

**Joint Representations of Imperial Tobacco Canada Ltée,
Rothmans Benson & Hedges Inc.
and
JTI-Macdonald Corp.**

on the

Consultation Document

**“Progressing toward a tobacco-free Quebec -
Developing Quebec Anti-Tobacco Legislation”**

published by

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Joint Representations of
Imperial Tobacco Ltd.,
Rothmans Benson & Hedges Inc.
and
JTI-Macdonald Corp.

Imperial Tobacco Canada Ltd, Rothmans Benson & Hedges Inc. and JTI-Macdonald Corp. are pleased to respond to the January 11, 2005 letter of the Minister of Health, Dr. Philippe Couillard, regarding the consultation process for the amendment of the *Tobacco Act*. In his letter, the Minister invited us, as businesses that are directly concerned, to comment on the amendments to the Act currently being considered.

We wish to thank you for this opportunity to participate in the consultation process and to emphasize how important it is that all stakeholders, including the tobacco manufacturers, be involved in these discussions. We are well aware of the government's concerns about smoking and we support reasonable measures to regulate the sale, distribution and use of our products. We are committed to continue to act responsibly and to satisfy the expectations of the community as to how modern-day tobacco companies do business.

Introduction

Imperial Tobacco Canada Ltd., Rothmans Benson & Hedges Inc. and JTI-Macdonald Corp. are the three largest tobacco manufacturers in Canada. Imperial Tobacco Canada Ltd. has its head office in Montreal, while both Rothmans Benson & Hedges Inc. and JTI-Macdonald Corp. have major manufacturing facilities in the province of Quebec. All three companies have been in Quebec for decades, providing quality products to adults and contributing to the national economy. Currently, our sales account for more than 90% of tobacco sales in Canada. Collectively, we have over 1150 full-time employees in Quebec. The tobacco industry paid the federal and provincial governments over \$8.6793 billions in taxes and duties on our tobacco products in fiscal year 2004, representing 13 times the tobacco industry's earnings on sales of tobacco products. Taxes on tobacco products paid to the Quebec government by the industry totalled \$923 million the same year.

We believe that the observations of the largest tobacco manufacturers are important, even essential, to the success of the government's health objectives, which must be achieved with the respect for individual and collective rights which is the hallmark of a free and democratic society. In this regard, our opinions deserve the same consideration as those of other stakeholders.

We are, however, concerned about the apparent partiality of the consultation process. Not only does the Consultation Document seem to come out strongly in favour of certain options,¹ but it appears to have been inspired, if not drafted by, anti-tobacco activists who reject out of hand any solution that respects the rights of both smokers and non-smokers. In fact, the Consultation

¹ Certain statements by the Minister also give the impression that the decisions have already been made and his mind is made up: *Le Devoir*, January 12, 2005, p. A-3; *Le Droit*, January 12, 2005, p. 2; *Canadian Press*, January 11, 2005.

Document repeats a number of statements made by such activists in various forums, echoing their frequent demands for a ban on the sale of a product which is otherwise legal for use by adults. We note that none of the sources referred to in the Consultation Document emanate from the hospitality industry or from tobacco manufacturers or their representatives. The sources cited in support of scientific, sociological or other claims frequently consist of the writings of anti-smoking activists who have no relevant professional training. Thus, the Consultation Document leaves the impression that the government has surrendered its responsibilities in this area to the very lobby groups that would normally be invited to make submissions, notwithstanding that the consultation process in question relates to proposed legislative amendments that affect an entire industry and its workforce.

Despite this apparent bias, we nonetheless hope that the comments and suggestions we put forward in our submission, which respect the rights both of smokers and of non-smokers, will be received with the required objectivity and open-mindedness that all governments must demonstrate.

Principles and facts on which any amendment of the *Tobacco Act* should be based

To begin with, we recognize that smoking is associated with a number of health problems, including lung, throat and laryngeal cancer and emphysema and that this is the basis for the government's interest in passing reasonable and responsible legislation with regard to the tobacco industry.

We are not contesting these facts, but we repeat that any new initiative by the government must acknowledge that:

- any legislation must respect the basic rights and freedoms set forth in the Constitution, which also apply to manufacturers
- it is therefore inappropriate for the government to state publicly in the same breath that a legal activity is nonetheless "illegitimate", thereby imposing its own morality over and above the law
- the government is also subject to the rule of law and it cannot, directly or indirectly, encourage attacks on the reputation and integrity of individuals who legally choose to smoke or to work in the tobacco industry without suffering the legal consequences
- the tobacco industry is already one of the most regulated businesses in the country
- under current regulations, advertising aimed at minors, so-called "lifestyle" advertising, sponsorships and all television and radio advertising are already prohibited
- point-of-sale displays are the last remaining means for manufacturers and retailers to provide their adult customers with useful information about brand availability and differences between brands or within brand families

- solutions exist that respect non-smokers' desire to be protected from environmental tobacco smoke while allowing smokers to use reserved smoking areas. Both smokers and non-smokers have an obligation to practise courtesy and civility.

