

PLAIN PACKAGING Of TOBACCO PRODUCTS



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PLAIN PACKAGING OF TOBACCO PRODUCTS

Introduction

A Definition of Plain Packaging

Plain or generic packaging of tobacco products is standardized packaging that is devoid of the promotional elements that identify it with a specific tobacco brand or company, except for the brand name itself, that is, the word mark. The word mark would need to be carefully defined in legislation or regulations to ensure that the descriptive phrases now being used by many tobacco companies are not interpreted as an integral part of the brand name. *All* promotional aspects of the package other than the brand name—including colours, logos, descriptive words and phrases, and distinctive fonts—would be prohibited. As well, the size and shape of the package, packaging material, lining material and colour, gloss level, ink colour and type, and style of opening would all be regulated and should be standardized, likely by type of product. This would remove distinctive packs, such as flip-tops, soft packs, metal cases, hinge lid packs, “Zmart” boxes,ⁱ and ‘kiddy packs’ⁱⁱ from the market.

The prohibition against promotional elements should apply both to the exterior and the interior of the package, including the tobacco product

ⁱ A new packaging innovation that combines “the manufacturing features of a modern cigarette hinged lid [and] the looks of the more luxurious shoulder box.” See Brinson.

ⁱⁱ The term ‘kiddy packs’ traditionally refers to diminutive packs containing 10 cigarettes at most that are intended to appeal to the price-sensitive youth market. However, with product and packaging innovations, kiddy-sized packs are now being produced that contain 20 cigarettes.

itself (cigarettes, cigarillos, cigars, and smokeless pouches). This measure would ensure that tobacco companies do not extend their distinctive branding elements to the products by using unique or coloured wrapping papers or filters or imprinting them with logos.

Finally, plain packaging should apply to all forms of smokeless and smoked tobacco—cigarettes, cigars, cigarillos, hookah tobacco, and loose leaf tobacco—as well as to carton wrappings, cigarette papers, carrying cases, and blunts.

The Scope of this Report

In 1994-95, Canadian health interests, led by the Non-Smokers’ Rights Association and the Canadian Cancer Society, made a strong case for the plain packaging of tobacco products,ⁱⁱⁱ based in part on extensive knowledge of tobacco industry practices and early research conducted in Australia. Their case was bolstered by a series of research studies commissioned by an expert panel on behalf of Health Canada.

ⁱⁱⁱ The Non-Smokers’ Rights Association commissioned legal opinions; enlisted advertising executives to provide expert testimony; organized funding for a joint University of Toronto/University of Illinois study; manufactured plain packages; and developed educational material to encourage public support. The NSRA also published a full-page ad in the national press that helped precipitate an examination by the Standing Committee on Health that produced a recommendation in favour of the plain pack reform. The Canadian Cancer Society funded research, surveys, and legal opinions; hosted and participated in news conferences; prepared briefs for Parliament; and, generally, put its significant weight behind the campaign.

Almost a decade and a half later, although the issue has stalled, the evidence base in support of plain packaging of tobacco products has advanced dramatically, largely as a result of the insight into the motivations and behaviour of tobacco companies gained from publication of millions of pages of previously confidential tobacco industry documents. The evidence presented in this paper comes from the following sources:

- Tobacco industry documents and business journal articles on the value of the package as a promotional vehicle;
- Industry documents and the experience of several nations showcasing the increased importance of packaging as other forms of promotion are restricted;
- Industry documents and evidence from several countries revealing the tactics of the industry in fighting plain packaging;
- Legal opinions and analyses of the authority of governments to mandate plain packaging, notwithstanding obligations under various trade agreements and the *Canadian Charter Rights and Freedoms*;
- Research on the attitudes and anticipated behaviour of non-smoking youth and youth and adult smokers regarding plain packaging;
- Public opinion surveys; and
- Positions of governments and non-governmental organizations.

Taken together this body of evidence makes the following case in support of the mandatory plain packaging of all tobacco products:

- Tobacco packaging is a major vehicle by which tobacco companies promote their products;
- Many aspects of tobacco packaging contravene the spirit and the letter of the *Tobacco Act*;
- Plain packaging would not contravene Canada's international trade obligations or

the *Canadian Charter of Rights and Freedoms*;

- Prohibiting all forms of promotion via the package exterior and interior is consistent with the requirements of the *Framework Convention on Tobacco Control*;
- Plain packaging of tobacco products would help fulfill the objectives of the *Tobacco Act* and the *Framework Convention on Tobacco Control*—to reduce the inducements to start using tobacco, to support current users who want to quit, and to prevent the relapse of former smokers.

Impact of Packaging on Sales and Consumption

The Five Ps of Marketing

A marketing plan traditionally focuses on the four Ps of marketing—product, price, place, and promotion. In recent years, marketing managers have added a fifth 'P', packaging, acknowledging the role that packaging plays in product communication and branding (Silayoi).

Tobacco companies have long recognized the importance of the tobacco pack in attracting attention to the product, in generating recall of advertising, and ultimately in stimulating sales:

“Good merchandising is about the impact your product has on the consumer, it is about using the product itself to stimulate the customer to buy, it is about reminding the consumer of your mass media campaigns at the actual point of purchase when he/she is faced with the buying decision” (BAT, “Merchandising”).

Indeed, a marketing training manual from British American Tobacco (BAT) exhorts managers to maximize the impact of their advertising dollar by making effective use of the pack: “Strengthen your most effective

advertising with the smallest budget: the pack!” (BAT, “Marketing Training”).

The Pack Is a Key Element of Branding

“A product is just a product. The packaging is the brand” (Gardner).

Research in psychology demonstrates that consumer preferences are determined much less by a product’s objective properties than by the relevance of these properties to the individual’s self-image. Thus the choice of brand in a given product category is related to the extent to which the brand image supports the individual’s self image (BAT 1980).

The package can be a key element of a product’s image. Indeed, “the package may be the biggest medium of communication” for several reasons (Rettie):

- The package has extensive reach to all purchasers and most/all users;
- The package is present at the crucial moment when the purchase decision is made; and
- The high level of involvement of users who obtain information from the package.

A recent qualitative study of young adult smokers in Norway, where tobacco advertising has been banned since 1975, investigated how cigarette brand identity is formed and what role package design plays in that process (Scheffels). Three themes emerged:

- The cigarette brand is an element of social and local identity;
- The cigarette brand is a means of drawing distinctions between oneself and others; and
- The cigarette pack is a kind of accessory, a means of expressing aspects of identity related to appearance and style.

The study shows the important contribution of the package to the identity that smokers construct for themselves from a brand and then communicate to others. Participants emphasized the dichotomy between the Scandinavian brand Prince and international brands, such as Marlboro and Camel. The former is perceived as being harsh, uncool, low-class, common, small town/rural, whereas the foreign brands are perceived as cool, elegant, cosmopolitan, for the urban crowd (Scheffels):

“If you want to be a bit of a snob, you smoke Marlboro Light. That is because Marlboro Light is much milder. Then you’re a bit more snobbish, with a golden package and ... it looks a bit nicer. Prince sort of has capital letters—PRINCE—and it is red and there is a picture of a cigarette on the cover. It is not very nice. So if we’re going to a [sic] elegant party or something, I normally buy Blend or something.... If I want to be a bit posh that is.”

Reinforcing the findings of the Norwegian focus group, internal documents from British tobacco maker Gallaher emphasize that the cigarette pack assumes even greater importance because the consumer does not discard the pack upon opening. Rather, the pack is retained and reopened many times, often in front of others. The social visibility of cigarette packs make cigarettes a “badge product,” that is, a badge of identity whereby the owner’s image becomes closely aligned with that of the brand:

“Remember this campaign has its origins in a very simple truth, the smokers of B&H [Benson and Hedges Special Filter] when they put their pack on the pub table, will always have it noticed by their friends. It is their badge and all we are trying to do is celebrate it” (Collet Dickenson Pierce, “Benson and Hedges Special Filter: Creative Brief,” 22 May 1997 as quoted in Hastings).

British American Tobacco also undertook studies to measure the influence of brand image

variables on smokers' perceptions of the sensory characteristics of cigarettes. Three stages of exposure to brand imagery were compared:

- Cigarettes with all brand identification markers masked and no packaging (masked);
- Unmasked cigarettes with brand identification markings visible and no packaging (unmasked); and
- Unmasked cigarettes in their original packaging (package context).

Research by BAT shows that packaging plays a key role not only in influencing the *intangible* characteristics of brand image but also in influencing perception of the brand's *tangible* characteristics (such as taste, strength, and smoothness) and of the type of person that would smoke such a brand. Brand identification and pack imagery serve either to enhance or to diminish the consumer's perception of the brand's sensory attributes such as taste, strength, aroma, and smoothness, having the most influence on "mouthfeel" and "acceptability." The researchers conclude that, as the manufacturers' ability to communicate with their customers is increasingly restricted, assessments of the influence of brand identification/pack imagery on perception of smoking characteristics should be included in both product development and marketing (BAT, "The Influence of Brand Identification"):

"In a future where increasingly the product will have to sell itself through the pack, greater attention must be paid to the influence of brand image on perceived smoking characteristics."

