PUBLIC HEALTH LAW CENTER
Tobacco Control Legal Consortium

May 2017

LEADING FROM UP NORTH

How Canada Is Solving the Menthol Tobacco Problem

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Suggested citation: Kerry Cork, Tobacco Control Legal Consortium, *Leading from Up North: How Canada Is Solving the Menthol Tobacco Problem* (2017).

The author thanks Blue Cross and Blue Shield of Minnesota for funding this project, our Canadian tobacco control experts – Rob Cunningham, Flory Doucas, Les Hagen, Krista McMullin, and Michael Perley – for their support and consultation, Joanna Cohen for sharing her research in this area, and Desmond Jenson for his editorial review.

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Introduction

On May 31, 2015, the province of Nova Scotia, Canada, became the first jurisdiction in the world to prohibit the sale of menthol-flavored tobacco products. Six Canadian provinces — Alberta, New Brunswick, Quebec, Ontario, Prince Edward Island, and Newfoundland & Labrador — soon followed suit by passing similar legislation, with the last of these prohibitions taking effect in July 2017. As of spring 2017, more than 80 percent of the Canadian population was covered under provincial flavor/menthol restrictions. In the wake of this provincial legislation, on November 6, 2016, the Canadian government published a draft Order to amend the nation's Tobacco Act and prohibit the use of menthol in all cigarettes, blunt wraps and most cigars sold in Canada.[1] The federal law was finalized on April 5, 2017,[2] and will take effect on October 2, 2017.[3]

How did our neighbor to the North become a global leader in tackling the problem of regulating menthol tobacco? And what lessons can we learn from Canada's experience in adopting and implementing restrictions on the sale of menthol flavored tobacco products? Although the U.S. and Canada have different demographics and government structures, our countries have much in common, including concern over the disturbingly high prevalence of menthol tobacco products among targeted populations. This case study explores Canada's experiences in outlawing menthol flavored tobacco products and highlights lessons the U.S. can learn from Canada's success at the provincial and federal levels in addressing the problem of menthol tobacco use.

Background

The Infamous Flavor

Menthol is the most dangerous flavor in tobacco products. Not only does menthol flavoring encourage youth to smoke and make it harder for smokers to quit, but menthol cigarettes in the U.S. are also disproportionately targeted to, and used by, African Americans and other racial and ethnic minority smokers. For instance, 85 percent of African American smokers over the age of 12 smoke menthol cigarettes, compared to 29 percent of white smokers.[4]

Menthol is an ingredient produced synthetically or found organically in plants of the mint family. Its cooling properties make it a popular additive in confectionery products, such as peppermint candies; oral care products, such as toothpaste; and over-the counter medicinal products, such as cold remedies. These properties also reduce the harshness of tobacco smoke and the irritation of nicotine in cigarettes.[5] As a result, menthol tobacco products are a popular choice for first-time tobacco users. In the U.S., menthol cigarettes are the source of addiction for more than half of all teen smokers (56.7 percent), compared to 45 percent for 18- to 25-year olds and 30.5 percent to 34.7 percent for older adults. More than

80 percent of adolescent African American smokers and more than half of adolescent Latino smokers use menthol cigarettes,[6] as do approximately 71 percent of all young LGBTQ smokers.[7] Menthol products are also popular among non-minority youth, unemployed people, and those making less than $10,000 per year in the U.S.[8]

In 2009, the Family Smoking Prevention and Tobacco Control Act (Tobacco Control Act) prohibited the manufacturing, marketing and sale of cigarettes containing "characterizing flavors," such as vanilla, chocolate, and coffee, and any candy, fruit, and alcohol favors.[9] This prohibition extends to flavored cigarettes and flavored cigarette "component parts," such as their tobacco, filter or paper. However, the prohibition exempts tobacco and menthol flavors, and does not apply to non-cigarette tobacco products, such as electronic cigarettes, cigars, smokeless tobacco, hookah tobacco, and their flavored component parts. The FDA cited the prevalence of flavored tobacco use among youth and young adults as a reason for extending its regulatory authority over other tobacco products.[10]

Over the past several years, the U.S. government has reviewed a wealth of scientific evidence on the health effects of menthol.[11] Both the FDA and an independent scientific advisory committee have found that menthol cigarettes pose a public health risk above that seen with non-menthol cigarettes and that the removal of menthol cigarettes would have a positive impact on public health.[12] Nevertheless, in 2016, when the FDA issued its final deeming rule extending its authority to regulate e-cigarettes, cigars, pipe tobacco, and hookah, it did not take the step supported by many public health advocates and prohibit all flavored tobacco products, including menthol-flavored cigarettes, from the U.S. market.[13]

In the absence of U.S. federal action to regulate menthol tobacco products, some state and local governments are considering ways to regulate this infamous flavor, and a few U.S. jurisdictions have taken steps to restrict sales of menthol products.[14] Nevertheless, these measures pale in light of Canada's astonishing success at both the provincial and federal levels in restricting the sale of menthol tobacco products.

The Global Perspective

Canada's pioneering tobacco flavor legislation aligns with a recommendation by the Conference of the Parties to the Framework Convention on Tobacco Control that parties regulate ingredients that make cigarettes more palatable, including flavoring substances like menthol.[15] The World Health Organization's Framework Convention on Tobacco Control (FCTC) is the first global treaty on public health**.** The FCTC sets up specific steps for governments to address the tobacco epidemic, including tax and price measures; bans or restrictions on tobacco

advertising, promotion and sponsorship; smoke-free work and public spaces; prominent health warnings on tobacco packages; and limits to tobacco industry interference in public health policy.[16] FCTC guidelines to implement Articles 9 and 10 (product regulation and disclosures) support government action to regulate tobacco flavors, stating that "masking tobacco smoke harshness with flavours contributes to promoting and sustaining tobacco use."[17] The guidelines specifically cite menthol as an example of such a "masking" tobacco flavor.

The U.S. has signed but not yet ratified the treaty and is not a party to the FCTC. Nevertheless, 179 countries and the European Union (representing 28 member states) have ratified the FCTC, including Canada, which signed the treaty in July 2003 and ratified it in November 2004.[18] For these countries, the FCTC has resulted in a series of progressive tobacco control initiatives. For example, in 2014, the European Union passed a Tobacco Products Directive that includes a ban[19] on flavorings (other than menthol) in cigarettes and roll-your-own tobacco as of May 20, 2015; a ban on flavor capsules in tobacco products as of May 20, 2015; and a ban on menthol cigarettes and roll-your-own tobacco as of May 20, 2020.[20] In 2016, the World Health Organization issued an advisory note "unequivocally recommend[ing] banning the use of menthol and its analogues, precursors or derivatives in cigarettes and possibly all tobacco products."[21] Other countries, including Brazil, Ethiopia, Turkey, Uganda, Moldova, and Canada (both at the provincial and federal levels) have passed regulations to prohibit the sale of menthol cigarettes, as well as some (or all) other flavored tobacco products.[22]

Although the U.S. federal government has not yet ratified the FCTC, many FCTC-proposed initiatives can be adopted at state and local levels. Canada led in May 2015, with Nova Scotia the first of seven provinces to implement a ban on menthol tobacco products. And in late 2017, Canada's national menthol legislation will take effect, covering flavors at all levels, not just characterizing flavors.

Overview

Canada in Brief

Many U.S. residents know relatively little about Canada. With a land mass of 250,604 square miles spanning six time zones, Canada – containing ten provinces and three territories – is the second largest country in the world.[23] Ottawa, in the province of Ontario, is the capital of Canada and the fourth largest city in the country, with close to 25 percent of its residents coming from other nations.[24]

Map of Canada

Canada's overall demographics are notably different from those in the U.S.[25] This is significant in terms of menthol tobacco, because unlike in the U.S., menthol is not identified with use by minority communities in Canada. Black Canadians represent only a small percentage of the population (2.9 percent or 945,665)[26] and are not affected by menthol use in the way African Americans in the U.S., who represent close to 13 percent (or 38,929,319)[27] of the U.S. population, are affected. Nevertheless, in both countries a preponderance of youth favor menthol flavored products – particularly when they first start smoking or using tobacco.

