



***Submission on Bill S-5, AN ACT TO AMEND THE TOBACCO
ACT AND THE NON-SMOKERS' HEALTH ACT AND TO MAKE
CONSEQUENTIAL AMENDMENTS TO OTHER ACTS***

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EXECUTIVE SUMMARY

Bill S-5, An Act to amend the Tobacco Act and the Non-Smokers' Health Act and to make consequential amendments to other Acts combines two public policy initiatives in one piece of legislation: the regulation of vaping products, and the further regulation of tobacco products through the introduction of "plain packaging" and cigarette standardization.

The government's stated objective with the introduction of Bill S-5 is to protect Canadians from nicotine addiction and tobacco use. To that end, Imperial Tobacco Canada supports the vaping products measures introduced in the Bill that have the potential to contribute to the government's stated health objectives, but opposes those tobacco product measures that are not constitutional, supported by sound evidence, that will have no impact on public health and that unjustifiably prevent the use of legal trademarks. These unsupportable measures are instead counterproductive to the government's objectives.

The government's introduction of vaping product legislation is a welcome step towards legalizing and regulating products that are currently being used by a large number of Canadian consumers. Bill S-5 correctly acknowledges, both that these products may offer a valid and potentially less hazardous alternative to cigarettes, and that there is currently a legal enforcement vacuum governing their manufacture and sale in Canada. However, as discussed in our submission, it is critical that Bill S-5 is swiftly followed by detailed regulation to govern standards for these products and ensure that the health of consumers is not compromised by poorly-manufactured and potentially dangerous products. In our submission, we also have identified a number of provisions in the current version of the Bill, which, if not rectified, could adversely affect the government's stated health goals with respect to vaping products, notably around the ability to inform consumers in relation to the potential benefits of using these products.

When it comes to the other provisions of Bill S-5, however – those related to tobacco products – the government has chosen to advance an extreme position intended to eradicate all valid trade and quality distinctiveness associated with the legal sale of tobacco products. In addition to proposing a plain packaging policy, which, as discussed in our submission, cannot be demonstrated to be effective, the Bill seeks to introduce the standardization of the appearance and attributes of cigarettes themselves. There is no compelling evidence – nor even apparent public will – to support making Canadian cigarettes all look alike. Such an effort will only enhance the already severe problems flowing from the proposed elimination of manufacturers' rights to package their products fairly. The combined effect of these initiatives will lead to an increase in the already severe problem of contraband tobacco in Canada, undermine research into potentially less harmful products and lead to lengthy and expensive litigation by legitimate manufacturers, not only for Bill S-5's violation of their trademark rights and freedom of commercial speech, but also seeking compensation for the expropriation of their valuable intellectual property rights and associated goodwill.

In addition, as detailed in our submission, a number of other provisions of Bill S-5 require re-drafting, to avoid potential unintended consequences of the legislation in areas such as potentially harm-reduced tobacco products, commercial activity and regulatory reporting.

INTRODUCTION

Imperial Tobacco Canada Limited (ITCAN) welcomes the opportunity to share our views on Bill S-5.

Bill S-5 should be regarded as two separate pieces of legislation: one dealing with vaping products and the other setting a framework for the introduction of “packaging and product standardization”. ITCAN supports the vaping products provisions (with some exceptions noted in Section 3 and Appendix 1 of this submission) but is firmly opposed to those related to the packaging of tobacco products and the standardization of cigarettes themselves.

We strongly urge Senators to be extremely cautious about the tobacco product provisions, which seek not only to implement Australia’s failed experiment with the plain packaging of tobacco products into Canada but also to go beyond plain packaging by standardizing the appearance of the cigarettes inside such packaging. These measures altogether disregard the evidence from Australia (the only country that has fully implemented plain packaging for any substantial length of time), which shows that plain packaging is not having its desired effect, and fails to have regard for the likely impact of the proposed measures on Canada’s already thriving illegal tobacco trade.

In addition to the concerns noted above, our submission will also address serious procedural flaws in the development of this legislation, the lack of any cogent evidence to support standardizing the appearance and attributes of cigarettes, the likely legal and trade challenges that will result, the dangerous precedent this sets for all industries, and the glaring contradictions between the government’s approach to tobacco and its approach to marijuana.

There are specific tobacco-related provisions of Bill S-5 which pose particular policy, constitutional or interpretation problems which we believe directly engage the Senate’s important role of carefully reviewing the wording of legislation passing through Parliament. While we address some of these concerns in the body of this submission, a full list of these provisions and our concerns with them is set out in Sections 4 and 5 and Appendix 1 to this submission.

ABOUT ITCAN

Established in 1908, ITCAN is Canada's leading tobacco company. It is headquartered in Montreal and employs over 400 people across Canada.

ITCAN is dedicated to conducting its business responsibly, in a manner that meets society's expectations of a 21st century tobacco company. ITCAN recognizes the health risks associated with tobacco consumption and believes that underage people should not consume tobacco products. We support constitutional, reasonable and evidence-based regulation, especially measures aimed at keeping tobacco products out of the hands of youth.

ITCAN strictly follows all laws and regulations that govern the tobacco industry and pays all required taxes. Unfortunately, the legal Canadian tobacco market is being tainted by an illicit trade which funds organized crimeⁱ – and does not comply with any regulations or product standards. We will return to this subject in the section on plain packaging. First, however, we wish to offer a few comments on vaping products.

VAPING PRODUCTS AND HARM REDUCTION

ITCAN has been advocating for the Federal Government to introduce a new and specific regulatory framework for vaping products such as e-cigarettes for several years now, so the fact that Health Canada has moved forward with legislation is helpful. The new legislation will be welcomed by all vaping product stakeholders, including consumers, manufacturers, retailers, tobacco control groups and provincial governments.

Harm reduction is a priority for our company. We recognize that a certain portion of the adult population will choose to continue to smoke so we are committed to researching, developing and commercializing a range of less risky alternatives to regular cigarettes, including vaping products.

Our company does not currently sell vaping products. Others, however, have taken advantage of the regulatory enforcement vacuum that currently exists, and Senators will have no doubt seen e-cigarette stores popping up across the country. This has created a dangerous situation where, in the absence of a clear regulatory framework for product standards, Canadian consumers have been exposed to poorly manufactured and potentially dangerous products.

For example, the Quebec investigative report program "JE" aired a piece on e-cigarettes that clearly showed that a lack of regulation was leading to dubious production methods. This report also found that some samples of the various e-cigarette liquids purchased contained significant impurities and variable levels of nicotine.ⁱⁱ

Media reports suggest that 2.5 million Canadians are using vaping products, but they have been doing so without proper regulatory protection. These products abide by no uniform manufacturing, content or safety standards.ⁱⁱⁱ Introducing Bill S-5 is a first step in addressing this problem. However, until proper regulations are in place, Bill S-5 will do nothing to protect consumers from badly manufactured or dangerous products. For this reason, introducing vaping product regulations should be the government's first priority if it is serious about helping consumers choose potentially safer alternatives.

We welcome that Health Canada appears to have recognized the remarkable harm reduction potential of vaping products. As the Health Minister herself said when announcing Bill S-5, "*We know that there is some evidence to suggest that the use of vaping products can be used as a harm-reduction tool for people who are current smokers.*"^{iv} This potential is one that has been brought to attention largely by recognized public health advocates, not by the vaping industry or tobacco industry.