Packaging Increases Sales

There is substantial evidence from consumer product research that effective packaging increases sales:

"Today, it is universally acknowledged that packaging decisions can have a significant impact on sales" (Young).

Studies by the U.S. milk industry show that when a school changes its offering from gable-top milk cartons to plastic milk bottles, milk sales increase by as much as 24% (Dairy Field). Likewise sales of Snapple brands Mystic RE and Elements increased 30% when the company changed the packaging from glass to aluminum, despite a 15-20% price premium (Todd). Strong sales growth of wine in the grocery industry, which has outpaced total beverage sales and doubled beer sales, is attributed to several changes designed to spark consumer interest—funky new names, colourful labels, and alternative packaging, such as screw caps and boxed wines (Liebeck). Clearly, good packaging sells:

"Packaging, all packaging, be it wine labels, boxes, bottles or toothpaste tubes, is at the heart of a perfect storm—the epicenter where the consumer, the product and the cash all convene in a spectacular display of buy-it-or-leave-it. Unlike other forms of media, packaging has the power to close a sale in the final critical moments of the purchasing decision. In this way, package design becomes critical to making an impression" (Isoline).

The package plays a key role in generating impulse purchases. A study by AC Nielsen found that more than half of consumers purchased something not on their shopping list "because it looked good: it looked good on the shelf, the package was appealing, it stimulated them to buy a particular item, it was a craving" (Rostoks). Although retail cigarette displays have been restricted or banned in 12 of 13 provinces/territories in Canada, the ability of an attractive pack to incite impulse buys remains relevant because of the enduring visibility of cigarette packs in social situations.

Elements of Tobacco Packaging that Influence Sales

Consumer product marketing research reveals that various elements of a packaging design system can affect product sales—visibility on the shelf, aesthetic appeal, product perceptions, brand imagery, price expectation, advantage over the competition (Young). Tobacco companies have gone further in identifying the key criteria on which to evaluate pack design—brand name, image, impact, communication, interest, timelessness, extendibility (BAT, “Marketing Training”).

Because the decisions involved in pack design can have a direct impact on sales, marketers rely on consumer research to guide their decision-making. Tobacco companies make extensive use of focus groups during the design process to assess consumer responses to proposed designs and narrow down their choices. Later in the process, they use quantitative surveys to assess the new design and guide their final decision-making (Barezzi; Forsythe; Young). During development of the design for the new du Maurier ‘Signature Pack’ (see below), Imperial Tobacco focus-tested fifteen separate designs. Testifying to the importance of the new pack design is the fact that Imperial had 600 packs *hand-made* for this exercise (Barezzi).

Two elements in particular influence the brand image and perception of the brand, as well as the impact of the pack—colour and shape. Colour is vital to establishing brand image and brand recognition. Indeed, marketers use studies of colour psychology to develop effective colour combinations for packaging and display. A study by the University of Loyola found that colour increases brand recognition by as much as 80% (Brand Design). As Hancock has concluded, “most successful brands now, own, their own colors” (Hancock).

Shape can likewise play an important role in communicating brand image and in differentiating a product from the competition. It can also help draw attention to a product both on and off the shelf (Todd). For an existing product, a new package design can be introduced to keep the brand “contemporary and relevant”; in this case the expectation is not necessarily increased sales but rather improved visibility, aesthetics, and product perceptions (Young).

In 2005, the top-selling brand in Canada, du Maurier, underwent a radical redesign of the shape of the pack. As shown below, Imperial Tobacco replaced the traditional four-sided slide and shell pack with the new du Maurier ‘Signature Pack’, an eight-sided, bevelled-edge, hinge-lid design.



Award-winning du Maurier 8-sided hinge-lid pack (L) replaces old 4-sided slide and shell (R)

This ‘Signature Pack’ project reveals much about the motivation of tobacco companies in undertaking a new design. According to Jeff Guiler, Imperial Tobacco’s Vice-President of Marketing who headed the product, the goal was to set du Maurier apart from the competition and reinforce its image and position as Canada’s leading premium brand at a time when total tobacco sales were plummeting and du Maurier was losing market share to discount brands. With the restrictions on tobacco promotion in Canada, Imperial had to rely on the new package design to convey these messages (Barezzi):

“Given the current ban on cigarette advertising and severe limits on promotional activities, manufacturers must find other meaningful ways of communicating brand awareness.

Enhancements to packaging and other product details provide consumers with tangible touch points that effectively express the brand’s identity.”

Not only did the new design win Guiler the Giovanni Barezzi International Award for the best project in “cigarette design, paper, production and packaging,” but also it was credited with the 2% increase in du Maurier’s share of the premium market shortly after its launch (Barezzi):

“Mr. Guiler’s work should be considered an outstanding example of the capacity of product packaging to influence the end user, at the same time as increasing the image of the brand and differentiating it from its rivals.”

Another feature of the new pack, one that is not trumpeted publicly by Imperial for obvious reasons, is the fact that the design is effective in reducing the impact of the health warning. With the hinge-lid design, the graphic is not visible when the pack is open, and the bevelled edges result in much smaller major faces and thus much smaller warning text.

Importance of the Tobacco Package Increases When Promotion Restricted

In the era before the mass media advertising of cigarettes, the introduction of new brands and new packs was the key way to spur interest and trial: “Brand proliferation was the rule and eye-catching pack design was a key feature” (Slade). In the present day, where other forms of promotion have been restricted or banned, the tobacco pack once again becomes much more important as a promotional vehicle, as tobacco

industry documents, the assessment of packaging experts, and the experience in various countries demonstrate.

As early as the 1970s, tobacco manufacturers forecast the time when their marketing activities would be curtailed to such an extent that their ability to promote their products would rest solely on the pack itself (BAT, “Guidelines”):

“Under conditions of total ban, pack designs ... have enormous importance.... Therefore the most effective symbols, designs, colour schemes, graphics and other brand identifiers should be carefully researched.... An objective should be to enable packs, by themselves, to convey the total product message.”

International package designer Frans van Heertum makes it clear that in the era of advertising restrictions, the pack has replaced traditional advertising as the primary means by which companies establish a unique image for their products (Rossel):

“In earlier days ... the pack was just a reference to the image set by the advertising world. Now this trend and image setting have been taken away by the bans, the only thing left is the pack. You have to put your entire brand image into the pack. The pack has to draw new consumers for you. That’s why every small part of the pack is being used in the most innovative way, to set the brand apart from competition.”

Tobacco companies have undertaken sophisticated scientific research to understand how to enhance the effectiveness of pack design. BAT, for example, conducted a series of experiments using an eye-gaze monitor and projection tachistoscope^{iv} to measure the visual

^{iv} “A conventional tachistoscope is a piece of portable equipment which allows the presentation of visual stimulus material for successively increasing short intervals of time. Initially, the exposure durations are so short that the stimulus material is presented below the threshold [i.e. the level at which exposure is just long

prominence of various elements of a cigarette pack (BAT, “Structured Creativity”; BAT, “Principles of Measurement”):

“The elements of the pack can be designed so that those that are most important in communication terms also achieve the highest level of visual impact.”

Printing, ink, and packaging companies are collaborating with in-house tobacco marketing and design professionals to help tobacco packs do the job previously assigned to a range of promotional vehicles (Brinson):

“All the focus on advertising and marketing is now turned to the pack, as restrictions abound and the pack remains the one venue of communication with the consumer. Today’s packs are certainly turning heads with glitz and glamour—flashy foils, fancy paperboard featuring unique curves, and etching and embossing that you just have to touch.”

Redesigned Packaging

In the U.S. in the late 1990s, when additional restrictions on tobacco promotion were imposed by the Master Settlement Agreement (MSA), there was a proliferation of new packaging on the market, including the introduction of limited edition packs by several brands. The new packaging was intended to promote new interest in smoking and trial among new customers.



Limited edition Camel introduced for New Year’s Eve 2004 (www.trinketsandtrash.org)



Camels offered in new tin packs in a wide range of new flavours; many of the exotic blends were initially available only at Camel events and by special order (www.trinketsandtrash.org)

enough for the individual to become consciously aware of the stimulus.] As the exposure durations increase different elements of the pack reach the perceptual threshold level. This level is determined by the visual prominence of those elements” (British-American Tobacco, “Principles of Measurement of Visual Standout in Pack Design”).

A close parallel can be drawn to the current situation in Canada. In the wake of the Supreme Court decision that affirmed the prohibition on most forms of promotion under the *Tobacco Act* and before display bans took effect in Canada’s three most populous provinces, tobacco companies revised their mix of promotional activities to put new emphasis on the pack itself.

