Packaging Phoney Intellectual Property Claims

How multinational tobacco companies colluded to use trade and intellectual property arguments they knew were phoney to oppose plain packaging and larger health warnings.

And how governments fell for their chicanery.

(Revision of "Plot Against Plain Packaging, April 2008)

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Any initiative affecting cigarette packs be it for bigger warnings. repositioned warnings, wider declaration of constituents, more space for consumer information, inserts, quit information or a progression toward plain packs should not be contested as a health issue, a children's smoking issue, or a consumer information Issue .

It should be treated as expropriation of Intellectual Property and contested politically on that basis. If this strategy is followed the industry has a greater chance of both setting its own agenda and avoiding the need to critique anti-smoking proposals from a back foot position.

Tobacco institute of New Zealand
May 1993[1]

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TIME LINE

June 1986[2]
Canadian Medical Association annual general meeting supports motion of Dr. Gerry Karr in favour of plain packaging.

June 1987[3]
Canadian Medical Association President, Jake Dyck, calls on federal government to require "tobacco products be sold in plain, standard-size packages that state: 'This product is injurious to your health'."

January 1988
National Council on Tobacco or Health and the Non Smoker's Rights Association recommend to the committee reviewing Canada's first tobacco control law, the *Tobacco Products Control Act,* that they include in the law measures that will allow for plain or generic packaging.

May 1989[4]
On the eve of the release of the New Zealand Toxic Substances Board Report "Health or Tobacco An End to Tobacco Advertising and Promotion," a newly formed New Zealand Coalition Against Tobacco Advertising and Promotion announces it will press for 'generic' packaging of cigarettes.

September 1989[5]
In response to a request from New Zealand's Toxic Substances Board, its principal Medical Officer, Dr. Murray Laugesen, prepares a policy paper "Tobacco promotion through product packaging."

1989-1990[6]
University of Otago (NZ) researchers Park Beede, Rob Lawson and Mike Shepherd produce a study on "the promotional impact of cigarette packaging"

April 1990[7]
Swedish lawyer professor, Ulf Bernitz has an article published in the European Intellectual Property Review. "Logo licensing of tobacco products – Can it be Prohibited" concluding "such bans incompatible with long established principles of international trade mark law."

August 28, 1990[8]
New Zealand's *Smokefree Environments Act* receives Royal Assent. Plain packaging was referred to during committee review, but not included in law.

October 27, 1990
New Zealand General Election. Labour defeated. National Party (leader Jim Bolger) elected.

October 1991[9]
In response to the government green paper, "*The Health of the Nation:A consultative document for Health in England",* U.K. ASH issues a manifesto for tobacco control that includes plain packaging as a recommendation.

April 1992[10]
The Australian Centre for Behavioural Research in Cancer (CBRC) publishes a report "Health Warnings and Contents Labelling on Tobacco Products" including a recommendation for standard/plain packaging.

April 15, 1992[11]
The Australian Ministerial Council on Drug Strategy (composed of health ministers) proposes large new warnings and asks for a report on plain packaging.

July 22, 1992[12]
Wills Australia writes Peter Hughes, Vice Consul (Commercial) at the British Consulate General to protest the MCDS labelling proposals this "represent a major interference with the proprietors' rights to use these marks and is a radical departure from international practice. "

August 6, 1992[13]
Wills Australia writes BAT to ask for help in blocking new health warnings and informs that they have received advice that the proposals are **not** in breach of the Paris Convention on Industrial policy nor the

October 23, 1992[14]
Australia files a notice with GATT of intention to change regulations on the labelling of tobacco products.

October 1992[15]
The European Smoking agency, BASP, puts out a call for plain packaging.

1992
EU Labelling Standard comes into force. Warnings must cover 4% of the package surface.

December 1992[16]
Western Australia gazettes proposed regulations based on April announcement for warnings that cover 100% of the rear panel. Proposed implementation date is 1 July 1993.

January 6, 1993[17]
Canadian Cancer Society releases report on Plain packaging showing that it would break, or substantially weaken, the link between the package and other promotions.

January 22, 1993[18]
Wills New Zealand writes BAT UK to outline its approach to plain packaging.

March 19, 1993[19]
Canada gazettes proposals to increase size of health warnings (from about 20% to 25% and including a border which increases the total area to about 33%) and move them to the top of the pack. "

April 2, 1993[20]
Philip Morris US head office recommends to Australian companies a GATT challenge to labelling from countries which export tobacco to Australia to challenge at GATT the labelling process.

April 8, 1993
Canada files a notice at TBT of its intention to change warning labels.

April 8, 1993[21]
Rothmans UK describes a "slim chance of using the GATT mechanism for consultation in order to delay proceedings" on Canadian health warning messages.

April 19, 1993[22]
EU GATT liaison requests Canada provide more time to comment on warning labels.

April 21, 1993[23]
Australian tobacco companies solicit opinion from law professor Michael Pendleton to override their own solicitors' advice that plain packaging is not an infringement of intellectual property laws.

29 April 1993[24]
Canada agrees to longer comment period for warnings gazetted in March.

May 5, 1993[25]
EU GATT liaison informs Canada that proposed September 1 implementation date for new warning labels is too short and that it will be "virtually impossible" for European manufacturers to meet the deadline.

May 1, 1993.
The Tobacco institute of New Zealand outlines its strategy for "protection of intellectual property" by treating it as "expropriation of Intellectual Property and contested politically on that basis."

May 11, 1993[26]
Tobacco Institute of Australia outlines its "Taurus Strategy" to fight warnings and notes "The industry in Australia must, therefore, focus its attention increasingly on international developments in the area of GATT/TRIPS."

May 13, 1993[27]
UK Consul General in Australia writes DTI to enquire about "claims by Wills and Rothmans that Australian proposals to alter the requirements for cigarette package labelling may be in contravention of Australia's GATT obligations."

May 1993[28]
Rothmans international proposes that the multinational companies form a global industry committee to address packaging and labelling issues.

June 2 1993[29]
Rothmans writes UK Department of Trade and EC Commission to encourage them to ask for Australia's TBT notification on package warnings "null and void"

June 4, 1993[30]
Tony Wood of Australia's Rothmans branch reports that Canada has used the "GATT weapon" to "slow down their Phase II Regulations by as much as 75 days."

July 8, 1993[31]
Australian Ministerial Council on Drug Strategy backs down on labelling proposal of April 1992 and now proposes 25% of the front, 33% of the back and a side panel.

July 14, 1993[32]
New Zealand Public Health Commission provides the New Zealand Tobacco Institute with a draft of a proposed tobacco policy paper "Smoke-Free New Zealand 2000" which proposes "varied warnings, packet redesign and plain packaging."[33]

July 14, 1993[34]
Australian companies strategize to persuade one Australian state to adopt the smaller EU standard, and then shift manufacturing to that state. If this fails they see "using GATT procedures and technicalities it is possible to delay the implementation of the MCDS proposal. "

July 15, 1993[35]
Victorian Premier Jeff Kennett (who is being courted to support smaller EU size warnings) meets with BAT officials in London.

July 26, 1993[36]
British Consulate (Vice Consul, Commercial – Hughes) sends Australian companies the response he has received from this government that the Pendleton view of their labelling rights would require "several very large imaginative leaps."

September 22, 1993[37]
First meeting of the inter-company Plain Pack Working Group, also known as the Plain Pack Group (PPWG/PPG).

September 30, 1993[38]
Australian state of Victoria gazettes packaging regulations in line with EU, as the tobacco companies had encouraged its premier, Jeff Kennett, to do. Subsequently, the Australian federal Health Minister says that Special Commonwealth legislation will be used to establish July 1993 proposed labelling.

September 1993[39]
Tobacco Institute circulates its preliminary submission to the Public Health Commission report, saying: "The PHC is wrong to propose the appropriation by Government of intellectual property as such an appropriation would be contrary to international trade conventions to which New Zealand is a signatory."

November 1993[40]
Australia establishes an Industry Commission to inquire about "The Tobacco Growing and Manufacturing Industries."

November 29, 1993
Industry "Plain Pack Group" holds its second meeting.

November 30, 1993[41]
The Centre for Health Promotion, University of Toronto, publishes a report "Effects of Plain Packaging on the image of tobacco products among youth."

1994
US Institute of Medicine report "Growing Up Tobacco Free" recommends plain packaging be considered.

January 1, 1994
North American Free Trade Agreement goes into effect.

January 6, 1994
British MP, Ian Mills advises Rothmans on how to influence parliamentarians against packaging reform (Terry Lewis, MP was poised to introduce bill to improve labelling).

January 1994[42]
BAT's Australian subsidiary tells a government inquiry that generic packaging is contrary to "intellectual properties and rights advocated by GATT."

February 8, 1994[43]
Canadian Prime Minister Chrétien announces a reduction in federal tobacco taxes (and encourages provinces to follow suit). A review of plain packaging is promised as a way of compensating for the impact of tax reductions.

March 4, 1994[44]
Supreme Court of Canada denies the industries request for a stay on health warnings during the time that the challenge to the *Tobacco Products Control Act* was heard.

March 14, 1994[45]
The Plain Pack Group has its third meeting.

March 24, 1994
Canadian House of Commons Health Committee opens up hearings on plain packaging and holds a press conference.

March 25, 1994[46]
Ed Lang, chair of RJR-Macdonald writes Chretien to warn againt plain packaging. Raises several concerns, including GATT/NAFTA.

March 25, 1994[47]
On behalf of the Plain Pack Group, BAT solicitor writes to ask WIPO whether plain packaging is an infringement of trade mark rights.

March 29, 1994[48]
Australia gazettes regulations for national-wide regulations on pack labelling.

March 30, 1994[49]
Wills issues press release that warning regulations "are a clear breach of the recently signed GATT agreement," but internally admit that their claims are not defensible ("Regrettably, there would be legal difficulties if we were required to take the matter as far as the courts, however.")

April 6, 1994[50]
International Trade Mark Association is asked by Rothmans to participate in Canadian hearings on plain packaging.

April 12, 1994
Canadian Standing Committee on Health begins hearings on plain packaging.

April 12, 1994[51]
Rothmans circulates to other companies a note on "International Trade Aspects of Labelling", which concludes "The international trade argument by itself will not however be sufficient to ward off the threat of plain packs."

April 15, 1994
BAT writes again to WIPO to request reply.[52]

April 19, 1994
Plain Pack Group has its 4th meeting.

April 16, 1994
Canada signs new WTO agreements.

April 27, 1994
International Trade Mark Association (Richard Berman, president) submits to Standing Committee its opinion that trademarks have value. Notably, makes no reference to protection of trademarks under international law.

April 29, 1994[53]
BAT provides Standing Committee with opinions by Lovell White Durrant that plain packaging is an infringement of TRIPS.

May 3, 1994[54]
US/CAN Carla Hills, former U.S. Trade Representative, provides opinion that plain packaging contravenes NAFTA, and Paris Convention.

May 5, 1994[55]
Philip Morris, which also owned Kraft Foods and other consumer good companies, threatens economic retaliation for plain packaging, telling Commons Committee that "If Canada adopts legislation in total disregard of internationally recognized trademark rights, this would be a significant consideration in any new investment decisions… [Philip Morris is] reluctant to allow its trademarks to be subject to a Government which would expropriate these valuable property rights in disregard of its international treaty obligations."

May 5, 1994[56]
EC rejects appeal from companies to file GATT complaint with respect to Australian warning labels.

May 10, 1994[57]
Former U.S. deputy trade commissioners Julius Katz and former U.S. trade representative Carla Hills (on behalf of Philip Morris and RJ Reynolds) tells the Standing Committee that Plain Packaging would be an infringement of GATT, NAFTA and the Paris Convention.

May 1994[58]
National Intellectual Property Section of the Canadian Bar Association testifies that plain packaging violates international law.

May 11, 1994[59]
BAT's high level tobacco strategy group is told that the Plain Pack Group has found "little joy" in trade agreements and that they "afford little protection" from plain package laws.

May 14, 1994
Canadian Standing Committee on Health ends public hearings on plain packaging.

May 25, 1995[60]
New Zealand Public Health Commission pre-releases a summary of responses to its discussion paper, noting that "Several submissions support all tobacco products being sold in plain packaging, white background with standardised black lettering," but that opposition to improved warnings includes the view that "the amendments will be in breach of relevant trade-mark conventions."

June 1, 1994[61]
John Luik is engaged by PPWG as project manager on plain package book.

June 16, 1994[62]
Wills succeeds in getting Australian Office of Regulation Review to demand a review of the new Australian regulations on labelling.

June 21, 1994[63]
Canadian Standing Committee on Health presents its report on plain packaging "Towards Zero Consumption."

June 21, 1994
Plain Pack Group meets.

July 4, 1994[64]
BAT Executive Directors and Heads of Department are briefed by Purdy Crawford on plain packaging developments in Canada.

July 5 1994[65]
WIPO tells BAT that there is the Paris Convention does not contain any obligation to the effect that the use of a registered trademark must be permitted.

