



**IMPERIAL TOBACCO  
CANADA**

**Response to the *CONSULTATION ON*  
*“PLAIN AND STANDARDIZED PACKAGING”*  
*FOR TOBACCO PRODUCTS***

***August 31, 2016***

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## 1 INTRODUCTION

This submission by Imperial Tobacco Canada Ltd. (“**ITCAN**”) (the “**Response**”) responds to the Consultation on “*Plain and Standardized Packaging for Tobacco Products – Potential Measures for Regulating the Appearance, Shape and Size of Tobacco Packages* (collectively “**Plain Packaging**”) and of Tobacco Products” issued by Health Canada, May 2016 (the “**Consultation**”).

As explained in detail in this Response, ITCAN is strongly opposed to the introduction of Plain Packaging. We believe the proposal is illegal. 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.

## **2 EXECUTIVE SUMMARY**

### **PLAIN PACKAGING: FLAWED PROCESS AND POLICY**

The legislative process via which Health Canada is seeking to introduce Plain Packaging is wrought with bias and self-justification. Firstly, it appears that Health Canada intends to proceed via regulations even though the sweeping nature of the measures in the Consultation would seem to strongly militate in favour of proceeding by way of an Act.

Moreover, even if Health Canada proceeds via regulation, the process so far runs afoul of the Government's own rules regarding regulatory management and deliverology, which are meant to ensure that regulations are fair and legal and capable of meeting their stated objectives. Health Canada has decided that it wishes to adopt Plain Packaging and is now using procedures meant to protect Canadians against excessive and overly restrictive regulation as a self-justification exercise.

All this to implement a fundamentally flawed policy which is incoherent and inconsistent with other policies, makes it a point to go beyond the strictest plain packaging measures ever adopted notwithstanding that the latter are still subject to a challenge before the World Trade Organization, and has been shown ineffective at achieving its objectives in Australia, the only country in the world where it is currently implemented.

### **PLAIN PACKAGING IS UNLAWFUL**

Plain Packaging would prohibit the use of all graphic, design and colour trademarks, and would strictly dictate the form and format of any permitted word marks. Banning certain trademarks outright and restricting the appearance of those remaining so severely that they can no longer effectively serve as trademarks results in the loss of goodwill garnered over decades of investment. It also deprives trademark owners of their right to register trademarks, a right contingent on use in Canada, as well as their right to use them, a positive right granted by trademark registrations in Canada.

Plain Packaging also constitutes a clear violation of freedom of expression, a right so fundamental it has been entrenched in the Canadian Constitution. Plain packaging is not necessary given the multitude of tobacco control measures already in place in Canada, the widespread awareness of the risks of smoking and the existence of other more effective and less restrictive means to reduce smoking rates and protect youth. In addition to violating Canadian laws, Plain Packaging violates several international obligations to which Canada is a party.

### **CONSTRAINTS RELATED TO IMPLEMENTATION**

What can be misconstrued as minor details in the proposed measures (especially in view of a biased and incomplete consultation and cost-benefit analysis) can have very significant impacts.

By way of example, some health groups are lobbying for slide and shell format of packaging rather than the worldwide standard flip top format of packaging. This

position completely ignores the significant impact that such a seemingly small operational decision can have, including environmental concerns, implementation timelines and the capacity of the industry to comply. Indeed, any packaging standardization requires changes to equipment that is much more costly, complex and time consuming to implement than mere design changes.

Moreover, some of the measures proposed pertain to the standardization of tobacco products themselves. This is very different from, and goes very far beyond, Plain Packaging despite their being lumped together in the Consultation. Such measures would not only require additional changes to equipment, compounding costs, complexities and implementation delays, but also have an impact, notably on product emissions, smoke toxicity, smoking behaviour and environment. Changes of this magnitude and importance should not be considered on a whim simply to further the agenda of the anti-tobacco lobby, but must be based on robust evidence and thorough research.

### **UNINTENDED CONSEQUENCES**

Canada is already facing a contraband tobacco crisis with illicit products making up almost 20% of tobacco products. Plain Packaging will lead to an increase in Canada's already rampant illicit tobacco production and trade, as indicated by the experience in Australia, thereby actually undermining public health objectives.

Plain Packaging will also incite a rampant counterfeit tobacco market in Canada by essentially giving away the recipe to duplicate legal tobacco products. Moreover, as was the case in Australia, Plain Packaging will lead consumers to down-trade to cheaper products, which may in turn lead to an increase in consumption, particularly of contraband products.

Existing measures such as graphic health warnings and tax stamps will not be able to prevent this, nor will they allow proper distinctions to be made by consumers and law enforcement between legal and illegal products.

Moreover, the Government is considering stick standardization measures that would make a very bad situation even worse. Indeed, if the Government caters to the anti-tobacco lobby and standardizes not only tobacco packaging, but also tobacco products themselves, consumers and law enforcement will not have any indicia left upon which to distinguish legitimate from contraband/counterfeit products. Illegal operators will no doubt rejoice that the Government wants to use the product already found in most illegal baggies as the new federally mandated standard for tobacco products in Canada.

### **METRICS AND SAFEGUARDS**

If Health Canada continues its single minded pursuit of Plain Packaging despite all the significant procedural and substantive issues mentioned above, it will be crucial to provide clear metrics to assess the efficacy of the measures and whether or not they are justified. Proposed legislation must provide for a comprehensive Post Implementation Review based on clear metrics, determined at the outset, to evaluate the policy in a transparent, fair and unbiased way.

### **3 ABOUT IMPERIAL TOBACCO CANADA**

Established in 1908, Imperial Tobacco Canada Ltd. is Canada's leading tobacco company, offering brands like du MAURIER, Player's and Pall Mall to over five million adult Canadians who choose to smoke. ITCAN 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 21<sup>st</sup> century tobacco company. ITCAN recognizes the health risks associated with tobacco consumption and that is why we support reasonable, fact-based regulation, especially measures aimed at keeping tobacco products out of the hands of kids. We believe underage people should not consume tobacco products and we support fact-based regulation which protects young people.

However, ITCAN opposes arbitrary and excessive regulation that will not achieve any of the Government's stated objectives, which could actually prove counter-productive and that is based on a misinterpretation of the available evidence.

### **4 PLAIN PACKAGING: FLAWED PROCESS AND POLICY**

#### **4.1 FLAWED PROCESS**

##### **4.1.1 CABINET DIRECTIVE ON LAW-MAKING**

Although not explicit, the Consultation appears to indicate that the Government intends to implement Plain Packaging through new regulations rather than a new Act. Without more details, the assumption must be that the Government intends to implement regulations under the Tobacco Act 1997 (the "**Tobacco Act**").

Plain Packaging and the additional measures in the Consultation regarding pack and cigarette standardization are fundamental changes to tobacco control in Canada which are not only illegal, but also violate international agreements to which Canada is a party. Regulation is the result of delegated authority and is enacted pursuant to a truncated legislative process, and as such is not the proper legislative vehicle for such drastic and far-reaching measures. Plain Packaging must be afforded the fullest consideration, substantively and procedurally, and is the proper subject matter of an Act.

In addition, Plain Packaging has clear implications for Canadian trademark law, which is governed by an Act of Parliament. Plain Packaging legislation will need to address the relationship between these two bodies of law, and such can only be done by an Act, not by mere regulation.

##### **4.1.2 CABINET DIRECTIVE ON REGULATORY MANAGEMENT**

In 2012, the Cabinet Directive on Regulatory Management<sup>i</sup> ("**CDRM**") came into effect, replacing an earlier 2007 version. This directive was meant to implement a regulatory system that delivers the greatest benefits to current and future generations of Canadians by ensuring that when the Government uses its regulatory powers, it adheres to certain principles, including to protect and advance the public interest, to advance the efficiency and effectiveness of

regulation, to make decisions based on evidence, to promote a fair and competitive market economy and to require timeliness, policy coherence, and minimal duplication.

These principles stem from and recognize the fact that the power of delegated authority to regulate is not unfettered. The power to pass regulations alone is not sufficient to justify them in a hope that they work. These obligations are not Canadian idiosyncrasy, but recognized principles of regulatory policy and governance as recommended by the Organization for Economic Co-operation and Development (“**OECD**”).<sup>ii</sup>

The CDRM and the OECD recognize that the regulatory process must follow a logical and coherent approach, consisting firstly of identifying the goal, assessing the efficacy of the existing legal/regulatory context, and then identifying the best policy measures to achieve that goal and demonstrating that they will achieve the objective.

Here, however, the process has in effect been inverted. As stated above, Health Canada has identified Plain Packaging as policy it wishes to pursue and is now trying to justify that policy on the grounds that it would reduce rates of smoking and protect youth. Indeed, the Minister of Health was unequivocal in her commitment to the introduction of the measure, stating that “[t]here’s no question about whether we’re going to proceed with plain packaging regulations,”<sup>iii</sup> before the Consultation was even launched.