Two of the top three manufacturers, JTI-Macdonald and Imperial Tobacco, resumed advertising in the fall of 2007, primarily in

magazines and entertainment weeklies. The print ads have all showcased the tobacco package itself. To date, the advertising has focused on new brand extensions, Player's Black + Red/Silver/Gold; new brands, Aria and XS; and new products, Mirage (with "Less Smoke Smell" technology), Fusion (fluted filter cigarette), and du Maurier snus (Swedish-style smokeless tobacco product).



Ottawa Xpress, April 2008



Voir Ottawa-Gatineau, February 2008



Time, November 2007



Edmonton Journal, Dec. 2007; photo courtesy of ASH

Rothmans, Benson & Hedges signature brand was completely revised such that the pack resembles the size and shape of a typical cosmetic box containing a tube of lipstick or a small bottle of perfume. The pack is embossed with the B&H logo and the cigarettes inside are "superslim" and all-white, clearly targeted at the image-conscious, young female market. It is noteworthy that these packs of twenty superslims are only marginally larger than the 'kiddy packs' that have been banned in Canada since 1994. The size of the pack also renders the warning text so small as to be almost illegible, except at very close proximity.



Benson & Hedges Superslims Menthol, May 2008; Actual size: 2.8cm (w) x 10cm (h) x 2.3cm (d)

In 2008, Imperial Tobacco introduced a new line of the second best-selling brand in Canada, Player's, including new pack colouring, size, shape, and style of opening:



Former Player's pack, circa 2006; photo courtesy of Hammond



New Player's Black + Red pack, April 2008; photo courtesy of Info-Tabac

Descriptive Phrases

Another disturbing trend that tobacco companies have been increasingly following is the addition of descriptive phrases to cigarette packs, as illustrated in the table and photo that follow:

Brand	Descriptive Phrase
A = Face with English warning B = Face with French warning C = Face exposed only when package is open	
Canadian Classics	B Rock City Tobacco Company, Manufacturing in Canada since 1899
du Maurier Distinct	B The symbol of quality since 1936; Le symbole de la qualité depuis 1936
du Maurier Edition	B Smooth Flavour, Classic Quality; Qualité classique; Un goût unique
John Player Standard Blue	B Quality tobaccos from the House of Player's.
Mirage	A Less Smoke Smell B Odeur Réduite
Number Seven	A Genuine quality tobacco B Rock City Tobacco Company, Manufacturing in Canada since 1899; Dedicated to quality
Parliament	A Distinctive smooth taste B Premium quality tobacco in the world-famous cigarette; Taste and design of superior craftsmanship
Peter Jackson	A Smooth Flavour B Sun Ripened Tobacco Inside Bright Colour Outside; Peter Jackson Through & Through
Player's Black + Red	A + B A World Class Tobacco for a New Canadian Taste C Because Good Taste Travels; Full On Flavour
Player's Black + Silver	A + B A World Class Tobacco for a New Canadian Taste C Because Good Taste Travels; More Mellow

Brand	Descriptive Phrase
A = Face with English warning B = Face with French warning C = Face exposed only when package is open	
Player's Black + Gold	A +B A World Class Tobacco for a New Canadian Taste C Because Good Taste Travels; More Mellow
XS	A Extra Slims B Luxury Cigarettes; Cigarettes De Luxe

intended to serve the same purpose. The descriptive phrases promote the company's history, the product's quality, or its unique characteristics, serving to normalize and legitimize the product and divert attention away from its lethal nature. These descriptive phrases serve the same role as the advertising slogans of the past, further reinforcing the fact that tobacco packages have become portable advertisements. As well, it is fair to assume that by trademarking these phrases, the industry is hoping to retain a greater proportion of the pack for their own promotional purposes, in the event that plain packaging prohibits all promotional elements except the word mark.

Branded Filters/Liners

The use of designer tipping and wrapping papers is another noteworthy trend. As illustrated in the photos below, these designer papers incorporate branding elements, such as the brand name, brand logo, brand colours, and distinctive patterns that link the cigarette closely to the package design. Including these elements on the cigarette itself contributes to the image of the brands as being special, exotic, or superior (Lewis):



Peter Jackson Side B, October 2007

“Their appearance and marketing taps into the current trend toward ‘new luxury’ products that are somewhat more expensive but perceived as being of better quality and taste. Promotional messages describe the line [Camel Exotic Blends] as ‘a collection of sophisticated indulgences,’ luxuries that can enhance pleasure.”

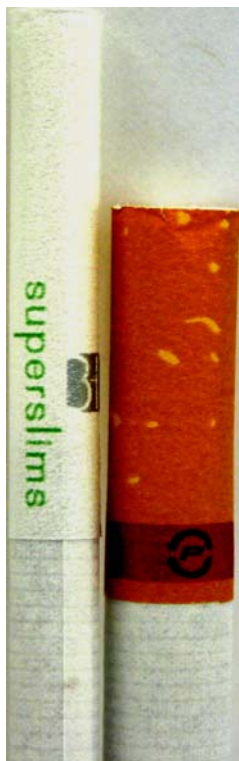
Under the 1988 *Tobacco Products Control Act*, Section 9(2), “extraneous information” was prohibited on cigarette packs, defined as “any writing other than the name, brand name and any trade marks of the tobacco product” and any prescribed information. The intent was clearly to prevent manufacturers from embellishing the pack with descriptions that connote positive attributes, benefits of use, or lifestyle associations.

As well, by displaying the name, logo, colour, and graphic pattern associated with the brand, each cigarette becomes an individual emblem of brand identity.

The prohibition in the current *Tobacco Act* against any form of promotion designed to create an erroneous impression about the characteristics or health risks of the product was



L to R: Camel Exotic Blend: Kauai Kolada; Camel Exotic Blend: Crema, Camel Exotic Blend: Izmir Stinger; Salem Silver Label: Cool Myst; Kool Smooth Fusion: Mocha Taboo; Kool Smooth Fusion: Mintrigue; photo courtesy of www.trinketsandtrash.org



Benson & Hedges Superslims; Player's Black + Red, May 2008

Similarly, numerous brands, particularly in the full-price/premium segment of the market, have started enclosing cigarettes in foil liners that are

embossed with the brand name and/or brand logo or are colour-coded to coordinate with or match the exterior of the package.



Camel No. 9, photo from *Vanity Fair*, September 2007
International packaging designer Martina Kunert believes the trend toward increasing focus on the package will only intensify. She forecasts major investments by tobacco manufacturers in sophisticated packaging that rivals that of cosmetic products (Rossel):

“With the restrictions on advertising the only way out for tobacco manufacturers is packaging. The cigarette packs have become more sophisticated in every aspect: material, shape, printing enhancements. The packs will become similar in sophistication, touch and feel to the cosmetic industry. Cigarettes will become items of indulgence.”

Impact of Plain Packaging

No jurisdiction has yet mandated the plain packaging of tobacco products. Evidence of the impact of plain packaging on smoking-related beliefs and behaviour is therefore experimental and speculative. Nonetheless, a significant and growing body of research provides a compelling indication of what could be expected from the implementation of plain packaging. The

research consists primarily of focus groups and surveys in which respondents are asked to describe their attitudes and beliefs toward the plain and branded packs, to compare and contrast the type of people who would choose each type of pack, and to infer the impact of the plain and branded packs on their own and/or other people's smoking behaviour. In addition several international investment firms have conducted financial analyses of the likely impact of plain packaging on specific tobacco companies and the tobacco market in general.

Plain Packs Diminish Brand Equity and Thus Decrease Tobacco Use and Industry Profits

“The pack is the brand” (Citi 2008)

Focus groups of youth in both New Zealand and Australia found that plain packaging was unattractive and destroyed brand identity. Many young people commented that they would not be willing to be seen with these packages, leading to the conclusion that plain packs would likely “have a substantial impact on preventing trial and uptake of smoking” (CBRC).

Research on teenagers commissioned by Health Canada's Expert Panel on Plain Packaging comprised five different approaches—a national survey; a word image survey; a visual image experiment; a recall and recognition experiment; and a conjoint experiment. Both the word image survey and the visual image experiment found that plain packaging lessens the ability of the pack to convey unique and positive brand images (Expert Panel):

“Denuding cigarette packages of major elements of their brand markings (other than their name) appears to limit teenagers' capacity to associate specific images with specific brands.”

In the conjoint analysis experiment, the researchers attempted to discern the relative effects of brand, package type, price, and peer influence on consumers' brand preference. The findings indicate the value of plain packaging (with or without a graphic warning image) in discouraging youth smoking uptake and encouraging cessation:

- After low price, the current branded packs had the most utility in encouraging smoking uptake by non-smoking teens.
- The current branded packs had the least utility in encouraging quitting among both teen and adult smokers.
- For teen non-smokers and smokers alike, packaging was at least as important as brand name and more important than peer influence in promoting uptake among non-smokers and motivating quitting.