July 6, 1994[66]
BAT circulates WIPO response to other companies, saying "I anticipate that the reason he had not replied earlier was that he did not feel he had anything helpful to say. Certainly his letter does not take us further."

July 21, 1994[67]
David Bacon presents an analysis of that there is "little joy" in trade agreements for tobacco companies to BAT's General Managers.

Aug 5, 1994[68]
Former U.S. Register of Copyrights, Ralph Oman, writes WIPO and sends May 3 opinion from Carla Hills.

August 31, 1994[69]
WIPO tells Ralph Oman that Carla Hill's opinion is wrong.

September 21, 1994[70]
International Chamber of Commerce, after a request from BAT,[71] writes Canada's trade minister, Roy Maclaren, to repeat the opinion that Canada's obligations under the Paris Convention stood in the way of plain packaging.

October 26, 1994[72]
Plain Pack Working Group meets.

October 1994
9th World Conference on Tobacco or Health passes a resolution in favour of plain packaging of cigarettes.

November 18, 1994[73]
Health Canada tables response to Standing Committee report, deferring decision until "the findings of an Expert Panel on the role of genetic packaging in reducing the inducement to purchase and use tobacco products will be taken into account, as will the international trade, contraband and economic implications of generic packaging… The legal ramifications of generic packaging must also be considered."

January 12, 1995[74]
The U.K. companies meet with the Department of Health to discuss forthcoming legislation on labelling and are pleased to hear the public servants and Minister are on their side and "keen to kill off the Lewis Bill at an early stage." They also note that the UK is blocking the EU directive on advertising. BAT marshals IP arguments against Terry Lewis' bill on tobacco labelling. [75]

January 18, 1995[76]
Washington State Senator Mike Heavey proposes legislation to require plain packaging.(Senate Bill 5300). PM International provides materials used in Canada to combat "Seattle Plain Packaging Proposal" [77]

February 1995[78]
BAT's Australian subsidiary, WD & HO Wills tells the Australian Senate that generic packaging would violate international law and the Australian constitution.

March 14, 1995[79]
Tobacco Institute of Hong Kong tells Hong Kong government that its proposed Smoking (Public Health) (Amendment) Bill 1996 would diminish commercial value of trademarks and may violate Paris Convention, GATT and TRIPS.

May 18, 1995[80]
Health Canada releases its expert report "When packages can't speak." Industry responds by repeating trade concerns.[81]

May 31, 1995[82]
BAT writes Thai government to signal Ingredient disclosure regulation as a breach of intellectual property.

July 17, 1995[83]
Australian Medical Association says it will be pushing for Plain Packaging

July 24, 1995[84]
Australian health minister Carmen Lawrence rejects the idea of plain packaging on international trade and legal grounds. "A spokeswoman for the Minister of Health, Dr. Lawrence, said this would breach constitutional requirements for free trade. "Unfortunately, it is just not feasible," the spokeswoman said "We would have to buy the tobacco companies' trademarks and that would cost us hundreds of millions of dollars".

September 21, 1995
Supreme Court of Canada strikes down *Tobacco Products Control Act.*

December 11, 1995[85]
Health Canada releases *a "Blueprint to protect the health of Canadians,"* a framework for renewed legislation that makes scant mention of plain packaging.

December 15, 1995[86]
Australian Senate Community Affairs References Committee releases its (160 page) report. "The Committee considers that, on the basis of the evidence received, there is not sufficient evidence to recommend that tobacco products be sold in generic packaging."

December 6, 1996[87]
David Dingwall tells parliamentary committee that companies must be allowed to display their trademark names in accordance with Canada's constitution and international law.

February 13, 1997[88]
Lithuania Constitutional Court notes that a ban on alcohol advertising does not violate Paris Convention. "The Constitutional Court notes that the disputed laws do not contain any norms which imposed direct prohibition to make use of trade marks …there are no legal grounds to assert that the right to a trade mark has priority over people's health."

September 1997[89]
Australian government formally replies to Senate Committee Report: "In response to the mounting interest In generic packaging, the Commonwealth obtained advice from the Attorney General's Department on the legal and constitutional barriers to generic packaging. This advice Indicates that the Commonwealth does possess powers under the Constitution to introduce such packaging but that any attempt to use these powers to introduce further tobacco control legislation needs to be considered in the context of the increasingly critical attention being focussed on the necessity, appropriateness, justification and basis for regulation by such bodies as the Office of Regulatory Review, the High Court, and Senate Standing Committees. In addition, further regulation needs to be considered in the context of Australia's international obligations regarding free trade under the General Agreement on Tariff and Trade (GATT), and our obligations under International covenants such as the Paris Convention for the Protection of Industrial Property, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)."

October 30, 1997[90]
BAT writes EC Commission DG Johannes Beseler to complain about Thailand's Ingredient disclosure

December 10, 1997[91]
EC DG Beserer replies to BAT to suggest that while Thailand was being asked to provide notice of TBT, that they did not see a problem with compliance. "Article 39.2 of the TRIPS agreement only aims to prevent information from being disclosed to, acquired by, or used by others without consent of the lawful owner. Article 39.2 does not deal with the question whether or not a Government is allowed to ask for information, e.g. for the grant of marketing approval of certain products."

1998[92]
Book on plain packaging, edited by John Luik is published with funding from all of the major multinational tobacco companies. Six chapters are written or co-written by Canadians.

October 19, 1998[93] [94]
Germany's federal health ministry lodged an appeal for the annulment of EU Directive 98/43 (advertising) as does Salamander GA. Salamander argues that directive is non-compliant with TRIPS, WTO and Paris Convention.

August 16, 1999[95]
CTMC says that a new (50%) Canadian health warnings are a violation of international trade law. "They would thus violate several of Canada's treaty obligations undertaken under Chapter 3cl and XVII of the North American Free Trade Agreement (NAFTA). Such violations would expose Canada to legitimate and well-founded complaints under World Trade Organization agreements such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Paris Convention for the Protection of Industrial Property and under the NAFTA .They would also expose Canada to obligatory and binding arbitration under Chapter Xl of the NAFTA to set the compensation due to the owners of those trademarks."

1999
Health Canada includes plain packaging as an option for restrictions on tobacco promotions, but regulations never developed further.

March, 1999[96] [97]
Philip Morris and BAT submit to the Australian consultation on a new national strategy for tobacco control, and warns that generic packaging would be a violation of IP rights (cites government response in 1997).

August 1999[98]
Ceylon Tobacco Company informs its government that the proposed national authority on tobacco and alcohol act that require information "would raise serious issues under Article – of the Sri Lankan Constitution as well as under a number of international agreements to which Sri Lanka is a signatory, including the Paris Convention."

January 22, 2000[99]
Canada gazettes proposals to implement 50% graphic warning messages on cigarette packages.

March 29, 2000[100]
Confederation of European Community Cigarette Manufacturers Ltd .briefs the EU in response to the proposed ban on light and mild and claims it is a violation of TRIPS and Paris Convention in the case of names like "Mild Seven".

June 16, 2000[101]
Hong Kong attorneys provide legal opinion that Private Member's bill to amend Hong Kong's smoking act is a violation of intellectual property agreements.

August 2000[102]
Japan Tobacco submits that the FCTC would violate IP laws if it banned descriptors.

2000: [103] [104]
British-American Tobacco's Submission to the WHO's Framework Convention on Tobacco Control warned that " The WHO's proposals to ban tobacco advertising and descriptors such as 'Lights', could infringe commercial and intellectual property rights guaranteed in international law and could clash with provisions embodied in national constitutions protecting freedom of speech.

October 13, 2000[105]
BAT writes to the EC to complain about Canada's new health warning messages

September 2001
Japan Tobacco International filed a complaint in mid-September 2001 with the European Court of First instance claiming that the ban on 'light' and 'mild' was a violation of intellectual property laws.[106] The law came into force, as predicted, on September 30, 2003.[107]

February 2, 2001[108]
EC Director General M.P. Carl writes BAT to note "the very strong concerns" about the Canadian regulations and to inform them "that our conclusion is that there is little action that the commission feels able to undertake to address these problem directly. Our initial assessment is that the measures are probably compatible with WTO rules."

December 1, 2001
Health Canada publishes a Notice of Intent in the Canada Gazette, proposing a ban on the terms "light" and "mild", but not on synonyms, or the use of colours or numbers to suggest one product is less harmful than another.

February 1, 2002[109]
On behalf of tobacco companies, the U.S. National Institute of Standards and Technology writes the Canadian GATT Enquiry point to ask for a delay in the deadline for comments in the ban on light and mild.

February 2002
Philip Morris submits comments on proposed ban on 'light' and 'mild' saying that "banning such terms on tobacco packaging would violate Canada's obligations under the North American Free Trade Agreement ("NAFTA"), the World Trade Organization's Agreement on Technical Barriers to Trade ("TBT") and the Agreement on Trade Related Aspects of Intellectual Property ("TRIPS").

November 27, 2007[110]
European Commission identifies plain packaging as a measure to be explored: *"In order to decrease the smoking initiation and to protect EU consumers on equal basis in all Member States the introduction of generic (black & white) standardised packaging for all tobacco products could be explored as a possibility to reduce the attractiveness."*

May 31, 2008[111]
The U.K. government launches a consultation on "The Future of Tobacco Control" and "seeks views from stakeholders and members of the public on the potential for plain packaging of tobacco products."

September 8, 2008[112]
European Communities Trade Mark Association responds to UK consultation and says that plain packaging "would involve various violations of treaty obligation... [and] is contrary to the harmonised EU and international systems of trade mark protection, including in particular Articles 15(4), 20 and 8(1) of the World Trade Organisation's agreement on Trade Related Aspects of Intellectual Property Matters ('TRIPS') and Articles 6quinquies and 7 of the Paris Convention. As noted above, this was a matter of some concern when the matter was considered in Canada."

September 5, 2008[113]
Japan Tobacco responds to the U.K. consultation paper saying that plain packaging would be "in breach" of TRIPS and the Paris Convention.

September 5, 2008[114]
British American Tobacco responds to the U.K. consultation paper saying that "the government's power to introduce plain packaging is constrained by law… also by international law, including the WTO Agreement on Trade-Related Aspects of intellectual Property Rights (TRIPS).

September 8, 2008[115]
Philip Morris responds to the U.K. consultation paper saying that "plain packaging will squarely conflict with" TRIPS and the Paris Convention.

April 9, 2008[116]
Australia's Minister for Health and Ageing, announces the establishment of the Preventative Health Taskforce to advise on preventive health programs and strategies… caused by obesity, tobacco and the excessive consumption of alcohol."

October 10, 2008[117]
Australia's National Preventive Health Taskforce issues a consultation paper "Australia: the Healthiest Country by 2020" and includes the recommendation of the tobacco task force that Australia needs to "Further regulate the tobacco industry with measures such as ending all forms of promotion including point-of-sale displays and mandating plain packaging of tobacco products. "

January 2, 2009[118]
Philip Morris submits to the Australian Task Force that "Eliminating trademarks would violate international treaty Obligations. International treaties such as the WTO Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs) and the Paris Convention for the Protection of Industrial Property require parties – including Australia – to follow minimum standards concerning the availability, scope and use of intellectual property rights. Mandating plain packaging would violate those treaty obligations."

January 2009[119]
BAT submits to the Australian Task Force that "Plain packaging is not a new idea and has been considered and rejected by numerous countries on numerous occasions. It was considered by the New Zealand Government in 1989 and rejected due to concerns of possible breaches of international law. It was considered in Canada in 1994 and rejected due to the lack of evidence and potential international trade law complications. It was considered in Australia in 1997 and rejected, in part, due to similar concerns."

SYNOPSIS

Beginning in the late 1980s, package reform emerged as an increasingly important component for tobacco control. In particular, larger health warnings and plain packaging were presented as ways to improve public knowledge about the harms of smoking and reduce the promotional appeal of the cigarette package.

Proposals for plain packaging in Canada were thrust abruptly onto the policy stage in February 1994 in the wake of a crisis over tobacco smuggling. By 1995, the idea had dropped virtually out of sight, in Canada in the wake of the Supreme Court ruling against the *Tobacco Products Control Act*. In Australia, proposals for dramatically larger health warnings emerged in 1992, and were watered down in 1993 before finally being implemented in 1995.

Documents made available as a result of U.S. court actions[1] reveal the intensity with which tobacco companies fought – and won – their first public battle against plain packaging in Canada and a more subtle campaign against package reform in Australia. This paper reviews documents from those years, and traces the steps taken by the companies to ensure they maintained their ability to use tobacco packages to lend their products visibility and image.

