 7.2);
- a manufacturer must submit prescribed information to the minister about vaping products (new section 7.3(1));
- the minister can request supplementary information from the manufacturer (new section 7.3(2));
- a manufacturer cannot sell a vaping product unless the prescribed information has been submitted to the minister (new section 7.4); and
- manufacturers (new section 7.5) and the minister (new section 7.6) must make prescribed information publicly available unless the vaping product has never been for sale in Canada (new section 7.7).

New section 7.8 establishes a fairly broad regulation-making authority for the Governor in Council in relation to characteristics of vaping products and emissions, test methods, information that must be submitted to the minister, and "generally for carrying out the purposes of this Part" of the Act (new section 7.8(k)).

Clause 13 includes provisions related to Schedule 2, which lists ingredients that cannot be used to manufacture vaping products (new sections 7.21, 7.22 and 7.23). These provisions will come into effect 180 days after Bill S-5 receives Royal Assent (see clause 80(3)).

2.1.4 PART II: ACCESS (CLAUSES 14 TO 19)

Clause 14 amends section 8(1), which prohibits furnishing a tobacco product to a young person in a public place, to similarly prohibit furnishing a vaping product to a young person. Young persons are defined in the *Tobacco Act* as persons under 18 years of age.

Clause 15(1) replaces section 9, which requires retailers to post signs containing prescribed information relating to selling or giving a tobacco product to a young person, or health-related information. New section 9 instead prohibits sending or delivering a tobacco or vaping product to a young person (new section 9(1)), and provides defences for the sender (new section 9(2)) and for the person making the delivery (new section 9(3)).

Clause 15(1) also prohibits sending or delivering a tobacco product from one province to another except in certain circumstances (new section 9.1(1)). Advertising to send or deliver a tobacco product from one province to another is also prohibited (new section 9.1(2)). Similar provisions are currently found in section 13 of the *Tobacco Act*.

Clause 16 adds new section 10(3) to prohibit importing a prescribed vaping product for sale, or packaging, distributing or selling the product unless it is in a package that contains the prescribed amount.

Clause 17 amends section 12, which relates to dispensing devices, to prohibit furnishing tobacco and vaping products through such devices, except under circumstances prescribed by regulation. The current section 12 allowance for tobacco dispensing devices in places “to which the public does not reasonably have access” or in bars has been removed.

Clause 18 replaces section 13 (which relates to the delivery and mailing of tobacco products) with provisions about prescription vaping products. New section 13(1) provides that prescription vaping products and devices as defined in the *Food and Drugs Act* that are authorized for sale are exempt from the provisions that prohibit furnishing or delivering tobacco or vaping products to a young person, as well as the provisions relating to the importing for sale, etc., of prescribed quantities of a vaping product.

2.1.5 Part III: Labelling (Clauses 20 to 22)

Section 15(1) of the Act prohibits a manufacturer or retailer from selling a tobacco product unless its packaging displays prescribed information about the product, its emissions and its potential health hazards and effects. Clause 20, through new section 15(1.1), adds a prohibition against packaging a tobacco product that does not display the information described in section 15(1) **on the package and the product.**

Clause 21 sets out prohibitions against selling, manufacturing or packaging vaping products unless the packaging contains prescribed information similar to that required for tobacco products (new sections 15.1(1) to 15.1(4) and 15.2). Clause 21 also prohibits a manufacturer or retailer from selling a tobacco product if the packaging contains information that is contrary to the regulations (new section 15.3(1)), or if written information is provided with a tobacco product that is contrary to the regulations (new section 15.3(2)).

Clause 22 amends the regulation-making authority of the Governor in Council in relation to labelling, in part so that regulations can be made with respect to the labelling of vaping products (new section 17(a.1)).

2.1.6 Part IV: Promotion (Clauses 23 to 44)

The existing provisions of the Act relating to the promotion of tobacco products are restructured to create Division 1, which applies to tobacco products, Division 2, which applies to vaping products, and Division 3, "Miscellaneous Provisions."

Clause 23(3) establishes exceptions for the promotion of vaping products in certain artistic works and in "a report, commentary or opinion" if no benefit is received, and promotion by manufacturers that is directed at manufacturers, distributors and retailers (new section 18(3)). These exceptions mirror the existing exception for promotion of tobacco products found in section 18(2).