Federal Government. Although both Canada and the U.S. are democracies with a shared border, history of British rule, and culture, our governments differ in several significant ways. While the U.S. has no official language, Canada has adopted both English and French as its official languages. Also, the U.S. is an independent republic, governed by a president and Congress,

while Canada is a constitutional monarchy – a part of the Commonwealth of Nations, closely tied to the United Kingdom – with a parliamentary-cabinet government. Canada's head of state is the British monarch, who is represented in Canada by an official known as the governor general.[28] Like the U.S. president, the Canadian prime minister is the head of government and is usually the elected leader of the governing political party.[29] Unlike the U.S. president who can serve only four years, the prime minister has no term limit and may remain in office until there is a change in the governing party.[30]

Parliament, like Congress, is divided into two bodies: the House of Commons and the Senate. Unlike Congress, however, only the members of the House of Commons are publicly elected. These elected officials hold office until Parliament is dissolved or for a period of five years, whichever comes first. Members of the Canadian Senate are appointed by the governor general and serve until they step down or reach a mandatory retirement age of 75.[31]

The two governments also differ in the way they allocate power. The U.S. government is based on the principle of separation of powers, with the three different branches of government (executive, legislative, judicial) checks on each other. Canada's government, however, is based on the idea of consolidated power. Thus, the prime minister is always a member of Parliament, as are most cabinet ministers, sitting in the House of Commons. If a governing party has a majority in the House of Commons, this normally means that government bills are likely to be adopted.[32]

Finally, although both Canadian and U.S. federalist systems rely on courts to determine the meaning of their written Constitutions, the U.S. courts have typically tended to interpret the Constitution in a way that broadens federal and narrows state powers, while the Canadian courts have tended to interpret the Constitution Act, 1867, in a way that narrows federal and broadens provincial powers.[33] As a result, Canada's federated system, with national, provincial and territorial governments, is one of the most decentralized federations in the world.[34]

Two acts address tobacco products and their use at the federal level: (1) The Tobacco Act, which is administered by Health Canada (the government's health department) and which governs the manufacture, sale, labeling and promotion of tobacco products; and (2) the Non-smokers' Health Act, administered by the Department of Human Resources and Skills Development.[35] Significantly, all three levels of government – federal, provincial and municipal – have jurisdictional powers over matters of public health, such as tobacco.

Local Government. The government structure is similar in all Canadian provinces, based on a constitutional monarchy and parliamentary democracy with a unicameral legislature. The premier, leader of the party in power in the provincial assembly, selects a cabinet from among the

elected party. Members of the legislature are elected from constituencies established by the legislature roughly in proportion to population. Because the Canadian parliamentary system does not have fixed election dates, provincial elections are held at different times throughout Canada.[36] The provincial legislatures set up roughly 4,000 municipal governments (cities, town, villages, counties, districts, metropolitan regions) and delegate limited powers to them.[37]

In addition to tobacco, Canadian provinces have jurisdiction over many public services such as health care, education, welfare and intraprovincial transportation and have considerable power compared to the federal government. Each province has a legislative assembly similar to the House of Commons, and conducts its business in a similar way, although there are no provincial Senates. Bills go through three readings and, before they are enacted into law, must receive Royal Assent (formal approval, which is ceremonial) by the province's lieutenant-governor, the representative of the Crown and titular head of government.

Canada & Flavored Tobacco

Tobacco is an equal opportunity killer. As it is in the U.S., tobacco use is the leading preventable cause of premature death and disease in Canada, responsible for more than 37,000 Canadian deaths each year.[38] Over 5 million Canadians use tobacco (including 4.2 million current smokers or 15 percent of all Canadians aged 15 and older).[39] Direct health care costs are estimated at $4.4 billion annually, and the total burden of tobacco use to the Canadian economy, including indirect costs (e.g., lost wages, productivity), is estimated to be $17 billion per year.[40] Canada has many of the strictest tobacco laws in North America, with most of them adopted by the ten provinces and three territories. In 2015, menthol tobacco products represented roughly 4.5 percent of the total tobacco market in Canada, with menthol cigarettes making up 98 percent of those sales.[41]

In the past, the Canadian and U.S. federal governments have tended to treat menthol similarly. The U.S. has issued no product standards to date for menthol in cigarettes and, up until recently, Canada also had no standards or regulations governing the inclusion of menthol in its cigarettes.[42]

Back in October 2009, roughly a month after the FDA, under the Tobacco Control Act, prohibited the U.S. manufacturing, marketing and sale of cigarettes containing "characterizing flavors," Canada passed a similar but more comprehensive law, outlawing the manufacture, import and sale of most flavored cigarettes *and small cigars*.[43] The "Cracking Down on Tobacco Marketing Aimed at Youth Act" (Bill C-32) amended Canada's Tobacco Act to limit the marketing of tobacco products to youth, especially flavored little cigars. Little cigars were defined in the Act

as cigars weighing no more than 1.4 grams or having a cigarette filter. These flavored cigars, as well as blunt wraps, were similar in size to cigarettes and had become increasingly popular among Canadian youth.[44] The Act added a schedule to the Tobacco Act to identify additives prohibited in specified tobacco products.[45]

Backed by both government and opposition lawmakers, the law also prohibited tobacco advertising in newspapers and magazines, closing a loophole that had allowed ads in publications with an adult readership greater than a certain percentage. Although a few U.S. lawmakers in tobacco-growing states complained that the Canadian law would cost U.S. jobs, this argument was dismissed by the Canadian tobacco control community, which pointed out that Canada did not import any U.S.-grown burley tobacco in 2007 and 2008, and that "American-style" cigarettes made up less than 1 percent of the Canadian market.[46]

At this time, some Canadian public health experts were concerned about the allure of flavors in recruiting smokers, but although menthol was identified as an enticing flavor, the extent of its popularity among young smokers was not widely known. Instead, menthol was described as an additive designed "to make smoking easier" and to lure smokers into believing products containing this ingredient were less harmful than other cigarettes.[47] At the same time, new marketing trends in marketing menthol in the U.S. included products, such as Camel Crush, with a novelty feature designed to encourage experimentation. The Camel Crush filter contained a menthol capsule that, when crushed, released a blast of flavoring. Consumers were invited to Squeeze, Click, Change.[48] Still, despite the debut of new menthol brands, cigarette designs, and packaging in Canada, menthol was not included in the nation's 2009 law restricting tobacco flavors.

Interestingly, the Canadian government addressed the 2009 menthol exemption in a Frequently Asked Questions posting on its website:

> **Q7.** Why do the [2009] amendments exclude menthol flavouring from the ban?
>
> **A7**. Menthol-flavoured cigarettes have been in the marketplace since the 1920s and are used by about 2% of smokers in Canada.[49] The measures in the legislation are designed to protect children and youth by focusing on new or emerging fruit- and candy-flavoured tobacco products — such as little cigars and blunt wraps — that may induce youth to smoke.[50]

After the 2009 amendment took effect, tobacco manufacturers and importers also introduced new cigar types – slightly larger than little cigars and without filters – to the Canadian market and sold them in the same flavors targeted by the amendment. Many of these new products retained physical characteristics, such as tipping paper, that made them resemble little cigars and cigarettes.[51] Thus, flavored tobacco products, including menthol cigarettes and cigars, continued to be sold in Canada.

In June 2015, the government again amended the Tobacco Act to extend the ban on flavored cigars from flavored little cigars (weighing 1.4 grams or less or with a cigarette filter) to most cigars weighing between 1.4 grams and 6 grams, but exempting port, wine, rum or whiskey flavors.[52] An exemption for menthol continued to apply to all cigars.

During this period, surveillance data indicated that Canadian youth were not only continuing to buy and use — but to a disproportionate extent were preferring — flavored tobacco products.[53] And hands down, the most popular flavor among teens was menthol. Beginning in 2009, menthol cigarette sales in Canada increased for five consecutive years and, in 2014, they were 14 percent higher than in 2008. On October 7, 2013, the University of Waterloo's Propel Centre for Population Health Impact (Propel Centre) released a report on Canada's Youth Smoking Survey for the 2010 – 2011 school year, which found that of Canadian high school students using tobacco, 52 percent used flavored tobacco, and of Canadian high school students who smoke, 32 percent smoke menthol.[54] A subsequent Propel Centre report on the Youth Smoking Survey for the 2012 – 2013 school year, released September 10, 2014, found that of Canadian high school students using tobacco, 50 percent used flavored tobacco, and of high school students who smoke, 29 percent smoke menthol.[55] Both reports generated significant media coverage across Canada.[56]

The provinces were about to make their move.

Nova Scotia

Province in Brief

Nova Scotia is Canada's second smallest province, with an area of 21,300 square miles, including Cape Breton Island. It is one of the original four provinces that became part of Canada in 1867, and it is also one of Canada's Maritime Provinces (along with New Brunswick and Prince Edward Island), with strong ties to fishing, shipbuilding, and transatlantic shipping. Nova Scotia has 923,598 residents – almost half of whom live in the capital city of Halifax.[57] Early French explorers called the area Acadia; its present name, which means "New Scotland" in Latin, stems from brief Scottish claims to the region in the 1620s.

Back Story

On May 31, 2015, Nova Scotia became the first Canadian province – indeed, the first jurisdiction in the world – to prohibit the sale of menthol tobacco products. The story behind this legislation speaks to the power of persistence in the public health community and the impact of tobacco control data on policymaking.