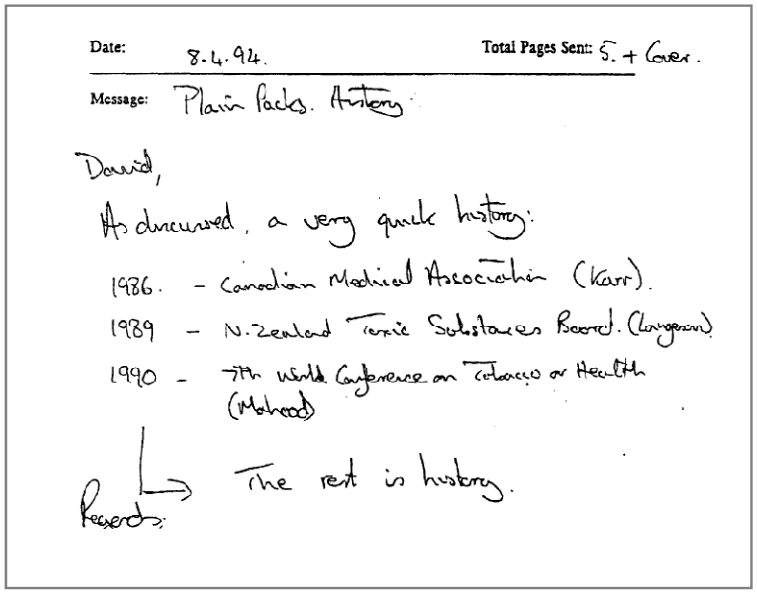
It shows that the companies decided to fight plain packaging on trade grounds because it provided them a more solid footing than allowing health issues to enter the debate. For this reason, they focused their energies on the Intellectual Property agreements governed by WIPO and the investment protection contained in NAFTA agreements (neither of which, unlike the World Trade Agreements, allow for exemptions on health grounds). Despite being told repeatedly by WIPO that their analysis was flawed, the companies persisted in telling the government and the public that plain packaging would be inconsistent with international intellectual property protections.

Following the industry's misrepresentation of international trade law, new health ministers in Canada and Australia forsook plain packaging as a tobacco control measure they mistakenly believed to be contrary to their countries' obligations under international trade agreements.

1 These documents have been taken from the Legacy Tobacco Documents Library (LTDL), which consolidates U.S. tobacco industry documents made public as a result of the Minnesota and other trials.

ACT 1: A NEW IDEA FOR HEALTH PROTECTION

Scene 1: Canada



Date: 8.4.94. Total Pages Sent: 5. + Cover.

Message: Plain Packs. Anthony.

David,

As discussed, a very quick history:

1986. – Canadian Medical Association (Kerr).

1989 – N. Zealand Toxic Substances Board. (Chapman)

1990 – 7th World Conference on Tobacco or Health (Mahood)

Records → The rest is history.

The first records of discussion of plain, or generic, packaging trace to Canada,[120] when the Canadian Medical Association (CMA) adopted a motion proposed by Dr. Gerry Karr to have cigarettes sold "in the equivalent of plain brown wrappers."[121] The following year, the CMA called on the federal government to require that "tobacco products be sold in plain, standard-sized packages that state: 'This product is injurious to your health'."[122] The rest, according to a memo from the industry's information clearinghouse, the Tobacco Documentation Centre, was history.[123]

It didn't take long for calls from health groups for plain packaging to reach Canadian parliamentarians. In the final parliamentary hearings on the *Tobacco Products Control Act*, during January 1988, several health agencies, including the National Council on Tobacco and Health (now the Canadian Council for Tobacco Control) and the Non-Smoker's Rights Association recommended that the committee adopt amendments that would make plain packaging a regulatory option in future years. [124]

Scene 2: New Zealand

It was in New Zealand in 1989 that the idea of generic packaging gained early ground. In May 1989, the New Zealand Toxic Substances Board released a wide-sweeping proposal to strengthen tobacco control, a 139 page report called "Health or Tobacco: An End to Tobacco Advertising and Promotion"[125] On the eve of its release, a newly formed Coalition Against Tobacco Advertising and Promotion (joined by Canadian Gar Mahood) framed the advertising issue with a call that "A ban on advertising must be complete. All advertising must go including the biggest advertising of all, the glamourous cigarette pack."[126]

In July 1989, within weeks of the launch of the New Zealand coalition effort, the industry's international clearinghouse, INFOTAB, had circulated scenarios to BAT and Rothmans of what this could mean for the industry,[127] and conjectured that even the brand name (and descriptors) could be eliminated.

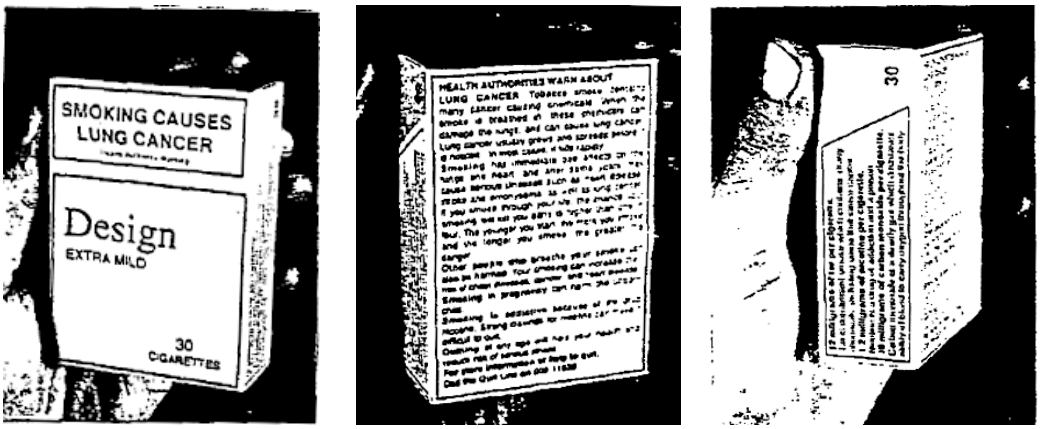
Four months later, the New Zealand Toxic Substances Board prepared to address the issue at its September 1989 meeting, and asked Principal Medical Officer (Health Promotion) of the Department of Health to provide background information. His brief "Tobacco Promotion Through

Product Packaging"[128] concluded that brand imagery created though packaging should be curtailed by government to protect young people from smoking.

> *Two important factors that influence young people's smoking are in the control of either the tobacco manufacturers or government. The first is brand imagery through advertising, now coming under increasing governmental control in many countries.*
>
> *The second is brand imagery through packaging, which is designed to attract the teenager into experimentation and to encourage the teenagers to persist with smoking for long enough for addiction to occur. Brand imagery on the pack may turn out to be as powerful in promoting sales as is advertising in the media, but so far has not attracted the attention of government policy makers. Controls on both may have a multiplier effect."*

That New Zealand spring-summer, University of Otago researchers, Park Beede Rob Lawson and Mike Shepherd produced the first consumer research on "the promotional impact of cigarette packaging."[129] The study concluded that "plain-pack cigarettes will inhibit attraction based on brand image" and that "information such as health warnings, will have a substantially greater degree of impact when presented on plain-packs."

The New Zealand government continued to develop legislation based on the 1989 discussion paper, but did not pursue plain packaging. In August 1990, the *Smokefree Environments Act*" received Royal Assent. Although the committee had heard recommendations for generic packaging, it was not included in the legislation.[130]



In 1992, the Australian Ministerial Council on Drug Strategy proposed health warnings that covered 25% of the front and 100% of the back of cigarette packages.

Scene 3: Australia

In Australia, a parallel debate was engaged over proposals to increase package warnings from 20% warnings at the bottom of the package. By 1992, the 1987 agreement to not change these warnings for a 5-year period was expiring,[131] and on April 15, 1992 the Australian Ministerial Council on Drug Strategy (composed of health ministers) proposed new warnings that would occupy the top 25% of the front of the package, the entire back of the package and one entire side. State and territory governments agreed to introduce uniform regulations to put these warnings in place.[132] [133]

These proposals were supported by a 244 page report commissioned by the Ministerial Council and prepared by the Centre for Behavioural Research in Cancer, which also explored the impact of

standardised (plain) packaging,[134] and recommended standardized packaging finding that adolescents found them less attractive.

Scene 4: United Kingdom

The following year, in 1991, the U.K. government issued a discussion paper "the Health of the Nation: A consultative document for Health in England." In its response to this paper in October 1991, ASH U.K. argued that health warning messages should cover 50% of the front of the packages and 75% of the back of the packages, and that "the government should require by law that all cigarette packets should be uniform and plain. The brand name should be printed in a uniform typeface, and the package should otherwise carry only health warnings and product details."[135]

A quiet campaign

Despite these early attempts, plain or generic packaging received little public attention in Canada until the announcement of a parliamentary review in 1994. The Globe and Mail, for example, first reported on generic packaging only in 1992.[136]

The news media were not the only publications to give few column inches to this policy option: a search of the U.S. National Library of Medicine database of peer-reviewed journals reveals fewer than a single handful of studies on plain packaging since 1990.[137] Before 1994, only a single study had been conducted in Canada on the potential impact of plain packaging; and although it was publicized, it was never published in a peer-reviewed journal.[138] Relative to other tobacco policies, little public opinion[139] or other Canadian research on plain packaging was published before or since.

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ACT II: THE INDUSTRY LOOKS FOR A NEW DEFENSE

The multinational tobacco companies operating in Canada, Australia and New Zealand took note of each of the proposed packaging reforms in those countries with alarm. Their initial attempts to counter the measures employed arguments (about nanny states and the importance of educating youth rather than regulating companies) [141] [142] [143] that were by then familiar to governments and industry-watchers. Alarmed over the prospect of losing control of the tobacco package, they worked together to develop new strategic approaches.

Scene 1: Shifting the policy framing from health to commerce

Soon after the Australian Health Ministers announced their plans for new package warnings, BAT Public Affairs director, David Bacon, flew down to assess the situation for himself. "I am now of the view that there are no other environments in the world more hostile to our business activities than Australia," he told BAT's regional director, Paul Adams. "The problems are such that, if they are not successfully managed in that market, they could spread rapidly to the rest of the world with serious commercial consequences."[144]

BAT attempted to pull the U.K. government into the issue. BAT's Australian operation, W.O. and H.O. Wills, asked BAT to enlist the support of the UK government, [145] and directly wrote the British Consulate in Sydney to request their intervention.[146] At this point, neither BAT nor Philip Morris was claiming that Australia's packaging reforms were an infringement of any international property law. To the contrary, Wills informed BAT in 1992 that:

> *The Company has also considered the issue of whether the proposed restrictions would be in breach of the Paris Convention on Industrial property and the Australian Trade Mark Act. We are advised that there is no basis for any legal challenge against State and Territorial Governments on these grounds.*[147]

The Australian package reforms that alarmed the companies appeared to be on track in December 1992, when the government of Western Australia gazetted proposals for labelling based on the agreement of health ministers.[148] When they reached BAT's New Zealand company, alarm bells went off. "[It] makes for alarming reading. If past experience is anything to go by, similar initiatives in New Zealand cannot be far behind."

In January 1993, John Owen of Wills New Zealand wrote his BAT colleagues a highly charged call to arms. New Zealand couldn't go it alone, he explained – an international strategy was needed. "New Zealand is not unusual among countries in that legislation protecting intellectual property rights is at best in an embryonic stage. If we are to protect our brands, we must use those international laws which do exist not only for tobacco products but wherever multi-national products are marketed."

He was not confident that international laws actually offered protection, but suggested that "the Paris Convention, provisions within GATT and the European Community would seem a good starting point for finding out what existing protection there is for our brands under these conventions." He hoped that the major manufacturers would work together to "research and develop strategies" and develop "legal defences that could tie up legislators in litigation over a long period, and, hopefully, attract international legal attention."

Laying out the groundwork for a strategy that would indeed be put in place, Owen called for a "blind trust" to be set up to commission the writing of papers that could be presented to economic and legal ministries and corporate colleagues.

In summary, I believe that the latest moves to introduce packaging changes heralds the biggest battle to be fought by the industry. In the past, our opponents have worked on a domino theory of picking upon country after country in terms of smoking restrictions and advertising and other restrictions. I believe that we should shift the playing field by taking an international approach to brand protection.[149]

On April 2, 1993, Philip Morris' Australian branch received encouragement from its US office to explore ways of getting tobacco exporting countries to use GATT as a way to bring pressure on the Australian government to back down on health warnings.

The ability of a Party or group of Parties (e .g ., several tobacco growing countries) to get GOA to "back off" or to change the proposed regulations on health warning on tobacco products will be a function of how much political and/or economic pressure the objecting Party or Parties are willing to put on the GOA.[150]

Only days after the tobacco companies' success in obtaining a GATT-based complaint against Canada in early May 1993, the New Zealand Tobacco Institute refined its approach, and argued that the entire issue of package reform should be reframed. Packaging and labelling should not be "contested as a health issue, a children's smoking issue, or a consumer information issue" but rather:[151]

It should be treated as expropriation of Intellectual Property and contested politically on that basis. If this strategy is followed the industry has a greater chance of both setting its own agenda and avoiding the need to critique anti-smoking proposals from a back foot position.