2.1.6.1 Division 1: Tobacco Products (Clauses 23 to 35)

Clause 25 amends section 19 to specify that promotion "by means of the packaging" is included in the existing prohibition against promoting a tobacco product or a tobacco product–related brand element (except in accordance with the regulations). The same specification is added to the existing prohibition against promoting a tobacco product through a testimonial or an endorsement (clause 28(1), amending section 21(1)). Clause 28(2) removes the current exception in section 21(3) for testimonials or endorsements with respect to trade-marks.

Clause 27 prohibits the promotion of a tobacco product, including through its packaging, in a way that would give the impression that the product or its emissions are less harmful than other tobacco products (new section 20.1(a)), or by using "terms, expressions, logos, symbols or illustrations" that are contrary to the regulations (new section 20.1(b)).

Clause 30 prohibits the sale of a tobacco product that is packaged contrary to the Act or regulations (new section 23(2)); this is in addition to the prohibition of packaging a tobacco product in a manner not permitted by the regulations (section 23(1)).

Clause 32 prohibits what is commonly referred to as "cross-branding": a person can neither display a vaping product–related brand element on a tobacco product package (new section 23.2(1)) nor can they sell such a product (new section 23.2(2)). **It also prohibits the promotion or sale of a device that is a tobacco product or a part that can be used with the device if the device or part has a sensory attribute or function that there are reasonable grounds to believe could appeal to young persons (new section 23.3).**

Clause 33 amends the sponsorship provisions contained in section 24 of the Act. The wording in the English version of the Act is changed to match the French: rather than prohibiting anyone to "display" a tobacco product–related brand element or the manufacturer's name "in the sponsorship of a person, entity, event, activity or

permanent facility," new section 24(2) prohibits anyone to "use" ("utiliser" in the French version) the brand element or manufacturer's name in those cases (new section 24(2)). In addition, promoting a tobacco product–related brand element or the manufacturer's name "in a manner that is likely to create an association between the brand element or the name and a person, entity, event, activity or permanent facility" is prohibited (new section 24(1)).

2.1.6.2 Division 2: Vaping Products (Clause 36)

Provisions relating to promoting vaping products start in new section 30.1. This section prohibits anyone from advertising a vaping product, a vaping product–related brand element, or a thing that displays a brand element if there are reasonable grounds to believe that it could appeal to young persons. New section 30.2 sets out that lifestyle advertising cannot be used to promote a vaping product, brand element, or thing displaying the brand element.

Sponsorship promotion, use of promotional material, and name of facility restrictions for vaping products are identical to the amended restrictions for tobacco products (new sections 30.3(1) and 30.3(2) and 30.4). New section 30.5 places restrictions on manufacturers regarding the giving or offering of vaping products and vaping product-related brand elements. These restrictions are similar to those for tobacco products.

Under new section 30.7, a vaping product or brand element may be promoted by advertising only if it conveys prescribed information about the product, its emissions and its health hazards and effects. New section 30.701 specifies that no person may advertise a vaping product in a way that contravenes the regulations. In addition, promoting a vaping product or brand element, including by means of the packaging, at the point of sale in a manner that is contrary to the regulations is prohibited (new section 30.8).

2.1.6.3 Division 3: Miscellaneous Provisions (Clauses 37 to 44)

One hundred and eighty days after Bill S-5 receives Royal Assent, other prohibitions relating to vaping products and promotion will come into force. Among other things, these prohibitions relate to various ways of promoting vaping products, including through the use of testimonials and references to health effects, additives and flavourings. Overall, the prohibitions cover:

- using testimonials and endorsements to promote vaping products (new section 30.21);
- promoting or selling a vaping product that is designed to appeal to young persons (new section 30.41);
- promoting a vaping product (including by way of packaging), "in a manner that is false, misleading or deceptive with respect to … the characteristics, health effects or health hazards" of the product or its emissions, or in a manner that is contrary to the regulations (new section 30.42(1));