#### 4.1.2.1 PUBLIC POLICY ASSESSMENT

The CDRM imposes, inter alia, the obligation of “*assessing the public policy issue, including potential risks, and demonstrating through the best available evidence and knowledge that government intervention is needed.*” In order to do this, the Government is to “[a]nalyze the public policy issue, its causes, and its context, including its urgency and immediate and long-term impacts” and “[e]xplain fully to decision makers and Canadians the nature of the issue, how its impacts have changed over time, and why government intervention is needed.”<sup>iv</sup>

This has simply not been done. No analysis or studies to assess the efficacy of the existing domestic tobacco control regulations have been conducted leaving fundamental questions unanswered. Indeed, as a precursor to a commitment to Plain Packaging, the Government should, at the very least, have a clear answer regarding whether the exposure to Plain Packaging will result in a decline in smoking rates, and whether it is particularly effective in reducing youth smoking. These questions are simply being ignored, most likely for a very simple reason: Plain Packaging does not translate into actual changes in smoking behaviour as branding on packaging is not a factor that causes smoking.

The real and universally accepted drivers of smoking initiation include factors such as parental influences, peer influences, socioeconomic factors, access and price.<sup>v</sup> These factors do not include product packaging. Similarly, the recognised drivers of smoking cessation include concerns about current and future health effects of smoking, the cost of smoking, and pressure from family to quit – not packaging.<sup>vi</sup>

This was noted in a report for none other than Health Canada, where Goldberg, et al,<sup>vii</sup> concluded that:

*“It is clear that in most first trials there are little package, brand or brand promotion elements. Most kids receive their first cigarette from friends. There is no brand choice - the choice is simply to smoke or not to smoke.”<sup>viii</sup>*

Similarly, a Cancer Research U.K. report entitled “The Packaging of Tobacco Products” states that:

*“To some extent the pack appeared peripheral compared with the cigarette in youth smoking, particularly at the initiation/experimentation stage. [...] Some said they never really saw the pack being used; it was just the cigarette that was passed around. [...]”<sup>ix</sup>*

With one of the world’s largest graphic health warning labels already mandated on packaging, and numerous other severely restrictive regulations regarding the advertising and promotion of tobacco products, the Government provides no evidence as to how the implementation of Plain Packaging will affect smoking behaviour, when there is already very little space available for the display of trademarks.

The decision to implement such measures has already been made and is being pursued single-mindedly by Health Canada. The requirements under the CDRM are already being skipped or shaped to result in only one possible outcome, thereby turning important safeguards against excessive and ineffective regulation into an exercise in self-serving policy justification, as illustrated by the examples below.

#### 4.1.2.2 *CONSIDERATION OF ALTERNATIVE MEANS TO ACHIEVE POLICY OUTCOMES*

The CDRM imposes the obligation of “assessing the effectiveness and appropriateness of regulatory and non-regulatory instruments for achieving policy.” Notably, the Government must “[c]onsider potential alternatives to regulation.” In its pursuit of Plain Packaging, Health Canada has, however, entirely failed to do so.

Such an analysis is explicitly provided in the CDRM and is crucial, as it could reveal numerous alternative measures that would achieve the same objectives without raising the legal challenges or the unintended consequences stemming from Plain Packaging.

##### 4.1.2.2.1 *THE U.S. EXAMPLE*

It is useful to compare smoking rates in Canada versus the U.S. 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.<sup>x</sup> In contrast, Statistics Canada reported that our national smoking rate was higher at 18.1% in 2014.<sup>xi</sup>



The Canadian Alcohol, Tobacco and Drugs Survey, a separate survey conducted by Statistics Canada on behalf of Health Canada, which had a much smaller survey size, assessed the 2013 national smoking rate at 15%, on a par with the U.S.<sup>xii</sup>

As such, according to the most recent data available in Canada, the national smoking rate is at worst higher than, or at best roughly equivalent to, 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 price are much lower.

In other words, the U.S. has exceeded Canada's success in reducing its national smoking rate without the massive and overly restrictive regulatory burden imposed in Canada. This is clearly indicative that measures other than stricter and more burdensome regulation (such as youth education and the measures discussed below) are just as, if not more, effective at reducing smoking incidence.

Despite this, instead of Health Canada carefully considering how the U.S. has accomplished these results with minimal regulatory intervention, it has simply decided to pursue a more burdensome regulatory regime without further analysis.

#### 4.1.2.2.2 *ELECTRONIC CIGARETTES*

Another policy measure that many tobacco control advocates agree could have a very significant impact on smoking incidence is electronic cigarettes.

Indeed, Public Health England released a detailed expert independent study in August 2015 which found that e-cigarettes are “around 95% safer than smoking,” that there is a “need to publicize” this fact, that there is no evidence so far that e-cigarettes are acting as a route into smoking for children or non-smokers and that e-cigarettes may be contributing to decreasing smoking rates among adults and young people.<sup>xiii</sup>

Progressive voices in the Canadian public health community are also advocating in favour of electronic cigarettes.

- University of Ottawa professor of medicine Mark Tyndall calls e-cigarettes “*the ultimate harm reduction innovation*,” and says they have “great potential to improve health, save lives and reduce health-care costs.”<sup>xiv</sup>
- Dr. Gaston Ostiguy, respirologist and past medical director of the smoking cessation clinic at the Montreal Chest Institute, wrote on behalf of a group of doctors, professors and health advocates to support age restrictions and manufacturing standards for e-cigarettes, but warned against “*any excessive regulations that could make it too difficult to communicate about the reduced risk of these products or to access them*.”<sup>xv</sup>
- David Sweanor, adjunct professor, Faculty of Law, University of Ottawa, Centre for Health Law, Policy & Ethics, says we should focus on the opportunities of products like e-cigarettes, “*rather than merely focus on*

*potential and theoretical risks as technology delivers products that can replace cigarettes.”<sup>xvi</sup> 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.<sup>xvii</sup>*

- A group of 50 public health experts said the urge to control e-cigarettes by regulating them as tobacco products “*should be resisted and instead regulation that is fit for purpose and designed to realize the potential should be championed.*”<sup>xviii</sup>
- Even the Canadian Cancer Society “*recognizes the potential benefit that e-cigarettes may provide to Canadians trying to quit smoking*”.<sup>xix</sup>

If these numerous voices are listened to when advocating for tobacco control measures, surely their views are valid when offering commentary on e-cigarettes.

Perhaps most powerful is the testimony of Dr. John Britton from the U.K. Centre for Tobacco and Alcohol Studies, who testified as follows to Canada’s House of Commons Health Committee during its study of e-cigarettes (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.”<sup>xx</sup>*

When the tobacco industry and many public health advocates are recognizing the harm reduction potential of e-cigarettes and are calling for federal e-cigarette regulation, surely it makes more sense to consider such an option before resorting to much more drastic and severe measures, which are ineffective and illegal, and according even to public health advocate David Sweanor, unnecessary:

*“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.”<sup>xxi</sup>*

Despite the support and scientific evidence regarding the harm reduction potential of e-cigarettes, instead of putting in place a proper regulatory framework for e-cigarettes, which ITCAN recommends and supports, Health Canada is disregarding this avenue entirely, preferring rather to pursue its headstrong campaign for the untested and unsupported policy of Plain Packaging.

#### **4.1.3 COST-BENEFIT ANALYSIS OF THE PLAIN PACKAGING OF TOBACCO PRODUCTS**

On March 11, 2016, Health Canada posted a public tender for a “cost-benefit” analysis of the Plain Packaging of tobacco products.<sup>xxii</sup> This tender and the Statement of Work that accompanied it contained several flaws and omissions that cannot help but impact its ultimate credibility:

- Despite stating that it was a public tender, it proved to be an advance contract award notice for a sole-sourced analysis, which raises concerns as to the impartiality of the process;
- The tender makes no mention of the potential costs related to a likely increase in the illicit tobacco trade, despite this being a clear possibility as demonstrated by the fact that the question is raised in the Consultation;
- The tender makes no mention of the cost of the loss of intellectual property rights that would necessarily result from Plain Packaging;
- Despite the tobacco industry being the key stakeholder that would be most significantly impacted by Plain Packaging, the tender does not provide for consultation with the industry, much less its direct participation, which should be required. The tobacco industry has the best knowledge of the costs and timing of compliance and implementation of Plain Packaging, as well as the various operational considerations that could have material impact on numerous fronts. It is for these reasons that ITCAN has made several requests to meet with Health Canada and the Cabinet of the Health Minister. ITCAN's requests remained unanswered. In July 2016, ITCAN was sent a short list of questions (set out in the tender) entitled "Questions for Gathering Industry Input on Compliance Costs Associated with Plain and Standardized Packaging" and asked if it would be interested in a one-hour discussion regarding the questions. The questions do not cover all the possible costs relating to Plain Packaging, much less all the relevant considerations and a single, one-hour conversation with external consultants is clearly insufficient to properly canvass these issues. As such, ITCAN does not view this engagement as anything more than a cursory and superficial "tick the box" exercise; and
- Most strikingly, the tender requires the Contractor to assume that Plain Packaging is beneficial rather than to actually assess the issue. Indeed, under the section "Benefits Analysis [...] Step 1: Determining an appropriate Conceptual Framework (establishing the impact of the Plain Packaging of tobacco products on consumer behaviour)," the Statement of Work indicates "The Contractor must undertake the analysis of benefits of the proposed change in tobacco products packaging. They must begin by establishing a conceptual framework that can support the assumptions about expected societal benefits of the changes to the regulations. [...] The purpose of this task in the analysis is to research, document and establish a theoretical framework that can support the hypothesis/assumption that exposure to standardized packaging is linked to a decline in smoking risks, and is particularly effective in reducing the appeal of tobacco products among young smokers."<sup>xxiii</sup>

With the Statement of Work clearly dictating the establishment of a framework that can support the assumption that Plain Packaging is effective in reaching the policy objectives, the "cost-benefit" analysis that will be delivered can hardly be said to be a meaningful, open, balanced or even *bona fide* assessment.