We intend to address the issues raised by the Consultation Document "Progressing toward a tobacco-free Quebec" in light of these facts and principles. We will deal first with some of the erroneous premises that the Consultation Document contains.

I. Erroneous Statements

a. Prevalence of smoking in Québec

The Consultation Document concludes on p. 8 under the heading "Prevalence of smoking in Quebec" that:

Smoking has dropped off considerably in Québec over the last decade. However, the decline appears to have stabilized at about 25%.

The conclusion that smoking rates in Quebec have stabilized is not borne out by the statistics contained in the Consultation Document. On the contrary, those statistics and others published by the federal government show that smoking has been declining steadily since 1996².

This decline shows that Quebec smoking rates are declining faster than in other Canadian provinces.

The tobacco industry is already one of the most highly regulated industries in the country, be it at the federal or provincial levels. In fact tobacco manufacturers are banned from advertising or promoting their products in any way. They are only allowed to use a limited portion (50%) of the package to display their brand and describe its attributes. All direct and indirect sponsorship associated with the promotion of tobacco products is prohibited.

Given that the existing regulatory regime achieves the stated objectives, one is justified in wondering whether the proposal to further regulate the tobacco industry is motivated by a real need or whether it results rather from pressure brought to bear by certain anti-smoking activists, for whom no measure is too aggressive or repressive regardless of the extent to which it jeopardizes freedom of choice and freedom of expression.

In a democratic society, the end does not justify the means. Laws whose effects exceed minimal impairment of fundamental freedoms are inoperative.

b. Dependence

The following statements contained in the Consultation Document are incorrect:

² Canadian Tobacco Use Monitoring Survey, Results for 2003, Health Canada, <http://www.hc-sc.gc.ca/hecs-sesc/tobacco/research/ctums/index.html>.

Nicotine addiction is as strong as heroin or cocaine addiction.

Numerous government studies confirm that 90% of ex-smokers managed to quit smoking without any assistance³ and almost half of Canadian smokers have quit.⁴ The same cannot be said of cocaine or heroine addiction.

That said, Imperial Tobacco Canada Ltde, one of the three signatories of this document, acknowledges that smoking can be described as a dependence in light of the fact that the traditional definition of this term has been expanded over the past 25 years.

It is, however, misleading to give the impression, merely because the DSM-IV⁵ covers the diagnosis of nicotine dependence in specific individuals, that psychiatrists consider nicotine dependence to be equivalent to cocaine or heroine addiction. In fact, the substances listed in DSM-IV as potentially creating dependence include coffee, and the DSM-IV further indicates that nicotine is associated with fewer disorders than most of these other substances.⁶ Furthermore, many individuals are able to quit smoking without experiencing withdrawal symptoms.⁷

There is quite simply no comparison between nicotine dependence and the dependence caused by substances such as cocaine and heroine.

c. Denormalization

On page 16 of the Consultation Document, the authors state:

...keeping the product [tobacco] legal is a "necessary evil"; tobacco must remain available to those who use it. Nevertheless, "legality" does not necessarily mean "legitimacy".

The authors conclude that:

... "denormalization" both in the sale and use of cigarettes are the cornerstones of the anti-smoking strategy.

³ See for example, Fiore M.C. et al., "Methods Used to Quit Smoking in the United States: Do Cessation Programs Help?", *JAMA*, (May 1990) 263(20), 2760-2765, p. 2760 and 2762; Jaen C.R. et al., "Patterns and Predictors of Smoking Cessation Among Users of a Telephone Hotline", *Public Health Reports*, (November-December 1993) 108(6), 772-73, p. 772.

⁴ Health Canada, "Profil de ceux qui renoncent au tabagisme", *Survey on Smoking in Canada*, chapitre 9 du fascicule sur le quartier 1, August 1994, p.1.

⁵ "DSM-IV" refers to the fourth version of the Diagnostic Statistics Manual of the American Psychiatric Association.

⁶ DSM-IV, p. 209.

⁷ DSM-IV, p. 290.

The Consultation Document proclaims that “the 'environment' component” of denormalization “... must promote a new social ethic...” (pp. 17-18).

