Tobacco Control and E-cigarettes: New Challenges for Businesses

March 24, 2016

Bill 44 has been adopted in the context of a major expansion of electronic cigarette sales.[1] Bringing with it significant legislative reforms, this Bill regulates the use of electronic cigarettes in much the same way as it does tobacco. It also amends the *Tobacco Act*,[2] changing its name to the Tobacco Control Act[3] (hereinafter "the Act").

The Bill makes several amendments which should be of interest to those responsible for operating establishments which are subject to the Act, including employers and health and social services institutions:

- By November 26, 2017, certain employers must adopt a tobacco control policy;
- Provisions have been added the goal of which is to increase the liability of directors and officers of legal persons and partnerships;
- Provisions have been added which seek to facilitate the prosecution's case in regulatory proceedings;
- The fines for violating the Act have been increased;
- The Act now applies to electronic cigarettes;
- Effective May 26, 2016, smoking will be prohibited in additional locations.

Here are a few details regarding these amendments.

OBLIGATION TO ADOPT A TOBACCO CONTROL POLICY

By November 26, 2017, **every health and social services institution, and every college or university-level educational institution, must adopt a tobacco control policy** aimed at establishing a smoke-free environment. A copy of the policy must be sent to the Minister of Health and Social Services. In addition, every two years, the executive directors of such institutions will need to report to the board of directors with respect to the application of the policy and the institutions must send those reports to the Minister within 60 days of their being filed with the board of directors.[4]

INCREASED LIABILITY OF DIRECTORS AND OFFICERS OF LEGAL PERSONS AND PARTNERSHIPS

Since November 26, 2015, the Act has contained new provisions which create presumptions of liability applicable to employers and to directors and officers of legal persons, partnerships, and associations without legal personality.[5] Essentially, these provisions state that:

- In regulatory proceedings related to offences under the Act or its Regulations, evidence that the offence was committed by a representative, agent or employee of a legal person or partnership is sufficient to establish that said offence was in fact committed by that legal person or partnership; and
- If a legal person or a representative, agent or employee of a legal person, partnership or association without legal

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.

personality commits an offence under the Act or the Regulations, the directors or officers of the legal person, partnership or association are presumed to have committed the offence.

The party who wishes to rebut these presumptions must establish that it exercised due diligence and took all necessary precautions to prevent the commission of the offence.

NEW PROVISIONS LIGHTENING THE PROSECUTION'S EVIDENTIARY BURDEN IN RELATION TO OFFENCES

For example, section 11 of the Act provides that the operator of a place where smoking is prohibited, such as a workplace, or a facility maintained by a health and social services institution, must not tolerate a person smoking (tobacco products or electronic cigarettes) in that area.

Evidence of such tolerance exposes the operator liable to regulatory prosecution and, potentially, to a conviction and the imposition of a fine.

On November 26, 2015, this provision was amended to facilitate evidence of the operator's "tolerance". Section 11 now states that, in regulatory proceedings, proof that a person smoked in an area where smoking is prohibited is sufficient to establish that the operator of the place or business tolerated such behaviour.

An operator that wishes to rebut this presumption must establish that it exercised due diligence and took all necessary precautions to prevent its commission, in particular, by posting clearly visible notices stating that smoking is prohibited and by having no ashtrays.

INCREASED FINES FOR OFFENCES

Several fines for offences under the Act have been increased, including the fines for violations of section 11:

BEFORE November 26, 2015	**AFTER** November 26, 2015[6]
FIRST OFFENCE	FIRST OFFENCE
$400 to $4,000	$500 to $12,500
SUBSEQUENT OFFENCE	SUBSEQUENT OFFENCE
$1,000 to $10,000	$1,000 to $25,000

APPLICATION OF THE ACT TO ELECTRONIC CIGARETTES

Since November 26, 2015, electronic cigarettes and all other devices of that nature, including their components, are governed by the same rules as those applicable to tobacco products. Specifically, the Act's prohibitions against "smoking" now apply to electronic cigarettes as well as tobacco products.[7]

NEW PROHIBITIONS AGAINST SMOKING

In addition to the existing rules under the former *Tobacco Act*, as of May 26, 2016, the prohibition against smoking (tobacco or electronic cigarettes) will be extended to the following areas, amongst others:

Motor vehicles in which a minor under the age of 16 is present;
Patios of restaurants and bars;

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.

Outdoor playgrounds for children that are open to the public;
Sports fields, vacation camps, skating rinks and outdoor pools used by minors and open to the public;
Daycare and childcare centre grounds; and,
The grounds of educational institutions providing preschool education services, elementary and secondary school instructional services, educational services in vocational training or educational services to adults in general education.[8]

COMMENTS

Bill 44's amendments significantly increase the scope of smoking prohibitions. They are part of the measures the government has taken to bolster tobacco control through a range of concrete and significant reforms, such as the obligation for certain employers to adopt a tobacco control policy, and the addition of presumptions of regulatory liability applicable to directors and officers of legal persons or partnerships in the event of offences under the Act.

It should be noted that the validity of certain provisions of the Act has recently been challenged.[9] However, the Superior Court of Québec has yet to render a decision.

---

1. *An Act to bolster tobacco control*, Bill 44 (assented to 26 November 2015), 1st Session, 41st Legislature (hereinafter "Bill 44").
2. CQLR, c T-0.01.
3. CQLR, c L-6.2
4. Bill 44, sections 11 and 76.
5. Sections 57.1 and 57.1.1 of the Act.
6. Section 43.1.1 of the Act.
7. Section 1.1 of the Act.
8. Bill 44, sections 5 and 76.
9. *Association québécoise des vapoteries et al.* v. *Procureur général du Québec*, Superior Court (200-17-023732-167) (motion filed February 25, 2016).

Copyright (c) Lavery, de Billy, S.E.N.C.R.L. - L.L.P.