# Framework Convention on Tobacco Control

## An international instrument
## to deal with an international problem

A Submission to the World Health Organization
by the
**Smoking and Health Action Foundation**[1]
Canada

August 25th, 2000

*"The cigarette industry is becoming increasingly international with consumers in different regions and countries moving towards a similar pattern of behaviour. British American Tobacco and its main international competitors are being increasingly successful at the expense of the local companies."*
— British American Tobacco, 1998 Annual Review
and Summary Financial Statement

**Introduction and history**

Like many other Western countries, Canada is in the "advanced" phase of the tobacco epidemic. Smoking prevalence among men has been declining for 40 years, from a high of 60% in 1960[2] to 27% in 1999[3]. Among women, prevalence peaked in 1974, at 40%,[4] and has now declined to 23%.[5] Despite this significant decrease in the percentage of Canadians who smoke, the number of deaths caused by tobacco continues to increase,[6] in particular among females; this reflects the long lag-time between consumption of tobacco and the development of disease. Tobacco can, in public health terms, be viewed as a "disease" with an exceptionally long "incubation" time.

By the early 1960s, public authorities in Canada had conclusive evidence of the health dangers of tobacco products. Yet it is not until the 1980s, when Canadian governments abandoned a long tradition of "voluntary agreements" with the tobacco industry, that a comprehensive tobacco control policy began to emerge in this country: rapidly increasing excise taxes on tobacco, coupled with an advertising ban for tobacco products, prominent health warnings on cigarette packages, and protection from second-hand smoke for non-smokers.

Though Canada has experienced modest success with its tobacco control policies over the last 20 years, there have also been a series of setbacks and obstacles directly related to the limits of national sovereignty:

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[1] The Smoking and Health Action Foundation is a sister organization to the Non-Smokers' Rights Association. It is a registered charitable organization whose mandate is to conduct research and analyse tobacco control policy issues that are both national and international in scope. The Foundation is funded by individual donations and grants from a number of governments. Contact person: Francis Thompson, fthompson@nsra-adnf.ca.
[2] Rob Cunningham, *Smoke and Mirrors* (1996), p. 14.
[3] Health Canada, Canadian Tobacco Use Monitoring Survey, Fact Sheets, Wave 1, February-June 1999.
[4] Rob Cunningham, op. cit, p. 14.
[5] Health Canada, op. cit.
[6] Eva M Makomaski Illing and Murray J Kaiserman, "Mortality Attributable to Tobacco Use in Canada and its Regions, 1994 and 1996," in *Chronic Diseases in Canada,* Vol. 20 No. 3, 1999, pp. 111-117.

- It is difficult to regulate advertising on a national basis in a country such as Canada where foreign (i.e. U.S.) media are omnipresent. Imported magazines account for 50% of magazine sales in Canada,[7] and the majority of Canadians have access to U.S. electronic media. The only saving grace, with respect to tobacco, is the fact that U.S. blends have only a tiny share of the Canadian cigarette market, which is dominated by UK-style cigarettes made from Canadian Virginia tobacco. However, the most recent delay in limiting advertising — the autumn 1998 decision to postpone partial restrictions on sponsorship advertising for another two years — was directly related to the issue of tobacco company sponsorship of international motor racing, and more particularly, the threat that the Canadian Grand Prix would be cancelled if planned restrictions came into effect.

- With respect to health warnings and packaging, a Canadian parliamentary committee recommended in 1994 that generic packaging be imposed for tobacco products sold in this country, in an effort to eliminate packaging as an advertising vehicle. The tobacco industry responded by hiring a former U.S. Trade Representative to argue that such a move would be a violation of international law, and in particular of the U.S-Canada Free Trade Agreement; the Canadian government has never implemented the recommendation. The tobacco industry is expected to contest Canada's most recent rules on health warnings under what is now the North American Free Trade Agreement.

- Canada suffered its most significant setback with respect to tobacco control in the early 1990s, when widespread cigarette smuggling and a massive industry lobbying campaign led to a drastic cut in excise taxes in much of the country, amounting to a halving of cigarette prices in the two most populous provinces, Ontario and Québec. This debacle might have been avoided had Canadian and U.S. authorities co-operated to control the problem at its source, i.e. the Canadian cigarette factories (and, later, a production facility in Puerto Rico) from which the smuggling market was supplied.

Meanwhile, the long-term trend towards increasing concentration of the Canadian tobacco market in foreign hands has continued:

- The number of major manufacturers has fallen to three, with one company, Imperial Tobacco, rapidly approaching a market share of 70%.

- Two of Canada's big three tobacco companies — including Imperial Tobacco — are now wholly owned subsidiaries of foreign-based transnationals. British American Tobacco recently bought out Canadian shareholders of Imperial Tobacco Ltd. of Canada; JTI-Macdonald belongs entirely to Japan Tobacco.