As mentioned above, back on October 7, 2013, the Propel Centre released a report on flavored tobacco based on data for the Youth Smoking Survey for the 2010 – 2011 school year.[58] The Propel Centre has conducted this biennial survey across Canada since 2004, aggregating provincial data representative of grade 6 to 12 students in a sample of schools in the ten Canadian provinces. The survey's aim is to "assist provincial and community leaders (educators, students, and public health workers) to prioritize actions that will create the healthiest environment possible in which students can thrive."[59] The statistics were startling: of high school Canadian students who used tobacco, 52 percent used flavored tobacco. And of high school students who smoked, 32 percent smoked menthol cigarettes.[60]

Then, on September 10, 2014, the Propel Centre issued its report on flavored tobacco based on the Youth Smoking Survey data for the 2012 – 2013 school year.[61] Four hundred and fifty schools and 47,203 students across Canada participated in this Youth Smoking Survey.[62] The results highlighted (again) the prevalence of flavored tobacco products among this population.

According to the Nova Scotia-specific survey and a special supplement on flavored tobacco use, of those Nova Scotia youth who had used tobacco products in the last 30 days, over half – 50 percent – had used flavored products.[63] Of high school students who smoke, 29 percent smoked menthol; and of high school students who smoked daily, 43 percent smoked menthol. Perhaps most surprising to many policymakers was that 31 percent of last-30-day smokers in Grades 6 to 9 had used menthol cigarettes.[64] In other words, as the Canadian Cancer Society and other public health organizations pointed out repeatedly over the intervening months, one-third of underage Canadian smokers used menthol cigarettes. This was a public health problem that disproportionately affected Canadian youth, that was getting worse, and that was not going away.

The Legislation. In fall 2014, Nova Scotia's Health Minister Leo Glavine introduced several regulations focused largely on e-cigarettes, but also outlawing the sale of all flavors in tobacco products and e-cigarettes, except for tobacco and menthol. The bill was strongly opposed – both by e-cigarette supporters, such as Canada's Electronic Cigarette Trade Association, and by proponents of flavored tobacco products, including the Atlantic Convenience Stores Association.[65]

In Nova Scotia (as in other provinces), bills get two readings, followed by committee consideration and possible amendments, where public testimony is taken, then a final vote at a third reading. During this time, three tobacco companies spoke to the government in support of e-cigarettes and flavored tobacco, and public health representatives spoke in support of restrictions, including the prohibition of flavored – including menthol-flavored – tobacco products. Young students also spoke at these hearings, telling compelling personal stories about the popularity of these flavored products at their schools and among their friends and submitting to a battery of questions during long and intense hearings.

Finally, in November 2014, the bill was amended to prohibit the sale of e-cigarettes to those under 19 years of age and to outlaw the use of water pipes and e-cigarettes in indoor public places and other areas covered under the province's Smoke-Free Places Act,[66] but the provision prohibiting the sale of flavored tobacco and e-cigarette products was shelved.[67] The Health Minister announced that the province would leave the regulation of flavored tobacco and e-cigarettes to the federal government.[68]

As a compromise, the provincial government agreed to hold consultations in early 2015 on flavored tobacco legislation to be introduced that spring. In the interim, the government gathered input from the public through online submissions, conducted focus groups of youth, and held meetings with e-cigarette vendors and small business organizations representing tobacco

manufacturers, as well as physicians and health professionals.[69] Listening to this testimony, Nova Scotia Health Minister Leo Glavine, who had introduced legislation for the previous flavor legislation exempting menthol, said he had a "change of heart on menthol, largely due to the testimony of people" at these hearings.[70] He said he now believed the product was a "gateway" to getting young people hooked on smoking.[71]

On March 2015, the Department of Health and Wellness issued a report summarizing the results of the requested consultations on the proposed flavored tobacco legislation. Predictably, health stakeholders supported the measure, with some willing to carve out an exemption for e-cigarettes, while the tobacco industry, retailers, and e-cigarette manufacturers opposed the measure.[72]

When news broke that the Nova Scotia government was planning to introduce legislation prohibiting flavoring in tobacco products during the 2015 spring session, the Atlantic Convenience Stores Association (ACSA) called on the government to exempt menthol tobacco from the bill, arguing that contraband menthol cigarettes would be brought into the province through illegal means.[73] The ACSA is funded by the tobacco industry and has members that are tobacco companies. The ACSA president warned "If the province looks at possibly banning this product, then the floodgates will open up and there will be much more access for this product at a much cheaper price than what they're paying right now."[74] The president of Nova Scotia Crime Stoppers raised concerns about a possible spike in illegal tobacco sales, arguing that "The profits that go from the sale of illegal tobacco help support organized crime and takes away funding from health care and education."[75]

Similar concerns were voiced by the national spokesperson for the National Coalition Against Contraband Tobacco (NCACT): "The discussion here is not about menthol, it's about the implementation of additional measures that will fuel contraband and crime. With this proposed law, Nova Scotia will be directly handing an additional 30 million cigarettes each year to the illegal market."[76] NCACT is also funded by the tobacco industry and includes the Canadian Tobacco Manufacturers' Council as one of its members.

Despite this opposition, on April 17, 2015, the Nova Scotia Health Minister introduced a bill to prohibit the sale of flavored tobacco, including menthol, as well as flavored rolling papers and tobacco products that are not smoked, such as chewing tobacco and snuff. The language identified flavored products as tobacco that (i) has a "characterizing scent or flavour, other than tobacco, that is noticeable before or during use, or both; (ii) by its packaging, labeling, advertising or otherwise, is represented as being flavoured, or (iii) is designated under the regulations as being flavoured, but does not include tobacco exempted by the regulations."[77]

The bill did not include port-, rum-, wine- and whiskey-flavored cigars that weigh five grams or more and cost more than four dollars per cigar. It also exempted e-cigarettes and e-liquid. (The provincial government maintained that the regulation of flavored e-cigarettes and flavored e-cigarette liquid should be the responsibility of the federal government.[78])

Although some in government projected that the legislation could cost the province approximately $5 million in tobacco revenues, the Health Minister dismissed these numbers as "short-term revenue losses" in light of the province's long-range savings in tobacco-related health care costs.[79] The Canadian Cancer Society, Smoke-Free Nova Scotia (a coalition of 28 health-related organizations), and many others in Canada's public health community rallied to support Nova's Scotia's progressive proposal, focusing on the law as a necessary health protection measure for the province's youth.[80]

On April 28, 2015, the Nova Scotia Legislative Assembly approved a law prohibiting the sale of menthol cigarettes and other flavored tobacco products, including flavored rolling papers. The law took effect within a month – a particularly short transition period according to some convenience store owners.[81] Not coincidentally, the Nova Scotia implementation date – May 31, 2015 – also happened to be World No Tobacco Day, an annual event where the World Health Organization and its partners around the globe highlight the health and additional risks associated with tobacco use, and advocate for effective policies to reduce tobacco consumption. On May 31, 2015, then, Nova Scotia was heralded internationally as the first jurisdiction in the world to enact a ban on the sale of flavored tobacco, including menthol.[82]

The Epilogue. That same week, two tobacco companies filed a legal challenge in Nova Scotia's Supreme Court against the province's new law.[83] Imperial Tobacco Canada Ltd. (a wholly owned subsidiary of British American Tobacco and Canada's largest tobacco company) and JTI-Macdonald (a wholly owned subsidiary of Japan Tobacco International) claimed Nova Scotia did not have the legislative authority to prohibit the sale of menthol cigarettes and other menthol tobacco products.[84] The companies also argued that menthol products have been sold for over 80 years and that (despite the Youth Smoking Survey findings) studies show they are preferred by an older demographic. Nova Scotia's chief public health officer said the legal challenge was no surprise. "This is standard tobacco industry practice around the world when there is any significant tobacco-control legislation brought in place," said Dr. Robert Strang. "We are confident we will be successful if there are any legal challenges. We are not going to back down to scare tactics from Big Tobacco. This is about protecting Nova Scotians, especially young Nova Scotians."[85] "We are shutting down the pipeline of flavoured tobacco into Nova Scotia stores. . . . I guess that's why we got a little attention from Imperial Tobacco," replied Health Minister Leo Glavine.[86]

The legal challenge, while expected, did not prevent the legislation from being enforced.[87] Unlike in the U.S., where a variety of claims and constitutional issues are often raised in challenges to tobacco control measures, the legal principles in this type of provincial legislation are settled. The court did not grant any stays, injunctions, hearing dates, or decisions in the case; the preemption argument lacked merit, having been decided on the side of the province in a 2005 Supreme Court of Canada ruling related to Saskatchewan's prohibition of retail displays.[88] Imperial Tobacco of Canada filed similar legal challenges in other provinces that passed menthol tobacco bans (e.g., Alberta, New Brunswick, and Quebec), and none of these lawsuits had any impact on the implementation of the laws.