For example, in August 2016, the U.K. Royal College of Physicians ("**RCP**") released a comprehensive analysis of nicotine and e-cigarettes in its report "*Nicotine without smoke: Tobacco harm reduction.*" In this report, the RCP recommend that "*in the interests of public health it is important to promote the use of e-cigarettes, NRT and other non-tobacco nicotine products as widely as possible as a substitute for smoking in the UK.*"^v Commenting on the report, the RCP stated that the "*public can be reassured that e-cigarettes are much safer than smoking.*" The RCP also stated that e-cigarettes are not a gateway to smoking; that use is confined almost exclusively to those who are using or have used tobacco; that vaping does not "*normalize*" smoking; that there is no evidence that non-smokers and teens are drawn to e-cigarettes and will end up smoking as a result; and that for many people e-cigarettes are an effective smoking-cessation tool. The report suggests that e-cigarettes may be about 95% less hazardous than cigarettes.^{vi}

This report echoes the earlier findings of Public Health England who released a report in August 2015 which concluded that "*best estimates show e-cigarettes are 95% less harmful to your health than normal cigarettes.*"^{vii} Public Health England stated that the report also found that nearly half the population does not realize e-cigarettes are less harmful than smoking; there is no evidence so far that e-cigarettes are acting as a route into smoking for youth or non-smokers; and e-cigarettes may be contributing to decreasing smoking rates among adults and young people.^{viii}

A July 2016 guidance document on the use of e-cigarettes in public places and workplaces published by Public Health England also concluded that: "*Based on the international peer-reviewed evidence, e-cigarettes carry a fraction of the risk of cigarettes and have the potential to help drive down smoking rates and improve public health.*"^{ix}

The U.K. is, arguably, the world's most advanced market for e-cigarettes, so these reports add to the growing consensus within that country's public health community that e-cigarettes have significant tobacco cessation potential. For example, Dr. John Britton from the U.K. Centre for Tobacco and Alcohol Studies told Canada's House of Commons Health Committee in 2015 that (emphasis added):

"We have found that a couple of million of our smokers in the U.K. are now occasional or regular users of electronic cigarettes and about 700,000 are now exclusive users. Seven hundred thousand people quitting smoking by swapping to an alternative source over the course of about four years is more than our National Health Service smoking cessation services have achieved in over a decade."^x

Many progressive voices in Canada's public health community have also called for the harm reduction potential of vaping products to be recognized:

- Mark Tyndall, who is now Executive Director of the University of British Columbia Centre for Disease Control, has called e-cigarettes "*the ultimate harm reduction innovation,*" and says they have "*great potential to improve health, save lives and reduce health-care costs.*"^{xi}

- Noted anti-smoking activist David Sweanor says that we should focus on the opportunities provided by products like e-cigarettes, *“rather than merely focus on potential and theoretical risks as technology delivers products that can replace cigarettes.”*^{xii}
- Sweanor has also been critical of the *“moral absolutism”* of those who advocate an abstinence-only approach to nicotine as opposed to one focused on harm reduction.^{xiii}

Very recently, a University of Victoria study carried out a systematic review of the evidence on the use of vaping products. The study reached the following conclusions:

- Overall, there is encouraging evidence that vapour devices can be at least as effective as other nicotine replacements as aids to help tobacco smokers quit.
- There is no evidence of any gateway effect whereby youth who experiment with vapour devices are, as a result, more likely to take up tobacco use. The available evidence is that tobacco use by youth has been declining while use of vapour devices has been increasing. The authors concluded that: *“[p]olicy should not be driven by ungrounded fears of a “gateway effect” but, rather, be geared towards helping tobacco smokers quit and ensuring that only the safest devices are legally available, thereby reducing harm for both direct and second hand exposure.”*
- Second hand exposure to vapour is more transient than exposure to tobacco smoke. However, it has been shown to create measurable but small exposure to nicotine but no significant exposure to carcinogens such as found in tobacco smoke. It is unclear whether low level nicotine exposure poses any risk to health.
- Vapour from e-cigarettes contains substantially fewer toxicants than does smoke from regular tobacco cigarettes; however, there has been insufficient research regarding some significant carcinogens that may still be present.^{xiv}

Finally, a US study published by Kozlowski et al., in 2017 has also concluded that *“risks for youth posed by e-cigarettes likely fall far short of those feared by the products’ opponents”* and that, currently *“youth use of e-cigarettes is unlikely to increase the ranks of future cigarette smokers.”*^{xv}

Of course, we recognize that vaping products are not completely devoid of health risks. In particular, vaping products such as e-cigarettes are not suitable for people under the age of 18, people who are allergic/sensitive to nicotine; pregnant or breast-feeding women; people who should avoid nicotine products for specific medical reasons, and people with an unstable heart condition, severe hypertension or diabetes.

We also acknowledge that there are some public health organizations that have voiced concerns that not enough is known about the long-term effects of e-cigarette use and we agree with public health stakeholders that continued research is an essential component of any sensible strategy to continue to monitor the impact of products on consumers and the population as a whole.

While there is much detail still to be spelled out in regulation, our company generally supports the fact that Bill S-5 proposes to introduce a long overdue regulatory framework for vaping products.

However, until the Bill is passed and regulations put in place, users of vaping products will not have the safety and quality assurances they need. We suggest therefore that the Senate report the following observation on Bill S-5:

It is critical that Health Canada prioritize the rapid implementation of a full and detailed vaping products regulatory and product standards regime.

In addition, we are concerned with some aspects of Bill-5's treatment of vaping products. In Appendix 1 we have set out a list of our concerns with specific provisions of Bill S-5. Those dealing directly with vaping products are the following:

1. Unlike certain regulations dealing with tobacco products, the regulations relating to vaping products are not required to be laid before the House of Commons before enactment. (Bill S-5, s. 52(1), amending section 42.1(1) of the *Tobacco Act*, which upon enactment of Bill S-5 will become the *Tobacco and Vaping Products Act* ("TVPA")).

The requirement that regulations concerning tobacco be laid before Parliament and referred to a House Committee before enactment is an important check on the extensive powers delegated to Health Canada. This check should be applied to vaping products regulations as well.

2. No person may promote a vaping product by comparing the health effects arising from the use of the product to those arising from the use of tobacco products. (Bill S-5, s. 38, adding new section 30.43(2) to the TVPA).

This restriction on freedom of speech would prevent vaping product manufacturers or retailers from repeating reliable and substantiated scientific evidence on the potentially reduced risks of vaping products or even echoing the words of the Health Minister when announcing Bill S-5. This prohibition is a clear and unjustifiable breach of the *Canadian Charter of Rights and Freedoms* and more importantly, prevents vaping products from achieving their full potential health benefits.

Proposed solutions to these drafting issues are set out in detail in Appendix 1.

CIGARETTE STANDARDIZATION

The government's election platform included a commitment to "*introduce plain packaging requirements for tobacco products, similar to those in Australia and the United Kingdom.*"^{xvi} The mandate letter for the Minister of Health echoed that commitment, asking the Minister to "[I]ntroduce plain packaging requirements for tobacco products, similar to those in Australia and the United Kingdom."^{xvii} In statements referring to the introduction of Bill S-5, Health Canada referred to the legislation as "*delivering on its commitment to implement plain packaging for tobacco products.*"^{xviii}

In the following section of this submission we detail the fatal flaws with the proposed plain packaging policy. It is crucial to note in advance, however, that Bill S-5 goes beyond standardizing the packaging of cigarettes, and additionally proposes to standardize both the appearance and attributes of cigarettes themselves. In particular, by seeking to standardize the emissions, dimensions, weight, components, performance of the products, and the amounts and concentrations of substances that may be contained within them, Bill S-5 exceeds the scope of both the Australian and United Kingdom plain packaging regimes.^{xix}

The reality is that Bill S-5 includes measures that go well beyond the government's platform commitment by conferring the power to standardize the interiors of tobacco packaging and the cigarettes themselves, even potentially going so far as to dictate the type of filters that can be used and the colouring of cigarette paper.

There are numerous problems with this unprecedented proposal.

First, by proposing the standardization of the appearance and attributes of cigarettes, Health Canada officials have seized on the government's commitment to introduce plain packaging to pursue a set of extreme measures that are outside the Minister's mandate letter and the government's election commitment.

Second, Health Canada does not have any sufficient and compelling evidence to support its proposal to standardize the appearance and attributes of cigarettes. The lack of sufficient evidence in support of the proposed measure appears to be evidenced by the fact that at the November 2016 meeting of the Conference of the Parties to the World Health Organization's Framework Convention on Tobacco Control ("FCTC"), signatory countries of the FCTC, including the European Union, rejected Health Canada's attempt to encourage other Parties to adopt cigarette standardization measures similar to those proposed under Bill S-5. In short, a policy that was rejected by the international community now finds itself in a bill in Canada.

Third, cigarette standardization will prevent product development that might reduce the health impacts of smoking or increase safety. For example, various filter designs can be used to control tar and carbon monoxide emissions, two substances monitored by Health Canada. Commercialization of new filtration agents capable of reducing specific toxicants might require unusual filter dimensions to ensure sufficient loading or to provide optimal performance. An innovative filter, like the DuPlus filter, may have a different appearance because of its increased rigidity. This prevents the filter from collapsing during smoking and allows it to both maintain its filtrating properties and facilitate the extinguishing of the cigarette when it is pressed into an ashtray.