- promoting a vaping product (including by way of packaging) in a way that suggests its use would have a health benefit (new section 30.43(1)) (subject to the regulations);
- promoting a vaping product (including by way of packaging) by comparing its effects on health to tobacco's effects on health (new section 30.43(2)) (subject to the regulations), unless it has an authorization under the *Food and Drugs Act* (new section 30.43(3));
- promoting a vaping product (including by way of packaging) if its promotion could discourage tobacco cessation (new section 30.44);
- packaging or selling a vaping product that is packaged contrary to the *Tobacco and Vaping Products Act* or regulations (new section 30.45);
- displaying information or images on a vaping product or its package that suggest that the product is flavoured, if the information or images could appeal to young people, or selling a product carrying such information or images (new section 30.46);
- promoting a vaping product using information or images that suggest that the product contains an ingredient that is listed as prohibited in Schedule 2 to the Act, or selling a product that has such information or images (new section 30.47); and
- promoting a vaping product using information or images that suggest that the product has a flavour listed as prohibited in Schedule 3 to the Act or selling a vaping product that has such information or images (new section 30.48).

New section 30.49 authorizes the Governor in Council to amend Schedule 3 (Flavours) by order.

In the same way that new section 23.2 prohibits displaying a vaping product brand element on a tobacco product and the sale of a cross-branded tobacco product, new section 30.71 prohibits the furnishing or promotion of a vaping product if a tobacco brand element is displayed on the vaping product, its package, or vaping product advertising.

Section 32, which requires manufacturers to report to the minister prescribed information related to promotion, is amended to allow the minister to request supplementary information from manufacturers (clause 42, adding new section 32(2)).

Clause 44 amends the regulation-making authority of the Governor in Council to provide authority for new or revised sections that require supporting regulations.

2.1.7 Part V: Administration and Enforcement (Clauses 45 to 50)

Clause 45 changes the title of Part V, "Enforcement," to "Administration and Enforcement," and the heading "Inspection" to "Inspection and Analysis."

A number of the provisions relating to administration and enforcement are amended to include references to vaping products, as well as conveyances. Clause 45 also adds the following powers for inspectors, in the context of verifying compliance with the Act:

- taking photographs and making recordings and sketches (new section 35(2)(g));
- ordering a person to move, or not move, a tobacco product, vaping product, thing or conveyance (new section 35(2)(h));
- ordering an owner or person in charge to establish his or her identity (new section 35(2)(i));
- using or ordering a person to use a computer system found in the place to examine data (new section 35(2)(j)); and
- using or ordering a person to use copying equipment found in the place (new section 35(2)(k)).

In addition to amending the existing forfeiture provisions so that they apply to conveyances, clause 49 adds the ability for a forfeited thing or conveyance to be disposed of at the expense of the owner or the person who was entitled to possess it at the time it was seized (new section 41(4)). New section 41.1 allows for the recovery of costs related to seizure or disposal.

2.1.8 Part V.1: Miscellaneous Provisions (Clauses 51 to 54)

Clause 51 replaces the existing Part V.1 heading, "Laying of Proposed Regulations" with the heading "Miscellaneous Provisions."

Under existing section 42.1, certain regulations must be tabled in the House of Commons before they can be made. Clause 52 **repeals that section, meaning that regulations no longer have to be tabled in the House of Commons.**

Clause 53 provides authority for the Governor in Council to make regulations that exclude some or all of the vaping products regulated under the *Food and Drugs Act* **or that contain a controlled substance (as defined in the Controlled Drugs and Substances Act (CDSA)** from the application of the *Tobacco and Vaping Products Act* or the regulations (new section 42.2).

Clause 53 also relates to trade-marks. Sections 18(1)(b) and 18(1)(c) of the *Trade-Marks Act* provide that a trade-mark is invalid if "the trade-mark is not distinctive at the time proceedings bringing the validity of the registration into question are commenced" or "the trade-mark has been abandoned."[30] New section 42.3(1) establishes that complying with the *Tobacco and Vaping Products Act* will not lead to the invalidation of a registration of a trade-mark under sections 18(1)(b) or 18(1)(c) of the *Trade-Marks Act*.

Finally, clause 54 requires manufacturers to keep all documents used to submit information to the minister (new section 42.31).