We submit that this basic premise is not only incorrect but is also contrary to the fundamental principles that govern our democracy. The sale of tobacco is legal. It is wrong to claim that the denormalization of tobacco products can be compared to changes in social norms in recent years with regard to driving behaviours.⁸ Drunk driving is illegal; smoking is not. Since the government has chosen not to criminalize the sale or use of tobacco products, it cannot impose a moral code which exceeds the dictates of the law by stigmatizing the use of such products as “illegitimate” or by attempting to marginalize those who use them, or worse, as we have already observed, by encouraging anti-smoking groups to enforce this moral code with a religious zeal through bitter and false attacks on the reputation and integrity of individuals who are associated with the use or manufacture of such products.⁹ Denormalization encourages and sanctions behaviour by certain anti-tobacco activists that is contrary to the law and that infringes the guarantees of privacy, right to reputation and freedom of expression which are enshrined in federal and provincial laws and charters and in the Civil Code of Québec.

Quite apart from the content of the Consultation Document, the Minister’s remarks that smoking is “unethical”¹⁰ and his description of smoking as an illegitimate activity are of particular concern. The government is not above the law and any attempt to interfere in the moral choices of citizens by directly or indirectly encouraging the commission of serious offences against those who are exercising a legal choice will surely give rise to legal challenges.

d. Environmental tobacco smoke (ETS)

It is necessary to comment on certain claims that environmental tobacco smoke causes diseases such as lung cancer, emphysema or cardiovascular disease. The source cited in the Consultation Document in support of these statements is a study in which the author himself qualifies his findings as follows: “Given the small size and observational design of the study, these findings might be discounted or even disregarded altogether.” Indeed, the most exhaustive statistical study on ETS was conducted by the World Health Organization¹¹ and showed no significant increase in lung cancer risk among individuals who were raised by a smoker or who lived, worked, travelled or socialized with a smoker. An independent study published in the *British Medical Journal* has not revealed any increase in the risk of developing lung cancer, coronary disease or chronic obstructive pulmonary disease among individuals exposed to ETS. Finally, a review of the two largest databases, namely, the *American Cancer Society’s Cancer Prevention Study* and the *U.S. National Mortality Followback Survey*, does not suggest any overall

⁸ P. 17 of the Consultation Document.

⁹ See the recent “De facto” campaign which was financed in part by the federal government and designed by various anti-smoking groups.

¹⁰ *The Toronto Star*, January 12, 2005, p. A-14; *CP Wire*, January 11, 2005 (Ross Morowits); *The Gazette*, January 12, 2005, p. A-1.

¹¹ P. Boffetta et al, Multicenter Case-control Study of Environmental Tobacco Smoke and Lung Cancer in Europe, *Journal of National Cancer Institute*, 1998, 90, pp. 1440-1450.

correlation between ETS and heart disease¹². We recognize, however, the necessity for further objective studies on ETS.

II. Comments on the specific measures contemplated

According to the Consultation Document, the measures being considered to strengthen the *Tobacco Act* include restrictions on the use, sale and promotion of tobacco products. As we will see, there are already significant restrictions on each of these activities.

a. Restriction on the use of tobacco in certain locations

We recognize that ETS may be a concern for Canadians, whether or not they smoke and we are not suggesting that one should be free to smoke anywhere, if only out of respect for non-smokers.

The hospitality industry and tobacco manufacturers can cooperate in order to find practical alternatives that respect the rights of smokers as well as those of non-smokers. A case in point is the substantial investment by certain establishments to set up smoking rooms that meet government standards.

Studies such as the one conducted at the Black Dog Pub in Scarborough, Ontario show that adequate ventilation in public places where smoking is allowed can provide an air quality in non-smoking sections that is similar to the air quality in premises where smoking is banned. The air quality obtained in those sections, using an adequate ventilation system, is similar to that found in the food court of the Eaton Centre in Toronto, which is entirely non-smoking. Adequate ventilation is therefore an option that not only respects the rights of smokers and non-smokers, but also allows the owners of bars, pubs or restaurants to choose the kind of environment they wish to offer their patrons.

As Jean Lefebvre, Vice-President of the Quebec branch of the Canadian Food Services Association, pointed out in an open letter to *La Presse*,¹³ New Brunswick's and British Columbia's experience with legislation banning smoking in public places was disastrous for licensed establishments. British Columbia later amended its legislation. Both British Columbia and Nova Scotia now allow the use of ventilation systems to provide smoke-free and smoking environments for Canadians adults.