Fourth, in introducing cigarette standardization, the government is increasing the likelihood of successful legal and trade challenges to Bill S-5. Any legislative curtailment of commercial freedom of speech must be justified as reasonably necessary and proportional under the *Charter*. Similarly, any eradication of trade-marks in Canada must be justified as necessary to protect public health to avoid breaching the country's international trade treaties. In both cases, attacking the appearance of the product itself appears to be even less connected to the goal of discouraging the purchase and consumption of tobacco than standardizing the packaging in which the product is purchased. Moreover, as discussed above, the proposed measure is not justified by the available scientific evidence. For this reason, Bill S-5's product standardization measures are an open invitation to litigation in multiple forums which is going to be very difficult for the government to successfully defend.

Fifth, as with plain packaging, the cigarette standardization model Health Canada seeks to impose will be a gift to the illegal tobacco industry. The legal industry would lose the ability to differentiate its cigarettes from illegal counterparts with the mandated standardised product looking the same as the type of products produced by the illegal tobacco industry.

As we currently understand it, the government is seeking to create a market in which tobacco packages and individual cigarettes must all look exactly the same – with their preferred standard being that of the organized crime groups behind the illegal tobacco trade. This would result in making it impossible for consumers and law enforcement agencies to differentiate between legal and illegal products.

Sixth, it appears that Health Canada is acting at the behest of the anti-tobacco lobby, rather than because of any public concern over differentiated tobacco products. In the recently released summary of public responses to Health Canada’s consultation on plain packaging, the only item relating to cigarette appearance that was raised related to so-called “*slims*.” There were no public concerns raised about the markings or trade-marks on cigarettes which Bill S-5 will move to eliminate.^{xx}

The following provisions of Bill S-5 (summarized below but set out in more detail in Appendix 2) are specifically problematic insofar as they delegate power to the Minister to standardize cigarettes:

1. It will be prohibited to manufacture or sell a tobacco product that displays a “*marking*” unless the marking is authorized by regulations or a provincial act. (Bill S-5, s. 8, introducing new 5.3(1) of the TVPA).

The word “*marking*” could cover many things that may be visible on a tobacco product. Tobacco products have many important features which have functional purposes (such as bands on cigarette paper and ventilation holes) and manufacturers need to continue to be able to use these features to meet emission standards and reduced ignition propensity.

2. Bill S-5 would authorise new regulations imposing product standards for characteristics of tobacco products and their emissions, including their sensory attributes – such as appearance and shape of the products, dimensions and weight. (Bill S-5, s. 11(1), amending s. 7(a) of the *Tobacco Act*).

As mentioned above, many elements affecting the “*characteristics*” of the product are required to allow for proper functioning of the tobacco product. Parliament should ensure that regulations do not affect these functional aspects of the product.

3. The Bill would also adversely affect manufacturers’ rights to use their trademarks in two ways: preventing the depicting of a trade-mark on a cigarette through the use of an additive (Bill S-5, s. 7(2), repealing s. 5.1(2) of the *Tobacco Act*), and by prohibiting any trade-mark which depicts a person, character or animal (Bill S-5, s. 28(2), repealing s. 21(3) of the *Tobacco Act*).

These provisions violate Canada’s treaty obligations relating to protection of trademarks and also give rise to potential compensation claims on the part of manufacturers who will be deprived of valuable property rights through the operation of the provisions.

Proposed solutions to these drafting issues are set out in Appendix 2.

PLAIN PACKAGING

In addition to the issues relating to product standardization discussed above, there are numerous flaws in the government's plan to impose regulations requiring plain packaging for tobacco products. These are grouped below into seven broad categories: deficiencies in the process that led to this legislation; a lack of evidence to support the policy; legal and trade issues; the impact on illegal tobacco; Health Canada's ties to the extreme tobacco control lobby; the implications for other businesses in Canada; and the contradictions between the government's approach to tobacco regulation versus marijuana. Each of these is addressed below.

1.1 FLAWED PROCESS: DECISION-BASED EVIDENCE-MAKING

Bill S-5 has its origins in a campaign promise made in the last election at the behest of tobacco control lobbyists.^{xxi} The commitment then ended up in the mandate letter of the Minister of Health, leading to the legislation that is now before the Senate.

The major flaw in this process is that the government started with a policy decision – to introduce plain packaging of tobacco – to address a public health issue – tobacco use – without conducting any analysis of whether that policy was necessary or would be effective. No prior analysis, studies or impact assessments were undertaken to gauge the efficacy of the existing tobacco control regulations in Canada or to establish the efficacy of plain packaging in reducing smoking. These questions were simply ignored.

Health Canada's initial consultation on plain packaging that was released in May 2016 was also clearly pre-determined, with no consideration undertaken of any alternatives. Indeed, the consultation did not contain any questions or seek any input regarding the efficacy or sufficiency (or lack thereof) of existing Canadian tobacco control regulations, nor the potential benefits (or lack thereof) of plain or standardized packaging in this context. Instead, the consultation presented a series of packaging measures and selected evidence, along with limited questions which were only designed to elicit answers in support of the policy.^{xxii}

The consultation questions only sought input regarding how the measures could be improved (i.e., how they could be more restrictive) and what additional measures could be added. The consultation did not, however, seek the input of Canadians regarding whether they consider that plain packaging or any of the other measures presented are adequate, necessary and proportionate, including whether they are effective or even beneficial to reduce smoking prevalence or to protect youth.^{xxiii}

All of these concerns were raised in our response to the Health Canada consultation^{xxiv} and we have yet to receive answers.

In addition, in March 2016, Health Canada issued a tender for a cost-benefit analysis of plain packaging.^{xxv} A U.S. firm was hired to conduct that work and the resulting report was due on November 30, 2016. However, Bill S-5 was introduced eight days before that due date, on November 22, 2016. Given that in the first week of November ITCAN was still responding to questions from the entity that was hired to conduct the cost-benefit analysis, it would appear that Health Canada either proceeded with Bill S-5 before reviewing the report or spent no time analyzing it once it was received.

As further evidence of the disconnected approach to policy, on September 27, 2016, the Health Minister announced plans to host a “*national forum*” on the future of tobacco control in Canada in early 2017, with the stated goal of developing “*a new and effective long-term plan*.”^{xxvi} The Minister has evidently pre-empted this by introducing Bill S-5 before that new plan takes shape.

Building on the above, the Minister released a consultation on “the future of tobacco control in Canada” in February 2017,^{xxvii} with the above mentioned forum held shortly thereafter. The consultation suggests that “bold” new measures are required to achieve a “radical” reduction in Canada’s smoking rate.^{xxviii} This would seem to suggest that Health Canada has no faith in the effectiveness of the measures within Bill S-5. Otherwise, why would bold new measures be needed?

When considering Health Canada’s general approach to tobacco regulation, it is useful to compare smoking rates in Canada versus the United States. A report from the U.S. Centers for Disease Control and Prevention released in May 2016 revealed that 15.1% of adults in the U.S. smoked cigarettes in 2015, which is an all-time low, the rate having dropped 1.7% from 2014.^{xxix} In contrast, data from the Canadian Community Health Survey released in March 2017 pegged the smoking rate at 17.7%, which is significantly higher than the rate in the U.S.^{xxx}

As such, according to the most recent data available in Canada, the national smoking rate is a couple of points higher than that in the U.S. This is despite the fact that the U.S. has a much less strict regulatory regime than Canada. For example, unlike Canada, the U.S. does not have graphic health warnings; has smaller health warnings appearing only on the side panel; has no retail display bans; the limitations on advertising and promotion are much more lenient; and, generally speaking, levels of taxation, and therefore prices are much lower.

Despite this, instead of Health Canada carefully considering how the U.S. has accomplished these results with moderate regulatory intervention, it has simply decided to pursue a more burdensome regulatory regime without further analysis. It is also worth noting that the U.S. has achieved its reduced smoking rate without fostering a thriving illegal tobacco trade.

