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Prohibitions/Restrictions on Flavoured Tobacco Products: Monitoring Update

What is the Issue?

In recent years in Canada and in other countries, the tobacco industry has increasingly used flavours as part of a marketing strategy. Flavouring tobacco products with fruit, candy, menthol and other flavours makes tobacco products more attractive, especially for youth and young adults. In response, a growing number of governments worldwide are adopting legislation to restrict or prohibit flavours in tobacco products.

KEY FINDING:

Among students in grades 10-12, use of cigarillos/little cigars in the last 30 days declined from 14% in the 2008-09 school year to 9% in 2010-11.

Federal Legislation

Bill C-32, the *Cracking Down on Tobacco Marketing Aimed at Youth Act*, amended the federal *Tobacco Act* effective July 5, 2010 to prohibit flavoured cigarettes, cigarillos and blunt wraps (menthol exempted).

An important factor leading to the introduction of Bill C-32 was the rise in the marketing of cigarillos in flavours such as chocolate, peach, cherry, strawberry, vanilla, and mint. These cigarillos were usually sold in colourful packaging, and were often sold individually.

Implementation of Bill C-32 has contributed to a reduction in cigarillo use, but use still remains substantial. Comparing data from 2009 (prior to Bill C-32) to 2011, use of cigarillos/little cigars in the last 30 days declined from 8% to 5% among 15-19 year olds, and from 11% to 7% among 20-24 year olds.¹ Among secondary school students in grades 10-12, use of cigarillos/little cigars in the last 30 days declined from 14% in the 2008-09 school year to 9% in the 2010-11 school year.²

¹ Health Canada, Canadian Tobacco Use Monitoring Survey, 2009, Summary. Summary available through Health Canada. Health Canada, Canadian Tobacco Use Monitoring Survey, 2011, Summary

http://www.hc-sc.gc.ca/hc-ps/tobac-tabac/research-recherche/stat/_ctums-esutc_2011/ann_summary-sommaire-eng.php

² Health Canada, Youth Smoking Survey, 2008-2009, Supplementary Tables, Table 9;

Available at: http://www.yss.uwaterloo.ca/results/YSS2008-2009_additional_tables_en.pdf

Health Canada, Youth Smoking Survey 2010-2011, Supplementary Tables, Table 9.

http://www.hc-sc.gc.ca/hc-ps/tobac-tabac/research-recherche/stat/_survey-sondage_2010-2011/table-eng.php#t9

A key reason why cigarillos remain popular with youth is that some companies have reformulated cigarillos to get around the definition in Bill C-32. Bill C-32 defines “little cigar” (a cigarillo)³ as a cigar weighing 1.4g or less (excluding any mouthpiece or tip), or having a cigarette filter. Some companies have sold flavoured cigarillos without a cigarette filter and with a weight of more than 1.4g. These reformulated products started appearing on the market even prior to Bill C-32 coming into effect in July 2010, prompting Prime Minister Stephen Harper to state “Compliance with these rules will be monitored and enforced in no uncertain terms. Adherence to the spirit of the legislation will also be monitored and, if necessary, the legislation will be revisited.”⁴

Bill C-32 has no effect on flavours in many categories of tobacco products such as water pipe tobacco, smokeless tobacco, cigars not covered by the “little cigar” definition, roll-your-own tobacco, cigarette papers, pipe tobacco, and bidis. Health Canada has interpreted Bill C-32 as not applying to clove cigarettes, often referred to as kreteks.

Regulatory authority exists in the federal *Tobacco Act* to restrict or prohibit flavours in all tobacco products (not just cigarettes, little cigars and blunt wraps) but to date this authority has not been used.

Flavoured tobacco products remain widespread in the Canadian market. Water pipe tobacco,⁵ smokeless tobacco, cigarillos weighing more than 1.4g and menthol cigarettes are examples of tobacco product categories that are heavily flavoured.

Ontario

Amendments to the *Smoke-Free Ontario Act* to prohibit flavoured cigarillos, except for menthol took effect July 1, 2010. Ontario’s definition of cigarillos is similar to that in federal legislation, so that the Ontario legislation has little incremental impact over and above federal legislation (however, Ontario does prohibit any type of filter, while federal legislation prohibits only “cigarette filters”). Ontario has regulatory authority to restrict or prohibit flavours in all other tobacco products, not just cigarillos, but to date this regulatory authority has not been used.