That is why the tobacco manufacturers believe that operators of all the locations listed on pages 24 to 25 should be authorized under the Act to set up a reserved smoking room and to install a ventilation system that satisfies the standards described above. Nor is there any scientific reason to ban smoking outdoors.

Dismissing out of hand reasonable alternative solutions that are available and that respect the rights of smokers and non-smokers is a mark of intolerance and an attempt at social engineering,

¹² M.E.LeVois and M.W.Layard," Publication bias in Environmental Tobacco Smoke/Coronary Heart Disease Epidemiologic Literature", *Regul. Toxicol. Pharmacol.*, 1995, 21,pp184-191.

¹³ *La Presse*, January 27, 2005, p. A-17.

or a form of totalitarianism¹⁴, as one editorialist has observed. For others, the excessive number of proposals to ban the use of tobacco, even outdoors, shows that "...it is no longer a health issue, but a moral issue", leading to the conclusion that "When the constraint becomes fascistic, it is one's civic duty to reject it."¹⁵

Moreover, we have always held that smoking is an exclusively adult activity. We have financially supported for a number of years the program *Operation I.D.* as part of efforts made by the Canadian Council of Tobacco Manufacturers to help retailers across Canada train their employees not to sell tobacco products to minors. More recently, certain manufacturers have lent their financial support to another component of this program called *Operation I.D. School Zone*, a community initiative, supported by the government of Prince-Edward Island, whose positive results have been confirmed by Health Canada surveys. More information on these programs and their accomplishments can be found on p.35 of the website www.operationid.com.

b. The tobacco point-of-sale network and tobacco promotion

There are already several restrictions on the sale of tobacco products. There is a ban on the sale of tobacco products to minors; a sales clerk must intervene in tobacco sales; vending machines are restricted to bars, taverns and "brasseries" and, if there is a remote electronic control, to licensed restaurants; there is a ban on sales in drugstores, on the grounds of and within the premises of childcare centres, primary and secondary schools and health and social service institutions, and there is a ban on the sale of cigarettes in packages of less than twenty.

In addition to these restrictions, there are other restrictions on advertising and promotion. These prohibitions are so numerous and so wide-ranging that, for all practical purposes, all forms of promotion and advertising of tobacco are banned. Pursuant to the federal legislation, 50% of the surface of tobacco product packaging must be devoted to the health warnings required by federal law. Few industries are subject to the kinds of control imposed on the tobacco industry. In this context it is difficult to justify additional constraints on the display of tobacco products or on their sale. The following comment from page 18 of the Consultation Document totally disregards contemporary reality:

The government must make legislation a fundamental anti-smoking strategy, employing its power to structure the environment to counteract the tobacco industry's power to do the same through marketing.¹⁶

As acknowledged on page 29 of the Consultation Document, point-of-sale displays in an already restricted distribution network constitute, for all practical purposes, the only aspect of sale and promotion that is not yet prohibited by law. Thus, any comment which gives the impression that the government must intervene further to counter the tobacco industry's power *to do the same* through marketing is unwarranted.

¹⁴ Mario Roy, *La Presse*, January 24, 2005, p. A-10.

¹⁵ Pierre Foglia, *La Presse*, January 29, 2005, p. A-5.

¹⁶ P. 18.

Indeed, a recent study of Canadians who shop at convenience stores reveals that 99% of those who buy cigarettes there made their decision to make their purchase before entering the store¹⁷. This study suggests that point of sale displays do not enter into the consumer's decision to purchase cigarettes.

We also draw to your attention to the numerous governmental studies identifying the factors that influence young people to start smoking. Point-of-sale displays do not even figure among those factors. By far the most important factors in young people's decisions to start smoking, as identified by them, is peer pressure and having a friend or relative who smokes.¹⁸ It is therefore unrealistic to claim that further restricting the distribution network or point-of-sale display will have a significant effect on smoking by young people.

Point-of-sale displays are already highly regulated and are the only means available to manufacturers to provide useful information to their customers, to inform them about differences between their products (such as tar and nicotine contents) and to compete with each other. In the absence of proof of a significant connection between point-of-sale displays and smoking, there is no justification for further restriction on the freedom of expression of manufacturers. In this regard, the words of Justice (now Chief Justice) McLachlin of the Supreme Court of Canada are apposite:¹⁹

As noted in my analysis of rational connection, while one may conclude as a matter of reason and logic that lifestyle advertising is designed to increase consumption, *there is no indication that purely informational or brand preference advertising would have this effect. The government had before it a variety of less intrusive measures when it enacted the total ban on advertising, including: a partial ban which would allow information and brand preference advertising; a ban on lifestyle advertising only; measures such as those in Quebec's Consumer Protection Act, R.S.Q., c. P-40.1, to prohibit advertising aimed at children and adolescents; and labelling requirements only (which Health and Welfare believed would be preferable to an advertising ban: A. J. Liston's testimony). In my view, any of these alternatives would be a reasonable impairment of the right to free expression, given the important objective and the legislative context. (our italics)*

In light of these remarks and freedom of expression, none of the measures contemplated on pages 27 to 30 of the Consultation Documents can be justified in a free and democratic society.