- The other major Canadian firm, Rothmans, Benson & Hedges, is owned jointly by Philip Morris of the United States and a publicly traded Canadian company.

- The Canadian cigarette market functions as an oligopoly, with no signs of price competition for many years now. This has made the Canadian industry increasingly profitable (and powerful), despite declines in overall industry volume over the last 20 years.

[7] Canadian Magazine Publishers Association Newsletter, August 1998.

Tobacco industry documents uncovered through American litigation demonstrate that this foreign control is not without consequences. Probably the most spectacular example is the December 1986 letter from BAT Chairman Patrick Sheehy, telling Canada's Imperial Tobacco to cease research into safer cigarette technology if it wished to remain part of BAT's Group Research and Development structure.[8] This decision was clearly motivated by fear of what such research might do to the liability of another BAT subsidiary, Brown & Williamson of the United States.

## Learning from Canada's (bad) example

> *"The Framework Convention on Tobacco Control…represents a developed world obsession being foisted on to the developing world."*
> — Martin Broughton, Chairman of British American Tobacco,
> in BAT's 1999 Annual Review and Summary Financial Statement

For countries where smoking prevalence is still rising, the primary lesson from the Canadian experience of the past 40 years is very simple: allowing the tobacco epidemic to run its "natural" course is simply not an option. Canada is now losing 46,000 citizens a year (out of a population of 30 million) to tobacco, despite 20 years of concerted tobacco-control efforts.

Canada is a declining market for the transnational tobacco industry, but it remains a significant cash cow.[9] The profits generated here and in other Northern countries are being used to fund the transnational industry's ongoing assault on the developing world. What is being "foisted on the developing world," thus, is a parasitic industry whose products are addictive and deadly.

The Canadian example demonstrates that tobacco-control policies that focus on controlling the tobacco industry can be effective. But it also shows that even a rich, Northern country that shares a border with only one other country cannot fully implement successful tobacco-control measures without international co-operation.

**The prime goal of a Framework Convention on Tobacco Control should be to better protect public health by <u>increasing</u> national sovereignty vis-à-vis a transnational rogue industry**.

## Recommendations

The Smoking and Health Action Foundation is in agreement with the joint submission of Canadian NGOs on the Framework Convention on Tobacco Control. The following should be considered elaborations thereon, or additional points, as the case may be:

1) **Smuggling is largely a supply-driven problem.**[10] Increasing tobacco taxes is the single most effective tobacco-control measure; the spectre of widespread cigarette smuggling is the tobacco industry's most powerful argument against such increases. As a result, **the most important contribution the FCTC can make to public health at this time may well be measures to**

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[8] Sheehy to Crawford, 29 Dec. 1986, pages 304017352-354 in the Guildford Depository of BAT documents; available on-line at http://www.tobaccopapers.org/LessHarmful/86-to-crawforda.PDF .
[9] In 1999, 15% of British American Tobacco's global operating profit came from its Canadian interests — almost as much as from all of Latin America, where it sold roughly five times as many cigarettes.
[10] See Non-Smokers' Rights Association, "Cigarette Smuggling: A Global Weapon against Public Health Measures," at http://www.nsra-adnf.ca/english/smuggling.html, and Luk Joossens, "Smuggling and Cross-Border Shopping of Tobacco Products in the European Union," UK Health Development Agency/UICC, 2000.

**effectively control cigarette smuggling**. To achieve effective measures, it is important that signatory countries realize that large-scale cigarette smuggling is not a spontaneous consumer revolt against tobacco taxes that are judged to be excessively high. As the Canadian (and more recently, British) examples demonstrate, large-scale smuggling occurs when tobacco companies judge it to be in their interest. It generally involves cigarettes on which no taxes have been paid in any country, i.e. shipments theoretically in transit to a third country. It occurs with the complicity of large manufacturers, who use smuggling to pry open previously closed markets or to drive down taxes. Smuggling control measures should be written into the text of the Convention proper and designed to eliminate the incentive for manufacturers to supply black markets:

a) The duty-free trade in cigarettes should be eliminated entirely. This involves not only the comparatively minor proportion of cigarettes sold through duty-free shops at airports and borders, but also cigarettes in the transit regime, which "disappear" from bonded warehouses in free-trade zones at alarming rates. **All taxes should be paid in full at the factory gate, whatever the stated country of destination**. Manufacturers and distributors should be licensed, and possession of a licence should be contingent on their goods not making their way onto the black market.
b) A system of product markings needs to be developed to ensure a proper chain-of-custody system is implemented for all mass-produced tobacco products, similar to the systems that exist in some countries with respect to pharmaceutical products. This would include not only tax-paid markings, but also further information for tracking purposes, including date and place of manufacture, destination market, etc. The Convention Secretariat could be empowered to determine the form and content of such markings, with the right to modify them as circumstances warrant.
c) In many countries, cigarette smuggling is seen as a minor offence, a harmless form of tax evasion. In fact, it represents an extraordinary threat to public health, and needs to be treated as such by the legal system. Signatory countries should agree to vigorously prosecute cigarette smugglers and provide mutual assistance to break up international smuggling rings. Measures applied to traffickers of international drugs, including the seizure of the proceeds of crime, should be extended to the illegal trade in tobacco products. The laundering of profits from the illegal cigarette trade should be treated as severely as money laundering by the illicit drug trade.