The national survey of 1200 youth aged 14-17 commissioned by the Expert Panel concluded that plain and generic packaging would have “a slight to perhaps moderate effect on smoking uptake among Canadian teens”. While there were mixed views among respondents regarding the potential impact of plain packaging, a key finding of the survey is that the vulnerable/naïve and those experimenting with smoking are the most likely to believe that plain packaging would have a deterrent effect. Overall, the survey found that between one-third and one-half of youth believe that plain packaging would deter youth smoking (Expert Panel):

- 49% believe that plain packaging would result in fewer teens starting to smoke;
- 36% believe that teens would smoke less as a result of plain packaging; and
- 38% believe that plain packaging would result in more teens quitting smoking.

A large quantitative and qualitative study of Ontario students aged 12-15 in 1994-95 yielded similar results to the national survey—one-third

thought plain packaging would make youth non-smokers less likely to start smoking, and one-third thought it would make teen smokers reduce their tobacco use. A large majority of students found the plain packs to be “more boring” (86%) and “uglier” (78%) due to their lack of brand identification and imagery. Indeed, almost two-thirds of students (60%) indicated a willingness to pay more for a regular pack, compared to only 4% for a plain pack (d’Avernas).

In 1994, the federal Standing Committee on Health conducted a series of hearings on plain packaging of tobacco products. Summarizing the evidence presented from available studies, the Committee found that “in all the studies, subjects indicated that plain packaging made the product less attractive and appealing.” The Committee emphasized the significance of the fact that “no comparable study providing contrary evidence was submitted.” In its final report, entitled *Towards zero consumption: Generic packaging of tobacco products* submitted to the House of Commons in June 1994, the Committee recommended (Standing Committee):

“That the federal government establish the legislative framework required to proceed with plain or generic packaging of tobacco products.”

Recent research by Hammond of approximately 600 adults, including an equal proportion of smokers and non-smokers, found that cigarette brands in plain packs are perceived as less attractive by 90% of respondents and as lower quality by 75% of respondents. As well, an overwhelming majority (86%) believe that cigarettes in plain packs would be less appealing to youth than the current branded packs (Hammond, Oct. 2007).

The reaction of market analysts to the possibility of plain packaging provides valuable insight into

the likely impact of this policy on the tobacco business. Responding to the UK government’s consultation paper on new tobacco control measures, Citi Investment Research ruled plain packaging a “new and serious risk” (Citi):

“In the medium-term, we think plain packaging would go a long way to undermine the power of tobacco brands and it is the brands that make the industry so profitable.”

Citi analysts predict that plain packaging would trigger a host of changes. Because smokers would “hate” the generic packs, they would switch to international versions (legal or illegal) or would trade down to cheaper domestic brands. While other interventions, such as smoking bans, result in decreased volume, tobacco companies are able to make up for decreased sales by increasing prices. With plain packaging, consumers would be much less willing to pay a premium for certain brands, driving down tobacco company profits substantially. The profits of Imperial Tobacco, for one, could be expected to drop by 3-4% per year (Citi).

Analysts with the investment firm Morgan Stanley reached much the same conclusion, that plain packaging would push consumers to lower priced brands and thereby harm tobacco company profitability (Morgan Stanley):

“In contrast to existing regulations, we believe that UK ‘plain packaging’ – which could become a standard in other markets – could have a materially adverse impact on cigarette brand equity, commoditize the overall category, and could result in significantly reduced profit.”

In 2007, Morgan Stanley researchers concluded that plain packaging and below-the-counter sales are the two regulatory environment changes that concern the industry the most (after taxation), as “[b]oth would significantly restrict the industry’s ability to promote their products” (Freeman).

A third analysis, by Deutsche Bank, focuses more on the likelihood that the UK will implement plain packaging. Although all three investment firms claim that plain packaging is unlikely to reduce tobacco consumption, all three nonetheless provide a key reason why the opposite is more likely to be true. For example, while contending that plain packaging would be “of no real use,” the Deutsche Bank report analysts then offers conflicting evidence of the effectiveness of plain packaging in decreasing tobacco use—“[S]mokers will not want them Smokers like their brands” (Deutsche Bank).

Plain Packs Increase the Salience of Warnings

The findings from hazard communication and tobacco control research indicate that plain packaging increases the salience of package-based warnings. A 1991 focus group study by Beede and colleagues of some 600 adolescents found that unaided recall of tobacco package health warnings increased substantially when brand image elements were removed from the pack (CBRC). The findings of this study are supported by two focus group studies of teenagers in Australia which concluded that design elements that make the pack less attractive, including standardized packaging, also serve to make the warning more noticeable (CBRC).

Recent research by Hoek in New Zealand found a strong correlation between plain packs and tobacco package warnings. Hoek conducted a study involving a convenience sample of 245 youth and three tobacco brands not currently available in New Zealand—an existing youth brand, an international youth brand, and a plain pack—to explore whether the effectiveness of warning labels varies according to the level of branding on the pack. The study found that a known brand with a picture warning label was

three times more attractive to the youth than a plain pack with a text-only label. By far the least attractive option was the plain pack with the graphic warning—it was 25 times less attractive than even the unknown brand with the graphic warning. The researcher concludes that plain packaging with a graphic warning label could be expected to reduce the status of cigarettes as ‘badge’ products and in so doing reduce youth smoking initiation (Hoek).

Plain Packs Reduce the Deceptive Potential of Packaging

Under an agreement negotiated with the federal Competition Bureau, Canada’s major tobacco companies ceased using the descriptors ‘light’ and ‘mild’ on their packs by July 31, 2007. The agreement was intended to prohibit the companies from continuing to mislead consumers into believing that brands producing lower machine readings of tar are safer or healthier. The evidence shows, however, that the new systems are as misleading as the old.

Tobacco company documents reveal that consumers associate product strength with different colours or shades of the same colour, the system adopted by major brands such as du Maurier, Player’s and Export ‘A’ to replace the banned descriptors:

“Lower delivery products tend to be featured in blue packs. Indeed, as one moves down the delivery sector, then the closer to white a pack tends to become. This is because white is generally held to convey a clean healthy association” (Philip Morris).



Photo courtesy of Hammond 2007



Photo courtesy of Hammond 2007

Research by Hammond and colleagues found that consumers hold the same false beliefs about brands labelled with a lighter colour, with the descriptors “smooth” or “silver,” or with a lower number as they do about brands labelled “light,” “mild,” or variations thereof. The vast majority of smokers and non-smokers believe that these brands deliver less tar, have a smoother taste, and pose lower risks to health (Hammond, Nov. 2007).

This research with Canadian subjects parallels the experience in the UK following implementation of a prohibition on ‘light/mild’ brand descriptors. The study of almost 4,000 adult smokers in the UK found that a significant percentage of smokers continue to believe that so-called low tar (light) cigarettes are a healthier alternative to higher tar (regular) cigarettes, despite a ban on the use of misleading descriptors and an accompanying public education campaign. Although the proportion of smokers holding these beliefs decreased following the ban, the change in beliefs was

similar in the US where there was no such regulatory change. The researchers conclude that removing the terms ‘light’ and ‘mild’ alone cannot correct decades of misperceptions, particularly in the absence of a ban on other equally misleading package elements (Borland):

The findings from this study suggest that bans on brand descriptors such as ‘light’ and ‘mild’ are insufficient to markedly change false beliefs held by smokers about low tar cigarettes and will need to be supplemented by bans on other misleading product descriptors such as providing yield numbers on packs, and the use of reassuring terms, images and coloring in product marketing.”

These recent developments show how adept tobacco companies are at circumventing narrow restrictions on their ability to communicate with their customers, such as the ban on ‘light’ and ‘mild’ descriptors. The only way to prevent tobacco companies from continuing to offer their customers false reassurance about the health risks inherent in using their products is to mandate a broad prohibition on the use of all colours, numbers, and descriptors on all tobacco packaging.

Support for Plain Packaging

Justification under the *Tobacco Act*

The new emphasis by Canadian tobacco manufacturers on the pack as a promotional vehicle must be evaluated in light of the restrictions on promotion contained in the 1997 *Tobacco Act*. The *Tobacco Act* includes a very broad definition of promotion:

“18.(1) In this Part, “promotion” means a representation about a product or service by any means, whether directly or indirectly, including any communication of information

about a product or service and its price and distribution, that is likely to influence and shape attitudes, beliefs and behaviours about the product or service.”

The Act imposes a blanket prohibition on all forms of promotion and then provides specific exceptions for two types of advertising—brand preference and information—in three venues—direct mail to a named adult; signs in a place to which minors are not permitted; and a publication with a minimum 85% adult readership. Clearly, tobacco packaging falls within the definition of promotion and is not one of the permitted forms of advertising. Plain packaging is thus justified on the grounds that the package has become the major vehicle used by tobacco companies to promote their products.