¹⁷ Meyers Research Center, *North American C-Store Close-Up 2003. an in-store intercept category management research program (among shoppers 21 years and older) Report*, December, 2003, p. 72.

¹⁸ See for example, Bernier S., Brochu D., «Usage de la cigarette », *Habitude de vie, Enquête sociale et de santé auprès des enfants et des adolescents québécois 1999*, Chapter 8, May 2000, <http://www.stat.gouv.qc.ca/publications/santé/pdf/enfado-4.pdf>, pages 195-209 at p. 206; Statistics Canada, *Youth Smoking Survey*, <http://www.statcan.ca/english/sdds/4401.htm>.

¹⁹ *RJR-MacDonald Inc. c. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at pp. 344-345, paragraph 164.

Conclusion

The consultation process must respect the rights of all stakeholders: smokers, non-smokers and manufacturers. These rights include freedom of expression and respect for reputation.

It is inappropriate for the government to state in the same breath that a legal activity is otherwise “illegitimate”, thereby imposing its own morality over and above the law, or encouraging attacks on the reputation and integrity of those who smoke or who work in the tobacco industry.

Certain premises of the Consultation Document are erroneous:

- The Minister’s claim that smoking rates in Quebec have stabilized is not borne out by the statistics quoted in the Consultation Document. On the contrary, these statistics show that smoking has been declining in Quebec faster than in the other Canadian provinces. One may therefore conclude that the current regulatory regime achieves the Minister’s stated objectives and that there is no need for additional legislation.
- There can be no comparison between the potency of nicotine dependence and that of heroine or cocaine dependence.
- Denormalization which brands the manufacture and use of products that are otherwise legal as “illegitimate” encourages and sanctions behaviour that is contrary to the law by inciting anti-smoking activists to attack the reputation and integrity of those who smoke or who manufacture tobacco products.
- The government is not above the law and any attempt to interfere in the moral choices of citizens by encouraging such serious offences is bound to give rise to legal challenges.
- The study cited by the Minister in support of the assertion that environmental tobacco smoke causes diseases such as lung cancer, emphysema or cardiovascular diseases does not bear out such a claim at this time, even according to the author of the study; the most exhaustive studies to date do not show a significant overall correlation between such diseases and environmental tobacco smoke.

The specific measures considered by the Minister are unjustified:

- Practical alternatives exist which respect the rights of both smokers and non-smokers, such as smoking rooms and ventilation systems, which, according to studies such as that conducted at the Black Dog Pub in Ontario, show that an adequate ventilation system provides in non-smoking areas air quality similar to that found in entirely “non-smoking” food courts.
- There are already many restrictions on the sale of tobacco products, and those that apply to advertising and promotion are so wide-ranging that for practical purposes all forms of promotion and advertising of tobacco products are banned. Pursuant to federal legislation, 50% of the surface of tobacco product packaging must be given over to health warnings. Few industries are subject to more regulation than the tobacco industry. It is therefore difficult to justify additional restrictions on the display and sale of tobacco products.

- Furthermore, the point-of-sale display of tobacco products does not figure among the factors that influence young people in deciding to start smoking; peer pressure and having relatives who smoke are more important.
- Point-of-sale displays remain the only vehicle available to manufacturers to communicate with their customers, to inform them about the attributes of their products (including tar and nicotine contents) and to compete with one another. In the absence of proof of a significant connection between point-of-sale displays and smoking, it is unjustified to further restrict manufacturers' freedom of expression, as pointed out by Justice (now Chief Justice) McLachlin of the Supreme Court of Canada in *RJR-MacDonald inc. et al. v. Canada (A.G.)*, [1995] 3 S.C.R. 199 at paragraph 164.

Rather than multiplying current legal restrictions and prohibitions, we hope that the Minister will recognize the validity of the alternatives proposed in this submission which are respectful of both smokers and non-smokers. We wish to thank the Minister for having invited us to participate in this consultation process. As previously stated, the views of all stakeholders are important particularly when reasonable alternatives to additional legislation exist which are respectful of the rights of all Quebecers,

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