#### 4.1.4 HEALTH CANADA CONSULTATION

The Consultation suffers from the same bias as the cost-benefit analysis tender.

Indeed, the Consultation does not contain any questions nor seek any input regarding the efficacy or sufficiency (or lack thereof) of existing Canadian tobacco control regulations, nor the potential benefit (or lack thereof) of plain or standardized packaging in this context.

Instead, the Consultation presents in a biased way measures that go beyond what have been done in the very few countries that have implemented plain and standardized packaging, and then poses only leading questions, which are designed to elicit answers that support the policy.

Indeed, there is a significant body of data and studies that conclude that plain packaging measures are not effective.<sup>xxiv</sup> However, this evidence is not presented, much less analysed. It is simply ignored and omitted, thereby going unseen and unconsidered by those participating in the Consultation.

This is even the case for the study by Goldberg, et al,<sup>xxv</sup> cited at section 4.1.2.1 above, commissioned by Health Canada and relating to issues central to Plain Packaging, which was excluded from the Consultation, undoubtedly as it acknowledges that packaging has little to do with youth smoking initiation.

Moreover, the studies that are cited in the Consultation are often dated, foreign and not representative or not designed to 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. One would assume (and the Consultation leads one to believe) that Health Canada has in hand some significant and relevant studies to rely upon in this regard. However, the Consultation is incredibly misleading in this respect. Take the following statements by way of example:

- *“Young adult smokers associate cigarette brand names and package design with positive personal characteristics, social identity and status.”* The Consultation makes 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;<sup>xxvi</sup>
- *“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.”*<sup>xxvii</sup>

Other studies relied upon by the Consultation acknowledge significant limitations and bias, yet the Consultation document relies upon them unreservedly. For example:

- *“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.”<sup>xxviii</sup>*
- *“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.”<sup>xxix</sup>*
- *“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.”<sup>xxx</sup>*

Even the questions as framed in the Consultation document show bias. The questions only seek input regarding how the measures could be improved (meaning, how they can be more restrictive) and what additional measures could be added. Not once does the Consultation seek the input of Canadians regarding whether they consider Plain Packaging or any of the other measures presented in the Consultation to be necessary, effective or even beneficial to reduce smoking rates or to protect youth.

In view of the foregoing, it is difficult to see how the Consultation can be considered meaningful, impartial, open and balanced, as set out in the CDRM and its guidance documents.<sup>xxxi</sup>

## **4.2 FLAWED POLICY**

### **4.2.1 INCOHERENT POLICY APPROACHES: TOBACCO VS. MARIJUANA**

One of the commitments to Canadians in both the CDRM and the Cabinet Directive on Law-Making is to foster policy coherence throughout the regulatory process. As such, the apparent contradiction between the policies of Plain Packaging versus the legalization of marijuana is clearly problematic. This is especially puzzling given the Government’s claim that both these divergent policies are necessary to achieve the same goal, namely, to protect youth.

Indeed, youth usage rates for marijuana are already higher than those for tobacco, which is remarkable since marijuana is currently illegal. According to the 2015 Ontario Student Drug Use Survey, 8.6% of youth in grades 7-12 reported past year use of cigarettes versus an astounding 21.3% for marijuana, nearly two and a half times as many.<sup>xxxii</sup> Health Canada’s own Youth Smoking Survey found that 4% of youth in grades 6-12 are current smokers whereas the rate of those in grades 7-12 who reported past year marijuana use is almost five times higher at 19%.<sup>xxxiii</sup>

In November 2015, Jane Philpot, the Federal Health Minister stated the following:

*“It’s extremely important to me as a young parent and as a [health-care] provider to make sure we keep marijuana out of the hands of kids and young people, whose brains are developing. And at the moment, unfortunately, it’s extremely accessible.”<sup>xxxiv</sup>*

These concerns were reiterated at the launch of the Consultation on the legalization of marijuana in June 2016, where the Minister of Health stated the following:

*“Our Government is moving forward with an approach to marijuana that is both comprehensive and evidence-based. We are committed to moving ahead in a responsible way, acknowledging and addressing the health risks associated with recreational use of marijuana, especially the health risks to young Canadians.”<sup>xxxv</sup>*

Despite the Minister of Health’s recognition of health risks associated with the use of marijuana and the same stated policy objectives of protecting youth, both for marijuana and tobacco, when she was specifically asked on World No Tobacco Day, which, if any, measures including Plain Packaging might be legislated for marijuana, she made no reference to any packaging restrictions being considered for marijuana, speaking only of “*serious restrictions around marketing*” and “*public education campaigns.*”<sup>xxxvi</sup>

The Government’s own website states that marijuana smoke “*contains many of the same cancer-causing materials as tobacco smoke*” and that regular long-term use “*can harm concentration, cause loss of memory, harm the ability to think and make decisions and decrease IQ.*”<sup>xxxvii</sup> Given the foregoing, it is very surprising, if not highly questionable, why the anti-tobacco lobby has remained utterly silent on the substantive question of legalizing marijuana.

In any event, it is interesting to note that the marijuana lobby has already begun its campaign against Plain Packaging for marijuana. The Cannabis Canada Association said in July that it is opposed to Plain Packaging because branding “is very important,” adding “[Y]ou do have a brand and you do have a reason for selecting the brand.”<sup>xxxviii</sup> The exact same logic applies to tobacco. Adult consumers of tobacco want to be able to choose which cigarettes to smoke based on blend and brand, just the same as if they were to choose to buy wine or whiskey or, in the future, marijuana.

Another cited goal of legalizing marijuana is to curb the black market, yet Plain Packaging is a boon to the tobacco black market. As explained below, Plain Packaging will simply push more of the legitimate market into the hands of criminal groups and make a very bad situation worse. Despite the Government having recognized the policy goal of removing marijuana from the black market, it is adopting policy regarding tobacco that is incoherent with this goal and that will, in fact, push more smokers to the black market.

It is unclear how the Government can credibly consider opposing policy measures to achieve the exact same policy goals. Indeed, the very same arguments that the Government is using to support the legalisation of marijuana can be applied to stop and even roll back the over-regulation of tobacco.

#### **4.2.2 POLICY IN UNCHARTED LEGAL WATERS**

In April 2016, the Minister of Health stated that the Government would learn from the Australian experience “to make sure that we manage those problems and try to

avoid legal challenges as much as possible.”<sup>xxxix</sup> It is however very difficult to see how Health Canada has done so. It in fact appears, to the contrary, that Health Canada is in zealous pursuit of Plain Packaging and is even attempting to move beyond it.

Canadian law has numerous particularities that distinguish it in very significant ways from other jurisdictions, yet Health Canada has committed to adopting Plain Packaging measures without providing any details or analysis as to the impact of these differences.

Moreover, it is difficult to see how Health Canada can maintain that it has taken any learnings from the international experience with plain packaging measures. Indeed, Australia has the strictest plain packaging measures in the world. Despite the fact that these measures are currently being challenged before the WTO and that every other jurisdiction that has adopted plain packaging measures since Australia has opted for less draconian measures, Health Canada is making it a point of pride to propose measures beyond those adopted in Australia.

#### **4.2.3 INEFFECTIVENESS OF PLAIN PACKAGING: THE FAILED AUSTRALIAN EXAMPLE**

Australia is the only country in the world to have implemented plain packaging measures, so it is the only country in the world with real-world evidence of whether it is an effective measure (as opposed to predictive survey studies looking at intentions and perceptions, which are incapable of establishing whether the measure will be effective).<sup>xl</sup>

Three and a half years after the introduction of plain packaging measures,<sup>xli</sup> the evidence from Australia shows that it is an ineffective policy measure that has not achieved any of the Australian Government's stated objectives.

##### **4.2.3.1 *THERE HAS BEEN NO INCREASE IN THE RATE OF DECLINE OF SMOKING IN THE AUSTRALIAN POPULATION***

The Australian Government said that plain packaging measures were required to reduce smoking rates. In the three years following their introduction, there has been no increase in the trend-rate of decline of smoking in the Australian population.

The Australian Federal Government's National Drug Strategy Household Survey (“**ANDSHS**”) data, which is collected every three years, shows that smoking prevalence has been declining steadily since 1995 and the proportion in 2013 is 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 Australia.

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 6 years. This data is not supportive of plain packaging measures leading to fewer adolescents taking up smoking. The proportion of daily smokers has not changed.

In a study of the National Tobacco Plain Packaging Tracking Survey (“NTPPTS”) data undertaken by Scollo et al (2015),<sup>xlii</sup> the authors similarly concluded that plain packaging measures had not reduced cigarette consumption in Australia.<sup>xliii</sup>

*“Among daily cigarette smokers, there was no change in consumption between pre-[plain packaging] and the transition phase or [plain packaging] year 1 period...Nor was any change detected when mean daily consumption was analysed among regular smokers...Mean daily consumption also did not change from the pre-[plain packaging] to subsequent two phases among current smokers...Furthermore consumption did not change from pre-[plain packaging] to the subsequent two phases among current smokers of brands of any market segment...”<sup>xliv</sup>*

#### 4.2.3.2 THE INTRODUCTION OF PLAIN PACKAGING IN AUSTRALIA HAS NOT ENCOURAGED SMOKERS TO STOP SMOKING

Analysis of the data also indicates that Plain Packaging measures have not increased quit-related behaviours. 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.