Therefore, as Senators review Bill S-5, they should appreciate that the Government has not conducted any thorough analysis of its effectiveness, nor apparently did it wait to consider the report on the cost-benefit analysis before introducing the legislation. We hope that Senators will hold Health Canada officials to account for these important procedural failings. The manner of the introduction of Bill S-5 suggests that the Government has abandoned evidence-based decision-making; is proceeding with a ‘closed mind’; and will disregard any response or evidence, no matter how cogent or convincing, from those opposed to plain packaging. It is a fundamental requirement of a fair consultation that it takes place at a time when proposals are still at a formative stage, and that the product of the consultation is given conscientious consideration. This requires that the results and recommendations from the cost-benefit analysis should also be consulted on before progressing with Bill S-5. A failure to do so calls into question the independence and reliability of the analysis and whether it was simply a waste of Canadians’ tax money.

1.2 NO EVIDENCE TO SUPPORT PLAIN PACKAGING

The *evidence* put forward by Health Canada to justify plain packaging is entirely inadequate. Some of the studies that are cited in the original Health Canada consultation document are dated, come from countries where conditions are very different from Canada, or are not representative or are not designed to properly assess the impact of plain packaging.

Particularly striking examples of the foregoing are the sources cited by Health Canada in support of its core justification for plain packaging, namely the protection of youth. For example:

- “Young adult smokers associate cigarette brand names and package design with positive personal characteristics, social identity and status.” The consultation made this statement unreservedly and without any qualification, yet the sole study cited in support of this proposition was published in 2008 and was conducted amongst only 21 smokers in Norway.”^{xxxix}
- “The 2012 report by the U.S. Surgeon General concluded that “the evidence reviewed [...] strongly suggests that tobacco companies have changed the packaging and design of their products to increase their appeal to adolescents and young adults.” The consultation selected this quotation without specifying, however, that the ultimate conclusion in this report is that “The evidence is suggestive but not sufficient to conclude that tobacco companies have changed the packaging and design of their products in ways that have increased these products’ appeal to adolescents and young adults.”^{xxxix}

Other studies relied upon in the consultation acknowledge significant limitations and bias, yet the consultation document relies upon them unreservedly. For example, the following words of reservation contained in these studies have been ignored or glossed over by Health Canada:

- “Given the small sample size, the findings cannot be considered representative [...] In addition, we do not know whether attractiveness of cigarette design translates into smoking behaviour or brand choice.”^{xxxix}
- “Participants in this study were not recruited using random sampling. Therefore, the findings are not necessarily representative of Canadian smokers and some degree of bias is likely.”^{xxxix}
- “The qualitative nature of the study and small sample size means that the findings may not be representative of the wider population of young adult smokers, and the study provides no insight into other age groups or indeed non-smokers.”^{xxxix}

Moreover, there is a significant body of data and studies that conclude that plain packaging measures are not effective.^{xxxix} However, this evidence was not presented in the Health Canada consultation.

The Australian Experience

Health Canada and tobacco control lobbyists like to cite Australia as “proof” of the effectiveness of plain packaging. In fact, more than four years after the introduction of plain packaging measures in December, 2012, the evidence from Australia provides no support for the efficacy of plain packaging in reducing smoking prevalence.

First, the Australian Federal Government's National Drug Strategy Household Survey (“ANDSHS”) data, which is collected every three years, shows that there has been no increase in the rate of decline of smoking in the Australian population. Smoking prevalence has been declining steadily since 1995 and the proportion in 2013 was almost exactly on the long-term trend-line. There is no evidence of any additional effect on the rate of decline due to plain packaging.

In fact, the ANDSHS data shows that following the introduction of plain packaging in Australia, the number of daily smokers aged 12 to 17 years increased between 2010 and 2013 to its highest level in more than six years. This data is not supportive of plain packaging measures leading to fewer adolescents taking up smoking.^{xxxvii}

Second, the introduction of plain packaging in Australia has not encouraged smokers to quit. Indeed, the ANDSHS data shows that the percentage of smokers nominating health warnings on tobacco packaging as the reason for trying to quit smoking reduced from 15.2% in 2010 to 11.1% in 2013 for all respondents (aged over 12), and from 15.3% to 10.9% for respondents aged over 18. It therefore appears that graphic health warnings were not more, but actually less effective after the introduction of plain packaging measures in Australia.^{xxxviii}

Third, the data from the Australian Post-Implementation Review (PIR) cannot be relied upon to demonstrate that plain packaging is appropriate, necessary or proportionate. It neither establishes that plain packaging is working in Australia, nor undermines the substantial evidence that shows the very opposite – that plain packaging is having counterproductive effects in Australia.

The PIR Report even itself acknowledges that it “does not conduct a comprehensive review of the experimental evidence available on the effectiveness of tobacco plain packaging, which has been undertaken elsewhere, but has used such reviews to inform the conclusions reached below.”^{xxxix} In other words, the PIR simply adopted the views expressed by others who support plain packaging measures without conducting any assessment itself, even when it was presented with contrary evidence.

There is no reason to believe that plain packaging would be any more effective if adopted in Canada. Even some anti-smoking activists have questioned the need for plain packaging here. For example, the University of Ottawa's David Sweanor, a long-time anti-tobacco advocate, said the following to La Presse:

“Nous avons détruit l'imagerie. Nous avons accompli ce que le paquet neutre vise à accomplir. Donc la valeur restante d'implanter le paquet neutre est plutôt mineure. Alors qu'il y a une énorme valeur à aider les gens à cesser de fumer, à leur offrir des solutions de rechange viables.”^{xl}

Finally, perhaps the most damning indictment of the effectiveness of plain packaging is the fact that tobacco control lobbyists are already posturing for a long list of further regulations to impose on the tobacco industry beyond plain packaging.^{xli}

If plain packaging was as effective as Health Canada and its allies in the tobacco control community would have us believe, this would surely obviate the need for all this planned future regulation.

In reality, the stated goal of tobacco control lobbyists is not public health, but rather to bankrupt the legal tobacco industry.^{xlii} In their minds, plain packaging is another step towards that goal.

1.3 LEGAL AND TRADE CHALLENGES

Talking points on Bill S-5 provided by Health Canada and tobacco control lobbyists will no doubt argue that the proposed measures are safe from any legal and trade challenges. That is incorrect.

Canadian trademark law comprises several important differences that distinguish it from other countries. Firstly, unlike many other countries, including Australia, Ireland, the U.K. and France, in Canada, use is a pre-requisite to obtaining a trademark registration. Secondly, while there may be debates in other jurisdictions such as Australia and the U.K., the situation in Canada is clear: a trademark registration grants the owner a positive right to use the trademark.^{xliii}

This means that arguments and findings of foreign tribunals as they pertain to intellectual property cannot simply be transposed or assumed to apply in Canada.

When the peculiarities of Canadian trademark law are considered, it is readily apparent that plain packaging deprives trademark owners of their legal right to register and/or use their registered trademarks, by:

- entirely eliminating the use of virtually all tobacco product trademarks (including logos, device and colour marks) thereby prohibiting their registration and their use as registered; and
- restricting the remaining permissible use of registered word marks to a single prescribed standardized incarnation despite the fact, as confirmed by the Supreme Court of Canada, that a registration for a mark in textual form grants its owner the right to use the words “in any size and with any style of lettering, colour or design.”^{xliv}

Plain packaging would impair ITCAN's ability to communicate with adult consumers about its lawful products. The ability both of manufacturers to communicate and consumers to receive information is a fundamental right of expression.

Moreover, as we noted in our response to the Health Canada consultation, the proposal must also be considered against the background of the existing high level of illicit trade in Canada, the high level of public awareness of the risks of smoking in Canada, and the already existing comprehensive regulation of tobacco products, including the requirement for oversized (75%) warnings on packaging; toxic emission statements that occupy 50% of one of the side panels of tobacco packages; mandated health information leaflets; severe restrictions on advertising and promotion; and the ban on product display at points of sale. In this context, the limited space remaining on packs, and the trademarks used on them, are to all practical purposes the only means by which manufacturers can identify and differentiate their products from those of their competitors. It is clear that measures such as plain packaging, which cannot be shown to be effective,

and that would extinguish this last means of communication for a lawfully available product, while resulting in adverse consequences in respect of pricing, the illicit market and public health, cannot be justified or proportionate.

While much of the actual eradication of trade-mark property rights will presumably be contained in the anticipated plain packaging regulations, three specific provisions in Bill S-5 provide for the expropriation of trademarks:

1. Trade-marks may no longer be depicted on a product using additives previously exempted for such a purpose. (Bill S-5, s. 7(2), repealing s. 5.1(2) of the *Tobacco Act*)
2. Trade-marks which depict a person, character or animal will be prohibited on packaging. (Bill S-5, s. 28(2), repealing s. 21(3) of the *Tobacco Act*); and
3. Not using a trademark in order to comply with the TVPA will not constitute non-use under the *Trade-marks Act*. (Bill S-5, s. 53, adding new section 42.3 to the TVPA).