Meanwhile, as Nova Scotia was moving ahead with its legislation, another much larger province was preparing to make its move as well – Alberta.

Alberta Legislation

Province in Brief

Alberta is a landlocked western "prairie province," bounded by Saskatchewan to the east, British Columbia to the west, the Northwest Territories to the north, and the state of Montana to the south. Its area is approximately 250,000 square miles. With an estimated population of 4,196,457, Alberta is Canada's fourth most populous province.[89] Alberta's capital of Edmonton and the city of Calgary each have metropolitan populations exceeding one million. Edmonton is near the geographic center of the province and is the primary supply and service hub for Canada's crude oil and other industries.[90]

Back Story

After Nova Scotia, other provinces adopted tobacco flavor restrictions in short order. On May 31, 2015, the same day Nova Scotia's flavored tobacco law took effect, Alberta's Health Minister Sarah Hoffman announced that Alberta's flavored tobacco ban would take place that fall.

Alberta had actually led all the provinces in approving comprehensive flavored tobacco legislation only 18 months earlier. In November 2013, Alberta's Legislative Assembly approved Bill 206 that prohibited the sale of flavored tobacco products including menthol cigarettes.[91] The bill received almost unanimous support in the Legislative Assembly. At the time, Alberta was applauded as leading the way in Canada by providing the strictest flavor ban in the country.[92] Unfortunately, the bill was not "proclaimed by cabinet" (officially implemented), and many months passed while the government claimed that it was developing regulations that would flesh out the law.[93] During this time, the tobacco industry, concerned that Alberta's groundbreaking law would spread to other jurisdictions, registered over twenty lobbyists to fight the legislation and related tobacco control measures in Alberta.[94] This period was also accompanied by unrelated political scandals and instability that resulted in the resignation of Premier Alison Redford and her replacement by Premier Jim Prentice. Premier Prentice and his new health minister Stephen Mandel were accused by health groups and opposition political parties of having close relationships with key tobacco lobbyists that opposed a ban on menthol tobacco.[95]

As in Nova Scotia, one of the deciding factors in the development of the Alberta legislation was the Propel Centre's report on flavored tobacco use among youth across Canada, which was released in the fall of 2013.[96] The report, based on the 2010 – 2011 Youth Smoking Survey, confirmed – for the first time – that large numbers of young Canadian smokers (roughly one-third) were using menthol cigarettes. These results contrasted sharply with statements made by Health Canada officials during deliberations on the national law, Bill C-32, in 2009.[97]

The Propel Centre's 2013 report on youth tobacco use in Canada was used to help justify a ban on menthol tobacco in Alberta. The study was released with the news that more than one-third of young Alberta smokers – 12,800 students – reported smoking menthol cigarettes, along with a finding that of Alberta students in Grades 9-12 who reported using tobacco in the last 30 days, more than half used flavored tobacco products.[98] This translated to 25,700 young Albertans.[99]

The Legislation. In 2011, the Campaign for a Smoke-Free Alberta launched a four-year effort to secure comprehensive tobacco control legislation that included a provincial ban on flavored tobacco. Members of this coalition included Action on Smoking & Health, Alberta Policy Coalition for Chronic Disease Prevention, Alberta Public Health Association Canadian Cancer Society, Heart and Stroke Foundation and The Lung Association. The Campaign strongly urged Alberta's Progressive Conservative government to include menthol in the flavored tobacco legislation: "From a public health perspective, menthol should be the first flavor to be banned

– not the last," said Dr. Candace Nykiforuk of the coalition. "If the goal of Bill 206 is to protect Alberta youth from tobacco use, then menthol flavors must be banned."[100]

In December 2012, when the Tobacco Reduction (Flavored Tobacco Products) Amendment Act was introduced in the Alberta Legislature, it was hailed as North America's most comprehensive legislation to ban flavored tobacco.[101] After lengthy consideration, the bill was passed in November 2013, but remained unimplemented for almost a year.

Then in November 2014, Health Minister Stephen Mandel announced that the law restricting the sale of flavored tobacco products in the province would *exclude menthol*.[102] The health minister defended the exemption, saying that Alberta needs to "deal with the realities of the world.... It is a legal product. People who smoke menthol who are older people need to be consulted and we'll make sure we do that in the next little while and then we'll bring it back to see how we can deal with these issues."[103]

The new regulations defined "characterizing flavour" as a *clearly noticeable* smell or taste other than tobacco that (a) results from an additive or combination of additives, and (b) is noticeable before or during the use of the tobacco product. In addition to exempting menthol, the regulations exempted pipe tobacco and cigars weighing more than 5 grams and costing more than $4 per unit.[104]

Health groups and opposition parties, deeply disappointed at this perceived betrayal, roundly criticized the government for, in their view, being persuaded by the tobacco industry to rewrite the legislation.[105] The Premier and the Health Minister were accused of having close political ties to key tobacco lobbyists. In fact, the primary Alberta lobbyist for Rothmans Tobacco was a former campaign manager for the health minister.[106]

The weakened tobacco legislation was slated to take effect June 1, 2015. As fate would have it, though – before this could occur – the opposition and governing parties traded places in the legislative assembly. Once the New Democrat party was in power, it became a political priority to pass flavored tobacco legislation that included menthol. The bill was promptly amended to remove the menthol exemption.[107]

Finally, on May 29, 2015, thanks to a strong and relentless advocacy effort by Alberta's tobacco control coalition, Alberta became the second Canadian province – and the second jurisdiction in the world – to adopt a law outlawing menthol tobacco products.[108] Again, the timing was propitious. Health Minister Sarah Hoffman announced the new law – her first official announcement – on World No Tobacco Day – with considerable national publicity. The law took effect September 30, 2015.

The Epilogue. Once the tobacco flavor legislation took effect in Nova Scotia and Alberta, the tobacco industry appeared to comply with the "letter of the law" in these provinces.[109] Unlike in Nova Scotia, where the law was enacted only a month after passage, Alberta retailers were allowed to sell menthol-flavored products for four months after passage so they could clear out their stock before the law took effect September 30. Between September and December 2015, to determine the industry's response to restrictions on the sale of menthol tobacco products in Alberta, as well as Nova Scotia, several researchers purchased samples of cigarette packs from two major cities in Alberta pre-ban and post-ban (422 packs) and Nova Scotia post-ban (76 packs).[110]

No cigarette packs labeled as "menthol" were purchased in either province after the law took effect. However, among packs purchased after the law took effect in Alberta, the researchers found former menthol brands that had been repackaged to connote products that were menthol replacements. Menthol packs that originally featured green as a prominent color, continued to display green as a prominent color after the law took effect, with the word "menthol" replaced with the descriptor "green." Also, 87.3 percent of the menthol replacement packs were wrapped in cellophane displaying the phrase "smooth taste without menthol."[111] Menthol replacement packs were not found in Nova Scotia after its law took place – only in Alberta. Moreover, before the law in Alberta took effect, the researchers were able to buy menthol tobacco packs from 14 brand families owned by three parent companies (Philip Morris International (PMI), Japan Tobacco International and British American Tobacco). Once the law took effect, menthol replacement packs in Alberta were available from only four brands owned by only one parent company – Philip Morris International.[112]

The researchers concluded "[s]imilar to the industry response following removal of misleading descriptors PMI has repackaged their products postban to communicate menthol-like flavouring using color and substitution descriptors. . . . To reduce tobacco industry tactics to circumvent restrictions on menthol, future policies should prohibit menthol in tobacco products as an ingredient and additive, prohibit marketing claiming menthol-like characteristics and prohibit marketing of menthol tobacco products."[113]

Despite PMI's efforts to foil the menthol tobacco law, the sale of menthol cigarettes in Alberta plummeted in 2015 following the implementation of the provincial ban.[114] Anticipated federal legislation to require plain and standardized packaging will prevent tobacco companies from using similar tactics in the future.

In the meantime, just as Alberta was announcing the passage of its menthol legislation, New Brunswick was stepping up to the plate.

New Brunswick

Province in Brief

New Brunswick, with its substantial coastline, is one of Canada's three Maritime provinces. Unlike Prince Edward Island and Nova Scotia, which are either surrounded or nearly surrounded by water, New Brunswick has a large inland area.[115] The state of Maine forms its western boundary. New Brunswick's population is approximately 747,101.[116] Its principal cities are the capital of Fredericton, the largest and most populous city Greater Moncton, and the port city of Saint John – the first incorporated city in Canada.