Likewise, analysis undertaken by Davidson and de Silva found that the evidence drawn from the NTPPTS does not support the efficacy of the plain packaging policy.<sup>xlv</sup>

#### 4.2.3.3 AUSTRALIAN POST-IMPLEMENTATION REVIEW IS NOT RELIABLE

Although the Australian Department of Health (the “ADH”) published a Post-Implementation Review (“PIR”) of the Australian Tobacco Plain Packaging Act 2011 (the “PIR Report”)<sup>xlvi</sup> on February 26, 2016, it cannot be relied upon for demonstrating 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 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.”<sup>xlvii</sup> 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.

The only direct evidence put forward in the PIR Report on the impact of plain packaging on smoking prevalence is presented by Dr. Chipty, an expert engaged by the Australian Government for the ongoing World Trade Organization dispute settlement proceedings relating to Australian plain packaging. Her analyses conclude that there was a decline in smoking prevalence of 0.55 percentage points over the post-implementation period, relative to what the prevalence would have



been without the packaging changes. However, the calculations were based on a single dataset (despite others being available) which was not disclosed and the report overstates the purported beneficial impact of plain packaging measures on smoking as she made no attempt to highlight their effect alone. Further criticisms are made of Dr. Chipty's reports in the WTO proceedings, which are summarised in the Integrated Summary of the Dominican Republic's submissions dated 23 March 2016.<sup>xlviii</sup> Dr. Chipty's analyses contained several critical errors that render it unreliable and fundamentally undermine Dr. Chipty's conclusions.

The remaining data relied on in the PIR Report merely show a continuing decline in the measurement of smoking both before and after the introduction of plain packaging in Australia. As explained in section 4.2.3.1, both prevalence and consumption have been falling in Australia for a long time independently of plain packaging measures. In fact, the PIR Report acknowledges this:

*"The data reviewed in the above sections suggest that prevalence rates and the consumption of tobacco products in Australia are declining. Similarly, the clearance data and ABS NHS and household expenditure data also report continued declines over recent years."*<sup>xlix</sup>

The flawed nature of the PIR is highlighted by research conducted by Davidson and de Silva.<sup>1</sup> That research clearly demonstrates that key studies relied upon by the PIR are "misleading"<sup>li</sup> and "[do] not support the efficacy of the plain packaging policy."<sup>lii</sup> Davidson and de Silva conclude that the PIR: "*failed to indicate that there was no credible evidence to suggest that the policy has worked*"<sup>liii</sup> and that there has been "*a failure of Australian policy governance.*"<sup>liv</sup>

Accordingly, the PIR Report cannot demonstrate that Plain Packaging is appropriate, necessary or proportionate and still less that it represents the least restrictive alternative or a fair balance when compared to the complete deprivation of lawful trademarks. It neither establishes that plain packaging measures are working in Australia, nor undermines the substantial evidence that shows the very opposite – that plain packaging is having counterproductive effects in Australia. There is no reason to believe that Plain Packaging would be any more effective if adopted in Canada.

## **5 PLAIN PACKAGING IS UNLAWFUL**

Plain packaging is unlawful because:

- it deprives manufacturers of the legal right to use their trademarks, as protected by the Trade-marks Act<sup>lv</sup>; and
- it violates the right to freedom of expression by impairing the ability of manufacturers to communicate with adult consumers about the origin, quality and other points of differentiation regarding their products; and
- it violates International Agreements to which Canada is a party.

## 5.1 THE FUNCTION OF TRADEMARKS

Trademarks are used by manufacturers as an essential tool to distinguish their goods from similar products. The function of trademarks is to indicate the source or origin of the product and to identify the product by distinguishing it from its competitors'. Trademarks also symbolize a product's quality and features and guarantee that the goods or services measure up to expectations. Trademarks are essential for effective competition in the market, as they enable firms to uniquely identify and differentiate their products other than on the basis of price alone.

Trademarks are often the most valuable asset that a manufacturer possesses. For manufacturers, the protection of intellectual property rights afforded to trademark owners means that firms can invest in the trademark and the associated brand with confidence. The importance of trademarks to the global economy is recognized by a report of the World Intellectual Property Organization, *World Intellectual Property Report 2013: Brands – Reputation and Image in the Global Marketplace*.<sup>lvi</sup>

The very severe restrictions with regard to advertising, display and promotion of cigarettes and the obligatory warnings, including the 75% graphic health warnings already required on cigarette packages in Canada mean that there are only very limited ways to inform adult consumers who choose to smoke about the different products and options available to them. Moreover, the very limited space on the cigarette packs for trademarks is, for all intents and purposes, the only tool manufacturers have to identify and differentiate their products from other competitive offerings.

## 5.2 TRADEMARK LAW – UNIQUE CANADIAN CONTEXT

Canadian trademark law comprises several important differences that distinguish it from other countries.

Firstly, unlike many other countries, including Australia, Ireland, the UK and France, in Canada, use is a pre-requisite to obtaining a trademark registration.<sup>lvii</sup>

Moreover, unlike the situation in other jurisdictions such as Australia<sup>lviii</sup> and the United Kingdom<sup>lix</sup>, the situation in Canada is clear: a trademark registration grants the owner a positive right to use the trademark.<sup>lx</sup>

As such, the 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 becomes 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.”<sup>lxi</sup> Not only do such restrictions amputate the scope of rights granted by a trademark registration, they also prohibit the effective use of the mark. Indeed, by forcing all word trademarks to appear in identical format, their essential function of distinguishing products and identifying their commercial origin is severely compromised. This amounts to a de facto denial of a trademark owner's rights in its trademarks.

In addition to trademark rights, the goodwill associated with the packaging of ITCAN's products and used in connection with their sale, will be impacted. Generally, the longer a trademark has been in use, the more valuable it will be as a tool to help distinguish the product from those manufactured or marketed by competitors. Plain Packaging amounts to a deprivation of substantial intellectual property rights and the associated goodwill that manufacturers have cultivated over many decades of investment. Given the commercial value of ITCAN's trademarks and valuable goodwill built over the years in their brand portfolios, the loss caused by Plain Packaging would clearly be very substantial.

### 5.3 FREEDOM OF EXPRESSION

As a legal person existing pursuant to the laws of Canada and operating a lawful business, ITCAN has the constitutional guarantee of freedom of expression as stipulated in section 2(b) of the *Canadian Charter of Rights and Freedoms*,<sup>lxii</sup> as has been explicitly recognized by the Supreme Court of Canada.<sup>lxiii</sup> Plain Packaging would impair ITCAN's ability to communicate with adult consumers about its products. The ability both of manufacturers to communicate and consumers to receive information is a fundamental right of free speech.

Rights of free speech consist not only of an absence of restraint, but also of an absence of compulsion to exercise that freedom in a particular way, or through a particular form. The right is infringed if the law (i) limits the ability of a person to communicate his or her message, or (ii) forces someone to say something.

Plain Packaging would violate ITCAN's right to freedom of expression in both ways. As stated by the Supreme Court of Canada in *RJR-MacDonald*:

*“Freedom of expression, even commercial expression, is an important and fundamental tenet of a free and democratic society. If Parliament wishes to infringe this freedom, it must be prepared to offer good and sufficient justification for the infringement and its ambit.”*

Indeed, ITCAN's freedom of expression is guaranteed by the Canadian Constitution “*subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society [emphasis added].*”<sup>lxiv</sup>

It must be remembered that, in Canada, the Minister of Health has acknowledged that the risks of smoking are very well known;<sup>lxv</sup> graphic health warnings occupy 75% of the front and back of tobacco packages, toxic emission statements occupy 50% of one of the side panels of tobacco packages; all tobacco packages must contain a mandated health information leaflet; advertising and promotion

appealing to young persons is banned, as is lifestyle advertising and sponsorship; products cannot be displayed at points of sale, nor can they be handled before purchase.

In such a context, in the absence of evidence clearly demonstrating that packaging influences smokers', and/or young persons' decisions to smoke and that Plain Packaging in Canada will reduce smoking rates accordingly, one can only wonder how Plain Packaging can be justified, especially where the restrictions contemplated go beyond not only what is done in other countries that adopted plain packaging measures, but beyond the strictest such measures implemented in the entire world.

#### **5.4 INTERNATIONAL AGREEMENTS**

First and foremost, it should be remembered that, as a matter of international law, the World Health Organization (“**WHO**”) framework convention on tobacco control (“**FCTC**”) is simply a “framework” agreement. Moreover, the WHO Guidelines to Article 11 and 13 of the FCTC, which suggest that parties to the FCTC “should” (not “shall”) “consider” (not “adopt”) plain packaging measures are only “*intended to assist Parties in meeting their obligations*” under the FCTC and do not create legally binding obligations. The FCTC itself neither requires nor authorizes plain packaging measures.

##### **5.4.1 WORLD TRADE ORGANIZATION (“WTO”) AGREEMENTS**

The measures proposed in the Consultation would violate international obligations under the WTO Agreements such as the Agreement on Trade-Related Aspects of Intellectual Property Rights, Paris Convention and the Agreement on Technical Barriers to Trade.

Indeed, several countries have contested the legality of the plain packaging measures adopted by Australia before the WTO. The panel report is expected in late 2016 or early 2017 and may be subject to appeal. Contemplating the adoption of plain packaging before a final report on its legality is rendered by the WTO Dispute Settlement Body is, at best, premature and ill-advised, if not reckless considering that the measures proposed by Health Canada make it a point to go beyond those in Australia, notwithstanding the pending WTO challenge.