The first and second of these provisions effectively expropriate a number of ITCAN trademarks, none of which are in any way inducements to smoke or attractive to youth.

For example, some of the current Canadian trade-marks depicting persons like the sailor appearing on ITCAN's Players' products have been in use for almost 100 years. The third is the creation of a fiction to seek to avoid the plain pack legislation from violating the trade-mark protections Canada is obligated to provide under international treaties (as discussed below). In our view the ban on trade-mark use will be interpreted as an unlawful expropriation of ITCAN's property. Any subsequent awards of compensation would be at the significant expense of Canadian taxpayers.

Regarding trade agreements, Canada is likely to face challenges on at least two fronts.

First, the measures proposed will violate international obligations under World Trade Organization ("**WTO**") Agreements such as the Agreement on Trade-Related Aspects of Intellectual Property Rights ("**TRIPS**"), the Paris Convention and the Agreement on Technical Barriers to Trade ("**TBT Agreement**").

Indeed, several countries have contested the legality of the plain packaging measures adopted by Australia before the WTO. A final panel report is expected after likely appeals in late 2018. Contemplating the adoption of plain packaging before a final decision on its legality by the WTO Dispute Settlement Body is premature and ill-advised.

Second, the measures proposed appear to violate other international agreements to which Canada is a party, including the North American Free Trade Agreement ("**NAFTA**").

For example, the following NAFTA provisions would appear to be violated by the TVPA:

Article 1110 NAFTA

- paragraph 1 of Article 1110 provides that "No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation..."^{xlv}

Article 1708 NAFTA

- paragraph 1 of Article 1708 which, unlike other international agreements regarding similar rights, expressly provides for trademark rights for designs, colours and shape of goods and packaging;
- paragraph 5 of Article 1708 which provides that “The nature of the goods or services to which a trademark is to be applied shall in no case form an obstacle to the registration of the trademark.” In a jurisdiction such as Canada where use and distinctiveness are required to obtain and maintain registrations, it is difficult to conceive how the inability to use and consequently register all forms of trademarks in association with tobacco products would not constitute exactly such an obstacle; and
- paragraph 10 of Article 1708 which provides that “No Party may encumber the use of a trademark in commerce by special requirements, such as a use that reduces the trademark’s function as an indication of source or a use with another trademark.” Given that continued use is required for a trademark to continue acting as an indicator of source, the proposed measures would clearly reduce the function of all banned trademarks as indicators of source. In this regard, it is telling that this paragraph does not provide for the same derogations as does its counterpart in TRIPS.

Given that plain packaging appears contrary to provisions of NAFTA, which does not provide for exceptions to be made within the trade-mark provisions on the basis of public health, and (unlike the international agreements at issue before the WTO) explicitly provides for compensation equivalent to the fair market value upon direct or indirect expropriation; and given that NAFTA is entirely untried with regard to plain packaging, it is clear that the proposed measures lead Canada into uncharted waters. Given the commercial value of ITCAN’s trade-marks and valuable goodwill, the government could be exposed to a very significant damages award.

A recent commentary by a leading Canadian legal expert on trade-marks and intellectual property law makes it clear that the problems posed by Bill S-5 have already been duly noted:

The plain packaging regulations on the horizon for Canada are being introduced in the face of considerable uncertainty as to their legality both under Canada’s constitution and Canada’s international trade obligations. The extensive resources required to defend such measures should be weighed carefully not just against the likelihood of success of any challenges, but also against the public health benefits that are likely to flow from further changes to how tobacco products are packaged in Canada.^{xlvi}

To sum up, legal decisions from other jurisdictions do not automatically apply in Canada, and in NAFTA, Canada is party to a unique trade agreement which provides additional protections for trade-marks and intellectual property. None of these matters are settled and Canada is almost certain to be subject to legal and trade challenges and potentially costly compensation.

1.4 ORGANIZED CRIME

Since 2006, illegal tobacco has made up between 16.5% and 32.7% of Canadian tobacco sales depending on the year.^{xlvii} A 2015 KPMG report measured Canada's contraband rate at 18%.^{xlviii} That same study measured Ontario's contraband market at 31%, second to Panama in the Americas and with only El Salvador and Brazil in a similar range.^{xlix}

The size of the illegal tobacco problem and its links to other criminal activity were clearly demonstrated on March 30, 2016, when over 700 police officers in Ontario and Quebec conducted 70 raids on a vast illegal tobacco smuggling network, the largest such police operation of its kind in Canadian history. Police forces in South America and Europe were also involved. The details are stark:

- 2,081 tons of raw leaf tobacco was smuggled onto the Kahnawake and Six Nations reserves to supply illegal cigarette manufacturing facilities – enough to manufacture upwards of 2.34 billion cigarettes.
- This single operation represents \$530 million in lost tax revenue.
- Those involved had links to biker gangs and other organized crime groups.
- Along with tobacco, Canadian authorities seized massive quantities of cocaine, methamphetamine, marijuana and fentanyl.
- Millions of dollars in cash was seized, with links to international money laundering.^l

Illicit tobacco traders do not pay tax. Nor do they comply with laws and regulations on tobacco control. Most importantly, they provide the cheapest available cigarettes, often at a fraction of the legal price, and have no qualms about selling their products to underage youth.^{li} Were that not bad enough, a recent report from the Macdonald-Laurier Institute suggests that globally the illegal tobacco trade is linked to the financing of terrorist groups like ISIS.^{lii}

Plain packaging offers illicit traders a golden opportunity to counterfeit legitimate manufacturers' products. It effectively provides a mandated "*recipe*" for tobacco packaging and cigarettes themselves, making it exceedingly easy to reproduce packaging and products identical to legal tobacco products.

It is currently difficult for counterfeiters to make passable replicas of legal packages or cigarettes; however, if plain packaging and cigarette standardization are implemented, technical barriers to the production of counterfeit packages and unique cigarette types would be removed. In such an environment, it will be very difficult, if not impossible, for consumers, retailers and law enforcement agencies to differentiate between legal and counterfeit products. The photos attached as Appendix 3 show examples of slide and shell contraband product packaging and the kind of standard cork tip cigarettes which are common contraband products.

Health Canada has argued that graphic health warnings on packages and the excise stamping system will mitigate against this risk.

However, as the photos attached in Appendices 4 and 5 clearly demonstrate, Health Canada's warning labels and excise stamps are already appearing on illegal products, so these are not adequate for identifying legal packages in a plain packaging regime.

The presence of legitimate stamps on clearly illegal products readily demonstrates that the stamps cannot reliably be used to distinguish contraband or counterfeit tobacco products from genuine ones. It also demonstrates that the Federal Government is failing to police its own tax stamp system and suggests that a complete review of the regime is required.

In a plain packaging environment, without branding and distinctive packaging formats, it will be exceedingly difficult for consumers, retailers and law enforcement agencies to distinguish a legal pack from an illegal one. Moreover, illicit traders will have an additional opportunity to supply branded product to consumers who prefer products in their current branded format.

Australia remains the only country that has fully implemented plain packaging legislation for any substantial length of time, and the experience there strongly suggests that plain packaging will provide a major boost to the illicit industry. A report by KPMG shows that the volume and market share of illegal tobacco in Australia has increased significantly since the introduction of plain packaging. From 2012 to 2015, annual illegal volumes increased by 500,000 kilograms. This resulted in an increase of over 20% in illegal tobacco's market share - from 11.5% in 2012 to 14.0% in 2015.^{liii} In fact, Australia had to expand its contraband tobacco task force just six months after its formation.^{liv}

This situation is likely to be exponentially worse in Canada. Unlike Australia, which is relatively isolated from a contraband perspective, Canada already has significant illegal manufacturing capacity that could supply the entire market many times over.

Moreover, with no ability to distinguish legitimate tobacco products from illegal products, price becomes the primary factor driving consumer behaviour – and it is impossible for the legal industry to compete with the illicit trade on price.

The recent "high water mark" for illegal tobacco in Canada was Ontario in 2008, which hit 48% of the market.^{lv} With no ability to distinguish legal products from illegal competitors, and with consumers, retailers and law enforcement agencies unable to do the same, a 50% illegal market in Canada is conceivable.