Industry should set the agenda in an effort to confine the argumentation to political, economic, international trade, and intellectual property issues.

The companies soon settled not on GATT, but on trademark and intellectual property laws, to make their case. The General Agreement on Tariffs and Trade (GATT) and the soon-to-be implemented TRIPS agreements contained qualified exceptions to their general protection for health-related decisions that allowed governments to over-ride trade constraints where legitimate health measures could be justified. Using these agreements would beg the question of whether the health objectives were legitimate or justified, and the companies did not consider it helpful to have the questions raised in that framing. They were advised that it would be much better to focus on agreements that had no explicit health exemptions, such as the Paris Convention for the Protection of Industrial Property, managed by the World Intellectual Property Organization (WIPO).

The way to do this, was explained in December 1993 by consultant John Luik, was to focus on the Paris Convention on Intellectual Property and the bureau which governed it, the World Intellectual Property Office (WIPO):[152]

While I think that the Gatt/Trips process provides a useful entry to this problem, I believe that its ultimate usefulness might well be limited. This is because the antis will soon argue that where health is involved, adopting minimal regulation as a basis for trade harmonization is not acceptable.

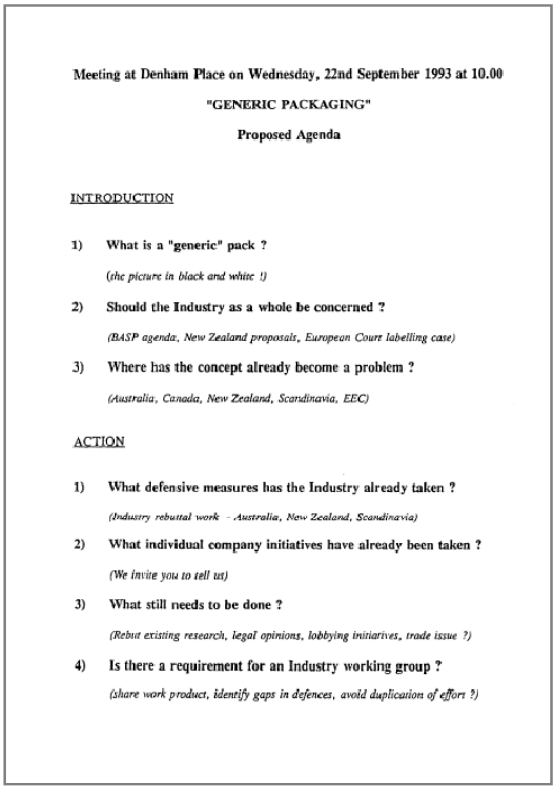
This will force the issue back to where it needs to be addressed now, namely developing good arguments as to why minimal intellectual property and trademark infringement is the only reasonable policy … The key to the problem of generics will finally be two issues: 1) are pack designs/trademarks first order intellectual property? and 2) if they are, what are the conditions under which what the intellectual property people call a 'justified taking" can occur ?

ACT III: FORMALIZING A GLOBAL PLAN

Scene 1: Building the Team

As companies were ramping up their efforts in Australia and Canada, Rothmans head office saw these isolated actions as an insufficient response to a spreading problem and looked to develop a global, coordinated, multi-company strategy.

On May 20 1993, Rothmans senior lawyer responsible for regulatory affairs, James Seddon invited his colleagues[153] in the other for-profit multinational companies to consider a joint approach to plain packaging and larger health warnings. [154] Companies which had a high level of government ownership or control, like Altadis, Tekel, Swedish Match, Prince, Seita, etc were not invited. Seddon visualized a team of "legal, public affairs and trade marks disciplines" to pool resources, develop strategies and parcel out work assignments.



Meeting at Denham Place on Wednesday, 22nd September 1993 at 10.00

"GENERIC PACKAGING"

Proposed Agenda

INTRODUCTION

1) What is a "generic" pack ?
(the picture in black and white !)

2) Should the Industry as a whole be concerned ?
(BASP agenda, New Zealand proposals, European Court labelling case)

3) Where has the concept already become a problem ?
(Australia, Canada, New Zealand, Scandinavia, EEC)

ACTION

1) What defensive measures has the Industry already taken ?
(Industry rebuttal work - Australia, New Zealand, Scandinavia)

2) What individual company initiatives have already been taken ?
(We invite you to tell us)

3) What still needs to be done ?
(Rebut existing research, legal opinions, lobbying initiatives, trade issue ?)

4) Is there a requirement for an Industry working group ?
(share work product, identify gaps in defences, avoid duplication of effort ?)

By September, his proposed group had met, and by November had fully taken shape.[155] [156] [157] Although they would also consider ways to block requirements for larger health warning messages, they called themselves the "Plain Packs Group" (sometimes the Plain Packs Working Group).

Their terms of reference were: [158]

> *"To undertake a global review of attacks on the design, style and content of the industry's trademarks with particular reference to the packaging of the product, requirements for ever-larger health warnings, and proposals for the restriction of companies' freedoms to utilise their valuable trademarks and pack designs.*
>
> *To identify opportunities for action, and to undertake such actions as necessary to defend and protect both the integrity of pack designs and the rights and freedoms of the companies to utilise their trademarks and pack designs as they see fit .*

The Plain Pack Working Group would coordinate global efforts on plain packaging until well after the proposal had been killed off in Canada and had slid out of public view in Australia and New Zealand.

Scene 2: Developing a Plan

The Plain Pack Group originally settled on three key actions:[159]

- To develop a bank of industry-friendly experts through Shook, Hardy and Bacon (the U.S. firm that coordinated litigation efforts).
- To seek the support of intellectual property associations, like Interbrand, WIPO (World Intellectual Property Organization), the Organisation for Economic Co-operation and Development (OECD), International Chamber of Commerce (ICC), UNICE (the Union of Industrial and Employers' Confederations of Europe, now Business Europe), AIM (Association des Industries du Marc), ITMLA (possibly a typo for ITMA, the International Trademark Lawyers Association) , AIPPI (International Association for the Protection of Intellectual Property).
- To develop alliances with other multinational industries, like pharmaceuticals, alcohol, cosmetics, Unilever, Colgate, Pepsi and Coke.

These elements would become the backbone of their global campaign, and would be central to their successful campaign in Canada.

They also decided what they would not do – namely conduct any research regarding the role or effectiveness of health warnings (despite any common-law duty on manufacturers to be knowledgeable about all aspects of the products they sell.)[160]

Scene 3: Little joy

In the spring of 1994, when the multinational Plain Pack Group met again to review progress,[161] they had little success to report. At this point, the hearings in Canada on plain packaging had not yet started, and their strategy had not yet been road-tested.

Their intentions to contact a dozen or so organizations and multinational companies who might come to their defence had no apparent success.[162†] Industrial allies did not become easier to find. "Not a very satisfactory response" was received from the Industry Council on Packaging and the Environment (INCPEN), which rejected their appeal for support on the plain packaging file.[163]

Nor were they making much headway in solidifying their legal arguments about international trade and IP law. By mid-1994, the companies knew that their claims to intellectual property were not legally supportable, even though they had been political successful.

In fact, from the very outset, the companies had internally acknowledged that trying to use international agreements to block progress was a Hail Mary pass. In 1993, a New Zealand manager described that pursuing TRIPS might be "grasping at straws."[164] Even the GATT ploy successfully used to get a delay on Canadian warnings (discussed above) was originally seen has having "just a slim chance" of success.[165]

This pessimistic view was an informed one: the companies had commissioned several private legal opinions about the impact of trade law on packaging (most of which have not been made public).[166] In addition, they had received consistent external advice that they did not have a case.

---

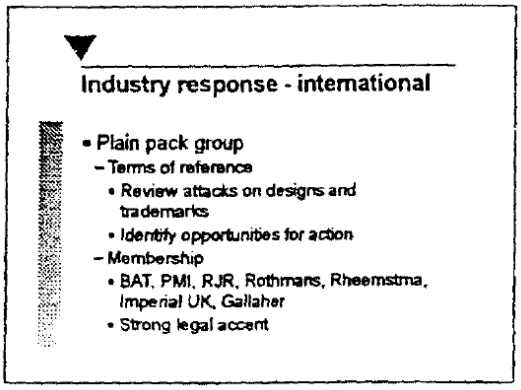
† BAT, in a worried tone, sent a message to its troops that summer: A new threat is emerging with pressure mounting on governments in some parts of the world to ban cigarette brands in favour of plain packets, a move which would destroy the value of one of our greatest asset, our trade marks. **The silence of the general business community on this issue is worrying.** (emphasis added)

- In August 1992, the Australian companies had sought and received advice from their own lawyers that they had no basis for legal challenge under the Paris Convention.[167]
- In July 1993, the Australian companies were told that an alternative view they had commissioned from a trade professor was characterized by the U.K. Department of Trade and Industry as incorrect and that to think otherwise would require "several large imaginative leaps."[168]
- In April 1994, John Clutterbuck of Rothman's, in a background paper prepared for his colleagues in other tobacco companies, observes that "there appears to be no direct redress available to companies under NAFTA as regards product labelling."[169] In the same paper, he candidly concludes:[170] "The international trade argument by itself will not however be sufficient to ward off the threat of plain packs."

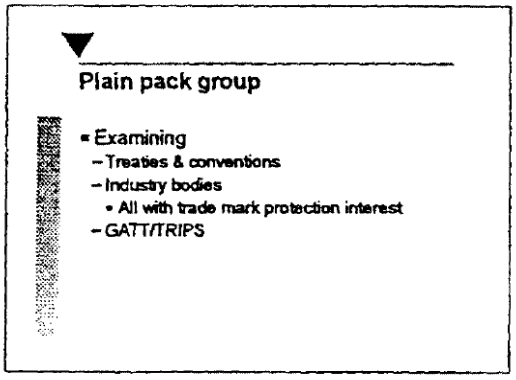
In March 1994, a bibliography compiled by the Tobacco Documentation Centre was shared with the Plain Pack Group. It listed five commissioned legal opinions on the subject of plain packaging and nine more on the related subject of pack labelling.[171] None of the plain packaging opinions have been made public (they are subject to solicitor-client privilege), but the content can be inferred by the discouraged tone of a presentation prepared by BAT's head of corporate affairs, David Bacon. The Plain Pack Group, with its "strong legal accent" (many of its members were lawyers) had investigated the potential of using international treaties to help buttress industry positions. "Current conventions and treaties offer little protection," he wrote. There was "little joy" in GATT or TRIPS.[172]

This conclusion was shared with the highest levels of BAT's management: to the Tobacco Strategy Group[173] as well as BAT's General Managers.[174] In May of 1994, his presentation (four slides from which are shown below) was circulated to all member companies of the Plain Pack Group.[175]

BAT's head of corporate affairs, David Bacon, reports to senior management that the companies are working together to oppose plain packaging.



The key task of the Plan Pack group was to find out what protection was offered by international law, and by groups like WIPO.



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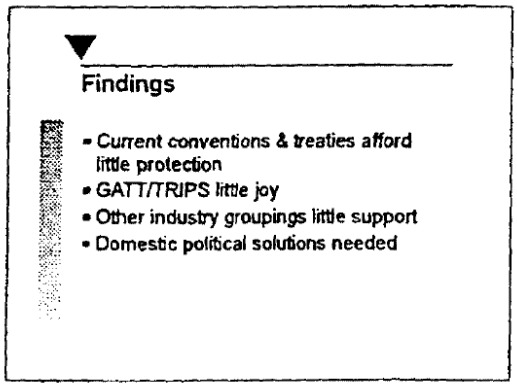
Their research has shown them that there is 'little protection' from trade agreements.

They realize that they will need to rely on fighting the proposals in each jurisdiction



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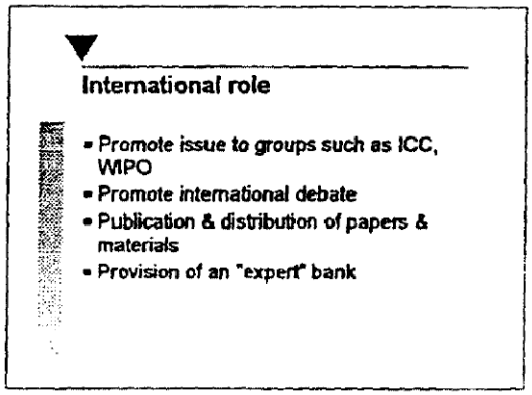
The companies will continue to work together to try to encourage bodies like WIPO to change their mind, and to stir up debate about how the treaties should be interpreted. They will also create their own body of evidence and experts.



Scene 4: The failed seduction of WIPO

One of the first tasks identified by the Plain Packs Group in its inaugural meetings in the fall of 1993 was obtaining the support of WIPO against plain packaging, and the task was assigned to Philip Morris International.[176] The idea also received enthusiastic support from Canada's John Luik, who proposed asking WIPO to co-host a meeting with the Conference Board on the "issue of trademark infringement by government regulation". Doing so, he suggested, "would allow the issue of I.P./Trademark confiscation to get onto the WIPO issues agenda …[and] eliminate the perception of tobacco industry isolation."[177]

The tobacco industry would have perceived that WIPO, in addition to administering agreements that do not contain health exemptions, was a known entity and a relatively corporate-friendly environment.