On June 29, 2010, as the *Smoke-Free Ontario Act* amendments were coming into force, the Ontario Government recognized the importance of the measure, stating:

“Ontario is banning the sale of flavoured cigarillos to make them less accessible, less affordable, and less attractive to young people. . . . Prior to these amendments, cigarillos in flavours like pina colada, grape, and chocolate were sold in brightly coloured

³ This document uses “cigarillo” and “little cigar” as interchangeable terms. Some laws use the term “cigarillo” while others use the term “little cigar”.

⁴ Prime Minister Stephen Harper, “Statement by the Prime Minister of Canada” July 4, 2010. <http://pm.gc.ca/eng/media.asp?id=3521>

⁵ Ontario Tobacco Research Unit, *Waterpipe Smoking: A Growing Health Concern*, OTRU Update 2011. <http://otru.org/waterpipe-smoking-a-growing-health-concern-2/>

"kiddie packs" sometimes for less than \$2 at convenience stores. By adding flavours, using colours in the wrapping and packaging, and selling them in small packages, these products were targeting youth.”⁶

In October 2010, the Report of the Tobacco Strategy Advisory Group included a recommendation to “*Amend the Smoke-Free Ontario Act and Regulation to prohibit the distribution and sale of all flavoured tobacco products (excluding menthol), and that a regulation to “Ban flavourings in all smokeless tobacco products” be adopted within one year.*”⁷

Other Provinces

Saskatchewan and New Brunswick have both adopted legislation to prohibit flavoured cigarillos, and to create regulatory authority to restrict or prohibit flavours in other tobacco products. However, for both provinces, this legislation has not yet been proclaimed into force.

British Columbia has longstanding regulatory authority over tobacco products, including the ability to restrict or prohibit flavours, but this authority has never been used. Quebec also has unused regulatory authority over tobacco products; in Quebec, any provincial regulations must be “harmonized” with regulations under the federal *Tobacco Act*.

In Alberta, a private member’s bill, Bill 206, the *Tobacco Reduction (Flavoured Tobacco Products) Amendment Act, 2012*, received first reading on December 6, 2012 and second reading on May 13, 2013. The bill would create regulatory authority to restrict or prohibit flavours in tobacco products.

To date no province has prohibited menthol in any type of tobacco product.

Table 1 provides a summary of federal/provincial/territorial legislative measures regarding flavoured tobacco products.

⁶ Ontario Ministry of Health Promotion, “McGuinty Government Bans the Sale of Flavoured Cigarillos” June 29, 2010. <http://news.ontario.ca/mohltc/en/2010/06/new-law-protects-children-from-tobacco.html>

⁷ Tobacco Strategy Advisory Group (TSAG). *Building on Our Gains, Taking Action Now: Ontario’s Tobacco Control Strategy for 2011 to 2016*. Report from the Tobacco Strategy Advisory Group to the Minister of Health Promotion and Sport, pp. 44, October 18, 2010. <http://www.mhp.gov.on.ca/en/smoke-free/TSAG%20Report.pdf>

Table 1: Prohibitions/Restrictions on Flavours in Tobacco Products, by Provincial, Territorial and Federal Jurisdiction, September 23, 2013^{a,b}

	NL	PE	NS	NB	QC	ON	MB	SK	AB	BC	YT	NT	NU	FED
Regulatory authority to prohibit/restrict flavours in some or all tobacco products				✓	c	✓		✓		✓				✓
Type of Tobacco Product														
Cigarettes														✓
Roll-your-own tobacco														
Cigarette papers														
Cigarillos/little cigars				d		✓e		f						✓g
Cigars (other than little cigars)														
Water pipe tobacco														
Pipe tobacco (other than water pipe tobacco)														
Smokeless tobacco														
Kreteks														
Bidis														
Blunt wraps														✓

^a Column headings show provincial jurisdictions east to west, then territorial and federal

^b There is to date no federal, provincial or territorial legislation prohibiting menthol in any type of tobacco product.

^c Any standards adopted under the Quebec *Tobacco Act* must be harmonized with standards under the federal *Tobacco Act*.

^d In New Brunswick, *An Act to Amend the Tobacco Sales Act*, where a legislative provision to ban flavoured cigarillos was adopted in 2009 but not yet proclaimed into force, defines “cigarillo” as including a tobacco product that “(a) is sold as a cigarillo, (b) is in the form of a roll or tube, has a wrapper that contains natural or constituted leaf tobacco and (i) weighs less than 1.4 grams or such other weight as may be prescribed by regulation, or (ii) has a cellulose, acetate or other type of filter”.