New Brunswick is the only constitutionally bilingual (English–French) province, with the highest proportion of residents whose mother tongue is French, outside of Quebec.[117] It is also the only province where both official language communities are heavily represented, with Anglophone New Brunswickers consisting of roughly two-thirds of the population, and Acadien or Francophone New Brunswickers representing over 30 percent of the population.[118]

Back Story

New Brunswick, along with Newfoundland & Labrador and Nova Scotia, has the highest smoking rates of the ten Canada provinces.[119] The province declined to participate in the Propel Centre's 2010 — 2011 Youth Smoking Survey, so no data on prevalence among New Brunswick youth of flavored tobacco use during that period are available. However, New Brunswick did participate in the 2012 — 2013 Youth Smoking Survey. In September 2014, when that survey's results were released, data showed that 52 percent of the New Brunswick high school students who smoked used flavored tobacco and 38 percent of them used menthol tobacco products.[120]

The Legislation. News of the popularity of flavored and menthol tobacco products among the province's youngsters provoked concern among the New Brunswick public health community and lawmakers. As a result, on May 29, 2015, the New Brunswick government announced a

plan to snuff out sales of all flavored tobacco products in the province, including menthol products.[121] This was just one of several tobacco control initiatives New Brunswick passed in 2015, including an expansion of the province's smoke-free law to outdoor public areas, such as patios, beaches, walking trails and playgrounds; age-related sales restrictions for e-cigarettes and e-liquid products; restrictions on e-cigarette retail advertising and promotion, with exemptions for specialist "tobacconist and vapour shops"; and a prohibition on the use of e-cigarettes and water pipes in any smoke-free area.[122]

Unlike the Nova Scotia and Alberta laws, which exempted a few tobacco products from the flavor restrictions – notably large cigars – New Brunswick's legislation contained no exemptions. It prohibited flavors in all tobacco products, including flavored cigars, flavored papers, menthol cigarettes and flavored cigarillos: "Despite any other provision of this Act, no person shall sell or permit to be sold tobacco that is represented as being flavoured, that is presented by its packaging, by advertisement or otherwise as being flavoured or that contains a flavouring agent, including menthol."[123]

The New Brunswick legislation was quickly passed: the first reading was May 29, 2015; the third reading and Royal Assent was June 5, 2015; and the flavor legislation took effect January 1, 2016.[124] Despite initial concern by some retailers about the law's possible adverse impact on business, implementation of the New Brunswick policy went as smoothly as it did in the other provinces where similar laws had taken effect.[125]

The Epilogue. In March 2016, Imperial Tobacco Canada and two tobacco businesses sued the New Brunswick government, alleging the province's law prohibiting the sale of menthol-flavored tobacco products was unconstitutional.[126] The plaintiffs argued that the "provincial government has overstepped its legislative authority by banning menthol," because menthol is specifically exempted from the list of prohibited flavor additives in Canada's federal Tobacco Act.[127] New Brunswick Health Minister Victor Boudreau dismissed the lawsuit as "a typical reaction" of the tobacco industry and Rob Cunningham of the Canadian Cancer Society called it "a public relations effort."[128] No provincial governments expressed concern that these legal challenges would prevail. At the time of the filing against the New Brunswick government, Imperial Tobacco Canada had issued similar lawsuits against the governments in Nova Scotia, Alberta, and Quebec, all of whom had passed laws prohibiting the sale of flavored tobacco products.

Quebec

Province in Brief

Quebec is the largest of Canada's ten provinces in size, consisting of nearly one-sixth of the nation's total land area, and is second only to Ontario in population. Its capital, Quebec City, is the oldest city in Canada. The name "Quebec" comes from the Algonquin word meaning "Where the river narrows," which likely refers to an area where the St. Lawrence River flows around Quebec City.[129] Located in the eastern part of Canada, Quebec is bordered on the south by New Brunswick and the U.S. states of Maine, New Hampshire, Vermont, and New York. It is the only province to have a predominantly French-speaking population, with French as the sole provincial official language. Most inhabitants live in urban areas near the Saint Lawrence River, especially in Montreal and Quebec City.[130]

Back Story

Ever since flavored cigars and cigarillos were introduced in the Quebec market in the mid-2000s, they were popular products in the province, particularly among youth, who often purchased them as inexpensive single sticks.[131] In 2008, the Quebec government attempted to make flavored cigarillos less accessible to youth by restricting their sale as single products.[132] However, when the Propel Centre released the results of its 2010 – 2011 Youth Smoking Survey, the popularity of these products was still a problem. More Quebec residents used flavored tobacco products than residents in any other province. Among the 56,300 Quebec students surveyed who had used tobacco products in 2010 to 2011 over the past 30 days, 33,400 (that is, 59 percent) had used a flavored product. This percentage was significantly higher than the national average of 52 percent and 46 percent in neighboring Ontario.[133]

In May 2013, the Quebec Coalition for Tobacco Control, an umbrella organization for some 400 groups, together with the Association of Pediatricians of Quebec, the Montreal Regional Public Health Director, and the Quebec Federation of Parent Committees, called on the provincial government to ban all flavored tobacco products. Along with the Canadian Cancer Society, the Coalition issued a press release, "deplor[ing] the data," pointing to the "crucial role that

flavours and additives play among those who are experimenting or just starting to smoke," and urging elected leaders in the province's National Assembly to "ban flavoured tobacco products without further delay."[134] Representatives from the two organizations appeared before the Health and Social Services Committee and called on the government to act promptly to "ban the addition of flavours, including menthol, to any product covered by the Tobacco Act."[135] According to an opinion survey commissioned by the Canadian Cancer Society in 2013, more than 75 percent of Quebecers supported a law prohibiting flavored tobacco.[136]

The Legislation. Lawmakers listened.[137] In May 2015, a strong tobacco control bill was introduced to Quebec's National Assembly. Bill 44 included restrictions on smoking and vaping in public places, set a minimum size for the warnings found on cigarette and little cigar packs, prohibited smoking in vehicles when a child under 16 was present, and prohibited the sale of all flavored tobacco products, including menthol: "It is prohibited to sell, offer for sale or distribute a tobacco product that has a flavour or aroma other than that of tobacco, including a menthol, fruit, chocolate, vanilla, honey, candy or cocoa flavour or aroma, or whose packaging suggests it is such a product."[138]

Like the New Brunswick legislation, the Quebec legislation did not exempt any tobacco products. The law did not apply to electronic cigarettes, their components and accessories, but it contained a provision stating that, "to the extent provided by regulation," the provincial government could eventually apply any flavor prohibition to these products. It also carved out an exception for tobacco products manufactured in Quebec and intended only for export.[139]

The bill was debated in public hearings at the National Assembly, with opponents such as convenience store associations, restaurant owners, and Imperial Tobacco Canada claiming that if Bill 44 were enacted, retail sales of tobacco products would decline and shift over to the contraband market. The Quebec convenience store association (funded by the tobacco industry) said that because convenience stores have a one percent profit margin, losing the ability to sell flavored tobacco would represent an average loss of $10,000 a year to the bottom line of independent retailers, who are already under economic pressure due to rising business permit costs and competition with larger chains.[140] The association claimed that if the bill passed into law, 12 percent of Quebec's retailers believed they would not collect enough revenue to stay in business and 57 percent anticipated their profitability would be affected.[141]

In addition, Imperial Tobacco projected that if the law went forward, the provincial government would lose approximately $35 million a year in taxes. "It's not so much about the size of the industry or the menthol category, but it's more about implementing legislation that will not have an impact."[142] Both the convenience store association and Imperial Tobacco an-

nounced that they would rather see the government "cracking down on the sale of contraband cigarettes, which are cheaper, unregulated products that represent nearly 20 percent of Quebec's tobacco market and could increase if menthol is banned."[143] The president of the Quebec convenience store association agreed. "Past experience to begin with has showed that what you take from the legal market goes directly into the illegal market."[144] Public health groups rejected these claims.[145]

Before the final passage of Bill 44, the Canadian Cancer Society announced that for the first time menthol capsule cigarettes had started to appear in the Canadian marketplace, including Quebec (but not Nova Scotia or Alberta, where menthol tobacco legislation was already in force).[146] In Quebec, these brands were known as Next Klik, Belmont Hybrid and Benson & Hedges Unison.[147] Other products appeared as well, including from Imperial Tobacco Canada Ltd. As just one example, an advertisement for Philip Morris Burst, which appeared in a trade magazine for retailers in Quebec, stated that given the growing number of jurisdictions banning menthol, Philip Morris was releasing this "alternative product" designed to help smokers "transition from a menthol to a non-menthol cigarette, allowing them to choose when they experience a menthol taste, if at all."[148] The brazen introduction of these new menthol products frustrated many in the public health community and fueled those supporting the flavor tobacco law.