##### **5.4.2 NORTH AMERICAN FREE TRADE AGREEMENT (“NAFTA”)**

Moreover, the measures proposed in the Consultation appear to violate other international agreements to which Canada is a party, including the North American Free Trade Agreement (“**NAFTA**”). Indeed, the measures proposed in the Consultation appear to run afoul of several provisions of NAFTA regarding trademarks, including notably:

- 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 (barring one) 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;
- NAFTA does not provide for exceptions to be made within the trademark provisions on the basis of public health; and
- NAFTA explicitly provides for a right to compensation for the taking of measures directly or indirectly amounting or tantamount to expropriation.<sup>lxvi</sup>

Given that Plain Packaging appears contrary to provisions of NAFTA, which (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 measures proposed in the Consultation lead Canada into clearly uncharted waters. Given the commercial value of ITCAN’s trademarks and valuable goodwill, careful consideration in this regard is necessary, as the Government could be exposed to a very significant damages award.

## **6 CONSTRAINTS RELATED TO IMPLEMENTATION**

### **6.1 OPERATIONAL CONSTRAINTS**

It is very important to fully understand the impact, particularly on the tobacco industry, of measures presented in the Consultation. Even measures that could be considered minor or not particularly consequential to an external observer or uninitiated party can have very important impacts and raise significant operational constraints.

One such example is standardized packaging format. Anti-tobacco campaigners are lobbying for a slide and shell format of packaging rather than the worldwide standard flip-top format. They state notably that when such packs are opened by consumers, the graphic image on the warning is not visible.<sup>lxvii</sup> However, this is false logic because when a consumer opens the pack, he or she must already have seen the warning and have nevertheless taken the decision to smoke, and will invariably close the pack before lighting the cigarette. Moreover, this assumes that health warnings will remain on the top portion of packages. This placement is a result only of current regulatory requirements, which could easily change. The other argument is that warnings are bigger on slide-and-shell packs. However, graphic health warnings by law have to cover 75% of the pack no matter the size.

“Flip-top” packages are the norm in Canada and the world standard for tobacco packaging. It is also the only format shown in WHO documents regarding Plain Packaging.<sup>lxviii</sup> This is not surprising, given that flip-top packages are much more environmentally friendly than slide and shell packages, using significantly less paper/cardboard. Moreover, the fact that flip-top packages are used around the world also means that they can be sourced from different suppliers in different jurisdictions. This is critical from an operational perspective as using another packaging format as a standard will be much more difficult, much more expensive and will take much longer to implement.

Indeed, any changes in packaging format require manufacturing equipment modifications that impact compliance lead time much more significantly than mere packaging design modifications. Imposing a standardized packaging format involves major factory foot print modifications, from equipment relocation to conversion and even new equipment acquisition, each of which further increases complexity and compliance timelines. This is particularly the case for a slide and shell format as it is not a standard in the industry anywhere, but rather a peculiarity unique to Canada, such that Original Equipment Manufacturers have significant restrictions regarding their capacity to manufacture and deliver slide and shell machines in the short to medium term.

The CDRM requires reasonable time frames to be provided between the publication of new requirements and their coming into force to allow sufficient time for businesses and Canadians to make the necessary adjustments. As shown by the example above, recommendations made by the anti-tobacco lobby regarding operational decisions, although they may appear minor, are uninformed, provide no real benefit and can have serious negative implications, the effects of which run counter to the CDRM. The effects and impacts of operational decisions require in-depth understanding of the industry and meaningful and open consultation is required to avoid pitfalls.

## **6.2 NEW HEALTH WARNINGS**

On July 28, 2016, Health Canada issued a Request for Proposal seeking a contractor to develop new health warnings for tobacco products.<sup>lxix</sup>

The tender provides that the contract will be for approximately 100 weeks, with all deliverables to be provided to Health Canada by July 31, 2018. Health warnings, and particularly graphic health warnings, are a very significant component of tobacco product packaging design and production. Indeed, modifying health warnings on tobacco packaging is complex and requires a significant amount of time and investment on the part of tobacco manufacturers and numerous of its suppliers, as was previously explained to the Health Committee when the Government adopted 75% graphic health warnings.<sup>lxx</sup>

Given that both new health warnings and Plain Packaging have direct and significant implications on tobacco product packaging, coordination between these two measures, particularly regarding implementation timing, is essential. Consolidating the measures is essential in order to avoid operational difficulties, to ensure feasibility by the industry, and to avoid unnecessary administrative burden,

costs and disruptions to the industry and its suppliers twice in a relatively short period of time.

### **6.3 MEASURES BEYOND PLAIN PACKAGING**

Some of the measures proposed in the Consultation pertain to the standardization of tobacco products themselves. This is very different from, and goes far beyond, Plain Packaging despite their being presented in an indistinct way. Indeed, even the FCTC which merely recommends plain packaging measures makes no mention or recommendation regarding tobacco product standardization.

As for standardized packaging, regulations imposing changes to products, including standardization of length and diameter of the sticks for example, require equipment modifications that extend lead time in order to comply, particularly when enacted concurrently with other standardization measures.

Moreover, current tobacco product science and product design knowledge indicate that reducing product design capacity by standardizing filters, papers or cigarette dimensions can adversely change product emissions, smoke toxicity, smoking behaviour and impact the environment. As such, it is essential that the impact of product standardization measures is evaluated with suitable scientific studies and proper consultation to understand how product changes imposed on the tobacco industry by the Government can be detrimental to the health of Canadians.

Implementation of operational measures by Health Canada that could have a direct impact on the health of Canadians should not be done on a whim simply to further the agenda of the anti-tobacco lobby. Such measures must be based on robust evidence and thorough research.

## **7 UNINTENDED CONSEQUENCES: INCREASE IN ILLICIT TOBACCO PRODUCTS**

As detailed below, the measures proposed in the Consultation will make it incredibly enticing and easy for illegal operators to aggressively pursue counterfeit tobacco products, and for smokers to turn to contraband products. Mandatory labelling elements and existing security measures cannot serve to distinguish legitimate products from contraband. As such, as has been seen in Australia, contraband and counterfeit tobacco products will increase after Plain Packaging.

### **7.1 CREATION OF A COUNTERFEIT TOBACCO MARKET IN CANADA**

Canada is currently facing a contraband tobacco crisis. Since 2006, contraband tobacco has made up between 16.5% and 32.7% of Canadian tobacco sales depending on the year.<sup>lxxi</sup> A 2015 KPMG report measured Canada's contraband rate at 18%. Particularly troubling was the revelation that Ontario's contraband market is the second largest in the Americas at 31%, trailing only Panama and on par with El Salvador.<sup>lxxii</sup>

Contraband tobacco is any tobacco product that does not comply with all applicable federal and provincial statutes. This includes importation, stamping, marking, manufacturing, distributing and payment of duties and taxes.<sup>lxxiii</sup> Counterfeit tobacco is a specific type of contraband whereby illegal operators try

to replicate existing legitimate brands and pass off fake, mostly inferior quality products, as if they were manufactured by the legitimate brand owner.

While a certain trade in counterfeit tobacco products already exists in Canada, it is much smaller than the trade in other forms of contraband tobacco.<sup>lxxiv</sup> The current contraband tobacco market in Canada results primarily from illegal manufacturing,<sup>lxxv</sup> which involves illegal cigarette factories and smoke shacks located on First Nations territories, selling tobacco outside existing legal, regulatory and tax frameworks, and connected with more than 175 groups tied to organized crime.<sup>lxxvi</sup>

However, Plain Packaging for tobacco products offers illicit traders a golden opportunity to counterfeit legitimate manufacturers' products.

By implementing Plain Packaging, illicit traders will be provided with a regulation mandated "recipe" for tobacco packaging, making it exceedingly easy for illegal operators to reproduce packaging identical to that of genuine tobacco products.<sup>lxxvii</sup> As it appears from the images of contraband tobacco packages attached as Schedule A, illegal operators are well equipped to manufacture traditional slide and shell type packages, as well as square "flip-top" type packages. Standardizing the shape, colour, font, ink, printing, board, etc., of packages makes the job even easier for counterfeiters.

It is currently difficult for counterfeiters to make passable replicas of genuine tobacco product packages in view, notably, of packaging shape, designs, colours, inks, printing processes, materials used, etc. Once they are standardized, technical barriers to the production of counterfeit packages are removed.

Moreover, there is great incentive for counterfeiters to grow this segment of contraband tobacco products. Given the measures proposed in the Consultation, it will be very difficult, if not impossible, for consumers and for law enforcement, to differentiate between genuine products and counterfeit products, even once the package has been opened. Such measures essentially open the floodgates to an entirely new market, namely consumers who would never generally resort to contraband products but who are essentially being duped given the lack of indicia to allow them to distinguish between genuine and contraband/counterfeit products.

This new market would be doubly enticing for counterfeiters given the potential to make even more illegal profits than with contraband cigarettes. Indeed, unlike current consumers of contraband tobacco products who are primarily driven by price and therefore pay less, consumers who purchase counterfeit products generally believe that they are purchasing genuine products and would therefore be willing to pay a higher price, the difference being pure additional profit to the counterfeiters.