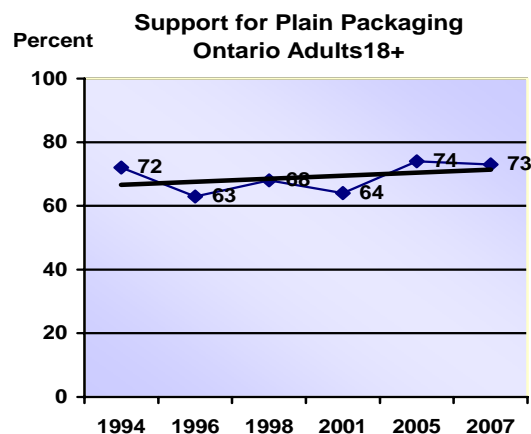
The *Tobacco Act* further specifies that the *packaging* of tobacco products that in any way contravenes the Act or the regulations is prohibited. Any form of promotion that is false or misleading is likewise prohibited:

“20. No person shall promote a tobacco product by any means, including by means of the packaging, that are false, misleading or deceptive or that are likely to create an erroneous impression about the characteristics, health effects or health hazards of the tobacco product or its emissions.

The evidence presented in this report is unequivocal that there are many current examples of tobacco packaging that are misleading and deceptive, particularly brands formerly labelled as ‘light’ or ‘mild’. The redesigned packaging has merely replaced one form of deception with other words, numbers, symbols, or colour schemes that convey the same misleading impression about the strength and toxicity of the product, again in clear violation of the *Tobacco Act*.

Public Opinion Surveys

Despite the fact that plain packaging has not been on the public agenda in Canada since 1995, public opinion surveys conducted in Ontario between 1994 and the present reveal consistently strong support for a legislated requirement that tobacco products be sold in plain packages as a means of discouraging youth smoking.^v



Particularly noteworthy is the fact that in 2007, a substantial majority (72.8%) of adults in Ontario agree that cigarettes should be sold in plain packs, including a majority who strongly agree that plain packaging should be mandated (CAMH).

Framework Convention on Tobacco Control

The World Health Organization *Framework Convention on Tobacco Control* (FCTC) is an international public health treaty that aims to “protect present and future generations from the devastating health, social, economic and environmental consequences of tobacco

^v Sources: 1994 – Ontario Alcohol and Other Drug Opinion Survey, CAMH; 1996, 1998 – Ontario Drug Monitor, CAMH; 2001, 2005, 2007 – CAMH Monitor.

consumption and exposure to tobacco smoke.” As of the end of June 2008, 157 countries had become Parties to the treaty and 180 were participants—nearly every country in the world.

Article 13(2) of the FCTC requires that each Party implement a comprehensive ban on all forms of tobacco advertising, promotion and sponsorship, insofar as it is permitted by its constitution.

As a minimum, under Article 13(4), each Party shall prohibit all forms of advertising and promotion that “are false, misleading or deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions.” Furthermore, Article 11.1(a) specifically requires that Parties ensure that tobacco product packaging and labelling do not promote a tobacco product by any means:

“that are false, misleading, deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions, including any term, descriptor, trademark, figurative or any other sign that directly or indirectly creates a false impression that a particular tobacco product is less harmful than other tobacco products.”

As shown in the previous section, there is considerable evidence that the tobacco pack is a powerful form of promotion. The size, shape, colours, logo, and descriptive phrases all serve to emphasize the association between the brand image and the consumer’s aspirational lifestyle and self-image goals. Many packs also aim to mislead consumers by minimizing their concerns about the health effects of tobacco use.

International Interest in Plain Packaging

In 1992, the Australian Centre for Behavioural Research in Cancer (CBRC) prepared a report on health warnings and tobacco package labelling for the Ministerial Council on Drug Strategy Tobacco Task Force. Based on a series of studies assessing tobacco package warnings, the CBRC concluded that “tobacco products should be sold in ‘standardized packages’” by which the colour, design, wording and font would be controlled by the government (CBRC).

In 2005 Cancer Research UK called for the implementation of generic packaging of all tobacco products, providing only the name of the brand, the health warning, and other mandatory consumer information. Based on a study of UK tobacco company documents, the organization concluded that plain packaging is “the next step in breaking the links between the tobacco industry and its consumers” (Cancer Research).

In May 2008, the Scottish Government released a comprehensive *Smoking Prevention Action Plan*. In addition to undertaking numerous interventions to reduce the uptake of tobacco use among children and youth, the Government also committed to considering the desirability of moving towards plain packaging of tobacco products, in conjunction with the UK government and other devolved administrations (Scottish Government).

The British government followed suit at the end of May 2008, releasing a *Consultation on the Future of Tobacco Control*. As this was a consultation document not an action plan, the UK government is currently seeking the views of stakeholders and the public on a wide range of measures, including the potential of plain packaging to reduce smoking uptake among youth (UK).

International Trade Law Challenges

When plain packaging first began igniting the interest of tobacco control organizations and activists, tobacco company consultants sought to frame the debate away from health concerns and onto issues that they had a higher chance of winning (PSC, April 2008). The New Zealand Tobacco Institute in 1993, for example, decided that opposition to packaging regulations should not be based on arguments related to health, children's smoking, or consumer rights (Tobacco Institute):

“It [proposed packaging reform] should be treated as expropriation of Intellectual Property and contested politically on that basis. If this strategy is followed the industry has a greater chance of both setting its own agenda and avoiding the need to critique anti-smoking proposals from a back foot position. Industry should set the agenda in an effort to confine the argumentation to political, economic, international trade, and intellectual property issues.”

In the summer of 1993, Rothmans initiated the formation of a “Plain Pack (Working) Group,” bringing together legal, trademark and public affairs experts from the major multinational tobacco companies to develop a coordinated strategy to deal with plain packaging. By the summer of 1994, various legal opinions and several letters from the World Intellectual Property Organization all reached the same conclusion, as summed up by BAT executive David Bacon: “Current conventions and treaties offer little protection [against plain packaging]” and GATT/TRIPS afford “little joy” (PSC, April 2008).

Despite being aware since 1994 that trade agreements did not provide the hoped-for solution to preventing plain packaging, tobacco

companies around the world continue to base their opposition to plain packaging on the argument that it would violate many of their rights under international trade laws, including the Paris Convention for the Protection of Industrial Property, the North American Free Trade Agreement (NAFTA), the General Agreement on Tariffs and Trade (GATT), and the World Trade Organization Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Specifically, the companies purport that plain packaging would give rise to the following violations (LeGresley):

- Unnecessary obstacle to international trade;
- Disguised trade restriction;
- Discrimination against foreign/new entrants;
- Unfair competition;
- Inadequate protection of trademarks;
- Unjustified encumbrance on trademark use;
- Inequitable treatment of investment;
- Expropriation of investment; and
- Creation of confusion among consumers.

Despite the stringent protection of trademarks and the requirement of a level playing field under international trade laws, there are numerous robust legal counterarguments and precedents that support mandatory plain packaging. Trademark holders would retain ownership of the trademark, use of the word mark portion of the trademark; and the ability to use the trademark, except on the package at retail in Canada (LeGresley). Even tobacco companies themselves have privately acknowledged that “the international trade argument by itself will not ... be sufficient to ward off the threat of plain packs” (Rothmans).

The industry's arguments and the counterarguments of various legal and tobacco control experts are summarized below.

Discrimination

Tobacco companies claim that even if national treatment (same treatment of domestic and foreign brands) results in no *de jure* discrimination, plain packaging would give rise to *de facto* discrimination against foreign manufacturers in violation of the WTO Agreement. A finding of *de facto* discrimination by a WTO or NAFTA panel is unlikely, however, because of two unique features of the Canadian tobacco market: Foreign manufacturers account for a very small fraction of direct sales and they have a dominant equity position in the Canadian market by virtue of their ownership of the big three Canadian tobacco makers (LeGresley).

Even if plain packaging is found to be *de facto* discrimination, however, it would likely be upheld by the general exception provision of the WTO Agreement. Article XX(b) permits measures “necessary to protect human, animal or plant life or health,” provided they do not constitute arbitrary or unjustified discrimination (LeGresley).

Registration of Trademarks

One fundamental purpose of international law to protect trademarks is to ensure that consumers are informed about and not confused regarding the source of goods and services. Plain packaging would not prevent the registration of new tobacco trademarks or the continued existence of previously registered trademarks. Tobacco manufacturers would be permitted to use the word mark on tobacco packages (the brand name), to use the trademark on invoices and communications with distributors and retailers, and to use the trademark on packages intended for export—these uses are sufficient to retain trademark registration under Canadian law, according to at least one expert in international trade law (LeGresley).