This could mean billions of dollars more in lost revenue for governments, in addition to the further enrichment of the organized crime groups behind the illegal tobacco trade. It is difficult to imagine a policy better suited than plain packaging to enrich the organized crime groups that operate Canada's illegal tobacco trade. For example, some proposals being mooted by Health Canada include a possible requirement that all cigarettes be packaged in a "slide and shell" type package, typical of the standard cigarette packaging of about 20 to 30 years ago. This packaging has generally been replaced in Canada by a number of international standard models, in particular a hinge-lid package which better protects tobacco products from becoming stale (a model which incidentally is used in conjunction with plain packaging in other jurisdictions, and is the specific pack design used as an illustration of recommended plain packaging by WHO).^{lvi} The machinery used to create slide and shell packaging is obsolete but is often the preferred machinery used by illicit manufacturers. Any attempt by Health Canada to require universal use of slide and shell would not only be a boon to those illegal operators already using this format (and permitting their packaging to become impossible to distinguish from legal product);

it would also require a massive and time-consuming industrial re-tooling for legitimate manufacturers who will need to source, and in some cases build, the machinery needed to use this pack format.

Our estimate is that imposing a slide and shell universal format for cigarettes (aside from its implication for illicit trade) would require at least a two-year transition period before coming into force to give legal manufacturers any chance to meet these requirements and to allow them to compete with the illegal trade.

It is impossible to discuss the plain and standardized packaging and product provisions of Bill S-5 without consideration of Canada's ongoing illegal tobacco problem. To proceed with these provisions without first addressing the illegal tobacco issue is reckless. ITCAN has already warned provincial Finance Ministers they stand to lose billions of dollars more in tobacco tax revenue to the illegal trade if plain packaging proceeds as planned.

Therefore, it is critical that an action plan be put in place to deal with illegal tobacco before implementing Bill S-5. The Federal Government has proven reluctant to tackle the sensitive issues around this illegal activity. However, ITCAN believes the Senate is ideally situated to conduct a thorough inquiry into the illegal tobacco trade and to make recommendations to the government for action on long-term solutions.

To that end, we recommend the Committee include an observation with its report on Bill S-5 calling for a Senate study of illegal tobacco.

In addition, the Committee should include an observation asking the Federal Government to present a detailed plan to address illegal tobacco in a plain and standardized packaging and product environment before proceeding with implementation of Bill S-5. There is simply insufficient evidence to suggest that Health Canada has properly considered the illegal tobacco implications of this legislation.

1.5 DANGEROUS PRECEDENT

Allowing Health Canada to eradicate the trademarks and intellectual property of lawful industries is a dangerous precedent that should alarm every business in Canada. In the loosely defined name of public health, and in this case with no reliable evidence to support its claims, Health Canada has given itself extraordinary, precedent-setting powers that can now be applied to any other product when politically expedient.

The Health Minister did nothing to allay these fears in her announcement on May 31, 2016 about plain packaging of tobacco, suggesting that the policy could be applied to other products.

It is also worth considering what is happening in the U.K. following its decision to implement plain packaging legislation. Before that law is even fully in effect, Public Health England (Health Canada's equivalent in England) is now calling for graphic health warning labels and plain packaging for alcohol.^{lvii} Indonesia has also proposed plain packaging on alcohol.^{lviii} Across the world now there are movements afoot to use the precedent set by tobacco plain packaging to target other products, including alcohol, wine, soft drinks and various types of food – even baby formula.^{lix}

The International Trademark Association ("**INTA**") has warned that plain packaging could lead to a domino effect. It says encouraging similar restrictions in other countries could lead to "*an expanding list of categories of products*" subject to this policy, including alcohol, pharmaceuticals, confectionery, foods and beverages.^{lx}

The former Prime Minister of the Czech Republic has suggested that alcohol, junk food and sugary sweets have all been identified as candidates for stronger regulatory controls by the WHO, and notes that there are even calls for toys to be sold in plain packaging because some believe they could encourage negative stereotypes of what males and females should be.^{lxi}

Senators need to think very carefully about the precedent they will be setting with Bill S-5. It will empower any future government to use this precedent to target any product that is deemed a public health threat. Canada's alcohol and food industries should be extremely concerned, as should the oil and gas sectors. Tobacco is the first target, but it will not be the last. By adopting plain packaging, the government would also compromise its ability credibly to oppose similarly misconceived regulatory initiatives that may be adopted by foreign governments to the detriment of Canada's exporters.

1.6 HEALTH CANADA AND THE RADICAL TOBACCO CONTROL LOBBY

Tobacco control lobbyists, who seem to have unparalleled influence over Health Canada, long ago abandoned any pretense of working in the interests of public health. As they boast about in their own publications, their goal is to bankrupt the tobacco industry^{lxii} and/or have it nationalized.^{lxiii} Canada's tobacco control lobbyists are in fact anti-industry lobbyists divorced from the realities of the tobacco market – and illegal tobacco in particular.

However, without a legal tobacco industry, the entire market is susceptible to organized crime groups which have business interests that extend well beyond tobacco.

Senators will no doubt have been approached by tobacco control lobbyists suggesting that illegal tobacco is a minor problem or even a 'red herring', cited by the tobacco industry.

When, as detailed earlier in this submission, 700 police officers are involved in a single illegal tobacco enforcement operation, you have to ask why these tobacco control lobbyists are deliberately distorting incontrovertible facts.

The answer is quite simple: because admitting the existence of Canada's thriving illegal tobacco industry would undermine their life's work. Illegal tobacco exists in this country because of the high taxation and over-regulation of the legal tobacco industry, which has come at the behest of tobacco control lobbyists.

Senators should ask those lobbyists at what point their policy approach is deemed a failure: when the illegal operators take over 40% of the market? 50%? This is not a hypothetical question: parts of Ontario already have illegal tobacco rates of 50-75%.^{lxiv}

1.7 TOBACCO VERSUS MARIJUANA

ITCAN remains confused about the contradictions in the government's plans to legalize marijuana versus its ongoing campaign to further regulate tobacco.

Youth usage rates for marijuana are already higher than those for tobacco, which is remarkable given that marijuana is illegal. The 2014-15 Canadian Student Tobacco, Alcohol and Drugs Survey, conducted by the University of Waterloo for Health Canada, found that the percentage of youth who were daily or occasional smokers is at a record low of 3%. Conversely, 17% had used cannabis in the past year.^{lxv}

Also, according to the 2015 Ontario Student Drug Use Survey, 3% of youth in grades 7-12 are daily cannabis users versus 2% who smoke cigarettes on a daily basis. That survey also found that 21.3% of youth in grades 7-12 reported past year use of marijuana versus 8.6% for cigarettes.^{lxvi} It should be noted also, that not only is marijuana illegal but is also often sold without any branded packaging – further demonstrating the fallacy in the assertion that branded packaging causes smoking.

A November 2015 Forum Research Poll also found that 18% of Canadians reported marijuana use in the past year. If legalized, another 13% of Canadians said they would be likely or very likely to use marijuana. This brings the total potential marijuana using share of the population to 31%.^{lxvii} This should be compared to the 13% of Canadians who are smokers, according to the Canadian Tobacco, Alcohol and Drugs Survey.^{lxviii} In other words, the expected share of the population that will use marijuana is more than double that for tobacco.

It is worthwhile pausing at this point to pose hard questions about the consistency of the government of Canada's approach to health issues facing young people. On what basis can the government legitimately claim to have a coherent approach to youth health? On the one hand the government intends to proceed with the radical step of normalizing a drug which many Canadians still look upon with suspicion and are concerned over their children consuming. On the other hand, the government proposes to overregulate a legal product whose use by young people is constantly declining. The government's stated intent with marijuana legalization is to regulate the product and take it out of the hands of organized crime. Perversely, the government is pursuing the opposite path with tobacco, regulating it to such an extreme degree that the unregulated, illegal market may be poised to take over.

In fact, it appears at this point that the government intends to adopt stricter regulations over tobacco products than over marijuana. It is surely premature to introduce such tobacco restrictions until a fair comparison can be made once the government announces its regulatory plans for the commercialization of marijuana in Canada.

