



Dear Members of the Committee:

We are writing you regarding the constitutionality of Senate Bill S-5 (“S-5”). Although the Canadian Constitution Foundation (“CCF”) takes no position on the science supporting the safety of e-cigarettes, deferring instead to medical experts like those guiding Public Health England, we do take a position on the constitutional rights of Canadians, that is, that governments in Canada must not unduly limit the right of Canadians to access harm reduction technologies. We believe that S-5, as it currently reads, does just this and thereby violates Section 7 of the Canadian *Charter of Rights and Freedoms*.

The CCF agrees that smoking presents a clear and on-going public health crisis of a pressing and substantial nature. It kills nearly 40,000 Canadians every year and costs our health-care system approximately \$17 billion annually, or \$3,071 per smoker. Although smoking rates have dropped to 17.5 per cent in recent years—perhaps due to the increased use of e-cigarettes during that time—our most vulnerable communities continue to smoke at an alarming rate. For instance, in 2014, 62 per cent of Nunavut residents and 244,682 youth ages 12 to 19 were smokers.

In *Canada (Attorney General) v. PHS Community Services Society*, the Supreme Court of Canada (“SCC”) ruled that the federal government must renew a *Controlled Drug and Substances Act* exemption for the Insite drug injection clinic in Vancouver's Downtown Eastside. The exemption from Canada's criminal laws permitted intravenous drug users to inject illicit drugs under the supervision of the clinic's medical staff without the risk of arrest. Ignoring evidence that the exemption reduced the considerable harms associated with such intravenous drug use, the federal Minister of Health refused to renew the exemption in 2008 and the clinic initiated legal proceedings.

The SCC found that Insite successfully reduced the risks of a harmful activity, which saved lives and improved the health of drug users using Insite's facility. Without the criminal law exemption, those users would lose the option of a less harmful means of satisfying their addictions. The SCC also found that the minister had ignored evidence that the exemption reduced the considerable harms associated with unsupervised intravenous drug use, and held that his failure to renew the exemption therefore violated section 7 of the *Charter*, which guarantees the rights of life and security of the person of Insite patrons.

For the SCC, the question “was not whether harm reduction or abstinence-based programs are the best approach to resolving illegal drug use, but whether the federal government has limited the rights of claimants in a manner that does not comply with the Charter.” The Canadian Constitution Foundation believes that this same question applies to unnecessary and non-evidence based restrictions on the sale and use of e-cigarettes. The point is not whether e-cigarettes are the best approach to stopping people from smoking, but whether S-5 will restrict smokers’ access to the less harmful technology of e-cigarettes and thereby violate Canadians’ right to seek harm-reducing alternatives to traditional smoking.

To avoid constitutional scrutiny and future litigation, S-5 must not erect irrational or arbitrary legal barriers that unnecessarily impede or inhibit smokers from switching to e-cigarettes. We believe that such needless barriers include, *inter alia*, treating e-cigarettes broadly as if they are traditional combustible tobacco products, banning e-juice flavours, prohibiting access for youth without even an exception for youth who are otherwise smoking, and restricting the discretion of vape shop owners to demonstrate products to customers. Such restrictions are poorly tailored, lack balance and proportionality, and are not necessary to achieve the purposes enumerated in section 4(3) of S-5, particularly when considering the harm reduction argument accepted by the SCC in the *PHS Community Services* decision. For more information, please consult the CCF’s “Vaping and the Law” report online at www.theccf.ca/vaping.

Another unnecessary and likely unconstitutional restriction is found in section 30.43(2) of S-5, which reads:

No person shall promote a vaping product, including by means of the packaging, by comparing the health effects arising from the use of the product or from its emissions with those arising from the use of a tobacco product or from its emissions.

This provision goes much further than a so-called plain packaging provision or ban on sponsored studies. It makes it illegal for Canadians to access scientific information about harm reduction at the point of sale, where this information would be most useful to smokers addicted to traditional combustible cigarettes. We would draw your attention to the fact that publications like Public Health England’s seminal 2015 report, which found vaping to be 95 per cent less harmful than smoking, will be banned from all retail vape shops, as would peer-reviewed scientific journal articles that have found vaping to be safer than smoking and an effective harm reduction tool for some smokers. None of the three exemptions associated with this ban, as drafted, would make it legal to provide customers with such scientific information.

There is no question that section 30.43(2) violates the *Charter's* guarantee to freedom of expression, but as with all *Charter* litigation, finding that a guaranteed right has been violated is only the first step. The second step is that the government must demonstrate that its violation of the right is a reasonable limitation that can be justified in a free and democratic society.

Previous decisions of the SCC have upheld some restrictions on the expressive activities of companies selling combustible cigarettes because those products are well-established to be addictive and cause serious physical harm to users. In the *RJR MacDonald Inc. v. Canada* and *Canada v. JTI MacDonald Corp* cases, the SCC considered restrictions on commercial expression that promoted smoking—a habit that was well-established by overwhelming scientific evidence to be seriously and almost uniquely harmful.

But S-5's restriction on speech is unlike those considered by the SCC in those cases. In S-5, Parliament is attempting to restrict information that could convince smokers to cease smoking and switch to vaping—a habit than many scientific studies have found to be far less harmful than smoking. Previous jurisprudence dealt with restrictions on expression intended to save lives, but S-5 would restrict expression with the opposite, unintended effect of jeopardizing the health and lives of smokers. It is likely that other restrictions on communication or advertising of e-cigarettes would also not be justified constitutionally by the arguments that the SCC found persuasive in upholding restrictions on traditional cigarettes. Those SCC decisions were based on strong evidence of the serious harms of smoking—evidence that is so far absent in the vaping context.

Viewed against the harm reduction backdrop of the *PHS Community Services* case, we believe that S-5 is erecting legal barriers that unnecessarily impede or inhibit smokers from switching to e-cigarettes and will do nothing to further the legislative purposes listed in section 4(3) of S-5. Therefore, despite an alleged pressing and substantial objective, S-5 fails to strike the proper balance and degree of proportionality required by the *Charter* to uphold a restriction on a fundamental right and will not withstand constitutional scrutiny.

Thank-you,



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