Encumbrance/Non-Use of Trademarks

In a legal opinion prepared for U.S. tobacco makers Rothmans and Philip Morris, former U.S. Trade Representative Carla Hills asserts that plain packaging would violate NAFTA Article 1708(10) which prohibits a Party from encumbering “the use of a trademark in commerce by special requirements” (Hills).

Article 1708(12), however, permits Parties to provide “limited exceptions to the rights conferred by a trademark,” provided that such exceptions take into account the legitimate interests of the trademark owner and third parties. Plain packaging would only be a “limited exception” to trademark rights, since the trademark owner would retain ownership of the trademark; would still be able to use the trademark for non-retail or export purposes; and would still be able to use the word mark element of the trademark. As well, a strong case can be made that third parties include the general public and that the protection of health is a legitimate public interest (LeGresley).

Similarly, tobacco companies claim that plain packaging would violate TRIPS Article 20, which stipulates that the use of a trademark may not be “unjustifiably encumbered” by special requirements. As with NAFTA, TRIPS Article 17 permits limited exceptions, “provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.” Further Article 8 specifies that members may adopt measures to protect public health and promote the public interest. Plain packaging could constitute a “justifiable” encumbrance in contravention of Article 20. The government of Canada would have the onus of proving that the protection of public health is an important objective and that plain packaging would have a positive impact on public health (LeGresley).

McGrady argues that because Article 8 defines the principles of TRIPS, it should serve as an interpretative aid to each provision of the Agreement. In *Canada: Patent Protection of Pharmaceutical Products*, Canada and other third party states argued successfully that the inclusion of Article 8 in TRIPS demonstrates that the drafters “intended to strike a balance between the protection of intellectual property rights, free trade, and other policy considerations such as the protection of public health” (McGrady).

Plain packaging would not result in the non-use of trademarks. However, even if it did, this would not constitute a violation of Article 7 of the Paris Convention. This conclusion was provided to the tobacco industry’s Plain Pack Group in July 1994 by the Director of the Industrial Property Law Department of the World Intellectual Property Organization (WIPO):

“Therefore, countries party to the Paris Convention remain free to regulate or prohibit the sale of certain types of goods, and the fact that a mark has been registered for such goods does not give the right to the holder of the registration to be exempted from any limitation or prohibition of use of the mark decided by the competent authority of the country where the mark is registered.”

Despite definitive statements from WIPO to the contrary, tobacco companies have continued to argue that plain packaging would contravene the Paris Convention (PSC, April 2008).

There are numerous examples in Canada of restrictions on the use of registered trademarks. For example, registered pharmaceutical trademarks may not be printed on packaging of consumer drugs (LeGresley).

Unfair Competition

Tobacco companies argue that plain packaging would violate several provisions of the Paris Convention, including the requirement to provide effective protection against unfair competition. In fact, plain packaging would not create unfair competition because all manufacturers of tobacco, foreign and domestic, would be treated the same (LeGresley). Likewise, in a letter written on behalf of WIPO, Director Ludwig Baeumer concluded that it was “doubtful” whether Article 10bis of the Convention would serve as grounds on which to contest the legality of plain packaging, because the use of trademarks is not the only means of preventing unfair competition (WIPO).

Creation of Confusion

Tobacco companies likewise contend that plain packaging would contravene the prohibition in the Paris Convention against any act that would create confusion with the products of a competitor. Plain packaging could not be considered an act creating confusion with a competitor, however, because it would constitute compliance with a law, not a competitive act (LeGresley).

Encouragement of Counterfeiting

Tobacco companies raise the spectre of increased counterfeiting as a result of plain packaging, in contravention of TRIPS. However, counterfeit versions of many fully branded products, including cigarettes, are currently available in many markets around the world. Clearly, copying trademarked imagery is not an impediment to counterfeiting. Furthermore, there is no reason that plain packs could not be mandated to include markings, such as a tax-paid stamp, that are difficult to counterfeit (LeGresley).

Expropriation of Investment

Hills makes the case that plain packaging would violate NAFTA Article 1110(1), by implementing a measure that is tantamount to expropriation of the investment and in so doing would entitle owners whose trademarks had been expropriated to compensation equal to the fair market value of the expropriated investment under Article 1110(2)-1110(6). In fact, Parties may expropriate an investment if it is done for a public purpose, on a non-discriminatory basis, with due process of law, and with the payment of the necessary compensation (LeGresley). However, plain packaging does not strip ownership of trademark and therefore cannot be considered expropriation or nationalization. It is not tantamount to expropriation because tobacco companies would still be able to use their trademarks, just not on tobacco packaging at retail. Finally even if the above arguments fail, NAFTA would not preclude plain packaging but would require that the fair market value of the trademarks be paid to the companies (LeGresley).

Tobacco control researcher Becky Freeman points out that despite the “the near universal appropriation by governments of sometimes substantial parts of tobacco packaging for health warnings,” no tobacco company has ever succeeded in resisting this appropriation and in being compensated for any resultant loss of trade (Freeman). This fact bodes well for the industry’s likelihood of success in demanding compensation for plain packaging.

Framework Convention on Tobacco Control

The *Framework Convention on Tobacco Control* is an international treaty with the same legal stature as World Trade Organization agreements. During FCTC negotiations, the relationship between the treaties was considered

at length by the Parties. Writing before the FCTC negotiations were concluded, Ira Shapiro, a former General Counsel in the Office of the United States Trade Representative, argued that the existence of a treaty dealing exclusively with tobacco products meant that trade rules covering normal goods should not apply (Shapiro):

“It would be anomalous for the nations of the world to identify tobacco control as a major global health priority, justifying several years of multilateral negotiations, only to conclude that tobacco products should in fact be subject to the normal trade rules.”

Shapiro made the case for the FCTC to define clearly the relationship of the FCTC to the WTO, to ensure that the specific provisions of the FCTC designed to protect public health from a single class of lethal product take precedence over the provisions of treaties of general applicability intended to protect commercial concerns. Although the final text of the FCTC is not quite as direct as Shapiro advised, the Preamble to the FCTC, which sets out the assumptions underlying the Parties’ agreement on the terms of the Convention, provides substantial guidance on the question of precedence (PSC, April 2008; San Francisco; Shapiro). The relevant sections of the Preamble are reproduced below:

“Determined to give priority to their right to protect public health,”

“Recognizing the need to be alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts,”

“Recalling Article 12 of the International Covenant on Economic, Social and Cultural Rights ... which states that it is the right of everyone to the enjoyment of the highest attainable standard of physical and mental health,”

“Recalling also the preamble to the Constitution of the World Health Organization, which states that the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction

of race, religion, political belief, economic or social condition,”

“Recalling further that the Convention on the Rights of the Child ... provides that States Parties to that Convention recognize the right of the child to the enjoyment of the highest attainable standard of health” (FCTC 2005).

Furthermore, Article 27 of the FCTC provides the Convention with its own dispute settlement mechanism. The fact that the FCTC has been ratified by more than 80% of UN countries and that these Parties declared unequivocally that the right to health should take precedence suggests that disputes over the legitimacy of tobacco control measures such as plain packaging would be dealt with the FCTC process and not through the WTO dispute settlement body (PSC, April 2008).

International Agreements on Human Rights

Canada is a signatory to several international agreements that obligate Parties to prioritize health over other issues including trade—the United Nations Convention on the Rights of the Child; the International Covenant on Economic, Social and Cultural Rights; and the United Nations Universal Declaration of Human Rights. The Committee on the Rights of the Child has specifically identified that tobacco consumption falls within the scope of the Convention, requiring states to “take all necessary legislative and regulatory measures to protect children from tobacco and ensure that the interests of children take precedence over those of the tobacco industry.”

The International Federation for Human Rights has issued an extensive report condemning international trade agreements for eroding human rights, in particular the right to health and well-being (Shaffer 2005). The Federation

has concluded that the United Nations Universal Declaration of Human Rights prevails over any trade agreement and is calling on the World Trade Organization and its member states to recognize the principles in the Declaration as standards of behaviour (FIDH).

Similarly the Center for Policy Analysis on Trade and Health is seeking endorsements of its “Call for Public Health Accountability in International Trade Agreements,” urging the health community to advocate forcefully for health to supersede trade, particularly in regard to tobacco issues (Shaffer):

“Tobacco is uniquely deadly and addictive, and should be excluded from all current and future trade agreements.”

Charter Challenge

Tobacco companies claim that mandatory plain packaging of their products would be a violation of their right to freedom of (commercial) expression under section 2(b) the *Canadian Charter of Rights and Freedoms*. Whether or not mandatory plain packaging is legal under the *Charter* will depend on whether the measure is a violation of the companies’ *Charter* rights and if so whether the infringement is reasonable and justifiable in a free and democratic society, as provided for in Section 1.