1.8 PLAIN PACKAGING CONCLUSION

Plain packaging represents an unprecedented assault on commercial expression and also a wholesale expropriation of an industry's brands and trade-marks which cannot be justified. There is no reliable evidence that plain packaging will work. The only evidence from the policy being fully implemented for any significant length of time in any market comes from Australia, and it fails to demonstrate that plain packaging has reduced smoking rates in that country.

All this begs the question "*at what cost?*"

- Canada is almost certain to face legal challenges as a result of Bill S-5, including those based on its constitution and the particular provisions of its trade-mark and intellectual property laws. If Australia's experience is any indication, Canada's legal costs will be in the tens of millions of dollars and damages are likely to be assessed in the billions.
- Depending on the outcome of a case before the WTO, Canada could also face a challenge in that forum. Canada is also very likely to face a trade challenge of Bill S-5 under NAFTA.
- Canada's illegal tobacco rate is almost certain to spike and could well exceed its historic high (as previously discussed this ranged as high as 48% of the Ontario market).
- All Canadian industries will be put at risk of having plain packaging applied to their products.

Our company would welcome a discussion about the future of tobacco control in Canada, but it has to be fact and evidence-based.

CONCLUSION

As mentioned throughout this submission, ITCAN supports the government's public health objectives related to reducing the harm related to cigarette consumption.

With respect to vaping products, ITCAN supports the framework introduced by the government in this Bill (with some notable exceptions related to discouraging promotion through reference to harm reduction) but urges prompt enactment of appropriate regulations governing the manufacture of these products.

However, as explained in detail in above, ITCAN is strongly opposed to the scheme of standardizing tobacco products in Canada.

Furthermore, the proposal is fundamentally flawed and will not achieve its stated objectives. Plain packaging measures have failed to deliver any of the anticipated benefits in Australia, but instead have led to unintended consequences that are adversely impacting the public, businesses and the government. There is no reason to believe the result would be any different in Canada, especially given the nature and magnitude of its existing illicit trade problems. In addition, the Bill goes beyond plain packaging to standardize the appearance of cigarettes themselves, for which there is no justification or even public will to support the proposals.

We also draw attention to the flaws in the procedures whereby this regulatory scheme is being brought into effect, the difficulty in reconciling the government's position on tobacco and on marijuana, the ramifications for other consumer goods businesses and the likelihood of legal and trade challenges that will result from the government's suggested scheme.

In Appendices 1 and 2 which follows we provide a full list of problematic provisions in Bill S-5 and our proposal to address the issues they create. We remain open to future engagement with all genuinely interested stakeholders in addressing the future of tobacco in Canada.

APPENDIX 1

SPECIFIC PROBLEMATIC PROVISIONS OF BILL S-5 – VAPING PRODUCTS

We address in this Appendix a few concerns with provisions of Bill S-5 dealing solely with vaping products. Some of the sections addressed in Appendix 2 below relating to tobacco products also apply to vaping products or have word-for-word equivalent provisions dealing with vaping products and we do not repeat our concern about such provisions here. The following problematic provisions of Bill S-5 are unique to vaping products, however.

1. Unlike certain regulations dealing with tobacco products, no regulations relating to vaping products are required to be laid before the House of Commons before enactment. (Bill S-5, s. 52(1), amending section 42.1(1) of the *Tobacco Act*)

Problem: The requirement that regulations concerning tobacco be laid before Parliament and referred to a House Committee before enactment is an important and necessary democratic check on the wide-ranging powers devolved to the executive under the *Tobacco Act*. There is no valid reason why this check should not be applied to vaping products as well.

Solution: Section 52 of Bill S-5 should remove the words “*concerning tobacco products*” from its proposed amendment to subsections 42.1(1) and 42.1(3) of the *Tobacco Act*, and should add to those subsections a reference to section 7.8 of the TVPA (which governs product regulations about vaping products).

2. No person may promote a vaping product by comparing the health effects arising from the use of the product to those arising from the use of tobacco products. (Bill S-5, s. 38, adding new section 30.43(2) to the TVPA).

Problem: This is an unjustified breach of freedom of speech. In announcing Bill S-5 both the Honourable Senator introducing it and the Minister of Health herself made specific reference to the existing scientific evidence that suggests that the use of vaping products is significantly less harmful to health than the use of tobacco products. This provision would simply prevent vaping product manufacturers or retailers from repeating the government’s own position (backed up by reliable and substantiated scientific evidence on the reduced emissions or risks of vaping products) to assist consumers to make informed choices. This prohibition makes no policy sense and is an invitation for vaping products manufacturers to challenge Bill S-5 before the courts. It seems impossible to imagine this provision surviving a *Charter* challenge.

Solution: This provision should be removed from Bill S-5 and replaced with the following provision:

- No person shall make an unsubstantiated representation in respect of a vaping product.
- A representation is unsubstantiated if the person making the representation does not, when the representation is made, have documentary evidence demonstrating that the claim is accurate and reliably proven.

APPENDIX 2

SPECIFIC PROBLEMATIC PROVISIONS OF BILL S-5 – TOBACCO PRODUCTS

Bill S-5 is a long and complicated piece of legislation that seeks to accomplish many things in relation to tobacco control beyond simply setting a framework for the introduction of plain packaging. Amendments proposed to the *Tobacco Act* and other Acts, will effect change not only in relation to standardizing tobacco products and their packaging, but will also impact the introduction of new potential harm reduced tobacco products, the marketing and trade activities of participants in the tobacco industry and the reporting obligations of manufacturers. Certain of these provisions of Bill S-5 are, in our view, ill-conceived or poorly worded and serious consideration needs to be given by the Senate to proposing amendments to the Bill which will avoid unforeseen consequences of these provisions, without jeopardising the Bill's aim of protecting public health. We set out these provisions below and in some cases propose how they ought to be amended before passage of the Bill.

CIGARETTE AND PACK STANDARDIZATION

In addition to our general concerns on the concept of plain packaging outlined above, several specific new provisions supporting standardization of product and packaging are problematic:

1. It will be prohibited to manufacture or sell a tobacco product that displays a "marking" unless the marking is authorized by regulations or a provincial act. (Bill S-5, s. 8, introducing new 5.3(1) of the TVPA).

Problem: The word "*marking*" is not defined in the Act and could cover many things that may be visible on a tobacco product. Moreover, it is noteworthy that the recently released Health Canada Consultation Survey did not disclose any public responses that demonstrated a concern about markings on tobacco products.^{lxix} Modern tobacco products have many important features which have functional purposes such as control of emissions and promoting the extinguishing of the products (i.e. lowering their ignition propensity). These features can include visible bands on cigarette paper and ventilation holes or marks to guide consumers in the proper use of the product. Future features could also be visible and therefore considered "*markings*" even if supporting functional improvements to the product. It is important that manufacturers continue to be able to use these features, which may not be possible if they are considered "*markings*."

Solution: Additional wording should be added to new s. 5.3(1) to exclude from its prohibition any "*markings that have a purpose relating to the function of the tobacco product.*"

2. Bill S-5 would authorise new regulations imposing product standards for characteristics of tobacco products and their emissions, including their sensory attributes – such as appearance and shape of the products, dimensions and weight. (Bill S-5, s. 11(1), amending s. 7(a) of the *Tobacco Act*).

Problem: Aside from our general concerns about plain packaging, we do not believe that the government of Canada should be in the business of designing products or limiting the functions of the various components of tobacco products. Many elements affecting the "*characteristics*", "*appearance*", "*shape*", and "*dimensions*" of the product are required to properly design the product and to

control emissions, ensure an acceptable performance or to meet self-extinguishing requirements. All these elements work closely together. Parliament should ensure that regulations do not affect the correct functioning of the products.

Solution: Additional wording should be added to s. 7(a) to exclude from its regulation-making power, "*characteristics that have a purpose relating to the functioning of the tobacco product*".

3. In addition to our general concerns about plain packaging, Bill S-5 would also adversely affect tobacco manufacturers' rights to use specific trade-marks in two ways: preventing the depicting of a trade-mark on a cigarette through the use of an otherwise proscribed additives (Bill S-5, s. 7(2), repealing s. 5.1(2) of the *Tobacco Act*), and by prohibiting any trade-mark which depicts a person, character or animal (Bill S-5, s. 28(2), repealing s. 21(3) of the *Tobacco Act*).

Problem: Canada's international trade treaty obligations limit its ability to adversely affect the trading rights of businesses via trade-mark restrictions. In addition, these steps to eradicate specific trade-mark usage constitute expropriation of the property of manufacturers exposing the government to potential compensation claims.

