

Best Practices in Tobacco Retailer Licensing

Why Implement a Tobacco Retailer Licensing System?

Tobacco products are the most addictive and deadly consumer products on the market, and yet they are available 24 hours a day, 7 days a week in most communities in Canada. They are sold in essentially every corner store, gas station and grocery store, as well as a wide range of other venues. Not only does this situation make no sense on logical or ethical grounds, but a large body of evidence from the alcohol field and a growing body of tobacco-specific research demonstrate that reducing the availability and accessibility of tobacco products at retail can reduce tobacco consumption.¹

- The ubiquity of tobacco vendors undermines tobacco control measures, for example, graphic health warnings designed to convey the magnitude of the risk of tobacco use. Similarly the easy accessibility of tobacco products reduces the total cost of using them (cost of the product plus factors such as time and convenience), which undermines a high-tax policy.
- The pervasiveness of tobacco vendors contributes to the belief that smoking is the social norm, and the perception that peer smoking is the norm is associated with youth initiation and progression from experimentation to regular use.



- The pervasiveness of tobacco vendors contributes to the perception that tobacco is easily obtained, and this perception correlates to youth initiation.
- There is a positive correlation between greater retail availability and youth smoking.
- There is a correlation between distance to the nearest retailer from a smoker's home and individual smoking.
- Proximity to a tobacco retailer affects quitting success, with smokers living less than 500 metres from a retailer less likely to maintain continuous abstinence.

A well-designed and fully enforced tobacco retailer licensing system can be an effective means of making tobacco products less available, less accessible, and less visible in our communities, by²

- Providing an incentive for retailers to comply with all tobacco control laws and regulations;
- Providing a disincentive for low-volume retailers to continue selling tobacco;
- Establishing a mechanism to reduce the total number of tobacco vendors.

Most Canadian provinces and almost all US states already have some form of tobacco retailer licensing system; however, in most cases licensing is intended solely to facilitate the collection of tobacco taxes and not as a health measure—to support tobacco control policies.³ As well, many municipalities in Alberta and Ontario require tobacco vendors to be licensed, and several charge a significant fee.

Key Elements of an Effective Tobacco Retailer Licensing System

General Requirements

When governments mandate that an activity be licensed for regulatory purposes rather than merely for revenue generation, the regulated activity is considered a privilege and not a right. In order for the privilege to be granted and sustained, businesses must fulfill a set of requirements, which typically include paying a fee, passing a background check, undergoing mandatory training, and complying with rules regarding how the activity is carried out. This is the case, for example, for proprietors seeking a licence to serve alcoholic beverages.

At present, eleven provinces/territories require some form of tobacco retailer licence for which the vendor need only submit a completed application and, in New Brunswick and Nova Scotia only, pay a nominal fee. Instead, the licensing requirements for tobacco retailers should reflect the toxic and lethal nature of tobacco products and the need to protect children from addiction. Ideally, the licensing system would be a provincial/territorial government initiative that would be administered by the health ministry or by revenue in partnership with health. As with other tobacco control interventions, municipalities would retain the right to enact more stringent measures than the minimum provincial/territorial standard.

Regardless of which level of government administers the licensing system, all tobacco wholesalers and retailers should be required to obtain a licence to sell tobacco products, with a separate licence required for each individual venue. Licensees should be required to display the licence prominently in a prescribed location. Licensees should be permitted only to sell to or buy from other licensed operators.⁴ An important licensing condition is that the retailer certifies that he receives no payment, monetary or otherwise, from tobacco companies.

Licensing Fee

All wholesalers and retailers should have to pay a fee to obtain a licence and for the annual licence renewal. The amount charged for a licence should be reviewed regularly by the governing authority and should be high enough to ensure that it is regarded as more than a cost of doing business. The fee should also be high enough to serve as an incentive to small-volume stores to exit the market and to other stores to comply with the licensing conditions.

Effective Retailer Licensing: In Brief

- ✓ Considered a regulatory measure to protect health
- ✓ Applies to all tobacco retailers
- ✓ Separate licence for each venue
- ✓ Licence displayed prominently
- ✓ Payment of annual fee
- ✓ Licensing fee high enough to cover all costs associated with licensing system, including enforcement and public education
- ✓ Condition of licence that retailer receives no remuneration from tobacco companies
- ✓ Graduated penalty system
- ✓ Notice of licence suspension/ revocation displayed prominently

The fee should cover all costs associated with the following activities:

- administration of the licensing regime;
- enforcement of all tobacco control laws that relate to tobacco sales, including sufficient inspections and compliance checks;
- provision of information to customers and the public regarding the rationale for the licence;
- training and ongoing updating of vendors regarding the law.