2.1.9 Part VI: Offences and Punishment (Clauses 55 to 66)

Clause 55 amends the offences relating to promotion by splitting them into offences by manufacturers and offences by a "person" (defined as being "other than a manufacturer"), as well as increasing the associated fines.

The tables below list some of the offences and associated penalties under the **former** *Tobacco Act* (where applicable), and the *Tobacco and Vaping Products Act*.

Table 1 – Selected Offences and Penalties for Manufacturers Under the **Former** *Tobacco Act* and the *Tobacco and Vaping Products Act*

Offence	Type of Offence	Penalty Under the **Former** *Tobacco Act*	Penalty Under the *Tobacco and Vaping Products Act*
Manufacturing or selling tobacco or vaping products contrary to the standards established by the regulations referenced in sections 5 and 7.2; or Promoting a tobacco product or brand element, including by means of the packaging, contrary to the regulations referenced in section 19	Hybrid[a]	For a summary conviction offence, maximum fine of $100,000, maximum of one year's imprisonment, or both For an indictable offence, maximum fine of $300,000, maximum of two years' imprisonment, or both	For a summary conviction offence, maximum fine of $500,000, maximum of one year's imprisonment, or both For an indictable offence, maximum fine of $1,000,000, maximum of two years' imprisonment, or both
New offences relating to manufacturers having to: • publicly disclose certain information in relation to tobacco products and vaping products; • provide vaping product information to the minister; • report information to the minister with respect to promotion; and • include information as part of vaping advertising	Summary conviction	n/a	Maximum fine of $50,000, maximum of six months' imprisonment, or both

Offence	Type of Offence	Penalty Under the **Former** *Tobacco Act*	Penalty Under the *Tobacco and Vaping Products Act*
Selling a vaping product without submitting prescribed information to the minister	Summary conviction	n/a	Maximum fine of $50,000, maximum of six months' imprisonment, or both
Using a prohibited ingredient listed in Schedule 2 in a vaping product or selling a vaping product that has a prohibited ingredient	Summary conviction	n/a	Maximum fine of $300,000, maximum of two years' imprisonment, or both
Manufacturing or selling a tobacco product that displays a marking that is not authorized by the regulations	Summary conviction	n/a	Maximum fine of $300,000, maximum of two years' imprisonment, or both
Failing to keep documents used to submit prescribed information to the minister relating to tobacco products, vaping products, or promotion	Summary conviction	n/a	Maximum fine of $50,000, maximum of six months' imprisonment, or both
Selling a tobacco product without submitting the prescribed information to the minister	Summary conviction	n/a	Maximum fine of $50,000, maximum of six months' imprisonment, or both
Various prohibitions contained in sections 15(1), 15(1.1), 15(2), 15.1(1), 15(4), 15.3(1), 15.3(2), 29, 30.5, 30.6(1) or 30.6(2), including selling tobacco products unless they contain the prescribed information relating to the product, its emissions, and its health hazards and effects	Summary conviction	For offences listed in the *Tobacco Act*, maximum fine of $300,000, maximum of two years' imprisonment, or both	Maximum fine of $300,000, maximum of two years' imprisonment, or both

Note a: A hybrid offence is one in which the Crown can choose to charge the offender with either a summary conviction offence or an indictable offence.

Source: Table prepared by the authors using information contained in Bill S-5, An Act to amend the Tobacco Act and the Non-smokers' Health Act and to make consequential amendments to other Acts [*Tobacco and Vaping Products Act*].

Table 2 – Selected Offences and Penalties for Persons Other than Manufacturers Under the **Former** *Tobacco Act* and the *Tobacco and Vaping Products Act*