On November 28, 2015, the National Assembly unanimously approved Bill 44. The public health community hailed Quebec's tobacco control law. According to the Quebec Minister for Rehabilitation, Youth Protection and Public Health, the law contained "ambitious measures that will allow Quebec to become a world leader in the fight against tobacco."[149]

The Epilogue. In late February and early March 2016 – before the flavor tobacco prohibition took effect – JTI-Macdonald Corporation and Imperial Tobacco filed legal challenges with the Quebec Superior Court, arguing that the legislation, infringed on their rights and freedoms as guaranteed by the Canadian and Quebec charters and violated the principle of federal paramountcy (preemption).[150] In addition, Imperial Tobacco contended that the government's move to prohibit flavored tobacco and menthol cigarettes would "help fuel the contraband trade," and this legislation, and related tobacco control measures, were "tacked on at the last minute and without properly considering the constitutional rights of those affected by the measures."[151] As with the legal challenges leveled against the other provinces, nothing came of this litigation and the law took effect as planned.

Ontario

Province in Brief

Ontario, located in east-central Canada, is named after Lake Ontario, a term derived from either the Huron word meaning "great lake" or the Iroquoian word for "beautiful water."[152] The province is well named: it has roughly 250,000 freshwater lakes, which — including the Great Lakes bordering the U.S. — contain a fifth of the planet's fresh water.[153] Ontario is the second largest of the provinces, and is larger than France and Spain combined.[154] Ontario is bordered by Manitoba to the west, Hudson Bay and James Bay to the north, Quebec to the east and northeast, and Minnesota, Michigan, Ohio, Pennsylvania and New York to the south. Nearly 40 percent of all Canadians live in Ontario, making it the nation's most populous province.[155] It is home to the nation's capital city, Ottawa, as well as the nation's most populous city, Toronto.

Back Story

Since 1993, Ontario's Campaign for Action on Tobacco, the Canadian Cancer Society, Canada's Heart & Stroke Foundation, and the Ontario Medical Association have worked together to promote evidence-based tobacco control measures in the interest of public health. Largely as a result of the advocacy and commitment of this well-established coalition, Ontario lawmakers have proposed, considered and passed a number of robust tobacco control measures over the years.

The University of Waterloo, whose analysts issue the influential Canadian Youth Smoking Surveys, is located in Waterloo, Ontario. In 2014, when findings from the 2012/2013 Youth Smoking Survey disclosed that more than 19,000 Ontario youth – or 1 in 4 who report smoking –claimed that they smoked menthol cigarettes, this was an eye-opener. Moreover, the findings pointed to other troublesome trends about young menthol smokers: Young menthol smokers in grades 9 to 12 reported smoking 43 cigarettes a week, compared with 26 cigarettes a week among young non-menthol smokers.[156] Menthol smokers also expressed a greater intention to smoke the following year compared to non-menthol smokers. Significantly, in late 2014, the well-respected Ontario Medical Association issued a research backgrounder on menthol

cigarettes,[157] which (in addition to citing data from the FDA's 2013 preliminary scientific report on the health effects of menthol cigarettes) cited disturbing data to demonstrate the value of menthol to the Canadian tobacco industry and the added threat that menthol cigarettes pose to youth.[158]

Given this new evidence, Ontario tobacco control and health groups, including the Canadian Cancer Society and the Ontario Medical Association, worked with youth advocates and policy-makers to galvanize support for legislation that would address the problem of flavored tobacco products, including menthol cigarettes.[159] In November 2014, a comprehensive bill was introduced that amended the Smoke-Free Ontario Act to prohibit flavored tobacco products. The National Coalition Against Contraband Tobacco (funded by the tobacco industry and whose members include the Canadian Tobacco Manufacturers Council, the Canadian Convenience Stores Association, and the Ontario Chamber of Commerce) [160] warned that a menthol tobacco ban could send customers to organized crime and trafficking menthol cigarettes through "underground illegal channels."[161] Nevertheless, the public health community and health professionals such as Dr. Scott Wooder, a former president of the Ontario Medical Association, persisted in their support of the legislation. "We know that flavoured (tobacco) and menthol cigarettes are aimed squarely at children and are meant to addict children and teenagers."[162]

The Legislation. On May 26, 2015, the Ontario Legislative Assembly voted to pass the law prohibiting the sale of all flavored tobacco products (including menthol), defined as all tobacco products represented as being flavored or containing a flavoring agent.[163] Pursuant to regulation, under the amended Smoke-free Ontario Act, a "flavoring agent" refers to "one or more artificial or natural ingredients contained in any of the component parts of a tobacco product, as a constituent or an additive, that impart a distinguishing aroma or flavour other than tobacco either before or during the consumption of the tobacco product."[164] Ontario's law was broad, covering flavored (including menthol and clove) cigarettes, cigarillos, little cigars, cigars less than 6 grams, smokeless tobacco/chew and hookah/waterpipe products. It exempted flavored pipe tobacco, cigars larger than 6 grams, cigarette papers, and e-cigarettes. The provisions prohibiting the sale of flavored tobacco products took effect January 1, 2016, with menthol and clove restrictions phased in a year later on January 1, 2017.

The Epilogue. The Smoke-Free Ontario Act set out rules and restrictions for tobacco retailers, including guidelines on how to enforce the provisions prohibiting the sale of flavored tobacco products.[165] The Ontario Ministry of Health and Long-Term Care also posted on its website information for retailers and consumers, including penalties for violations.[166] Despite the comprehensiveness of Ontario's law, it did not apply to flavored cigarette papers or "flavoring cards."[167] Flavoring cards fit inside a cigar or cigarette package so the flavor can infuse the cigars or

cigarettes. Although the cards are allegedly sold to flavor nutritional products, consumers can easily use them to flavor tobacco products.

Once these products (e.g., "Itsa flavour cards") came to the attention of Ontario's Ministry of Health and Long-Term Care, the public was advised that if Ontario retailers marketed them at the point of sale as products that enhance the flavor of tobacco products, this would be viewed as a violation of the tobacco flavor prohibition and the retailers would be liable for penalties.[168]

Aside from the flavor card phenomena, which served more as a side bar diversion, retailer compliance with Ontario's law went well. As in the past, tobacco smuggling continues to be a problem in both Ontario and Quebec – largely products imported from Canada's First Nations territories.[169] No data are available yet on flavored or menthol flavored tobacco products on the contraband market. In early 2017, in warning of the dangers of a federal menthol ban, Imperial Tobacco Canada voiced concern over a March 30, 2016 series of 70 raids in Ontario and Quebec on a massive illegal tobacco smuggling network – "the largest such police operation of its kind in Canadian history."[170] This criminal endeavor, however, took place before both the Quebec and the Ontario flavor tobacco laws took effect. Regardless, tobacco contraband continues to be a concern in these provinces, although it is by no means as colossal a problem as the tobacco industry suggests.

Prince Edward Island

Province in Brief

Prince Edward Island is one of the three Maritime Provinces and the smallest Canadian province in both land area and population, slightly larger than the state of Delaware. The only North American jurisdiction (outside the Caribbean) to have no mainland territory, the province consists of the island of the same name, as well as 231 smaller mostly uninhabited islands.[171] Called the "Garden of the Gulf" because of its pastoral scenery and lush agricultural lands, Prince Edward Island has a strong farming economy.[172] The province, also often called the Birthplace (or Cradle) of Confederation, is one of Canada's older settlements. Its capital is Charlottetown.

The Back Story

In 2016, the Propel Centre released findings from its 2014 – 2015 Canadian Student Tobacco, Alcohol and Drug Survey (CSTAD, the former Youth Smoking Survey).[173] The results showed that Prince Edward Island had one of the highest youth smoking rates in the country: 6.6 percent of Island students in grades 6 to 12 said they were smokers, compared with a national rate of 3.4 percent. The 2014 – 2015 survey results also highlighted what it described as "a statistically significant rise" in the use of menthol cigarettes and little cigars or cigarillos by Prince Edward Island youth since 2012 – 2013.[174]

On June 10, 2015, the Prince Edward Island government had announced that it was considering prohibiting the sale of flavored tobacco products as part of a new three-year cancer strategy, but needed time to determine the details, including whether menthol would be included.[175] The prospect of Canada's smallest province being sued over a ban on menthol tobacco products did not daunt Health Minister Robert Henderson. "I'm not prepared to allow big tobacco companies to dictate policy that's in the best interest of Islanders," said Henderson.[176] "We'll take on that challenge should it come forward to us."

For ten months the government consulted with more than 200 stakeholders on the proposed legislation.[177] The unwelcome CSTAD survey results highlighting Island youth's disproportionately high use of menthol products may have been the catalyst needed for legislators to decide to include menthol as a flavor in the law.

The Legislation. On September 21, 2016, the government of Prince Edward Island approved a regulation prohibiting the sale of any tobacco product that contains an additive meant to give the product the aroma or taste of anything but tobacco, including the aroma or taste of candy, chocolate, fruit, a spice, an herb, an alcoholic beverage, or menthol.[178] Public health groups were delighted: The Canadian Cancer Society described the new regulations as "among the most comprehensive and protective in the country."[179] The law took effect May 1, 2017.