Unlike the WTO (or its predecessor at the time, GATT), WIPO did not deal exclusively with member states/governments, but also provided direct access to corporations. WIPO's services are provided to member states, and also to the companies who register trade marks and other intellectual properties, and who may have occasion to require WIPO's interventions to resolve inter-corporate disputes. WIPO has some independence from member states, in that it generates revenues from corporate service fees.[178]

WIPO proved to be more difficult to approach. When the group next met in mid-March 1994, contact had still not been made, and BAT solicitor David Latham took over the assignment of doing so. Within a fortnight, he had written Ludwig Baeumer, who headed WIPO's Industrial Property section. Mr. Latham expressed his hopes that WIPO would support tobacco-industry friendly opinion

that had been published the year before by Swedish trade lawyer and sometimes industry consultant, Ulf Bernitz:[179]

> *You mentioned that WIPO had taken a different view on the interpretation of Article 7 of the Paris convention from that adopted by Ulf Bernitz in his article. I should be interested to know whether WIPO have published anything on this matter, and if so I should be grateful if you would let us have copies.*[180]

Ludwig Baeumer did not reply quickly, and Latham followed up with reminder letters in both April and June of that year,[181] [182] as well as meeting requests.[183]

Baeumer's reply, written on July 6, 1994,[184] was not what was hoped for. "The Paris Convention does not contain any obligation to the effect that the use of a registered trademark must be permitted," Baeumer wrote. "If a national law does not exclude trademarks for certain kinds of products from registration, but only limits the use of such trademarks, this would not constitute a violation of the Paris Convention." Disappointed, David Latham circulated the letter to the Plain Pack Group coordinator, Jacqueline Smithson at Rothmans. "I anticipate the reason he had not replied earlier was that he did not feel that he had anything helpful to say," observed Latham. "Certainly his letter does not take us further."

MUDGE ROSE GUTHRIE ALEXANDER & FERDON

May 3, 1994

R.J. Reynolds Tobacco Company
401 North Main Street
Winston-Salem, North Carolina 27102

Philip Morris International Inc.
800 Westchester Avenue
Rye Brook, New York 10573

Re: Legal Opinion With Regard to Plain Packaging of Tobacco Products Requirement Under International Agreements

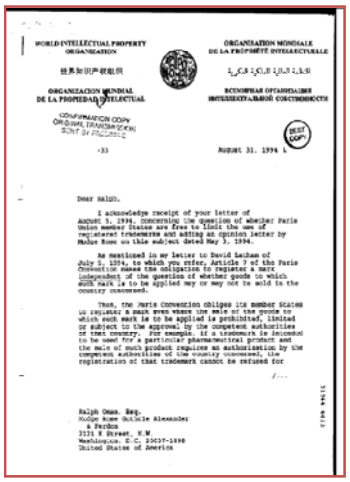
Dear Sirs:

You have asked us to provide a legal opinion analysing the consistency of the plain packaging requirement for cigarettes being considered by the Standing Committee on Health of the House of Commons of the Canadian Parliament with relevant international intellectual property agreements.

It is our opinion that a plain packaging proposal[1] would infringe the trademark rights of foreign investors who own or control the trademarks on cigarettes sold in Canada, in violation of the Government of Canada's obligations under:

[1] For purposes of this opinion, we assume that a plain packaging proposal would severely restrict the use of trademarks and trade dress in Canada.

No was clearly an answer that would not be taken easily. A subsequent letter was sent by Ralph Oman, and attached to it was the opinion offered by former U.S. Trade Commissioner, Carla Hills, to the Canadian Standing Committee. Ralph Oman, like Carla Hills, was no lightweight: until January of that year he had been the U.S. Register of Copyrights.[185]



WORLD INTELLECTUAL PROPERTY ORGANIZATION
ORGANIZACION MUNDIAL DE LA PROPIEDAD INTELECTUAL
ORGANISATION MONDIALE DE LA PROPRIÉTÉ INTELLECTUELLE

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August 31, 1994

Dear Ralph,

I acknowledge receipt of your letter of August 3, 1994, concerning the question of whether Paris Union member States are free to limit the use of registered trademarks and asking an opinion letter by Mudge Rose on this subject dated May 3, 1994.

As mentioned in my letter to David Latham of July 5, 1994, to which you refer, Article 7 of the Paris Convention makes the obligation to register a mark independent of the question of whether goods to which such mark is to be applied may or may not be sold in the country concerned.

Thus, the Paris Convention obliges its member States to register a mark even where the sale of the goods to which such mark is to be applied is prohibited, limited or subject to the approval by the competent authorities of that country. For example, if a trademark is intended to be used for a particular pharmaceutical product and the sale of such product requires an authorization by the competent authorities of the country concerned, the registration of that trademark cannot be refused for

Ralph Oman, Esq.
Mudge Rose Guthrie Alexander & Ferdon
2101 K Street, N.W.
Washington, D.C. 20037-1898
United States of America

On August 31, 1994 Mr. Baeumer gave a detailed response[186] to Carla Hills' views[187] on the application of the Paris Convention to plain packaging – and only strengthened his dismissal of the tobacco industry's position.[188] (Her opinion on the Paris Convention and his full reply are shown below). His superior, the Director-General of WIPO expressed the same view in a letter addressed to the Director-General of the World Health Organization in February 1995, extracts of which were published in *Tobacco Control* in 1996:[189]

> *Article 7 of the Paris Convention makes the registration of a mark independent of the question of whether the goods to which such mark is to be applied may or may not be sold in the country concerned. In other words, the Paris Convention obliges its member States to register a mark even where the sale of the goods to which such mark is to be applied is prohibited, limited or subject to approval by the competent authorities of such states.*
>
> *Article 7 does not address the question of permission to use a registered mark.*
>
> *Therefore, countries party to the Paris Convention remain free to regulate the sale of certain types of goods and the fact that a mark has been registered for such goods does not give the right to the holder of the registration to be exempted from any limitation of using the mark which may be decided by the competent authority of the country where the mark is registered.*

At this point, the tobacco companies could have told the Canadian (and other) governments that WIPO had disagreed with the opinion provided by Carla Hills. At the very least, they could have stopped saying that the Paris Convention was an impediment to plain packaging. They did neither.

Despite the definitive letter received from the World Intellectual Property Organization in 1994, Purdy Crawford of IMASCO pressed the matter in 1995 with the Canadian Minister of International Trade, the Honourable Roy MacLaren.[190]

In 1998, when the book on plain packaging, coordinated by John Luik but reviewed by law firms Shook Hardy and Bacon as well as the Canadian legal team,[191] [192] was published, it included a chapter on "plain packaging and international trade treaties."[193] The authors were former U.S. trade negotiator Julius Katz and Canadian lawyer Richard G. Dearden. Four years after WIPO had informed them that their analysis was incorrect, these authors repeated their disinformation about the impact of obligations under the Paris Convention to plain packaging.

In 1999, in response to the Health Canada's proposals for 50% health warning messages, the CTMC again appealed – this time unsuccessfully – to the Paris Convention as an impediment to package warnings:

> *The regulations would deprive trademark owners of the benefits or intended benefits of their investments. …. Such violations would expose Canada to legitimate and well-founded complaints under World Trade Organization agreements such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Paris Convention for the Protection of Industrial Property and under the NAFTA.* [194]

Scene 5: Overcoming defeat by creating their own reality

Faced with unsupportive legal opinions, unsupportive intellectual property agencies and unsupportive corporate allies, the Plain Pack Group set about to improve their chances of success:

- They would encourage WIPO and other intellectual property authorities to align their views with the tobacco companies.
- They would not accept defeat without prompting an "international debate."
- They would create their own body of evidence by publishing their own materials and papers.
- They would create their own experts.

The companies could not change the Paris Convention, they might not be able to change WIPO's mind, but could they set out to try. They could not change GATT or NAFTA, but they might be able to persuade governments to change their understanding of what these agreements meant. They could make sure that there were published articles and 'experts' available to support their claims before government. They could make sure that whatever evidence they had was presented in its best light to government: an early BAT case study on advertising and GATT/Trips recommended "even when arguments are sometimes not conclusive in themselves, they should be used uniquely to lobby local governments in our favour." [195]

May 3, 1994 - Carla Hills to the House of Commons:[196]

It is our opinion that a plain packaging proposal would infringe the trademark rights of foreign investors who own or control the trademarks on cigarettes sold in Canada, in violation of the Government of Canada's obligations under the Paris Convention for the Protection of Industrial Property.

The proposal undermines the value of the mark protected by Articles 1(2), 6bis, 6quinquies(A) and fails the "likelihood of confusion" test by requiring packaging that makes the products nearly indistinguishable in the marketplace. Similarly, requiring virtually identical marks for different brands of cigarettes is an infringement of trademark and trade dress rights and would itself constitute a form of unfair competition in violation of Article 1, paragraph 2 and Article 10bis. In addition, the plain packaging proposal undermines Canada's obligation under Article 10bis to prevent confusion and unfair competition because in eliminating distinctive marks, it makes both inevitable.

The plain packaging proposal cannot be justified under the limited exceptions set forth in 6quinquies(8). The plain packaging proposal would not fall within any of the three enumerated exceptions because the trademarks at issue do not "invalidate other trademarks", are not "devoid of any distinctive character," and are not "contrary to morality or public order."

The plain packaging proposal also would violate Article 7 of the Paris Convention because it would effectively prohibit use of cigarette trademarks in commerce. If the non-use results in the cancellation of existing marks or an inability to register new marks, it would constitute a breach of Canada's obligations under Article 7.

Finally, the plain packaging proposal cannot be justified under the general principle under customary international law allowing for temporary measures in unexpected emergency situations.

Nothing in the proposal suggests that it would be a temporary measure. If anything, the clear implication is that the ban on the use of the trademark would be permanent. Therefore, the "fundamental change of circumstances" escape clause under international law would not permit Canada to deprive trademark owners of their substantive rights under the Paris Convention and could lead to an abrogation of Canada's obligations under the Agreement.

Extracts of a legal opinion provided by Carla Hills on behalf of Mudge Rose Guthrie Alexander & Ferson and presented to the Standing Committee regarding Plain Packaging and the Paris Convention. (May 3, 1994)

August 31, 1994 – WIPO's response to Carla Hills' argument:[197]

I acknowledge receipt of your letter of August 5, 1994, concerning the question of whether Paris Union member States are free to limit the use of registered trademarks and adding an opinion letter by Mudge Rose on this subject dated May 3, 1994.

As mentioned in my letter to David Latham of July 5, 1994, to which you refer, Article 7 of the Paris Convention makes the obligation to register a mark independent of the question of whether goods to which such mark is to be applied may or may not be sold in the country concerned.

Thus, the Paris Convention obliges its member States to register a mark even where the sale of the goods to which such mark is to be applied is prohibited, limited or subject to the approval by the competent authorities of that country. For example, if a trademark is intended to be used for a particular pharmaceutical product and the sale of such product requires an authorization by the competent authorities of the country concerned, the registration of that trademark cannot be refused for the reason that the authorization of the competent authority has not yet been obtained. The owner of the mark has an interest in securing his rights even before the sale of the product is permitted. The same applies where the sale of a certain type of products is currently prohibited in a country but the prohibition could be lifted in the future.

Article 7 of the Paris Convention is silent on the question of permission to use a registered mark. Different attempts to give Article 7 a wider scope--namely, an extension of its application to renewals and a prohibition to limit the right to use a registered mark with respect to goods that can lawfully be sold--were made during the Revision Conference of Lisbon in 1958, but, as you mention, those attempts failed because the (then) required unanimity was not obtained. The fact that the majority of the Paris Union countries, including Canada, were, at that time, in favour of an amendment to Article 7 clarifying that the exclusive right to use the mark could not be abolished or limited as long as the sale of the products in question was legal cannot bind those countries and oblige them to - apply the proposed amendment although it was not adopted.

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

Moreover, the argument that in many countries of the Paris Union a registered mark must be used in order for it to remain protected, does not support the thesis that regulations restricting the use violate Article 7, because Article 7 only concerns the initial registration but not the subsequent fate of the mark.'

In conclusion, it does not seem that Article 7 of the Paris Convention could serve as a basis for challenging existing or planned requirements of Paris Union member States regarding the plain packaging of tobacco products.

With reference to Article 6quinrruies of the Paris Convention, which is mentioned in the aforementioned letter of Mudge Rose, it is to be noted that Article 6 inquies A does not address the question of use, but the obligation, for any country party to the Paris Convention, to accept for filing and protect (against infringement by others) a mark already registered in the country of origin. The grounds enumerated in Article 6auinauies B are those for which a trademark covered by Article 6quinquies A can be denied registration or invalidated under the trademark law.