Offence	Type of Offence	Penalty Under the **Former** *Tobacco Act*	Penalty Under the *Tobacco and Vaping Products Act*
Promoting a tobacco product or brand element, including by means of the packaging, contrary to the regulations referenced in section 19	Under the *Tobacco Act*, hybrid[a] Under the *Tobacco and Vaping Products Act*, summary conviction	For a summary conviction offence, maximum fine of $100,000, maximum of one year's imprisonment, or both For an indictable offence, maximum fine of $300,000, maximum of two years' imprisonment, or both	Maximum fine of $500,000
Manufacturing or selling a tobacco product that displays a marking that is not authorized by the regulations	Summary conviction	n/a	Maximum fine of $50,000
Furnishing a vaping product to a young person, or sending or delivering a vaping product to a young person	Summary conviction	n/a	For a first offence, a fine not exceeding $3,000 For a subsequent offence, a fine not exceeding $50,000
Various prohibitions contained in these sections: 9.1(1), 9.1(2), 20(1), 20.1, 21(1), 22(1), 23(1), 23(2), 23.1(1), 23.1(2), 23.2(1), 23.2(2), **23.3**, 24(1), 24(2), 25, 27, 30.1, 30**.2**, 30.21(1), 30.3(1), 30.3(2), 30.4, 30.41, 30.42(1), 30.43(1), 30.43(2), 30.44, 30.45(1), 30.45(2), 30.46(1), 30.46(2), 30.47(1), 30.47(2), 30.48(1), 30.48(2) or 30.71	Summary conviction	For offences listed in the *Tobacco Act*, maximum fine of $300,000, maximum of two years' imprisonment, or both	Maximum fine of $500,000, maximum of two years' imprisonment, or both

Note a: A hybrid offence is one in which the Crown can choose to charge the offender with either a summary conviction offence or an indictable offence.

Source: Table prepared by the authors using information contained in Bill S-5, An Act to amend the Tobacco Act and the Non-smokers' Health Act and to make consequential amendments to other Acts [*Tobacco and Vaping Products Act*].

Clause 64 makes available a due diligence defence: if a person establishes that he or she exercised due diligence to prevent an offence from being committed, the person will not be found guilty of the offence (new section 48.1).

Clause 65 amends sections 57(a) and 57(b) to add "vaping products" to the evidentiary presumptions for tobacco products in the context of a prosecution for an offence under the Act.

Clause 66 amends the provisions relating to the orders that can be made by a court when sentencing an offender to include references to vaping products (amended sections 59(b) and 59(f)).

2.1.10 Part VII: Agreements (Clause 67)

Clause 67 amends the provision relating to the minister's ability to enter into agreements with provinces or other bodies regarding the administration or enforcement of the Act. It adds to the provision for federal officials to be appointed as inspectors under provincial legislation for tobacco products the provision for such an appointment for vaping products (amended section 60(1)).

2.1.11 Part VII.1: Review of the Act (Clause 67.1)

Clause 67.1 (new section 60.1) requires the minister to undertake a review of the provisions and operation of the Act three years after section 60.1 comes into force and every two years thereafter. These reviews must be tabled in both houses of Parliament no later than one year after the date on which each review is undertaken.

2.1.12 Other Provisions (Clauses 68 to 70)

Clauses 68 to 70 renumber the single schedule in the *Tobacco Act* to include Schedule 1, Schedule 2 and Schedule 3. These clauses also replace references to "the schedule" with "Schedule 1" where appropriate. Schedule 1, which lists prohibited additives for tobacco products, was amended by the Senate to include menthol and its related compounds, as well as cloves.

2.2 Consequential Amendments, Terminology Coordinating Amendments, and Coming into Force (Clauses 71 to 80)

2.2.1 Consequential Amendments to the *Food and Drugs Act* (Clauses 71 and 72)

Clause 72 amends the *Food and Drugs Act* (FDA) to specify that the FDA does not apply to a tobacco product as it is defined in the *Tobacco and Vaping Products Act* (new section 2.2 of the FDA) or to vaping products as defined in the *Tobacco and Vaping Products Act*, despite the definitions of "drug" and "device" contained in the FDA (new section 2.3 of the FDA).

2.2.2 Consequential Amendments to *An Act to amend the Tobacco Act* (Clauses 73 and 74)

An Act to amend the Tobacco Act was introduced in 2008 primarily to address issues relating to little cigars and flavourings. Clauses 73 and 74 of Bill S-5 repeal sections 7 and 16 of that Act. Section 7 added a section 6.1, which prohibited a manufacturer from manufacturing or selling a tobacco product unless it had provided prescribed information about the product's composition and ingredients to the minister. Section 6.1 was never brought into force. Section 16, which added a penalty for contravening section 6.1, never entered into force either.