The Supreme Court ruling on the constitutionality of the *Tobacco Act* signals how the court would likely rule on the question of the constitutionality of plain packaging. The Supreme Court upheld the *Tobacco Act* in its entirety, finding that several provisions did violate the manufacturers’ right to freedom of commercial expression but that the restrictions were all reasonable limitations given the pressing and substantial objective of the legislation. Of particular relevance to plain packaging is the fact that the Court upheld the

prohibition in Section 20 against false promotions, including anything that may be considered “likely to create an erroneous impression about the characteristics, health effects or health hazards of the tobacco product or its emissions.”

The Court concluded that the government’s objective was a “matter of life or death for millions of people,” whereas the limitation placed on the companies was of minimal concern. The Court also upheld the package-based warnings requirement in the *Tobacco Products Information Regulations*, concluding that “benefits flowing from larger warnings are clear, while the detriments to the manufacturers’ expressive interest in creative packaging are small.”

A key issue in the striking down of the predecessor to the *Tobacco Act*, the *Tobacco Products Control Act*, was that the government did not introduce evidence that less intrusive regulations would fail to achieve the government’s public health objectives. As this paper presents, there is substantial evidence that measures less intrusive than plain packaging—such as minimum package size, large graphic health warnings, and prohibitions on the terms ‘light’ and ‘mild’—have all failed to prevent tobacco manufacturers from exploiting the marketing potential of the package. Tobacco packages continue to entice adolescent non-smokers, deceive current smokers about the harmfulness of the product, and encourage tobacco consumption—all in direct opposition to the stated objectives of the *Tobacco Act*.

In his legal opinion on the question, written prior to the Supreme Court ruling on the *Tobacco Act*, Patrick J. Monahan, Professor of Law at Osgoode Hall Law School in Toronto, concludes that plain packaging would infringe the tobacco manufacturers’ right to free expression but that the infringement would be upheld as a reasonable limit and as such would

be “interpreted as being consistent with the Constitution of Canada” (Monahan).

Professor Monahan’s opinion is based on two assumptions—that the plain packaging requirements would follow the definition used by the Expert Panel and that there is credible evidence associating packaging with tobacco consumption. Monahan asserts that there is no doubt plain packaging would breach the companies’ right to freedom of expression. He cites as evidence the unanimous Supreme Court ruling in *RJR-Macdonald Inc. v Canada (Attorney-General)*, [1995] that the prohibition in section 8 of the former *Tobacco Products Control Act* on the use of tobacco-related trade marks on non-tobacco products violated this right.

To determine whether this infringement is justified under Section 1 of the *Canadian Charter of Rights and Freedoms*, it must pass the two-part *Oakes* test. In the first part of the test, the court must rule that the objective underlying the limit involves “pressing and substantial” matters. Monahan is confident that the court would find that the objectives of plain packaging legislation are pressing and substantial, given the unanimous view of the Supreme Court that the objective of the former *Tobacco Products Control Act* of reducing tobacco use by restricting tobacco advertising and promotion was of sufficient importance to justify limiting the tobacco companies’ freedom of expression.

Satisfying the second part of the *Oakes* test is more complex, as three separate questions must be addressed. First there must be a ‘rational connection’ between the means chosen and the end sought. The Supreme Court was divided regarding whether there is a rational connection between a full advertising ban and the objective of reducing tobacco use. Three judges ruled that in certain cases, such as with legislation aimed at changing behaviour, finding a rational

connection on the basis of “reason or logic, without insisting on direct proof” may be justified. The judges concluded that there are common sense grounds to find a rational connection between certain kinds of tobacco advertising (lifestyle advertising) and tobacco use. Four judges ruled that there is a rational connection between tobacco advertising and consumption, not only based on reason and common sense but also on the evidence presented at trial, concluding that *all* advertising contributes to the positive images associated with tobacco and thus is linked to consumption. It is important to note that six of the nine judges endorsed this view, which in fact is the key argument in support of plain packaging. Monahan points out that plain packaging would “very likely” satisfy the remaining judges, provided there is sufficient evidence of the link between packaging and consumption.

The second question to be addressed under part two of the *Oakes* test is the minimal impairment test. The majority ruled that the total advertising ban in the *TPCA* failed the minimal impairment test because the government did not submit any evidence to justify a total ban over a partial ban, the less intrusive alternative. However, Supreme Court rulings since the *TPCA* decision suggest that the Court would defer to the legislature in regards to limits on commercial expression provided an attempt has been made to allow some scope for free expression. Monahan argues that plain packaging would likely pass the minimal impairment test, because the *Tobacco Act* only limits and does not ban advertising and because tobacco brand elements would continue to be allowed in media other than the package.

The third question requires that there be proportionality between the deleterious and the beneficial effects of the measures; this part of the proportionality test, however, has never played a decisive role in determining whether the infringement of the *Charter* right is justified. Monahan believes that plain packaging would

satisfy the proportionality test given that even a small reduction in tobacco consumption would be of substantial public health benefit and that this benefit clearly outweighs the interests of tobacco manufacturers in using their branded packaging.

Other Barriers

Tobacco Industry Opposition

Given the tremendous potential of plain packaging to depress tobacco sales and the value of tobacco company stocks, the tobacco industry can be expected to launch a no-holds-barred campaign against any attempt to mandate plain packaging of its products, as they did when governments first considered plain packaging in the early 1990s. Led by a “Plain Pack (Working) Group” of experts from the major multinational tobacco companies, the coordinated global strategy against plain packaging included lying about the legal impediments and manufacturing evidence. For example, despite knowing by August 1994 that the World Intellectual Property Organization did not regard the protection of intellectual property under the Paris Convention as a basis for challenging plain packaging, the companies continued to contend the plain packaging would violate intellectual property agreements (PSC, April 2008).

Faced with scant legal evidence to substantiate their case and having failed to obtain the support of intellectual property associations and to recruit multilateral industries to join their cause, the Plain Pack Group merely adjusted their strategy. Determined not to accept defeat without generating an “international debate,” the Group decided to create their own body of evidence and roster of experts who would promote the industry perspective on the issue (PSC, April 2008). To this end, the Group commissioned a book of articles against plain

packaging, edited by Canadian John Luik, a discredited academic and long-time tobacco industry consultant and apologist. In developing the book, the industry employed the same strategy it has used successfully to prevent or delay many other reforms, including legislated protection from second-hand smoke in public places and workplaces—“hiring ‘third parties’ to lead a worldwide campaign to plant ‘genuine doubts, conflicts, ambiguities and contradictions that characterize the evidence against smoking’” (Marsden). John Luik has been a key ‘third party’ in many such campaigns.

The strategy of the Plain Pack Group was effective the first time around, with plain packaging proposals defeated in New Zealand, Australia, and Canada largely because decision makers were convinced that plain packaging would violate the companies’ legal rights under international trademark laws. To ensure that history does not repeat itself, it is critical that governments learn from the past, that is, understand not only the industry’s strategies but also the depth and breadth of their opposition to plain packaging becoming health policy in any jurisdiction in the world.

Increased Smuggling

An argument frequently cited in opposition to the plain packaging of tobacco products is that it would increase the smuggling of branded cigarettes and would facilitate counterfeiting. This concern is not to be taken lightly, as illicit trade is estimated to account for 11% of cigarette sales worldwide, and the availability of lower-priced contraband tobacco undermines a key objective of plain packaging, namely, to reduce the inducements of young people to use tobacco (FCA).

During its hearings on plain packaging, the House of Commons Standing Committee on Health gave serious consideration to the

contraband question and concluded that the design requirements of plain packaging could be made sophisticated enough to deter counterfeiting and smuggling (Standing Committee). In fact, the federal government recently awarded a contract for the development of a high-tech digital tax stamp system to facilitate the identification of contraband tobacco (Authentication News) and is participating in the negotiation of a protocol on illicit trade in tobacco products as part of the *Framework Convention on Tobacco Control*.

Job Losses

During the campaign for plain packaging in Canada in 1994-95, the spectre of job losses in the tobacco growing, manufacturing, and packaging sectors was often raised by opponents. Representatives of both Ontario and Quebec growers stated their belief that plain packaging would intensify competition on the basis of price, causing tobacco firms to move their manufacturing facilities outside Canada and to purchase lower-priced flue-cured tobaccos from producers in other countries. Representatives of packaging companies campaigned vigorously against plain packaging, likewise on the grounds that tobacco manufacturers would leave Canada, taking specialized packaging jobs with them (Standing Committee).

In evaluating the potential impact of plain packaging on the current Canadian economy, it is important to note that much has changed since 1994, with many of the predicted job losses attributed to plain packaging having already occurred:

- In 2006, Imperial Tobacco moved all of its production to Mexico, accounting for 53% of the legal Canadian market.
- Tobacco growing in Canada has declined dramatically and is now primarily limited to a

small area in southern Ontario. The Ontario tobacco crop decreased from 68 million kilograms in 1998 to a mere 16 million in 2007, a drop of 87% (compared to a 24% drop in smoking rates in the same period) (PSC, June 2008).