Article 6quinquies B does not mean that the use of a trademark registered under Article 6quinquies cannot be the subject of a limitation or prohibition for other grounds contained in laws other than the trademark law.

As regards Article 10bis of the Paris Convention obliging countries party to that Convention to provide for effective protection against unfair competition, it is doubtful whether this Article may serve as a basis for contesting the legality of the plain packaging requirement which is presently under consideration in Canada, because the use of marks--although of eminent importance in order to avoid confusion and misleading—is not the only means of avoiding such unfair practices.

The above considerations are not, of course, to be taken as a support for the proposed plain packaging requirement . …

Ludwig Baeumer, Director, Industrial Property Law Department

Publishing their own science

The major focus of the Plain Packs group turned to the funding and development of a book of articles challenging plain packaging that could be used to foster a different understanding of international law, one that was favourable to the industry's point of view.

Although this project was managed at a global level, and funded by the headquarters of these companies,[198] it had a particularly Canadian flavour: the editor (John Luik) and 4 of the commissioned authors were Canadian[199] (Zalman Amit, Concordia University; Jamie Cameron, Osgoode Hall Law School; Richard Dearden, Gowling Strathy & Henderson law firm; Rod Stamler, Lindquist, Avey Macdonald, Baskerville

7 A booklet/book containing authoritative rebuttal evidence from a selection of contributors should be published. The following sections or chapters were identified:-

International Conventions - Trade Marks
- Human Rights

Orderly market

Socio-Political-Economic arguments why Governments should not impose trade mark restrictions

Trade ramifications - international freedom
- competition
- new entrants to a market

accounting).

Pushing false arguments

Notwithstanding WIPO's complete and utter rejection of Carla Hill's opinion about the meaning of the Paris Convention to plain packaging, tobacco companies nonetheless engineered lobbying efforts by representatives of the wider business community to the Canadian government. The International Chamber of Commerce (ICC) was among those recruited by BAT[200] into writing a strongly worded letter to Canada's trade minister, opposing plain packaging in Canada on trademark grounds.[201] Despite WIPO's advice to the contrary only a month before, the ICC maintained this would be a serious breach of Canada's obligations under the Paris Convention. The complaint received coverage in the business press.[202]

BAT continued to instruct its public relations officials to counter proposals for plain packaging with arguments that it would violate intellectual property laws,[203] and when it launched an industry public relations publication, The Tobacco File, in Canada in 1995, it continued to position plain packaging as contrary to intellectual property laws.[204] In July of 1995, Rothmans, Benson and Hedges president, Joe Heffernan, told shareholders that plain packaging was against Canada's "International Treaty obligations to protect intellectual property including trade marks." [205]

Chapters of the Plain Pack Group book:
PLAIN PACKAGING AND THE MARKETING OF CIGARETTES

Chapter 1:
Predictors of smoking initiation among adolescents: A review of Conrad, Flay and Hill (1992)
Zalman Amit & Brian R Smith, Montreal

Chapter 2:
Plain Packaging of cigarettes & the onset of smoking among youth: A review of the existing unpublished literature. Zalman Amit & Brian R Smith, Montreal

Chapter 3:
Advertising, sponsorship of sports events & packaging as predictors of the onset of smoking among youth.
Zalman Amit & Brian R Smith, Montreal

Chapter 4:
Plain Packs & the onset of smoking
W Fred Van Raaij, The Netherlands

Chapter 5:
Plain Packs, smoking initiation & consumption. Roderick Power, Australia

Chapter 6:
Adding value to brands through packaging. Leslie de Chernatony

Chapter 7:
Effects of plain packaging on the cigarette consumption process
Claude R Martin, Michigan

Chapter 8:
Plain packaging & international trade treaties. Julius L Katz, Hills & Company, Washington, DC Richard

Chapter 9:
Cigarette packages, tobacco consumption & the Charter: The role of perception & harm in constitutional analysis
G Dearden, Gowling, Strathy and Hendersen, Ottawa, Ontario Toronto

Chapter 10:
Plain packaging & public policy
John C. Luik. Niagara-on-the-Lake, Canada

ACT IV: PACKAGE WARNINGS ARE DELAYED AND PLAIN PACKAGING PREVENTED IN AUSTRALIA

The tobacco industry campaign to forestall large health warning messages in Australia is well told elsewhere. (See Simon Chapman and Stacy Carter, "*Avoid health warnings on all tobacco products for just as long as we can": a history of Australian tobacco industry efforts to avoid, delay and dilute health warnings on cigarettes.)*[206]

Tobacco companies responded to the threats of large health warnings as they did to plain packaging – both devalued their brands.

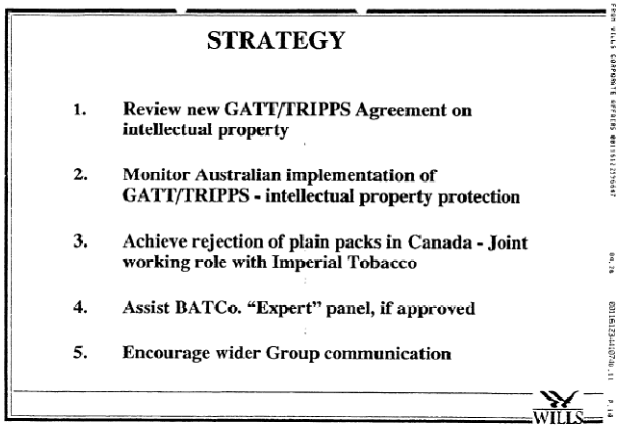
In responding to the 1992 proposals by the Australian Ministerial Council on Drug Strategy for larger health warning messages (and steps towards generic packaging),[207] the industry aimed to ensure that the new warnings in Australia were no larger than those in the European Union, and that the position of the Victorian state government (whose Premier they had successfully wooed and which supported the EU standard)[208] was the one that would prevail.

Their first line of defence was to use Australia's internal trade law, *the Mutual Recognition Act*, which allowed manufacturers to adopt "state regulations which are recognized in other states and do not constitute a barrier to trade." As long as one state agreed to the lower standard/EU warnings, they could move all their manufacturing to that state and carry on business as usual. Their key objective, thus, was to "ensure (Victoria Premier) Kennett is committed to implementing the EC model."[209]

They also noted the usefulness of international trade law, which had the potential of bringing the federal government on side. They noted that although labelling was a responsibility of state governments, international trade law was the purview of the federal level of government.[210] [211]

The initial advice the companies received about international law, as noted above, was not helpful to their cause. They were told by their legal advisers that neither the Paris Convention on Industrial Property nor the *Australian Trade Mark Act* were a basis to challenge the new warnings.[212] Unsatisfied with this advice, and with the opinions on related constitutional issues they received from their solicitors, Clayton Utz,[213] [3] they approached Michael Pendleton, professor of law at Murdoch University in Perth, to research the issue.

Pendleton gave them the advice they wanted. He criticized the unsympathetic approach of Clayton Utz, whose view he reported as "trade mark rights are not true positive rights and that the proposed regulations only govern the manner of use of trademarks." Pendleton encouraged the industry to distinguish between 'regulating' and 'extinguishing'



STRATEGY

1. **Review new GATT/TRIPPS Agreement on intellectual property**
2. **Monitor Australian implementation of GATT/TRIPPS - intellectual property protection**
3. **Achieve rejection of plain packs in Canada - Joint working role with Imperial Tobacco**
4. **Assist BATCo. "Expert" panel, if approved**
5. **Encourage wider Group communication**

WILLS

[3] This advice, like most of the legal opinions received by the lawyers, has not been made public as it is subject to solicitor-client privilege.

trademarks, and to claim that the regulations "extinguish certain existing intellectual property."[214]

The industry quickly incorporated his views and this approach into their new "TAURUS" strategy to fight the warnings.[215] They also persuaded the vice-consul (commercial) of the British Consul General in Sydney, Peter Hughes, to write his government's Department of Trade to raise the issue. The answer he received and forwarded in July 1993[216] was consistent with virtually all the external advice the companies received: there were no trade barriers to restraining the use of trademarks on cigarette packages. To think otherwise, in the opinion of the British government, would require several "large and imaginative leaps"

> *The Patent Office has advised that it is possible to register as a trade mark the whole of what appears an the packet but this is unusual and gives no additional rights. It is also true that Article 15 .2 of the draft TRIPS text provides for the registration of the whole packet, and that Article 16 reiterates the Paris Convention Provisions on well-know marks. However to proceed from these facts to the proposition that restrictions on the labelling are a potential breach of GATT requires, in their view, "several very large imaginative leaps." ....*

In January 1994, BAT's Australian subsidiary nonetheless took these large and imaginative leaps and told a government commission of inquiry into the tobacco industry that:[217]

> *The Company does not oppose a review of health warnings, only pack design regulations which take no account of registration of trade marks and pack designs, intellectual properties and rights advocated by GATT…*
>
> *WD & H0 WILLS' opposition to current generic-style product labelling is not an opposition to health warnings. These are not opposed. Instead, the Company's opposition is to the severe defacement of the Company's registered trade marks and designs that black-on-white packaging changes would impose… Indeed the proposals indicate an abandonment by government of any interest in intellectual property rights.*

The companies had initial success in their attempt to get one state to introduce weaker health warning. They persuaded the State of Victoria's Premier Jeff Kennett's to gazette EU-style smaller warnings instead of those proposed by the health state ministers in March 1994.[218] If the companies thought their *Mutual Recognition Act* finesse would work, they would soon find out that the federal Australian government was prepared to trump this play. That government responded to the Victoria gazetting by announcing that it would assume responsibility for tobacco labelling and, on March 29, 1994,[219] the Government of Australia government gazetted regulations for black-on-white warnings which came into effect in the beginning of 1995.

A year later, in February 1995, BAT's Australian subsidiary, WD & HO Wills, provided the Senate Inquiry into the Tobacco Industry and the Costs of Tobacco Related Illnesses with a supplementary submission, focused entirely on generic packaging.[220] This strongly worded submission concluded that plain packaging would violate "the legal and constitutional rights of the manufacturers who own them. Loss of brand rights would lead to substantial claims for compensation." Included among the international agreements which the companies felt protected them from plain packaging legislation were the TRIPS and Paris Conventions.

What the companies did not tell the Australian Senate was that 2 years previously they had sought and received advice that they had "no basis for any legal challenge" and that the British government had told them they "did not have a case." Nor did they mention that their arguments had been soundly refuted by WIPO only months earlier.

Nonetheless, their trade bluster paid off. In July 1995, four months after BAT's appearance before the Senate Inquiry, the health minister's spokesperson explained that the reason that Australia would not be pursuing plain packaging was because of free trade and constitutional constraints.

"Unfortunately, it's just not feasible" the spokesperson said. "We would have to buy the tobacco companies' trademarks and that would cost us hundreds of millions of dollars."[221] When the Senate Inquiry presented its report at the end of the year, its weak recommendation on plain packaging was only that "additional research be undertaken."[222]

BAT's Australian and Canadian subsidiary companies worked together to present their trade bluff. In April 1994, with the Commons Committee hearings in Canada underway, Australian Wills set its strategy to "achieve rejection of plain packs in Canada", jointly working with imperial Tobacco.[223]

ACT V: WARNINGS ARE DELAYED AND PLAIN PACKAGING DEFEATED IN CANADA

The high-profile campaigns for and against plain packaging in Canada in 1994 are better known than a warm-up act for the battle which took place the previous year over a proposal in March 19, 1993 to increase the size of health warnings from 20% to 25% plus border, and to move them from the bottom of the package to the top.[224] This lead to the industry's first trade victory, and established a new approach to challenging health reforms.

Scene 1: Getting governments to file GATT complaints in order to delay regulations

Unmatched warning

Cana a to get grim on cigarette labels

By Geoffrey York

OTTAWA — The world's strongest warning labels will become mandatory on Canadian cigarette packages later this year, Health Minister Benoit Bouchard says.

The warnings will be powerfully worded and prominently displayed in black and white on every pack. One of the warnings will say, "Smok-

Among the warnings that will be rotated in equal number on cigarette packages: "Smoking during pregnancy can harm your baby." "Smoking can kill you." "Cigarettes can cause fatal lung cancer." "Cigarettes are addictive" and "Tobacco smoke can harm your children."