The measures proposed in the Consultation would effectively create a perfect storm in that they would simultaneously give counterfeiters an exact and easy-to-follow recipe, while removing all elements on the inside, as well as on the outside of cigarette packaging, allowing consumers to distinguish counterfeit from genuine tobacco products. Given that organized crime is already heavily involved in the



contraband tobacco trade, it is very naïve to believe that they would not readily take advantage of such an opportunity.

## **7.2 INCREASED CONTRABAND AS A RESULT OF INEVITABLE DOWN TRADING**

Not only is Plain Packaging likely to generate a counterfeit market catering to consumers who would not otherwise buy contraband tobacco, but it would also cause price to become the main driver for other smokers who will turn to the readily available contraband market given the very significant price differential between these products and even the least expensive legal tobacco products.

Brands, and the trademarks they represent, play an important role in the market, and their erosion or elimination changes the nature of the market. Without the ability to differentiate or offer the quality and value attributes created by trademarks and the brands they represent, manufacturers will find it challenging to compete on anything other than price.

As such, markets without brands become price-driven commodity markets. In such a market, consumers are likely to down trade to cheaper alternatives because there would be no reason to purchase more expensive products. In this situation, more consumers will simply choose the cheapest product available, even if it is contraband tobacco.

Indeed, in Australia, following the implementation of plain packaging measures, high-quality brands lost market share. This is confirmed by the KPMG report on the illicit tobacco trade in Australia, which clearly shows that there has been an increase in down trading in Australia following the introduction of plain packaging.<sup>lxxviii</sup> Adult smokers are moving away from the mid-priced and premium brands and towards cheaper cigarettes.

In fact, contraband products will be even more attractive to such consumers in a Plain Packaging market. Indeed, other than when it serves their purpose as for counterfeit products, it is illusory to believe that illegal operators will otherwise respect Plain Packaging laws any more than they respect current federal and provincial tobacco regulation. As such, the only branded cigarette packages on the market will be contraband tobacco. In addition to being the cheapest tobacco products available, smokers may very well consider such products to have a certain level of quality because of the branding, thereby further enticing them to turn to contraband tobacco.

## **7.3 INCREASE IN ILLEGAL TOBACCO IN AUSTRALIA**

The foregoing is supported by what happened in Australia after the implementation of plain packaging measures, where contraband tobacco rates increased significantly. Indeed, the KPMG report on the illicit tobacco trade in Australia mentioned above shows that from 2012 to 2015, annual consumption of illegal tobacco increased by 450,000 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.<sup>lxxix</sup>

While there are limitations in respect of any estimate of the illicit trade given its very nature as an illegal activity, the KPMG reports provide the most

comprehensive, timely and consistent (in terms of employing the same methodology over time) estimate of the illicit trade that is available from Australia.

In this regard, it is particularly telling that the Minister for Immigration and Border Protection in Australia very recently announced the significant expansion of the Australian Border Force Tobacco Strike Team in order to reduce the availability of illicit tobacco.<sup>lxxx</sup> Indeed, it is very difficult to imagine that such a significant investment of public funds and manpower would be considered justified if illicit volume and market share of illicit tobacco had not increased in Australia.

The repercussions on contraband tobacco are likely to be much more severe in Canada than in Australia given the significant differences between contraband tobacco markets in both countries. In Canada, the vast majority of contraband products are (and will likely remain) manufactured directly on First Nations territories within the country making such products much more readily available and accessible than in Australia, where contraband (including counterfeit) tobacco products must first be smuggled into the country.

#### **7.4 HEALTH WARNINGS AND TAX STAMPS DO NOT DISTINGUISH CONTRABAND FROM GENUINE TOBACCO PRODUCTS**

Existing measures such as graphic health warnings and tax stamps will not be able to distinguish contraband or counterfeit tobacco products from genuine ones, especially not by consumers, as these graphic health warnings and tax stamps are already readily found on contraband products.

Graphic health warnings cannot be relied upon. It is exceedingly easy for illegal operators to obtain the necessary information to reproduce graphic health warnings and other legally mandated labelling elements. These elements are publicly available and can readily be accessed online.<sup>lxxxi</sup>

As can be seen from the images of contraband tobacco products attached as Schedule B, illegal operators are already placing graphic health warnings on illicit products and they would do the exact same for counterfeit products as well.

With regard to tax stamps, the system has already shown to be flawed and unreliable. As evidenced by the photos attached as Schedule C, a disturbing trend can already be seen in the contraband marketplace: federal excise stamps are being used on illicit packages of cigarettes. In no way, shape or form do the baggies of cigarettes shown in Schedule C meet the labelling and packaging requirements explicitly set out in federal legislation, yet baggies like these are being found with legitimate federal tax stamps.

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 makes it clear that the Government is failing to police its own tax stamp system and suggests that a complete review of the regime is required.

Not only have legitimate stamps been found on clearly illegitimate products, but counterfeit stamps have also been found.

When the tobacco stamp system was launched, it was framed as a means to allow law enforcement and the public “to more easily detect and respond to counterfeit and illicit tobacco products.”<sup>lxxxii</sup> The Canada Revenue Agency said the stamps are designed “to enhance the integrity of the tobacco tax system and to combat the contraband tobacco market.”<sup>lxxxiii</sup> However, the presence of a tobacco stamp on packaging misleads consumers to believe that the product is legal and from a legitimate source when in many instances it is contraband. Moreover, many of the security features of tobacco tax stamps are covert, which by definition means that these features will not allow consumers to use tobacco tax stamps as a means of differentiating genuine from counterfeit products.

In a Plain Packaging environment, without branding and distinctive packaging formats, it will be exceedingly difficult for consumers, retailers and law enforcement to tell a legal from an illegal pack.

This becomes practically impossible if product standardization measures are adopted as well. In such a case, there will not be a single element to distinguish between legitimate and contraband/counterfeit cigarettes at any level. Illegal operators will no doubt rejoice that the Government wants to use the product already found in most illegal baggies as the new federally mandated standard for tobacco products in Canada.

In any event, it is naïve to believe that illegal operators will respect Plain Packaging regulations any more than they respect existing federal or provincial tobacco regulations. As such, unless and until tobacco control measures are enforced against all, including on First Nations territories, Plain Packaging is at best an illusory measure.

## **8 METRICS AND SAFEGUARDS**

From the above it is clear that the Plain Packaging policy and regulatory process in Canada are biased and flawed. Plain Packaging measures are illegal and violate international agreements to which Canada is a party, which exposes the Government to significant compensation awards, and the implementation of Plain Packaging will have very significant unintended negative consequences described above.

If Health Canada continues its single-minded pursuit of Plain Packaging regulations despite all the significant procedural and substantive issues raised above, it is incumbent upon it to provide clear metrics against which the measures can eventually be tested to assess their efficacy and determine whether they are indeed justified or not. If the measures fail to achieve their stated goals, the regulations need to be revisited and revised.

Indeed, the CDRM is clear in this regard when it states that “*Departments and agencies are responsible for ensuring that regulation continually meets its initial policy objectives and for reviewing regulatory frameworks on an ongoing basis.*”

In order to do so, a comprehensive PIR should be conducted to assess the available evidence in a transparent, fair and unbiased way (contrary to the approach of the Australian PIR) including:

- Assessing all available evidence, including the limitations of any such evidence, to draw independent conclusions;
- Commissioning an independent and transparent econometric modelling analysis of the effect of Plain Packaging on actual consumption and prevalence of smoking;
- Assessing the effectiveness and efficiency of Plain Packaging in meeting its objectives;
- Conducting a comprehensive cost-benefit analysis assessing the actual impact and effects of Plain Packaging, including unanticipated effects; and
- Considering whether the regulations are still required, or whether more appropriate options are available to meet the objectives.

This requires specific policy goals and precise metrics against which the policy's success or failure can be clearly measured to be spelled out from the outset. This is essential to ensure transparency and to avoid debate regarding the efficacy or justification of regulation measured against self-serving, ever changing goal posts.

## **9 CONCLUSION**

Reliable and probative data of more than three and a half years of application of plain packaging in Australia shows that the policy has not achieved its intended public health objectives, and has in fact had a number of unintended consequences, including a relative reduction in the price of cigarettes; a relative increase in the consumption of cigarettes; an acceleration in the shift from premium to non-premium brands; and a more than 20% increase in the size of the illicit tobacco market.

Plain Packaging will commoditize cigarettes, encourage down trading, including to contraband products and make counterfeiting easier. This will undoubtedly make Canada's already serious contraband tobacco problem much worse.

Plain Packaging is unlawful in Canada given that it would impermissibly interfere with free speech, deprives manufacturers of a right to use intellectual property, undermining decades of significant investment, and is inconsistent with obligations under WTO agreements and the provisions of NAFTA.

ITCAN supports effective, balanced, evidence-based regulation that meets public health objectives. However, experience from Australia, the only country that has fully implemented plain packaging to date, clearly indicates that measures like those currently being considered by Canada have not achieved their intended objectives.

Effective alternative policy measures exist that have been proven to work in other countries without the unintended consequences highlighted in this Response. We support efforts to address the risks associated with the use of tobacco products, including through youth education and creating a regulatory framework for e-cigarettes.

We also urge the government to continue to prioritize investment in combatting the illicit tobacco trade and to review the tax stamp regime, and devise proper methods for consumers and law enforcement to distinguish contraband and/or counterfeit from genuine products. We are ready and willing to work with Government to develop effective alternative policies. We strongly encourage widespread consultation that involves all impacted and potentially impacted parties across the value chain so as to mitigate unintended consequences and risks and better understand how alternative approaches could succeed here in Canada.