At this point, Nova Scotia, Alberta, New Brunswick, Quebec, and Ontario had all adopted laws prohibiting the sale of flavored tobacco products, including menthol. One more province was also moving ahead.

Newfoundland and Labrador

Province in Brief

Newfoundland and Labrador is the youngest of Canada's ten provinces, having joined the confederation in 1949. Its name was officially changed to Newfoundland and Labrador as recently as 2001. The province, covering 156,453 square miles, is composed of the island of Newfoundland and a larger mainland area, Labrador, in the northwest.[180] Because of its position on the Atlantic Ocean at the far eastern edge of North America, Newfoundland and Labrador has historically played a strategic role in defense, transportation, and communications. For instance, its capital city, St. John's, is closer to the coast of Ireland than it is to Winnipeg, Manitoba.[181] The province is known for its 14,400 miles of seacoast and its rich fishing grounds by the Grand Banks. St. John's, the largest city in Newfoundland and Labrador, is home to almost 40 percent of the province's population.[182]

Back Story

In 2013, smoking prevalence in Newfoundland and Labrador was 19.5 percent, well above the national average of 14.6 percent, and the highest among the provinces.[183] Smoking among youth was also high. According to survey data in 2015, provincial current smoking rates for Canadians aged 15 years and older ranged from a low of 10 percent in British Columbia to **a high of 18 percent in Newfoundland and Labrador** and Nova Scotia.[184] In addition, past-30-day use of at least one tobacco product (cigarettes, cigars, little cigars or cigarillos, smokeless tobacco, water-pipe and pipe tobacco) ranged from a low of 14 percent in British Columbia, Ontario and Prince Edward Island **to a high of 20 percent in Newfoundland and Labrador**, Nova Scotia and Saskatchewan.[185]

Newfoundland and Labrador legislators, concerned about the prevalence of tobacco use among the youth and young adults in their province – and aware of the growing movement among the provinces to outlaw the sale of flavored and menthol tobacco – began considering

legislation to address the problem. In June 2016, the Newfoundland and Labrador Legislative Assembly introduced an amendment to the Tobacco and Vapour Products Control Act to prohibit flavored tobacco and flavored additives in all tobacco products sold in the province, subject to exemptions specified in regulations under the Act.

"Our province has some of the highest rates of chronic disease in Canada," said the Newfoundland and Labrador Minister of Health and Community Services John Haggie. "The amendments we are proposing are designed to protect Newfoundlanders and Labradorians, particularly our children and youth, from the harmful health effects of smoking. Flavoured tobacco, e-cigarettes and hookah are of concern as they are enticing to youth. These amendments support our government's commitment to promoting a healthier population and reducing health care costs."[186]

The legislation was opposed by the tobacco industry and retail establishments. "If we're talking about reducing the factors that encourage youth and young adults to smoke, then criminal trafficking in illegal cigarettes is a far more serious issue than flavored tobacco ever would be," claimed Mike Hammoud, president of the Atlantic Convenience Stores Association (an organization funded by the tobacco industry).[187]

The Legislation. Despite opposition, in June 2016, the Newfoundland and Labrador Legislative Assembly passed amendments to the Tobacco and Vapour Products Control Act to prohibit retailers or other persons in the province from offering for sale, selling, giving or furnishing, directly or indirectly, flavored tobacco products and flavored additives in all tobacco products. [188] The law applies to cigarettes, cigarillos (little cigars), fine-cut tobacco, and smokeless tobacco (chewing tobacco and snuff) that have a characterizing flavor (e.g., candy, bubble gum, fruit, and menthol) or are represented as being flavored.[189]

Under the new law, flavored tobacco products are defined as having "a characterizing scent or flavour, other than tobacco, that is noticeable before or during use" or having packaging, labeling, advertising or otherwise, that is represented as being flavoured. "Tobacco" means tobacco in any form in which tobacco is consumed and includes an "accessory," described as any product that can be used in the consumption of tobacco, such as cigarette papers, filters, pipes, cigarette holders or cigar clips.[190]

The Newfoundland and Labrador flavored tobacco legislation takes effect July 1, 2017, a little more than three months before Canada's expansive federal flavor legislation becomes the law of the land.

The Epilogue. After the legislation was passed, opponents continued to voice concern about the possible impact the law could have on an increase in contraband. In November 2016, the Atlantic Convenience Stores Association released the results of its third annual study of illegal cigarette consumption in Newfoundland and Labrador. According to Mike Hammoud, the study showed that the prevalence of illegal cigarettes in Newfoundland and Labrador "is likely something in the range of 15 percent. That's a lot of illegal sales and it's costing the provincial government millions of dollars in lost revenue."[191] The research findings were based on almost 2,800 cigarette ends that NIRIC, an independent Montreal-based research firm, collected in autumn 2016 from twenty sites across the province.[192] The study was conducted after the menthol tobacco legislation was passed, but before it took effect.

The New Federal Legislation

On April 30, 2016, the Canadian government published a notice for consultation to ban menthol in all cigarettes, blunt wraps and most cigars sold in Canada.[193] Driving this decision was provincial data showing that despite Canada's success in reducing smoking rates among youth to a record low, an alarming number of Canadian youth continue to smoke menthol cigarettes.[194] Then, on November 6, 2016, the Canadian government published a draft Order to amend the nation's Tobacco Act and outlaw the use of menthol in all cigarettes, blunt wraps and most cigars sold in Canada.[195]

On April 5, 2017, the Canadian government published the final amendment to the Tobacco Act, banning menthol in cigarettes, blunt wraps and most cigars. As a result of the amendment, Canada prohibits any level of menthol or other flavor (not just characterizing flavors) in cigarettes, blunt wraps, and cigars weighing 6 grams or less.[196] For cigars between 1.4 grams and 6 grams, rum, wine, port and whiskey flavors are exempt. For most (but not all) cigars weighing more than 6 grams, any flavor is allowed. Most cigars weighing more than 6 grams will still be allowed to have menthol, as will roll-your-own tobacco and cigarette papers.[197]

The Order will apply across Canada, including in those provinces that have adopted their own flavored tobacco legislation. The government estimates that the new federal law will affect $78 million in wholesale value of menthol cigarette sales in Canada, based on value of those provinces and territories that do not have their own legislation banning menthol – British Columbia, Saskatchewan, Manitoba, Nunavut, Yukon and the Northwest Territories.[198] The market of menthol cigars affected by the Order is expected to be $808,000.[199]

During the 75-day public comment period that followed the pre-publication of the proposed Order banning menthol (the comment period ended January 18, 2017), Health Canada received 131 submissions, the vast majority of which supported the measure.[200] Imperial Tobacco Canada objected strongly to the Canadian government's proposed Order. The tobacco company expressed four concerns: "First, the 'evidence' presented by Health Canada is deeply flawed. Second, the proposed ban stands in direct opposition to the Government's own position that prohibition of a product does not address youth use of a product, as evidenced by its plans to legalize marijuana. Third, a ban on menthol cigarettes will be ineffective in a market already so permeated by illegal tobacco products. Fourth, Health Canada continues to do nothing on the more important issue of youth access."[201]

Despite the tobacco industry's objections, the federal law was finalized on April 5, 2017, and takes effect Oct. 2, 2017.[202] Health Canada estimates that the new federal law will ban 95 percent of the menthol tobacco products sold in Canada.[203] Moreover, a government bill before the federal Parliament contains a provision to ban menthol in all tobacco products in Canada, with the measure to take effect 180 days after the bill's adoption.[204]

Conclusion

Although menthol tobacco use affects a significantly larger portion of ethnic and racial populations in the U.S. than in Canada, the youth of both nations are disproportionately affected by menthol tobacco products, and equally seduced by the cool masking qualities of this single flavor. Given compelling evidence-based data on the role flavors – in particular, menthol – play in the high prevalence of tobacco use among young Canadians, seven provincial governments recently succeeded in adopting strong legislative measures to prohibit the sale of flavored and menthol tobacco products. The foresight and tenacity of provincial policymakers and public health groups both locally and nationally made it feasible – indeed, almost inevitable – for Canada's federal government to follow their lead with a national law prohibiting the sale of most menthol tobacco products.

Only a limited amount of post-implementation sales data is now available. The government's 2015 sales figures show that retail sales of menthol cigarettes declined 63 percent in Nova Scotia, (corresponding with a 7-month ban beginning when the law took effect June 1, 2015) and 31 percent in Alberta (corresponding with a 3-month ban beginning when the law took September 30, 2015).[205] No 2016 data is available yet on sales or menthol usage. By all accounts, implementation was smooth and relatively uneventful. No provinces resorted to laboratory testing to identify tobacco flavors, nor were increased enforcement resources needed in

any of the provinces where the laws took effect. None of the legal challenges has resulted in a court ruling or even a hearing to date.