2.2.3 Consequential Amendments to the *Canada Consumer Product Safety Act* (Clauses 75 and 76)

Under clause 75, the *Canada Consumer Product Safety Act*[31] (CCPSA) is amended to clarify that it applies only to the following aspects of a tobacco product as defined in the *Tobacco and Vaping Products Act*:

- the product's ignition propensity; and
- the devices and parts of the product referred to in the definition of "tobacco product" in the *Tobacco and Vaping Products Act*.

In addition, a new section 4(4) is added to the CCPSA to exclude vaping products from the application of the *Consumer Chemicals and Containers Regulations, 2001*, subject to explicit language indicating that they apply.[32] This exclusion, however, will be repealed on a day to be fixed by order of the Governor in Council (clause 75(3) and clause 80(8)).

Clause 76 amends Schedule 1 of the CCPSA, which lists consumer products to which the CCPSA does not apply. According to the schedule, items 3 and 4, which are devices and drugs that fall within the FDA definitions, are exempt from the application of the CCPSA. The amended items state that vaping products that are not subject to the FDA are excluded from that exemption.

2.2.4 Terminology (Clause 77)

Clause 77 replaces references to the *Tobacco Act* in federal Acts and regulations with references to the *Tobacco and Vaping Products Act*.

2.2.5 Coordinating Amendments (Clauses 78 and 79)

Clause 78 relates to provisions of *An Act to amend the Tobacco Act* that are not yet in force and sets out what will happen if those sections come into force prior to certain related provisions of the *Tobacco and Vaping Products Act*.

Clause 79 relates to a provision regarding registration of trade-marks in the *Economic Action Plan 2014 Act, No. 1 (An Act to implement certain provisions of the budget tabled in Parliament on February 11, 2014 and other measures)* that is not yet in force. It sets out what will happen if that provision comes into force prior to or on the same date as section 42.3 of the *Tobacco and Vaping Products Act*.

Clause 79.1 relates to Bill C-45, An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts. On the first day that section 204(1) of Bill C-45 (which repeals cannabis from Schedule II of the CDSA) and section 3 of the *Tobacco and Vaping Products Act* (which includes amendments to certain definitions) are in force, the definition of accessory in the *Tobacco and Vaping Products Act* is amended to

specify that "accessory" does not include cannabis accessories. In addition, the definition of "vaping product" will be amended to specify that "vaping product" does not include cannabis or cannabis accessories.

2.2.6 Coming into Force (Clause 80)

Clause 80 sets out when various provisions come into force.

2.3 Amendments to the *Non-smokers' Health Act* (Clauses 81 to 85)

Clause 81 replaces the long title of the *Non-smokers' Health Act (An Act to regulate smoking in the federal work-place and on common carriers and to amend the Hazardous Products Act in relation to cigarette advertising)* with *An Act to regulate smoking in the federal workplace and on certain modes of transportation*.

Clause 82(2) amends the definition of "smoke" in the English version of the Act to include vaping. In the French version of the bill, section 82(4) adds a corresponding definition of the term "fumer" to replace the definition of "usage du tabac," which is repealed by clause 82(1) of the bill, and to incorporate the notion of vaping.

Clause 82(3) adds a definition of "vaping product" (amended section 2(1)). In addition, clause 84 amends the regulation-making authority in the Act to include the authority to designate any device to be a vaping product (new section 7(1)(a.1)).

2.4 Schedules

As mentioned in section 2.1.12 of this Legislative Summary, the single schedule in the *Tobacco Act*, which contains a list of prohibited additives, becomes Schedule 1 in the *Tobacco and Vaping Products Act*. **That schedule is amended to create an exception from the prohibition for products that are manufactured or sold for export.**

New Schedule 2 sets out ingredients that cannot be added to vaping products, including caffeine and vitamins, **unless they are prescription vaping substances, or manufactured or sold for export.**

New Schedule 3 lists the flavours that cannot be promoted for vaping products, **unless they are prescription vaping substances, or manufactured or sold for export:**

- confectionery;
- dessert;
- cannabis;
- soft drink; and
- energy drink.