- Shorewood Packaging, the largest among a few speciality firms in Canada that produce tobacco packaging, announced in 2007 that one of its Ontario plants would close and the second would be downsized (CBC).
- Tobacco consumption in Canada is expected to continue decreasing—indeed the federal government has set an ambitious goal of reducing tobacco use prevalence from the current 19% to 12% by 2011 (Health Canada)—which will inevitably have an impact on employment in the sector.

Finally, the threat of job losses in the tobacco sector due to plain packaging must be weighed against the expected reduction in tobacco-related diseases and premature death, as well as the short- and long-term savings to the health care system. The Standing Committee on Health said it best:

“Difficult choices may well have to be made; in such situations, however, the health of Canadians must receive first consideration.”

Recommendations and Conclusions

When evaluating the evidence base in support of plain packaging, there are several important considerations to keep in mind.

The necessary burden of proof. The Standing Committee on Health concluded that the deadly consequences of tobacco use demand that plain packaging be considered in a different context from the regulation of other products (Standing Committee):

“In light of this persuasive evidence that tobacco products are extremely hazardous to human health, the Committee believes it is appropriate to consider the plain packaging question in a different context from that associated with marketing other consumer products, such as candy bars, cosmetics and foods. Despite the industry’s routine assertion that tobacco is a ‘legal product’, most would argue that this facile designation is based on history and tradition rather than on any rational legitimacy.”

Tobacco is highly addictive, with most consumers becoming addicted before the age of majority. Tobacco is also the only legal product that kills when used exactly as the manufacturer intends. For these reasons, the burden of proof necessary to satisfy governments that plain packaging is justified should be considerably lower than is usually required.

The measure of success. With few exceptions, it is not possible to isolate the impact of a specific tobacco control intervention on tobacco use (U.S. Surgeon General 2000). There are simply too many factors that influence tobacco consumption and prevalence. It is thus critical that the success of plain packaging not be tied to the initiative having a direct, measurable impact on tobacco use. Given that tobacco products are highly addictive, cause the deaths of almost 40,000 Canadians every year, and inflict untold suffering on countless Canadians living with a tobacco-caused illness, a more appropriate and realistic criteria for success should be the ability to demonstrate that plain packaging renders tobacco products less attractive and appealing to existing and potential consumers.

Plain Packaging Is Necessary to Eliminate a Key Promotional Tool

Substantial evidence has been presented in this paper—from tobacco company documents,

international packaging design experts, and marketing professionals—illustrating the extent to which tobacco packs have become miniature billboards for tobacco products. Every element of the package design—from the size of the cigarette itself, the filter, the foil liner, the size and shape of the package, the packaging material, the fonts, inks, colours, opening style, colour scheme, logo, and descriptive phrases—is intended to develop and sustain the brand image, attract the attention of consumers, and downplay their concerns about the health consequences of tobacco use.

Tobacco is a ‘badge product,’ that is, a badge of identity whereby the image of the brand conveys the image of the user. In part because of its high social visibility, packaging makes a critical contribution to the identity smokers construct for themselves from a brand and communicate to others. Tobacco company research demonstrates that packaging influences not only the intangible characteristics of the brand but also smokers’ perceptions of the tangible, sensory qualities of the cigarette product itself.

Packaging also plays an important role in influencing sales. New package designs have been credited with increasing sales of various consumer products, including tobacco. A case in point is the new award-winning ‘Signature Pack’ of du Maurier cigarettes, which reinforced its image as the leading premium brand and boosted sales.

The evidence is irrefutable that in jurisdictions where most forms of tobacco product promotion have been banned or restricted, the pack becomes the primary means of establishing and reinforcing a unique brand image. Foreseen by tobacco companies in the 1970s, this shift to the pack as the most important promotional vehicle is substantiated by recent developments in the Canadian market. Tobacco companies have recently redesigned the packaging of most brands, using new colours, fonts, inks, logos,

package sizes, and styles of opening and putting new emphasis on descriptive phrases. As well, the package interiors, in particular the cigarettes themselves, are becoming individual emblems of brand identity through the use of branded and/or coloured filters and liners.

Considerable evidence has been shown regarding how tobacco companies circumvent one form of packaging restriction by introducing equally appealing or deceptive alternatives. Two recent examples are the introduction of packs of 20 superslims that are only marginally larger than the ‘kiddy packs’ that have been banned in Canada since 1994 and the replacement of the misleading descriptors ‘light’ and ‘mild’ with new descriptors or numbering or colouring systems that make the same implicit health claims. Research conducted in both Canada and the UK demonstrates that consumers continue to be misled regarding the health consequences of smoking when only partial restrictions are imposed that merely enjoin the industry from using certain descriptors.

For international tobacco package designer Frans van Heertum, the future of tobacco packaging as an innovative promotional vehicle looks bright (Rossel 2008):

“From our perspective the cigarette pack has just begun its life, a complete new life and we cannot wait for the future.”

The past and present behaviour of tobacco companies makes clear that the only way to prevent tobacco companies from continuing to exploit the package as a vehicle to promote tobacco use is by legislating plain packages. Research on the possible impact of plain packaging shows that at very least plain packaging would strike a blow to the deception perpetuated by tobacco manufacturers that tobacco products are normal consumer goods. The available evidence, however, shows that plain packaging would achieve much more.

Health Canada's Expert Panel concluded, based on the consistent findings of 4 out of 5 studies, that "plain and generic packaging would have a noticeable impact by limiting the capacity of consumers to associate specific and positive images with specific brands." Focus groups, surveys, and experiments involving teens and adults all found that plain packaging makes tobacco packages less attractive and appealing, particularly to youth and young adults. Two large surveys, one Canada-wide and one in Ontario, both found that at least one-third of youth believe that plain packaging would decrease youth tobacco consumption. Between one-third and one-half also believe that plain packaging would decrease youth smoking uptake. Recent analyses of the possible impact of plain packaging by several investment firms all concluded that plain packaging would seriously undermine the power of tobacco brands and thus substantially weaken tobacco company profitability.

The research also shows that plain packaging would confer two additional benefits: it would increase the salience of package-based health warnings and it would lessen the manufacturers' ability to use the package to deceive consumers about the nature of the product.

To maximize the potential of plain packaging to render tobacco products less appealing and thus reduce the inducements to start, continue or resume tobacco use, mandatory plain packaging must include the following elements:

- Uniform size, shape, and number of cigarettes;
 - Uniform package size and shape;
 - Prescribed exterior and interior packaging material and colour;
 - Prescribed font type and size, ink type, and colour;
 - Prohibition on all package-based promotional features, except the brand name;
- Required elements, including the health warning, poisonous content information, and tax-paid markings.

Plain Packaging Provisions Can Achieve Health Objectives While Meeting Trade and Charter Obligations

Mandatory plain packaging of tobacco products is consistent with the *Tobacco Act*, which bans all forms of promotion, except two forms of advertising. Plain packaging is not only consistent with and but also arguably foreseen by the *Framework Convention on Tobacco Control*, in particular Article 13, which calls for a ban on all form of advertising and promotion. In addition, Articles 13(4) and 11.1(a) of the FCTC prohibit all forms of promotion, including packaging, that are misleading or deceptive or likely to create an erroneous impression about the characteristics or health effects of tobacco products. As a Party to the FCTC, Canada was obligated to be in conformity with the requirements within three years of ratification, by February 2008. The research presented in this report makes an unassailable case that tobacco packaging is a form of promotion of critical importance to the tobacco industry. Likewise there is strong evidence that consumers continue to be misled about the characteristics and health risks of tobacco.

The legal impediments to plain packaging trumpeted by the tobacco companies do not stand up when subjected to legal scrutiny. Expert analyses by LeGresley and McGrady refute every ground on which, according to the industry, plain packaging would contravene Canada's obligations under various trade agreements. Furthermore, industry documents reveal that tobacco companies were aware early on that plain packaging did not violate the intellectual property provisions of the Paris

Convention and yet continued to use the same false argument to oppose plain packaging in countries around the world.

Canadian tobacco companies also contend that plain packaging would infringe their rights to commercial freedom of speech under the *Canadian Charter of Rights and Freedoms*. A legal opinion by Patrick J. Monahan, professor of Osgoode Hall Law School, taken together with the Supreme Court ruling on the constitutionality of the *Tobacco Act*, indicates that plain packaging would be upheld in a constitutional challenge. Monahan asserts that plain packaging would breach the companies' right to freedom of expression but that this infringement would be justified under Section 1 of the *Charter*. Monahan is confident that the courts would rule that the objectives of plain packaging legislation—to protect Canadians, especially youth, from inducements to use tobacco by restricting advertising and promotion—are pressing and substantial and thus justifiable in a free and democratic society.

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