^e Regulations under the *Smoke-Free Ontario Act* define “cigarillo” as a tobacco product that is in the form of a roll or a tube, has a wrapper that contains natural or reconstituted leaf tobacco and either (1) “weighs less than 1.4 grams, excluding the weight of any mouthpiece or tip” or (2) “has a cellulose acetate or other type of filter”

^f In Saskatchewan’s *Tobacco Control Amendment Act, 2010*, where the ban on flavoured cigarillos is not yet proclaimed into force, the definition of “little cigar” is a tobacco product that is in the form of a roll or a tube; and has a wrapper that contains natural or reconstituted leaf and (a) has a cellulose, acetate or other type of filter” or (b) “weighs less than 1.4 grams”.

^g The federal *Tobacco Act* defines a “little cigar” as a roll or tubular construction that (a) is intended for smoking; (b) contains a filler composed of natural or reconstituted tobacco; (c) has a wrapper, or a binder and a wrapper, composed of natural or reconstituted tobacco; and (d) has a cigarette filter or weighs no more than 1.4g, excluding the weight of any mouthpiece or tip.

International Developments

International guidelines adopted in 2010 under the *WHO Framework Convention on Tobacco Control* (FCTC) recommend that countries restrict or prohibit flavours in tobacco products. The guidelines further recognize that: “Regulating ingredients aimed at reducing tobacco product attractiveness can contribute to reducing the prevalence of tobacco use and dependence among new and continuing users” and that “Masking tobacco smoke harshness with flavours contributes to promoting and sustaining tobacco use.”⁸

Jurisdictions have taken approaches that vary in the level of restrictiveness in regulating flavours. Various Australian states have adopted legislation to prohibit fruit and candy flavours in cigarettes. US national legislation goes further to prohibit any characterizing flavour, not just fruit and candy flavours, but also spice (e.g. cinnamon), herb (e.g. mint), alcohol or any other flavour. Canadian legislation goes further still by banning all flavours, not just characterizing flavours. Most jurisdictions have to date exempted menthol from flavours legislation. Jurisdictions also vary in terms of what tobacco products are covered by legislation.

In the U.S. since September 22, 2009, the national *Family Smoking Prevention and Tobacco Control Act*, has prohibited characterizing flavours in cigarettes, roll-your-own tobacco and cigarette papers (menthol exempted).⁹ The U.S. Food and Drug Administration has rule-making authority to prohibit flavours in other tobacco products, but this authority has not yet been used.

At the municipal level in the US, New York City has implemented a local law to prohibit the sale of all tobacco products with characterizing flavours,¹⁰ going beyond national legislation by applying the legislation to cigarillos, smokeless tobacco, water pipe tobacco, and other tobacco products. The New York City law exempts cigarettes (because cigarettes are covered by US federal legislation), and exempts menthol, mint and wintergreen flavours. The law also has an exemption allowing the sale of flavoured tobacco products in “tobacco bars,” but there are only about a dozen such bars in the city.¹¹ The tobacco industry filed a legal challenge claiming that the New York City law was pre-empted by US federal law, but this challenge was dismissed by U.S. federal court.¹²

⁸ Conference of the Parties to the WHO Framework Convention on Tobacco Control, *Partial guidelines for implementation of Articles 9 and 10 of the WHO Framework Convention on Tobacco Control (Regulation of the contents of tobacco products and Regulation of tobacco product disclosures)*, 2010, sections 3.1.2.1 and 3.1.2.2. http://whqlibdoc.who.int/publications/2011/9789241501316_eng.pdf

⁹ *Family Smoking Prevention and Tobacco Control Act* (U.S.)

<http://www.fda.gov/downloads/TobaccoProducts/GuidanceComplianceRegulatoryInformation/UCM237080.pdf>.

¹⁰ *Local Law to amend the New York city charter and the administrative code of the city of New York, in relation to the regulation of tobacco products*, Local Laws of the City of New York for the year 2009, No. 69, enacted October 28, 2009.

http://www.nyc.gov/html/dca/downloads/pdf/Local_Law_69_of_09_ban_sale_of_flavored_cigarette.pdf

New York City Health Code, chapter 28, Restriction on the Sale of Certain Tobacco Products

<http://www.nyc.gov/html/doh/downloads/pdf/about/healthcode/health-code-chapter28.pdf>

¹¹ Andrew Nagy, “Judge Upholds New York City Flavored Tobacco Ban” *Cigar Afficianado*, November 29, 2011.