It is important to note that a municipality could face a legal challenge as a result of choosing to interpret licensing costs broadly as recommended, since it is a general principle that when a licence is primarily for regulatory purposes, the fee should be limited to covering the costs of administering the regulation. However, in reality the line between licensing for regulatory purposes and for revenue generation is often blurred. Moreover, limited information on the actual costs of administering a licensing scheme means that it is often difficult to determine whether the fees reflect cost recovery or in fact raise revenue.⁵

Given the legal requirement in Ontario and many other jurisdictions that the licensing fee reflects cost recovery, the fee will necessarily vary by jurisdiction size. At present, several dozen municipalities in Ontario and Alberta charge a licensing fee, with Ottawa, Ontario, having the highest fee in Canada, at \$806/year, and Prince Albert, Alberta, and Hamilton, Ontario, close behind at \$700/year and \$649/year, respectively. These fees should be regarded as the minimum acceptable.

Penalties

The penalties for violation of any of the retail sales requirements must be significant enough to serve as a real deterrent to non-compliance. A graduated penalty system is optimal, which includes substantial fines for a first violation as well as licence suspension and revocation for multiple violations. Retailers whose licence to sell tobacco has been suspended should be required to post in one or more prominent locations in the outlet a government-mandated sign indicating the reasons for and duration of the licence suspension.

Number of Licences

A key goal of a retailer licensing plan is to reduce the availability of tobacco products. To do so likely requires reducing not only the total *number* of retailers but also the *density* of retailers in a community. The number of retailers can decrease significantly without having much impact on availability if the only vendors who stop selling tobacco are those who sell marginal amounts.

The Ontario *Municipal Act, 2001* grants municipalities the authority to pass bylaws for the "health, safety and well-being of persons" and the "protection of persons and property, including consumer protection." Section 151 of the *Act* authorizes municipalities to pass a licensing bylaw that requires tobacco retailers to be licensed and limits the number of licences granted. However, the licensing bylaw must specify the system to be used for allocating licences if demand exceeds supply. Beginning with imposing a cap on licences granted at the current number, there are several possible ways to reduce the number and/or density of tobacco vendors in the community:

- Municipalities can choose not to grant licences to certain types/classes of business, such as bars. While the Ontario government prohibits tobacco sales in a number of venues (pharmacies, vending machines, healthcare facilities), the provinces of Nova Scotia and Quebec lead the way with the most prohibitions on where tobacco can be sold.⁶ There are many more locations where a tobacco sales ban is justified, including restaurants, bars, gaming facilities, and temporary outdoor venues such as music festivals. However, a municipality may need to demonstrate that there is a logical rationale for its choice.
- Municipalities can hold a lottery to determine which retailers are awarded the limited number of licences. The lottery system must be provided for in the bylaw.
- Despite the merits of restricting the proximity of retailers to schools and other youth-oriented facilities and the popularity of this measure in some US jurisdictions, municipalities cannot, under section 153(1) of the *Municipal Act, 2001*, base eligibility for a licence on a business's geographic location. However, municipalities do have the authority, under sections 34(1)1 and 34(1)2 of the *Planning Act*, to use zoning bylaws to prohibit tobacco retailers from operating in certain geographic areas/zones and within a certain proximity of another retailer. A municipality may impose as a condition of licensing, under section 153(2) of the *Municipal Act, 2001*, a requirement that the business's location comply with a zoning bylaw. Existing retailers must be grandfathered, however. Called a "legal non-conforming use," grandfathering applies even after the business is sold, as long as tobacco retailing continues. With mandatory grandfathering, it could take a long time before the number of retailers in a community or their density in established neighbourhoods is substantially reduced. Much faster progress can be made in limiting the availability of tobacco products in newer developments.

Given the limitations of both licensing and zoning bylaws under Ontario law, the optimum way for municipalities to reduce the retail availability of tobacco products is to use licensing and zoning together to reduce the total number of retailers, to control the types of venues where tobacco products can be sold, and also to decrease the density of vendors operating in specific locations and zones throughout the municipality. The ultimate impact on tobacco use will depend on the scale of the reduction in the number of outlets and on where it is concentrated. Most communities have an enormous oversupply of tobacco outlets, so marginal changes in the number of outlets will likely have little if any effect on smoking behaviours. The bottom line is that municipalities do have valuable tools—licensing and zoning bylaws—that they can use to reduce the availability of tobacco products at retail, but using these tools effectively will require political will and a long-term view.

References

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- ³ ChangeLab Solutions, "Tobacco Retailer Licensing: An Effective Tool for Public Health," 2015.
- ⁴ Adapted from The Allen Consulting Group Pty Ltd., "Licensing of Tobacco Retailers and Wholesalers: Desirability and Best Practice Arrangements, Report to the Commonwealth Department of Health and Ageing," December 2002.
- ⁵ The legal information throughout this document is based on a legal opinion authored by Robert Cosman, Fasken Martineau "Re: Municipal Authority to Regulate Tobacco Retailing," 24 October 2013.
- ⁶ See Non-Smokers' Rights Association, "Prohibiting Tobacco Sales in Specified Outlets: Policy Analysis," Fall 2010. http://www.nusra-adnf.ca/cms/file/files/Prohibiting_tobacco_sales_in_specified_outlets_2010.pdf