Canada continues to lead by example in the tobacco control movement. The Canadian government is now working to introduce plain and standardized packaging requirements for all tobacco products, preparing legislation to regulate e-cigarettes and related products, and collaborating with its First Nation and Inuit communities to develop socially and culturally appropriate tobacco control projects.[206]

Given the striking scientific evidence on the adverse health impact of menthol tobacco products, nations around the world (including members of the European Union, as well as Brazil, Ethiopia, Turkey, Moldova, and Uganda) have joined Canada in adopting legislation to outlaw menthol cigarettes. In each of these countries, the tobacco industry has been a powerful opponent. And yet each nation is still moving ahead boldly to address the public health problem of menthol tobacco products and to remove them from the marketplace.

Lessons Learned

Canadian public health experts and tobacco control advocates who supported the passage of the flavor tobacco laws strongly believe that the release and dissemination of data showing the disproportionate use of menthol flavored tobacco products by Canadian youth was key to the passage of tobacco flavor legislation in each province.[207] Other takeaways that contributed to the success of the provincial measures include the following:

- Use jurisdiction-specific data and examples of flavored / menthol tobacco products to educate the public, policymakers and media about the popularity and prevalence of these products among vulnerable populations.
- Advocacy is key.
    - Frame messaging around the need to protect youth and other affected populations.
    - Organize local advocates, public health champions and organizations early.
    - Launch mobilization campaigns that involve parents and especially youth.
    - Purchase examples of menthol/flavored products to show the media and policymakers.
    - Recruit compelling, credible speakers to give testimony, such as former smokers, youth, parents, and medical professionals.

- Engage with key politicians and government officials.
- Conduct public opinion polls to measure support for comprehensive flavor restrictions.

- Expect the tobacco industry to fight back through retail associations and other organizations and prepare for lawsuits. Expose the tobacco industry lobby and its strategies. Common arguments raised by opponents to Canadian menthol flavor restrictions:
  - Provincial legislation is preempted by federal law.
  - Sales restrictions will result in a rise in contraband.
  - Sales restrictions will not affect the overall smoking rate.
  - The restrictions are "nanny state" meddling with smokers and the consumer market. Adults should be able to purchase these products.
  - Menthol tobacco products have been sold since the 1930s.
  - Menthol tobacco products are not popular among youth; menthol is an adult flavor.
  - The legislation will have an adverse impact on the economy.
- Draft comprehensively.
  - Problems can arise if all tobacco products are not covered in a flavor restriction (e.g., smokeless tobacco, pipe tobacco, hookah). (Note: Canada's flavor legislation did not include e-cigarettes.)
  - Prohibit menthol in tobacco products as an ingredient and an additive in any quantity – not just characterizing levels.
  - Be wary of exemptions, such as menthol roll-your-own tobacco and cigarette papers. For example, Quebec's approach to legislative drafting is more inclusive than Ontario's approach.
  - Prohibit marketing of flavored / menthol tobacco products and products claiming to have menthol-like characteristics.
  - Prohibit packaging that refers to or suggests prohibited flavors through color-coding or other means. (See, e.g, Canada's national law: "No person shall package a tobacco product . . . in a manner that suggests, including through illustrations, that it contains [a banned additive/flavor])."

- Keep it local.
  - Be aware of the "Me too effect" – competitive politics are in play at both the local and national levels.
  - Although success in one Canadian province led to success in others, advocacy efforts need to build from the ground up in each jurisdiction.
  - Recognize that elections can significantly impact a measure's outcome.
- Remain vigilant for new menthol lookalikes and related products, as well as new marketing tactics (e.g., menthol capsules, "green packs," flavor cards).

Appendix

Canadian Legislation Prohibiting Sale of Menthol Flavored Tobacco Products

Canadian Provinces & Federal Government (Chronologically)

1. Nova Scotia (effective May 31, 2015)
2. Alberta (effective Sept. 30, 2015)
3. New Brunswick (effective Jan. 1, 2016)
4. Quebec (effective Aug. 26, 2016)
5. Ontario (effective Jan. 1, 2017)
6. Prince Edward Island (effective May 1, 2017)
7. Newfoundland and Labrador (effective July 1, 2017)
8. Canadian Federal Government (effective Oct. 2, 2017)

Jurisdiction	Legislation	In Effect
Federal	Canada Gazette Part I, *Order Amending the Schedule to the Tobacco Act (Menthol)*, Vol. 150, No. 45 (Nov. 5, 2016), http://www.gazette.gc.ca/rp-pr/p1/2016/2016-11-05/html/reg5-eng.php; Canada Gazette Part II, Order Amending the Schedule to the Tobacco Act (Menthol), Vol. 151, No. 7 (Apr. 5, 2017), http://www.gazette.gc.ca/rp-pr/p2/2017/2017-04-05/html/sor-dors45-eng.php. **Note pending legislation:** Bill S-5, *An Act to Amend the Tobacco Act and the Non-smokers' Health Act and to Make Consequential Amendments to Other Acts* (First reading Nov. 22, 2016, second reading Mar 9, 2017, approved by Standing Senate Committee on Social Affairs, Science and Technology, Apr. 13, 2017), http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=8616151.	**Oct. 2, 2017**

Jurisdiction	Legislation	In Effect
Alberta	*Tobacco Reduction Amendment Regulation*, AR 85/2015 (Adopted May 29, 2015), http://www.qp.alberta.ca/documents/gazette/2015/pdf/11_Jun15_Part2.pdf; Bill 33, *Tobacco and Smoking Reduction Act* (Adopted Dec. 11, 2013) http://www.qp.alberta.ca/1266.cfm?page=T03P8.cfm&leg_type=Acts&isbncln=9780779784790; Bill 206, *Tobacco Reduction (Flavored Tobacco Products) Amendment Act* (Adopted December 11, 2013), http://www.assembly.ab.ca/ISYS/LADDAR_files/docs/bills/bill/legislature_28/session_1/20120523_bill-206.pdf.	**Sept. 30, 2015**
New Brunswick	Bill 57, *An Act to Amend the Tobacco Sales Act* (First reading May 29, third reading and Royal Assent June 5, 2015, in effect July 1, 2015, except for flavors prohibition (including menthol) which takes effect Jan. 1, 2016), http://www.gnb.ca/0062/acts/BBA-2015/Chap-46.pdf.	**Jan. 1, 2016**
Newfoundland and Labrador	Newfoundland Labrador Stat. Chap. 32, *An Act to Amend the Smoke-free Environment Act, 2005 and the Tobacco Control Act*. (Assented to June 7, 2016, takes effect July 1, 2017), http://www.assembly.nl.ca/Legislation/sr/Annualstatutes/2016/1632.chp.htm.	**July 1, 2017**
Nova Scotia	Bill 90, *An Act to Amend Chapter 14 of the Acts of 1993, the Tobacco Access Act*, S.N.S. 2015, c.26 (Royal Assent May 11, 2015), http://nslegislature.ca/legc/PDFs/annual%20statutes/2015%20Spring/c026.pdf; *Tobacco Access Regulations – Amendment (Summary Offence Tickets Regulations)*, N.S. Reg. 227/2015 (Adopted May 29, 2015), http://www.novascotia.ca/just/regulations/rg2/2015/jn1215.pdf.	**May 31, 2015**
Ontario	Bill 45, *Making Healthier Choices Act, 2015*, Schedules 2, 3 (First reading Nov. 24, 2014, Third reading May 26, 2015, Royal Assent May 28, 2015), http://www.ontla.on.ca/bills/bills-files/41_Parliament/Session1/b045ra.pdf.	**Jan. 1, 2017**
Prince Edward Island	Bill No. 10, *An Act to Amend the Tobacco Sales and Access Act*, S.P.E.I. 2015, c. 17 (First reading June 9, 2015, Third reading and Royal Assent, July 10, 2015, proclaimed into effect October 1, 2015), http://www.assembly.pe.ca/bills/pdf_chapter/65/1/chapter-17.pdf.	**May 1, 2017**
Quebec	Bill 44, *An Act to Bolster Tobacco Control* (First reading May 5, 2015), http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-44-41-1.html.	**Aug. 26, 2016**

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Menthol Cigarette Sales as a % of All Cigarette Sales

Province	2014	2015
Alberta	6.1%	4.4%
British Columbia	5.7%	6.0%
Manitoba	6.0%	6.3%
New Brunswick	5.7%	5.9%
Newfoundland and Labrador	4.5%	4.8%
Nova Scotia	4.5%	1.7%
Ontario	4.3%	4.2%
Quebec	3.5%	3.7%
Saskatchewan	7.5%	7.7%

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207 "Lessons Learned" compiled from interviews with and presentations by the following Canadian tobacco control experts: Rob Cunningham, Flory Doucas, Les Hagen, Krista McMullin, and Michael Perley.

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