NOTES

1. 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 Session, 42nd Parliament (S.C. 2018, c. 9).
2. Senate, Standing Committee on Social Affairs, Science and Technology, *Report of the Committee*, Twelfth Report, 1st Session, 42nd Parliament, 2 May 2017.
3. **House of Commons, Standing Committee on Health [HESA], *Bill S-5, An Act to amend the Tobacco Act and the Non-smokers' Health Act and to make consequential amendments to other Acts*, Thirteenth Report, 1st Session, 42nd Parliament, 20 March 2018.**
4. *Tobacco Act*, S.C. 1997, c. 13.
5. *Non-smokers' Health Act*, R.S.C. 1985, c. 15 (4th Supp.).
6. World Health Organization [WHO], Conference of the Parties to the WHO Framework Convention on Tobacco Control [FCTC], *Electronic nicotine delivery systems*, FCTC/COP/6/10, 6th Session, Moscow, **21** July 2014, p. 2.
7. *Food and Drugs Act*, R.S.C. 1985, c. F-27.
8. *Food and Drug Regulations*, C.R.C., c. 870.
9. Government of Canada, *Prescription Drug List*.
10. House of Commons, HESA, *Vaping: Towards a Regulatory Framework for E-Cigarettes*, Ninth Report, 2nd Session, 41st Parliament, March 2015, p. 2.
11. **"Health Canada warns against 'e-cigarettes'," *CTV News*, 27 March 2009.**
12. See, for example, Ontario, *Electronic Cigarettes Act, 2015*, S.O. 2015, c. 7, Sched. 3; Manitoba, *The Non-Smokers Health Protection Amendment Act (E-Cigarettes)*; Quebec, *An Act to bolster tobacco control*, 2015, c. 28; and City of Vancouver, *Health By-Law No. 9535: A By-law to provide for the care, promotion, and protection of the health of inhabitants*.
13. WHO, FCTC/COP/6/10, p. 1.
14. WHO, "Electronic nicotine delivery systems and electronic non-nicotine delivery systems," FCTC/COP6(9), *Report of the sixth session of the Conference of the Parties to the WHO Framework Convention on Tobacco Control*, 6th Session, Moscow, 13-18 October 2014, p. 76.
15. United States, Food and Drug Administration, "Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act; Restrictions on the Sale and Distribution of Tobacco Products and Required Warning Statements for Tobacco Products," *Federal Register*, 81 FR 28973, 10 May 2016.
16. United States, *Federal Food, Drug, and Cosmetic Act*, U.S. Code, Title 21, Chapter 9.
17. HESA (2015).
18. Ibid., p. 5.
19. Ibid., "Recommendation 10," p. 22.
20. WHO, *Get Ready for Plain Packaging*, 2016, p. 5.
21. HESA, *Towards Zero Consumption – Generic packaging of tobacco products*, 1st Session, 35th Parliament, June 1994, p. 29.
22. Canadian Partnership Against Cancer, *Issue Backgrounder: Plain Tobacco Packaging*, 1 April 2016.

23. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 SCR 199.

24. Canadian Cancer Society, *Cigarette Package Health Warnings: International Status Report*, 5th ed., October 2016.

25. European Union, "Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC," *Official Journal of the European Union*, L 127, Vol. 57, 29 April 2014.

26. Plain packaging was again articulated as a priority for the next health minister, Ginette Petitpas Taylor, in her mandate letter. See Justin Trudeau, Prime Minister of Canada, *Minister of Health Mandate Letter (October 4, 2017)*, **4 October 2017**.

27. Health Canada, "Backgrounder Plain Packaging," Backgrounder, November 2016.

28. In clause 3(3) of Bill S-5, "lifestyle advertising" is defined as "advertising that associates a product with, or evokes a positive or negative emotion about or image of, a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring."

29. "Marking" is not defined in the *Tobacco Act*, nor is it defined in the *Tobacco and Vaping Products Act*.

30. *Trade-marks Act*, R.S.C. 1985, c. T-13.

31. *Canada Consumer Product Safety Act*, S.C. 2010, c. 21.

32. *Consumer Chemicals and Containers Regulations, 2001*, SOR/2001-269.