The new warnings must be displayed in sharply contrasting colors: black letters on a white background

The companies, through the Canadian Tobacco Manufacturers Council, began with a tried and true protest, arguing that the new warnings were illegal (because the enabling legislation was under court challenge), were unnecessary (because the current warnings were sufficient), and were unfeasible (because the regulations and their time line were impossible to meet). In their official response to the government, filed on May 18, 1993, not a single reference was made to intellectual property, to technical barriers to trade, or to GATT or other international agreements.[225]

But the companies' strong desire to cause a delay in proceedings prompted a new line of attack. In March 1993, political change was in the Canadian air. Prime Minister Brian Mulroney had announced he would be stepping down and a new Prime Minister was due to be chosen at the Conservative Party leadership election on June 13, 1993. A few weeks one way or another could make a difference to whether the labelling reforms came into force. As it was explained to BAT headquarters: "For Canada we are trying to get an extension of the 60 days comments period [sets to end on May 19] to allow it to run out past the date the Progressive Conservatives choose a new leader, i.e. Prime Minister."[226]

To accommodate their Canadian operations, the European headquarters and New Zealand colleagues of the Canadian companies worked behind the scenes to get an objection filed by the European Union under GATT technical barriers to trade (TBT) procedures in order to slow things down. The companies were intrigued:

RBH [Rothmans, Benson & Hedges], has written saying a consultant of their's has advised that the GATT weapon might be used on the Canadian Government to slow down their Phase II Regulations by as much as 75 days which, with all the political changes there, could be a long long time. He did not explain how all this might work but we are having a telephone hook-up between Tobacco Institute members and RBH on Wednesday morning our time so perhaps we will learn more. [227]

The companies lobbied the UK, EC and Canadian governments, claiming that the notice period given by Canada to its labelling reforms was inadequate.[228] On May 24, 1993, their efforts paid off when the EU GATT Inquiry point wrote the Canadian authorities[229] to say that the new 25% warnings were "excessive" (they said the EU warnings which were only of 4 to 6% of the package worked just as well). In addition to expressing "serious concern" the EU requested "an additional period of 12 months before the entry into force."

This first GATT intervention on labelling proved valuable to the companies in showing that they could trigger inter-governmental representation to their favour. The message from the European Union to Canada was cited repeatedly in industry representations to other governments (including Poland[230] and the United Kingdom[231]) about the trade implications of "excessive" health warnings.

The companies won the battle over the delay, but not the war over the warnings. The new Prime Minister, Kim Campbell, and health minister, Mary Collins, did not take a different view from their predecessors. The new government moved forward with the warnings, somewhat delayed. Mr. Clutterbuck noted "our experience with the GATT Technical Barriers to Trade procedure can therefore be said to have contributed to a postponement of 11 months of planned implementation, originally intended for 1 September 1993, but not to have changed the policy itself."[232] Although the companies had been able to use GATT/TBT rules to gain delays in regulations, what they really wanted was a way to defeat such measures.

Scene 2: Plain Packaging is thrust into the parliamentary limelight

Focus on plain packaging in Canada suddenly intensified early in 1994, when it became a front-and-centre issue in the wake of a dramatic reversal of tobacco tax policy following a prolonged 'smuggling' crisis.

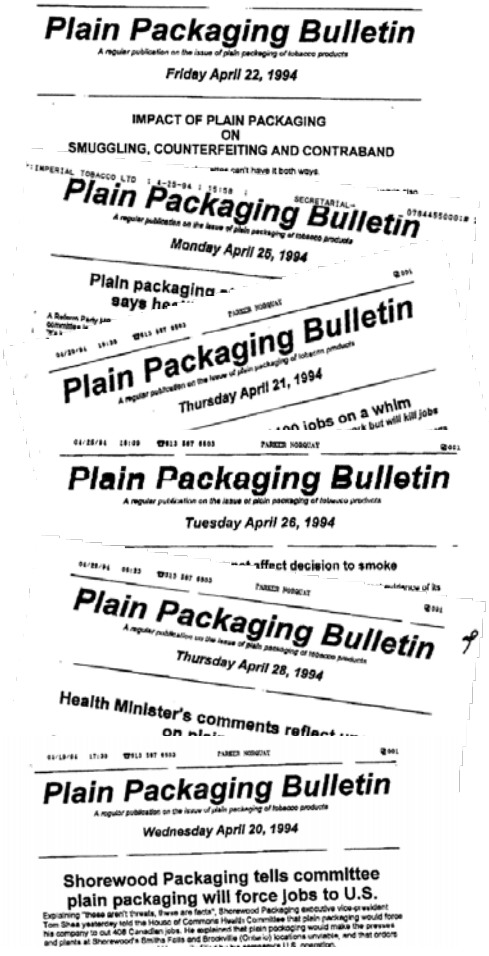
Between 1982 and 1992, a five-fold increase in cigarette taxes in Canada had lead to an almost doubling in the price of cigarettes.[233] In response, tobacco companies facilitated "round trip" smuggling of cigarettes exported to warehouses in the northern U.S. and then smuggled back to Canada through first nations territories. The companies facilitated this smuggling (admitting to doing so and agreeing to pay over $1 billion in damages in 2008),[234] and used the 'crisis' atmosphere of the sudden loss of the legal market to argue for a reduction in taxes. They launched a pitched campaign[235] [236] [237] [238] to get government to agree on a a sole solution to this industry-exaggerated and industry-exacerbated problem of contraband tobacco: a tax rollback.

On February 8, 1994 Jean Chrétien rose in the House of Commons and announced significant cuts in tobacco taxes. To counter concerns for the impact this would have on the health of Canadians he

promised several compensatory measures, including consideration of 'plain packaging' of cigarettes. Within weeks, the House of Commons Standing Committee on Health had launched hearings into plain packaging.

Scene 2: Planning a campaign strategy

On March 9, 1994, barely a month after taxes were rolled back and the plain packaging study announced, John McDonald of Rothmans, Benson and Hedges, provided his assessment of the situation and the initial plans in a memo to Jacqui Smithson, who was coordinating Rothmans efforts on plain packaging at an international level. [239]


Plain Packaging Bulletin
Friday April 22, 1994
IMPACT OF PLAIN PACKAGING ON SMUGGLING, COUNTERFEITING AND CONTRABAND
Plain Packaging Bulletin
Monday April 25, 1994
Plain Packaging Bulletin
Thursday April 21, 1994
Plain Packaging Bulletin
Tuesday April 26, 1994
Plain Packaging Bulletin
Thursday April 28, 1994
Health Minister's comments reflect
Plain Packaging Bulletin
Wednesday April 20, 1994
Shorewood Packaging tells committee plain packaging will force jobs to U.S.

"The 'tobacco issues environment' in Canada is dangerous at this time," he explained "because the anti-tobacco lobby have given the impression that governments have 'caved in' to the tobacco industry with the tobacco tax rollback and that initiatives such as generic packaging must be undertaken immediately to counter the 'flood' of lower priced cigarettes in the market."

McDonald explained that the lawyers were giving the issue an "extensive" review and that "Experts will be asked to look at the violation of domestic trade marks as well as the violation of International trade marks (NAFTA, GATT, TRIPS, WIPO, etc.)."

A month later, with hearings about to begin, McDonald again wrote the Plain Pack group (on April 5, 1994). This time he had more specifics to report on the CTMC's strategy, [240] which closely followed the Plain Pack Group strategic outline:

- They encouraged third parties to align their views with the tobacco companies on the questions of intellectual property rights.
  (They successfully recruited the Canadian Bar Association, National Intellectual Property Section).[241]

- They worked to prompt an energetic public debate.
  (Their campaign manager, David Small, coordinated messaging through frequent bulletins and an aggressive media campaign).[242]

- They created their own body of evidence by publishing their own materials and papers.
  (They soon commissioned market research from Decima[243] and hired university-based researcher, Zalton Amit, to counter the findings of the Canadian Cancer Society).[244]

- They created their own experts.
  (They engaged John Luik coordinate 'academics who would argue against plain packaging,' and engaged former Mountie Rod Stamler to say that plain packaging would lead to contraband).[245]

Scene 3: House of Commons hears testimony on Plain Packaging[4]

When the Standing Committee on Health opened its hearings into plain packaging on April 12, 1994, the CTMC's campaign was well underway. To this process they would deliver witnesses who would give the plain packaging issue an intellectual property framing, who would counter health agency studies with industry-created expertise, and who would create a public debate intended to weaken public consensus on the proposal. In short, they would successfully deploy the strategy outlined that spring by their multinational headquarters.

From the industry's perspective, the hearings opened on a very good footing. With considerable attention, the hearings opened on April 12 with an appearance by Health Canada witnesses. Already, Health Canada was back-tracking on the idea.

The industry did not expect that Kent Foster, assistant deputy minister would express doubt about the proposal or say that he felt there was "insufficient evidence" to go ahead at the time. "This very useful statement came as a pleasant surprise to the industry and it helped set the tone for the balance of the hearings," IMASCO CEO, Purdy Crawford, later recounted, adding that this testimony was "certainly a factor" in their later success.[246]

Throughout April 1994, the compressed hearings (six witnesses in each half day session) involved a rotation of health and industry witnesses. The media played little attention to the content of these briefs, but did take note of the politics of the hearings, such as the opposition of Reform Party critic Dr. Keith Martin, and the apparent political weakness of the health minister.[247] When the plain packaging focus was interrupted to allow the committee to question the Minister on the Estimates (an annual event), the minister was attacked for her commitment to plain packaging: "As we sit here with our health care system on the brink of disaster, to waste time on plain packaging is the height of nonsense," said Reform MP Dr. Grant Hill. [248]

It was the hearings in early May in which the intellectual property arguments were presented – and they were delivered by high-octane witnesses.

Philip Morris and RJ Reynolds engaged former U.S. trade representative, Carla Hills, and former Deputy Trade Representative, Julius Katz to tell the Canadian Commons Committee that plain packaging would be an "unlawful expropriation" of their trademark rights and that "the compensation claims of affected foreign trademark holders would be staggering, amounting to

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[4] **The setting: in 1994 trade agreements were new, poorly understood and greatly feared.**

The North American Free Trade Agreement had come into effect on January 1, 1994, only five weeks before Prime Minister Chrétien announced that his government was open to considering plain packaging as a policy reform and that it would be the subject of parliamentary hearings. On April 16, 1994, less than a week after the hearings on plain packaging were opened, his government committed Canada to another set of international trade commitments, when it signed the 26,000 page "Uruguay Round" of agreements. The plain packaging review was flying directly into one of the largest and most disputed policy reforms in Canada's history.

Half a year would elapse between the opening of the parliamentary hearings into plain packaging and the introduction of legislation to bring WTO agreements into force, but there was little question that measures to comply with these trade agreements would indeed become the law of the land. There was much less certainty about the difference these agreements would make to Canada's ability to set its own domestic agenda. For tobacco companies, this uncertainty about the potential scope of these new trade agreements was an invitation to create doubt about not just the effectiveness, but also the legality of plain packaging.

From a strategic view point, there was little downside for tobacco companies in pulling out the stops in Charter or trade agreement threats. The risk-benefit ratio was on their side: a relatively modest investment in legal opinions and public relations could forestall or defeat laws that would otherwise cost them much more in the form of lost profits. Each time they 'rolled the dice' of a legal challenge they had something to win, and little to lose.

hundreds of millions of dollars."[249] Parliamentarians could have been forgiven for believing that NAFTA negotiators intended the agreement to have this effect, as Julius Katz had been the chief negotiator for the United States during the NAFTA negotiations.

This landmark testimony, as later described by IMASCO CEO, Purdy Crawford, "drew headlines and ruffled the feathers of economic nationalists." Despite the fact that it "created a public uproar, and perhaps could have been handled better," he was pleased that "the message got through."[250]

The industry made sure "the message got through" on other occasions as well: they arranged for the International Trade Mark Association to submit a supportive brief,[251] [252] as well as the Canadian Bar Association.[253] RJR Macdonald's CEO, Ed Lang, also wrote a stern letter to the Prime Minister, threatening trade reprisal.[254] British American Tobacco submitted an opinion from its lawyers, Lovell White Durrant, similarly arguing that "the Canadian proposals are very much against the letter and the spirit of GATT."[255]

The Non Smokers' Rights privately circulated to MPs a counter view of trade agreements, commissioned from Osgoode Law Professor G. Castel, but this opinion was never made public nor did it become part of the official deliberations.[256]

Ironically, it was only one day after the Katz and Hill appearance that BAT's high level Tobacco Strategy Group was being told that the trade agreements, in fact, held "little joy" for the industry.[257]

On Thursday, May 14, 1994 the last set of 6 witnesses were heard, and the last word was given to the Canadian Tobacco Manufacturers Council. Plain packaging, they said, would lead to contraband, would make cigarettes cheaper and more available to youth, would result in the direct loss of 1,200 jobs, would expose the government to "billions of dollars" of compensation claims and would be an abuse of process, in light of the industry's constitutional challenge to the *Tobacco Products Control Act*.[258] The hearings were over.

Plain cigarette packaging rejected by House committee

MPs want proof of idea's effectiveness

BY ROSS HOWARD
Parliamentary Bureau

OTTAWA — A proposal by federal Health Minister Diane Marleau to put cigarettes into plain wrappers to promote publi her political profile has fallen flat.

Ms. Marleau's plan was deflat after the parliamentary committ rejected the idea of plain packa bacco products unless its effectiv proved.