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- i <http://www.tbs-sct.gc.ca/hgw-cgf/priorities-priorites/rtrap-parfa/guides/cdrm-dcgr-eng.asp>.
- ii OECD, Recommendation of the Council on Regulatory Policy and Governance, 2012. Available at: <http://www.oecd.org/governance/regulatory-policy/49990817.pdf>.
- iii Jane Philpott, Minister of Health at a World No Tobacco Day press conference at Lisgar Collegiate Institute, Ottawa on May 31 2016.
- iv CDRM, *supra* note i.
- v See, e.g., "Smoking, drinking and drug use among young people in England in 2012" Editor: E Fuller, London: National Centre for Social Research, (2013); US Government and Human Services. "Preventing tobacco use among young people: A report of the Surgeon General". (1994) (summarizing approximately 160 studies on the subject of the psychosocial risk factors associated with underage tobacco use); *see also* US Government and Human Services. "Preventing tobacco use among youth and young adults: A report of the Surgeon General" (2012), at Ch. 4 (reinforcing findings of 1994 Surgeon General's report with added emphasis on individual cognitive processes).
- vi See, e.g., Halpern M, Warner K. "Motivations for smoking cessation: A comparison of successful quitters and failures", *Journal of Substance Abuse*, 5, 247-56, (1993); McCaul KD, Hockemeyer JR, Johnson RJ, Zetoch K, Quinlan K, Glasgow RE. "Motivation to quit using cigarettes: A review", *Addictive Behaviours*, 31(1) 42-56, (2006); Caponnetto P, Polosa R. "Common predictors of smoking cessation in clinical practice", *Respiratory Medicine*, 102, 1182-1192, (2008); Pisinger C, Aadahl M, Toft U, Jørgensen T. "Motives to quit smoking and reasons to relapse differ by socioeconomic status", *Preventive Medicine*, 52, 48-52, (2010).
- vii Goldberg M, Liefeld J, Kindra G, Madill-Marshall J, Lefebvre J, Martohardjono N, Vredenburg H., When packages can't speak: Possible impacts of plain and generic packaging of tobacco products - Expert panel report for Health Canada (March 1995) [*Goldbert et al.*].
- viii *Ibid* at 184.
- ix The Centre for Tobacco Control Research Core funded by Cancer Research U.K., "The packaging of tobacco products", (March 2012), at 31.
- x See <http://www.npr.org/2016/05/24/479349619/cdc-report-reveals-decline-in-american-smokers>.
- xi See <http://www.statcan.gc.ca/tables-tableaux/sum-som/101/cst01/health74b-eng.htm>.
- xii See <http://healthycanadians.gc.ca/science-research-sciences-recherches/data-donnees/ctads-ectad/summary-sommaire-2013-eng.php>.
- xiii See <https://www.gov.uk/government/news/e-cigarettes-around-95-less-harmful-than-tobacco-estimates-landmark-review>.
- xiv E-cigarettes offer real potential to reduce harm, Mark Tyndall, Ottawa Citizen, June 5, 2014.
- xv It's time to authorize the sale of electronic cigarettes, Gaston Ostiguy, Montreal Gazette, March 25, 2014.
- xvi Public Health and Electronic Cigarettes, David Sweanor, Canadian Journal of Respiratory Therapy, Volume 50, Number 2, Summer 2014.
- xvii See <http://www.ecigarette-direct.co.uk/content/interview/e-cigarette-interview-david-sweanor/2/>.
- xviii See <https://nicotinepolicy.net/documents/letters/MargaretChan.pdf>.
- xix See <https://www.cancer.ca/en/get-involved/take-action/what-we-are-doing/tobacco-control/current-issues/?region=on#acc-panel-6>
- xx The full testimony is available at: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=6742722&Language=E&Mode=1&Parl=41&Ses=2>.
- xxi <http://plus.lapresse.ca/screens/859ddd9b-92c6-404b-ba63-024809c00324%7CRwrioE1.JKxE.html>
- xxii <https://buyandsell.gc.ca/procurement-data/tender-notice/PW-16-00726264>;
- xxiii See pages 42 – 43 of [http://buyandsell.gc.ca/cds/public/2016/03/11/6690f402f4f0695882ed3bd389240220/1000179835\\_english\\_translation.pdf](http://buyandsell.gc.ca/cds/public/2016/03/11/6690f402f4f0695882ed3bd389240220/1000179835_english_translation.pdf).

- xxiv Davidson, Sinclair and de Silva, Ashton, "Stubbing Out the Evidence of Tobacco Plain Packaging Efficacy: An Analysis of the Australian National Tobacco Plain Packaging Survey" (May 17, 2016) available at SSRN (<http://ssrn.com/abstract=2780938>) [*Stubbing Out the Evidence of Tobacco Plain Packaging Efficacy*]. McKeganey et al. "Tobacco plain packaging: Evidenced based policy or public health advocacy?" *International Journal of Drug Policy* Volume 26, Issue 6, Pages 560–568 (2015); Davidson et al. "The plain truth about plain packaging: An econometric analysis of the Australian 2011 tobacco plain packaging Act." *Agenda: A Journal of Policy Analysis and Reform* (Volume 21, Number 1, 2014); Plain Packaging and Its Unintended Consequence, Montreal Economic Institute, 15 August, 2011. Available at: [http://www.iedm.org/files/note0811\\_en.pdf](http://www.iedm.org/files/note0811_en.pdf); [Plain packaging: Commercial expression, anti-smoking extremism and the risks of hyper-regulation](#); Christopher Snowdon, Plain Packaging – Commercial express, anti-smoking extremism and the risks of hyper regulation, Adam Smith Research Trust, 2012. Available at: <http://static1.squarespace.com/static/56eddde762cd9413e151ac92/t/573c949c4d088e9a7fed45f6/1463587999195/plain-packaging.pdf>; Patrick B., John L., Erasing Intellectual Property: "Plain packaging" for Consumer Products and the Implications for Trademark Rights, Washington Legal Foundation, 2011. Available at: <http://www.wlf.org/Upload/legalstudies/monograph/LuikBashamMonographFnl.pdf>; Erik Bloomquist, Global Tobacco: The Plain Risk to Global Tobacco, Berenberg Bank, March 2011. Available at: <http://www.smoke-free.ca/plain-packaging/documents/2011/Philip%20Morris%20-%20Annex%2012%20-%20Bloomquist,%20Berenberg%20Bank%20-%20The%20Plain%20Risk%20to%20Global%20Tobacco%20-%202021%20March%202011.pdf>;
- xxv *Goldbert et al, supra note vii.*
- xxvi Scheffels J. 2008, A difference that makes a difference: young adult smokers' accounts of cigarette brands and package design. *Tob Control*. 17(2):118–122.
- xxvii U.S. Department of Health and Human Services, 2012, The Tobacco Industry's Influences on the Use of Tobacco Among Youth. In: Preventing Tobacco Use Among Youth and Young Adults. A Report of the Surgeon General. Rockland, MD: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, at p. 602. Available at: [http://www.ncbi.nlm.nih.gov/books/NBK99237/pdf/Bookshelf\\_NBK99237.pdf](http://www.ncbi.nlm.nih.gov/books/NBK99237/pdf/Bookshelf_NBK99237.pdf).
- xxviii Ford A, Moodie C, MacKintosh AM, Hastings G. 2014, Adolescent perceptions of cigarette appearance, *Eur J Public Health*. 24(3):464–468.
- xxix Hammond D, Parkinson C, 2009, The impact of cigarette package design on perceptions of risk, *J Public Health*. 31(3):345–353.
- xxx Moodie C, Ford A. 2011. Young adult smokers' perceptions of cigarette pack innovation, pack colour and plain packaging. *Austral Market J*. 19(3):174–180.
- xxxi See Treasury Board of Canada Secretariat, *Guidelines for Effective Consultations* <https://www.tbs-sct.gc.ca/rtrap-parfa/erc-cer/erc-cer-eng.pdf> and <http://www.tbs-sct.gc.ca/hgw-cgf/priorities-priorites/rtrap-parfa/guides/index-eng.asp>
- xxxii See [http://www.camh.ca/en/research/news\\_and\\_publications/ontario-student-drug-use-and-health-survey/Documents/2015%20OSDUHS%20Documents/2015OSDUHS\\_Detailed\\_DrugUseReport.pdf](http://www.camh.ca/en/research/news_and_publications/ontario-student-drug-use-and-health-survey/Documents/2015%20OSDUHS%20Documents/2015OSDUHS_Detailed_DrugUseReport.pdf).
- xxxiii See [http://www.hc-sc.gc.ca/hc-ps/tobac-tabac/research-recherche/stat/\\_survey-sondage\\_2012-2013/result-eng.php](http://www.hc-sc.gc.ca/hc-ps/tobac-tabac/research-recherche/stat/_survey-sondage_2012-2013/result-eng.php).
- xxxiv <http://www.cbc.ca/news/politics/world-is-going-to-be-looking-to-canada-on-pot-legalization-jane-philpott-says-1.3340383>.
- xxxv <http://news.gc.ca/web/article-en.do?mthd=advSrch&crtr.dpt1D=6681&nid=1092399&crtr.tp1D=1&crt>.
- xxxvi Jane Philpott, Minister of Health at a World No Tobacco Day press conference at Lisgar Collegiate Institute, Ottawa on May 31 2016.
- xxxvii <http://healthycanadians.gc.ca/healthy-living-vie-saine/substance-abuse-toxicomanie/controlled-drugs-substances-controlees/marijuana/about-au-sujet-eng.php#a4>.
- xxxviii *Marijuana industry closely watches advertising rules*, CBC News, July 9, 2016, <http://www.cbc.ca/news/politics/marijuana-advertising-1.3665098>
- xxxix [www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=42&Ses=1&DocId=8174744](http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=42&Ses=1&DocId=8174744).
- xl The inadequacy of evidence on attitudes and precursors to behaviour as a basis to evaluate the effectiveness of tobacco control policies was looked at by the U.S. Court of Appeals decision in *R.J. Reynolds Tobacco Co. v. Food and Drug Admin*. The Court stated: "FDA makes much of the "international consensus" surrounding the effectiveness of large graphic warnings, but offers no evidence showing that such warnings have directly caused a material decrease in smoking rates in any of the countries that now require them. While studies of Canadian and Australian youth smokers showed that the warnings on cigarette packs caused a substantial number of survey participants to think - or think more - about quitting smoking...it is mere speculation to suggest that respondents who report increased thoughts about quitting smoking will actually follow through on their intentions. And at no point did these studies attempt to evaluate whether the increased thoughts about smoking cessation led participants to actually quit."