¹² *U.S. Smokeless Tobacco Manufacturing Co. v. New York City*, U.S. District Court for the Southern District of New York, November 15, 2011 <http://www.law.com/jsp/decision.jsp?id=1202532907863>, upheld on appeal on February 26, 2013 by the U.S. Court of Appeals for the Fifth Circuit. <http://www.tobaccocontrolaws.org/litigation/decisions/us-20130226-u.s.-smokeless-tobacco-mfg.-v.>

Providence, Rhode Island adopted a local ordinance similar to the New York City local law.¹³ A tobacco industry legal challenge to the Providence ordinance was also dismissed.¹⁴

Other international jurisdictions have also taken steps to address the issue of flavours. Brazil has adopted legislation to prohibit all flavours, including menthol, in all tobacco products.¹⁵ (The Brazil measure does have a limited exemption for sugar to replace sugars lost during the leaf curing process.) However, implementation is currently on hold pending the outcome of a tobacco industry legal challenge.

Germany has banned cigarettes with menthol capsules, although regular menthol cigarettes may continue to be sold.¹⁶

In the 28-country European Union, on December 19, 2012, the European Commission released a proposed new Tobacco Products Directive that includes a ban on characterizing flavours for cigarettes, roll-your-own tobacco and smokeless tobacco, including menthol.¹⁷ In the EU, there is a multi-stage legislative process for approval of a Directive or amendments to a Directive, a process which is ongoing for the new tobacco directive.

On July 23, 2013, the U.S. Food and Drug Administration released an Advance Notice of Proposed Rulemaking for the potential regulation of menthol in cigarettes¹⁸ as well as an evidentiary report about the impact of menthol cigarettes on smoking behavior.¹⁹

Candy/Confectionary Resembling Tobacco Products

An issue distinct but related to flavoured tobacco products is that of candy/confectionary resembling tobacco products.

¹³ City of Providence, Rhode Island, *An Ordinance Amending Chapter 14 of the Code of Ordinances of the City of Providence, Entitled "Licenses" by Adding Thereto the Following Sections* Chapter 2012-6
<http://www.providenceri.gov/efile/2036>

¹⁴ *National Association of Tobacco Outlets Inc. et al. v. City of Providence*, US District Court for the District of Rhode Island, December 10, 2012 <http://www.tobaccocontrolaws.org/litigation/decisions/us-20121210-national-association-of-tobacco> upheld on appeal on September 30, 2013 by the U.S. Court of Appeals for the First Circuit
<http://media.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=13-1053P.01A>

¹⁵ Resolution – RDC Nº 14, of March 15, 2012 (Brazil).
http://www.tobaccocontrolaws.org/files/live/Brazil/Brazil%20-%20RDC%20No.%2014_2012.pdf

¹⁶ Administrative Court Braunschweig (Germany), Press Release, September 26, 2012 (translation)
http://www.who.int/fctc/implementation/news/Press_release_Germany.pdf

¹⁷ European Commission, "Proposal for a Directive of the European Parliament and of the Council 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" December 19, 2012.
http://ec.europa.eu/health/tobacco/docs/com_2012_788_en.pdf

¹⁸ U.S. Food and Drug Administration, "FDA invites public input on menthol in cigarettes" News Release, July 23, 2013
<http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm361966.htm>
U.S. Food and Drug Administration, "Menthol in Cigarettes, Tobacco Products; Request for Comment." filed July 23, 2013.
http://www.regulations.gov/#!documentDetail;D=FDA_FRDOC_0001-4088

¹⁹ U.S. Food and Drug Administration, "Preliminary Scientific Evaluation of the Possible Public Health Effects of Menthol Versus Nonmenthol Cigarettes" 2013.
<http://www.fda.gov/downloads/ScienceResearch/SpecialTopics/PeerReviewofScientificInformationandAssessments/UCM361598.pdf>

Yukon Territory and Nunavut have adopted legislation to prohibit candy cigarettes and other confectionary resembling tobacco products (e.g. chocolate cigars, licorice pipes, bubble gum resembling chewing tobacco). Nova Scotia adopted a similar legislative provision in 1993, but this provision has never been proclaimed into force.

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<http://www.fda.gov/TobaccoProducts/ProtectingKidsfromTobacco/FlavoredTobacco/ucm183198.htm>

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