2) **Tobacco tax policy is health policy.** The tobacco industry uses two false arguments to fight tobacco tax increases. First, they claim governments have already reached the point of diminishing returns, i.e. that further excise tax increases would actually cause a decline in revenues. This is patently false, as the Canadian example demonstrates.[11] Second, they claim tax differentials between neighbouring countries inevitably create smuggling. Since large-scale smuggling involves cigarettes on which no taxes have been paid anywhere, this argument is also disingenuous. **As a result, the FCTC text should not in any way suggest that "tax harmonization" is crucial to preventing smuggling.** Too often, tax harmonization means seeking the lowest common denominator.

Increasing tobacco taxes **is** a very good way to prevent youth uptake of smoking and decrease overall tobacco consumption, as well as an efficient way to raise revenues.[12] However, governments should also be aware that high specific taxes (a fixed tax per cigarette, as opposed to a multiple of the manufacturer's price) can have a perverse side effect: they reinforce price cartels, and hence industry profits, by ensuring that all cigarettes will be sold at virtually the same price.

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[11] The WHO itself, in its 1995 World No-Tobacco Day issue of *Tobacco Alert*, noted on p. 5 that "no government has ever shown…a decline in revenues attributed to reduced demand following a tax increase."
[12] See World Bank report, *Curbing the Epidemic: Governments and the Economics of Tobacco Control,* 1999.

Some form of profit control (which can be achieved through an appropriate tax structure), or anti-trust mechanism, is therefore highly advisable.

Given the complexity of the tax question and the sovereignty issue it raises, it might be advisable for the FCTC to contain simply a general statement that signatory countries **recognize that excise taxes are a crucial tobacco control policy tool** and that signatories will **co-operate on a regional basis to ensure that tax levels and structures are set to maximize the benefit to public health.**

**3)** **Tobacco products are not normal goods.** The provisional text of the Convention dated February 2000 is entirely silent on international trade agreements and their possible impact on tobacco control, save the proposed Guiding Principle that "trade policy measures for tobacco control purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade." This silence is a serious omission, as raised by several NGOs in the spring and emphasized by the World Conference on Tobacco OR Health in August.

Canada, like several other countries, has already experienced the chilling effects of international trade agreements on tobacco control. The forced opening of the Chinese and Thai tobacco markets should be argument enough to justify explicitly exempting tobacco products from international trade agreements. There is also a simple philosophical argument to do so**. The primary argument for trade liberalization is that it results in increased efficiencies and improved product quality; neither are objectives to be pursued with respect to tobacco products**, unless "quality" is measured in terms of population impact on health.

**The FCTC should include a blanket exemption, to the effect that tobacco-control measures motivated by public health concerns trump trade rules and intellectual property issues**. At the very least, there should be some provision whereby WHO has input into whether a restriction challenged by the tobacco industry on trade grounds in fact constitutes an appropriate tobacco-control measure.

4) **Transnational advertising can only be dealt with transnationally.** Transnational tobacco companies concentrate on building up a small number of international brands (Marlboro, Lucky Strike, Camel, etc.). This is not merely a matter of seeking economies of scale on the manufacturing side; tobacco companies also wish to have global brands that can be promoted globally, effectively defeating national restrictions (and, incidentally, facilitating smuggling). With the rise of international media such as satellite TV stations, with international events such as Formula One car racing, an increasing proportion of tobacco advertising is likely to be transboundary advertising. Whatever a country's internal policies on tobacco advertising may be, no country should act as a base for industry efforts to subvert its neighbours' public health efforts. **The import, export and transboundary broadcast of tobacco advertising and promotion should be prohibited.**

5) **Resources must be shared**. As tobacco control efforts become increasingly sophisticated — for example, as countries move towards regulation of cigarette design and contents — lack of financial resources may make it increasingly difficult for many countries to apply best practices. Even at present, many countries lack basic tools such as prevalence data. In recognition of the global importance of tobacco as a threat to public health, signatories should agree to set up a funding mechanism to facilitate the sharing of tobacco-control expertise, in particular between North and South.