- xli Plain packaging came into effect in Australia on 1 December 2012.
- xlii Michelle Scollo, Meghan Zacher, Kerri Coomber, Megan Bayly, and Melanie Wakefield, Changes in Use of Types of Tobacco Products by Pack Sizes and Price Segments, Prices Paid and Consumption Following the Introduction of Plain Packaging in Australia, *Tobacco Control* 2015;24:ii66-ii75.
- xliii *Ibid.*
- xliv *Ibid*, at ii73.
- xlvi Stubbing Out the Evidence of Tobacco Plain Packaging Efficacy, *supra* note xxiv.
- xlvi Post-Implementation review- Tobacco Plain Packaging – 2016 [*PIR Report*], <https://ris.govspace.gov.au/files/2016/02/Tobacco-Plain-Packaging-PIR.pdf>
- xlvii *Ibid*, at ¶67.
- xlviii [http://www.google.ca/url?url=http://mic.gob.do/media/22058/20160323%2520-%2520DOM%2520Integrated%2520Executive%2520Summary%2520\(EN\).pdf&rct=j&frm=1&q=&esrc=s&sa=U&ved=0ahUKEwjA\\_8DP6tzOAhWmKcAKHQEPCaYQFggTMAA&usg=AFQjCNGeSCkALm\]4g4w8kBJYIEVcCYH GFA](http://www.google.ca/url?url=http://mic.gob.do/media/22058/20160323%2520-%2520DOM%2520Integrated%2520Executive%2520Summary%2520(EN).pdf&rct=j&frm=1&q=&esrc=s&sa=U&ved=0ahUKEwjA_8DP6tzOAhWmKcAKHQEPCaYQFggTMAA&usg=AFQjCNGeSCkALm]4g4w8kBJYIEVcCYH GFA); See in particular ¶¶72-79 in relation to the evidence on the impact of plain packaging on smoking in Australia, and ¶¶80-82 specifically in relation to the PIR.
- xlix *PIR Report, supra* note xlvi, ¶140.
- l Stubbing Out the Evidence of Tobacco Plain Packaging Efficacy, *supra* note xxiv.
- li *Ibid* at page 11.
- lii *Ibid* at page 10.
- liii *Ibid* at page 12.
- liv *Ibid* at page 11.
- lv Trade-marks Act (R.S.C., 1985, c. T-13)[TMA].
- lvi 2013, World Intellectual Property Report, available at [http://www.wipo.int/edocs/pubdocs/en/intproperty/944/wipo\\_pub\\_944\\_2013.pdf](http://www.wipo.int/edocs/pubdocs/en/intproperty/944/wipo_pub_944_2013.pdf).
- lvii TMA, *supra* note lv, ss. 30 and 40.
- lviii *British American Tobacco Australasia Limited v The Commonwealth*, [2012] HCA 43.
- lix *British American Tobacco & others v. Department of Health*, [2016] EWHC 1169 at paras. 737-743 (Admin).
- lx Registration of a trademark in Canada gives the owner the right to exclude anyone else from using that same trademark anywhere in Canada irrespective of whether the owner is also using its trademark in the same area. This is said to be one of the three main distinctions or advantages of registering a trademark in Canada: GILL and JOLIFFE, *Fox on Canadian Law of Trade-marks and Unfair Competition*, 4th ed. (Thomson Carswell: Toronto) at §7.9(a); *Molson Canada v. Oland Breweries Ltd.*, 2002 CanLII 44947 at paras. 12, 16 (Ont. C.A.); *Remo Imports Ltd. v. Jaguar Cars Ltd.*, 2007 FCA 258 at paras. 111-113.
- lxi *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387 at para. 55.
- lxii *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
- lxiii *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 [RJR-MacDonald]; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30.
- lxiv Charter, *supra* note 63.
- lxv Tobacco packaging, trans fats to be part of government's 'activist' health agenda, Mark Kennedy, Ottawa Citizen, November 19, 2015(<http://ottawacitizen.com/news/politics/tobacco-packaging-eliminating-trans-fats-to-be-part-of-governments-activist-health-agenda>): "It's widely known, of course, the tremendous health risks associated with smoking."
- lxvi NAFTA, Article 1110: Expropriation and Compensation 1. 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 in accordance with paragraphs 2 through 6. 2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.
- lxvii <http://www.smokefreens.ca/wp-content/uploads/2016/07/ConsultationGuidePP2016.pdf>.
- lxviii [http://apps.who.int/iris/bitstream/10665/207478/1/9789241565226\\_eng.pdf?ua=1](http://apps.who.int/iris/bitstream/10665/207478/1/9789241565226_eng.pdf?ua=1);
- lxix [http://apps.who.int/iris/bitstream/10665/206456/1/WHO\\_NMH\\_PND\\_16.1\\_eng.pdf?ua=1](http://apps.who.int/iris/bitstream/10665/206456/1/WHO_NMH_PND_16.1_eng.pdf?ua=1);
- lxix <https://buyandsell.gc.ca/procurement-data/tender-notice/PW-16-00742166>;
- [https://buyandsell.gc.ca/cds/public/2016/07/28/f500703e1f91186c2fb8be436c028ef2/1000179470\\_rfp\\_english.pdf](https://buyandsell.gc.ca/cds/public/2016/07/28/f500703e1f91186c2fb8be436c028ef2/1000179470_rfp_english.pdf)
- lxx <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=41&Ses=1&DocId=5100652>
- lxxi Illicit usage of cigarettes – national study for the CTMC, GFK Research Dynamics, 2007, 2008, 2010.
- lxxii Project Frost, KPMG, May 27, 2015.

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- lxxiii RCMP, Contraband Tobacco Enforcement Strategy, 2008. Available at: [www.rcmp-grcg.c.ca/pubs/tobac-tabac/tobacco-tabac-strat-2008-eng.pdf](http://www.rcmp-grcg.c.ca/pubs/tobac-tabac/tobacco-tabac-strat-2008-eng.pdf).
- lxxiv RCMP, Contraband Tobacco Enforcement Strategy, August 2011. Available at: <http://www.rcmp-grc.gc.ca/pubs/tobac-tabac/2012-contr-strat/2012-eng.pdf>.
- lxxv RCMP, Contraband Tobacco Enforcement Strategy, August 2011. Available at: <http://www.rcmp-grc.gc.ca/pubs/tobac-tabac/2012-contr-strat/2012-eng.pdf>.
- lxxvi RCMP testimony to the House of Commons Public Safety and National Security Committee, April 27, 2010.
- lxxvii Letter from the International Trademark Association (INTA) to Greg Loyst dated April 18, 2016, <http://www.inta.org/Advocacy/Documents/2016/Health%20Canada%20Loyst%204.18.2016.pdf>.
- lxxviii KPMG Illicit Trade in Australia 2015 Full Year Report, 15 April 2016 [*KPMG Illicit Trade in Australia*], available at <https://home.kpmg.com/content/dam/kpmg/pdf/2016/04/australia-illicit-tobacco-2015.pdf>
- lxxix *KPMG Illicit Trade in Australia*, *ibid*.
- lxxx <http://www.minister.border.gov.au/peterdutton/2016/Pages/expansion-abf-tobacco-strike-team.aspx>.
- lxxxi <http://healthycanadians.gc.ca/publications/healthy-living-vie-saine/health-labels-cigarettes-etiquettes-sante/index-eng.php>.
- lxxxii <http://www.marketwired.com/press-release/new-tobacco-excise-stamp-on-cigarette-packages-one-step-closer-against-tobacco-contraband-1044340.htm>.
- lxxxiii <http://www.cra-arc.gc.ca/nwsrm/fctshts/2009/m09/fs090914b-eng.html>.



SCHEDULE A  
EXAMPLES OF CONTRABAND TOBACCO PACKAGES  
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SLIDE AND SHELL



Flip-Top



## SCHEDULE B

### 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.

# SCHEDULE C

## FEDERAL EXCISE STAMPS ON CONTRABAND TOBACCO PRODUCTS