Solution: These provisions should be removed from Bill S-5.

POTENTIALLY REDUCED RISK TOBACCO PRODUCTS

One specific provision will significantly prejudice the introduction of any new tobacco products (such as new products which heat rather than burn tobacco), which offer the potential for reduced toxicant exposure to smokers.

1. It will be prohibited to promote a tobacco product (including using packaging) in a manner that "could cause a person to believe that the product or its emissions are less harmful than other tobacco products or their emissions" (Bill S-5, s. 27, introducing new s. 20.1 of the TVPA)

Problem: This section is a clear and completely unwarranted violation of manufacturers' and retailers' freedom of speech. If cogent scientific evidence exists that a new category of tobacco products has a significant potential to reduce exposure to toxicants, manufacturers and retailers should be permitted to provide this information to consumers. Section 20 of the Tobacco Act already prohibits promotion of tobacco products "by any means, 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 products or its emissions." Since false promotional communication about the health effects of tobacco products are already banned by section 20, the new section 20.1 would apparently only apply to true statements about the reduced risk of products. The government has no grounds to justify banning accurate communications about products that are substantiated by reliable scientific data, especially when such information could assist consumers to make informed choices.

- Solution: This provision should be removed from Bill S-5.

COMMERCE RESTRICTIONS

A number of other provisions in Bill S-5 will in our view add unnecessary and onerous restrictions to normal trade activities related to tobacco products:

1. Sponsorship promotion will be redefined to prohibit any promotion in a manner that is likely to create an association between a tobacco product brand element or the name of a manufacturer and a person, entity, event, activity or permanent facility, and prohibit any person from using a tobacco product brand element or the name of a manufacturer in the promotion of a person, entity, event, activity or permanent facility. (Bill S-5, s. 33, amending ss. 24-25 of the *Tobacco Act*)

Problem: it is not apparent what is unclear or problematic about the existing wording of the *Tobacco Act*, which prohibits “*sponsorships*.” The new language is far too broad, and once again constitutes an unjustified infringement of freedom of speech. In particular, the new wording of section 25 goes beyond restricting the promotion of tobacco products; it restricts the promotion of other non-tobacco activities. For example, a large national law firm with a wide range of clients would be prohibited by the wording of section 25 from referring to the fact that it performs litigation services for tobacco manufacturers in promoting its own expertise. Would this provision also prevent employees of tobacco manufacturers from having their employers’ name on their business cards; or prevent a manufacturer from placing its own name on its own factory or head office facility? This captures situations far from any kind of sponsorship with no conceivable benefit to public health.

Solution: These provisions should be removed from Bill S-5.

2. Labelling regulations will apply to all packages, not only to those seen by the consumers (Bill S-5 s. 20(1), adding new s. 15(1.1) to the TVPA)

Problem: Section 15(1) of the TVPA already prohibits the *sale* of tobacco products which are not packaged in accordance with regulations. This provision presumably intends to go beyond the packaging seen by consumers when they purchase the products, and might be interpreted to apply to all packaging placed upon tobacco products at any time in the supply chain process. This might include the cardboard master cases in which cartons are transported or the clear cellophane wrapping in which cartons are delivered to retailers. None of this packaging would ever be seen by a consumer so any government imposed warnings or other information would serve no purpose. However, imposing an additional requirement relating to the packaging of products while in trade transit will unnecessarily impose expenses on tobacco manufacturers. This would be yet another cost separating those legitimate players in the tobacco market from those involved in illicit trade, in this case for no discernable public health benefit.

Solution: This provision should be removed from Bill S-5.

3. No manufacturer or retailer can provide written information with a tobacco product in a manner that is contrary to the regulations. (Bill S-5, s. 21, adding new section 15.3(2) to the TVPA)

Problem: Manufacturers and retailers have a recognised constitutional right to communicate with consumers provided this does not involve any prohibited form of promotion of tobacco products.

In the past, for example, written material has been provided to consumers at the time of purchase to warn consumers of the impact of illegal trade in tobacco products. Prohibiting this form of communication is an unjustifiable violation of freedom of speech.

Solution: This provision should be removed from Bill S-5.

REPORTING OBLIGATIONS

A number of problematic changes have been made to the reporting regime for tobacco products:

1. Manufacturers will have to make available to the public information about tobacco products available for sale in Canada and their emissions. In addition, the government will also make available to the public the above information, plus R&D information related to tobacco products available for sale in Canada and their emissions. (Bill S-5, s. 9, adding new section 6.1 and 6.2 to the TVPA)

Problem: The *Access to Information Act* already permits a mechanism by which the public can obtain copies of the information which is reported by manufacturers, provided such information does not fall within any of the sections of that Act designed to protect commercially sensitive information (such as trade secrets). The legal protection afforded to trade secrets is a critical component of a free market system. In particular, any disclosure of sensitive manufacturing information of a legitimate Canadian tobacco manufacturer would provide a huge competitive advantage to illicit product manufacturers (already relieved from the cost of compliance with regulation by virtue of their illegal approach to business). Widespread disclosure would also inhibit competition between legitimate manufacturers and undermine research and development activities into potential harm reduction products. The threat of public disclosure of the trade secrets of those who supply components of tobacco products will make it difficult for legitimate manufacturers to source component suppliers, once again to the advantage of illicit trade. Categories of information that cannot be disclosed (trade, confidentiality, competitiveness) should be set out in the Act and debated in Parliament not left up to Health Canada to specify in regulations.

Solution: These provisions should be amended by adding the words “provided such information could be disclosed in response to an application under the *Access to Information Act*.”

2. No manufacturer shall sell a tobacco product unless the information required to be reported about it has been reported. (Bill S-5, s. 10, adding new s. 6.01 to the TVPA)

Problem: This provision is ambiguous. It might be interpreted to mean that the reporting timing prescribed in the regulations would not apply.

Solution: This provision should be re-drafted as follows:

“No manufacturer shall sell a tobacco product unless the information required under subsection 6(1) with respect to that product is submitted to the Minister in accordance with the regulations.”

3. Based on regulations, there will be an obligation to “*keep in Canada*” all documents used for reporting and upon request provide them to Health Canada. (Bill S-5, s. 54, adding new section 42.31 to the TVPA)

Problem: ITCAN understands the desire of Health Canada to ensure compliance with reporting standards, if necessary by itself reviewing records which manufacturers need to refer to in preparing the required voluminous reports. However, a requirement that all documents used to prepare reports be *kept in Canada* ignores the multinational nature of many of Canada’s major tobacco manufacturers including ITCAN. As part of a global business where components and products are sourced from a worldwide integrated market and supply chain, many of the underlying documents required to produce a report are electronically stored in databases which must be simultaneously accessible to a large number of entities around the world. These databases are not typically stored in Canada. All of Health Canada’s needs would be satisfied by ensuring that all documents used by domestic reporting entities were at all times accessible from Canada and, if reasonably required by Health Canada, could be made accessible to its personnel. Requiring an additional step to store copies of such documents in Canada would be unduly expensive to those legitimately carrying out a tobacco business.

Solution: The relevant wording of the provisions should be changed from “*shall keep*” to “*shall maintain access to*” and from “*shall provide*” to “*shall provide access to*”.

4. Reporting of promotional activities to the trade (e.g. retailers) will be required (Bill S-5, s. 42, amending s. 32(1) of the *Tobacco Act*)

Problem: Currently s. 18(2)(c) of the *Tobacco Act* exempts any promotion activities of tobacco manufacturers directed to fellow participants in the tobacco business (e.g. suppliers and retailers) from the promotional restrictions otherwise set out in the Act. Requiring manufacturers to provide detailed reports on this entirely legal activity serves no purpose except to add to the expense and red-tape involved in being a legitimate tobacco manufacturer, all to the competitive advantage of illegal operators.

Solution: This provision of Bill S-5 should be removed.

APPENDIX 3

EXAMPLES OF SLIDE AND SHELL AND CORK-TIPPED CONTRABAND PRODUCT



APPENDIX 4

EXAMPLES OF CONTRABAND TOBACCO PRODUCTS* WITH GRAPHIC HEALTH WARNINGS



* Products shown are identified as contraband tobacco products as they lack any federal or provincial tobacco tax stamp.

APPENDIX 5

FEDERAL EXCISE STAMPS ON CONTRABAND TOBACCO PRODUCTS



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