In a brief report, heavy with and equivocation, the Liber committee concluded that plain p a reasonable component" in an tional anti-smoking strategy — bu

It recommended that the fed ment draft an outline of laws to packaging, as Ms. Marleau h urged last February amid a furor inet's decision to cut taxes on combat smuggling.

But it veered from the minister strategy and urged no legislatior before a federal study on the eff packaging is completed next year the results of that study support evidence that such packaging wil sumption.

The committee had heard cont timony from experts and advoc sides of the issue concerning the plain packaging, especially for yo

In an effort to protect jobs in industry, the committee also sa packaging should be as elaborate possible. It made no other recomr

The decision to embrace the id reality of plain packaging was el tobacco and packaging industry by critics of smoking, and provid mirth for some opposition MPs

yesterday.

"It is very sad to see a group of people who joke and laugh when 40,000 die every year as a direct result of smoking and we are committed

mediascan | Toronto | JUNE 22, 1994 | Toronto Star | 54 | A12

MPs push for plain cigarette packaging

Force makers to comply, committee says

BY SHAWN MCCARTHY
OTTAWA BUREAU

OTTAWA — The federal gov ernment should force cigarette makers to adopt plain packages even though the move could run afoul of free trade agreements, a House of Commons committee says.

Generic packaging, which would eliminate trademark col ors and symbols from cigarette packs, "is a reasonable component of the evolving national strategy to reduce tobacco consumption," the Liberal-dominated health committee said in a report released yesterday.

Health Minister Diane Marleau said she would follow the committee's recommendation to adopt plain packaging if an internal health department study confirms the measure would discourage smoking.

That study is due by the end of the year and, meanwhile, the government will prepare the required legislation so that it can move quickly.

"It's very important that we do everything that we can to ensure that when plain packaging legislation is brought forward, it's effective," Marleau said.

U.S. tobacco companies have warned they would seek "hundreds of millions of dollars" in compensation if the government proceeds.

They argue the North American Free Trade Agreement, which the Liberal government implemented Jan. 1, protects trademarks and requires com-

tries to pay compensation where that protection is breached.

Health organizations argue the country could invoke an exception in the pact if the measure would be necessary to protect the health of Canadians.

The Liberal majority on the committee conceded that "special attention" must be paid to the trade question if the government adopts generic packaging.

"Apparently, any action on plain packaging is open to international arbitration, which could lead to a resolution in one

Canadian or the other," the committee report said.

However, Bloc Quebecois MPs said the government would have a difficult time defending its policy before a court or dispute panel.

"The onus will be on the federal government to show that plain cigarette packaging is a necessary measure in protecting public health," the Bloc MPs wrote in a minority report.

So far, even the Liberal MPs have conceded the evidence is only circumstantial, the Bloc noted.

Committee chairperson Roger Simmons (Avalon-St.George's) said the plain packaging issue is primarily a health issue rather than a trade matter. And any measure that could help prevent young people from taking up smoking is worth pursuing, even if the risk of some trade action from the tobacco companies.

"It's a real nuisance to us because even if, at the end of the day, the companies' argu-

ment is rejected in law, we know smoking kills, but we have a legal right to do it," Liberal MP Hedy Fry (Vancouver Centre), a committee member and staunch advocate of plain packaging, said there is a clear link between marketing, which includes packaging, and consumption, especially among youth.

"Image is the key factor for young people beginning to smoke," Fry said in an interview.

"In fact, all the tobacco companies have researched the kind of image that is necessary to encourage young people to start smoking."

And, she said, they spend billions of dollars promoting that image through advertising and the sponsorship of sports and the arts.

Opposition critics issued dissenting reports, arguing the evidence is not conclusive that plain packaging would deter anyone, and particularly young people, from smoking.

Rob Parker, of the Canadian Tobacco Manufacturers' Council, said Marleau appears ready to ram through plain packaging despite the question of its effectiveness and despite the legal problems.

Scene 4: Reviewing early victories

At the end of June, the Standing Committee tabled its report, *Towards Zero Consumption*.[259] The committee "concluded that plain or generic packaging is a reasonable component" of a tobacco control agenda, that "the health of Canadians is the most vital criterion" and that the legislative framework for plain packaging be developed and introduced.[260] This could have been considered a step forward for plain packaging – but it was not seen that way in all quarters – especially as both opposition parties had written dissenting positions.

The media had differing takes on the outcome of the committee review: "Plain cigarette packaging rejected by House Committee" reported the Globe and Mail on June 22, 1994, the day after the committee tabled its report. [261] "MPs push for plain cigarette packaging,"[262] reported the Toronto Star on the same day.

The CTMC companies were somewhat less equivocal in their analysis. They knew they had run a successful campaign. So successful, in fact, that the highest level manager of Imperial Tobacco, the Chairman and Chief Executive Officer of its holding company, IMASCO, was invited to present an "Executive Mess" lunch at BAT to recount the story of the campaign only 2 weeks after the committee reported. "On balance," said Mr. Crawford, "the outcome was about as good as could have been expected." [263]

Rothmans, Benson and Hedges was even more bullish. "RBH management is pleased with the outcome of the hearings," David Dangoor wrote to William Webb.[264]

> *Whilst the industry is not out of the woods, there are some other positive developments. The Canadian Minister of Health is believed to be losing her job immanently as a result of her handling of many different issues. It is believed that if she goes, so will the plain packaging issue. …*
>
> *It is now very unlikely that this issue will ever reach cabinet level and it will remain dormant for the time being as the Parliament goes into recess until Fall.*
>
> *This issue has also lost the interest with the media. The industry has reinforced the notion of the issue being dead.*

Scene 5: These laurels aren't for sitting on.

In the summer of 1994, the plain packaging campaign in Canada could have been suspended while the industry, like other Canadians, waited for the government's response to the committee's recommendations to move forward with research and legislative preparations. Not satisfied with inaction, the companies described the next steps they would take.[265] They considered that the "[c]ommittee hearings were really only a skirmish along the way," and that ultimately it would be cabinet that would "decide the fate of branded cigarette packaging."[266] With that in mind, they turned their attention to the dynamics and opinions in cabinet and how to operationalize their assumption that "if [Marleau] goes, so will the plain packaging issue."

> ***Strategic Considerations:***
> *Marleau will have to carry the case to proceed to cabinet and caucus in the fall, perhaps with come sort of draft legislative framework as recommended by the committee to be introduced when the study hacking plain packaging is completed.*
> *This dictates two basic strategic approaches:*
> **Undermining credibility of the study and Minister on the grounds it is rigged.*
> **Continuing pressure from appropriate sources on target cabinet ministers and Liberal caucus members.*

During the summer of 1994 "continuing pressure" was indeed put on cabinet and caucus members. The Plain Pack bulletin reported that by mid-August 1994 "government and Opposition leaders have received well over 13,000 letters on the issue,"[267] including 1,700 to Industry Minister John Manley, 1,300 to Revenue Minister David Anderson, 1,860 to Opposition Leader Lucien Bouchard, 600 to Reform leader Preston Manning and 3,300 to Health Minister Diane Marleau.

Scene 6: Undermining the credibility of the Health Minister.

Tobacco companies would not have found it difficult, in the summer of 1994, to "undermine the credibility" of the health minister. Throughout 1994, as if according to the industry script, journalists, parliamentarians and members of the health community had discredited rookie cabinet member, Diane Marleau. The opposition were already using plain packaging as an illustration of her incompetence. "It's just a tragedy that while the health-care system is falling apart, we're dealing with something so irrelevant."[268]

Health groups were perhaps unaware that their frequent criticism of the minister fed into the industry's strategy. "Most health and anti-smoking lobby groups complained that Marleau is a weak minister who doesn't appear to understand the health implications of the tax cut or have the clout to make her views heard at the cabinet table," reported Southam News on February 11, 1994.[269] "She is not one of the really big players in the cabinet," David Sweanor of the NSRA was quoted by the Globe and Mail on April 9, 1994.[270] "

Cigarette action delayed

OTTAWA — The federal government is delaying a decision on plain packaging of cigarettes until some time next year, saying it is concerned about the legal ramifications of such a move.

The tone of a statement yesterday suggests Ottawa is having growing doubts about forcing cigarette manufacturers to put their products into plain wrappings.

Plain packs have been promoted as a way to fight the current marketing strategies of tobacco companies, but the concept has sparked fierce resistance from the tobacco industry. — *CP*

Scene 7: Health Canada applies the brakes

Whether or not tobacco companies followed through with their behind the scenes strategies to undermine Ms. Marleau's credibility, or to put pressure "from appropriate sources" on the government caucus and cabinet, their goals were successfully accomplished.

By the fall of 1994, the plain packaging initiative was floundering, and so was the career of the health Minister.

In mid-November the government was obliged, under parliamentary procedure, to provide a reply to the Standing Committee. The reply[271] when it came on the last possible day was a decision for a delay. Health Canada used two well-established government mechanisms to punt a decision on plain packaging into the realm of 'future decision making:' it announced it would wait until the Supreme Court had rendered its decision on the *Tobacco Products Control Act*, and it would commission further study.

The media saw this as good news for the tobacco companies:[272] "The federal government had some bad news Friday for advocates of plain packaging for cigarettes and good news for the tobacco companies," reported CBC radio. The government reply also strengthened the industry's intellectual property arguments by signalling the seriousness with which it took these claims and by announcing that health outcomes would have to be balanced with trade and economic concerns:

> *"The Government also recognizes, however, that a number of factors must be addressed before generic packaging can be introduced as a workable and useful control measure. As a result, the findings of an Expert Panel on the role of generic packaging in reducing the inducement to purchase and use tobacco products will be taken into account as will the international trade, contraband and economic implications of generic packaging.*[273]

While they waited for Health Canada to release its report, the industry found much to cheer about. The one-year anniversary of the tax rollback came and went, and government spokespeople denied

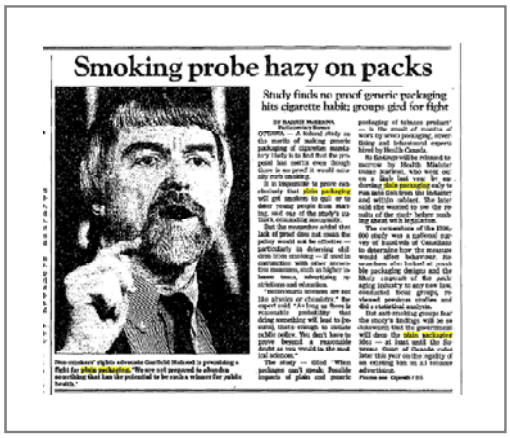
any increase in smoking. “We haven’t seen any increase in the number of people smoking,” said a Statistics Canada spokesperson.[274] A study by Health Canada researcher, Dr. Don Wigle, which predicted a significant increase in youth smoking as a result of the tax rollback was disavowed by a Health Canada policy spokesperson who said “Health Canada considers the analysis to be incomplete and therefore less than satisfactory.”[275]

If there was no increase in smoking as a result of tax rollbacks, then the political rationale for plain packaging and other measures that were introduced to compensate for reduced tobacco taxes was weakened. The industry had a new campaign message: “If he [Gar Mahood] and Diane Marleau were wrong about lower prices, do you suppose it’s possible they are also wrong about plain packaging? Could be.”[276]

Scene 8: The final blows

Packages can’t speak -- and the government stops speaking in favour

The release of Health Canada’s own research on plain packaging (“When packages can’t speak: Possible Impacts of Plain and Generic Packaging of Tobacco Products”[277]) on May 18, 1995 was received as a victory neither for tobacco companies nor public health. Health Canada’s press release acknowledged that the report “states that generic packaging would likely have an impact on smoking uptake and cessation” but was steadfastly noncommittal about the government’s intentions. The Minister was not directly quoted, and was attributed only with praising the researchers for “the scope and comprehensiveness” of their work.[278]


Smoking probe hazy on packs

Study finds no proof generic packaging hits cigarette habit; groups gird for fight

Globe and Mail reports were among those who found the study’s reports equivocal and the political commitment waning. “Smoking probe hazy on packs” was the headline over the report that “Diane Marleau released the study yesterday, but quickly soft-pedalled an earlier commitment to push ahead with legislation when she had the research in hand.”[279]

The Supreme Court Nail in the Coffin

Narrow as it was, the September 25, 1995 decision of the Supreme Court to strike down the *Tobacco Products Control Act* was a decisive blow to plain packaging. The government had signalled in November 1994[280] that it would attend the court’s ruling before making any legislative changes. As the Globe and Mail reported in advance of the ruling: “the fate of the advertising ban is expected to set the tone for future anti-tobacco legislation in Canada, including a controversial scheme to force companies to wrap their cigarettes in plain or genetic packages.”[281]

By striking down the existing law, the Supreme Court decision mandated legislative change. Arguably, this could have included legislation that provided for plain packaging, but this interpretation was not one shared by the government nor industry observers. “This puts a nail in the coffin of plain packaging,” wrote the Globe and Mail, citing an analyst “who didn’t want to be identified.”[282] The tobacco companies quickly pulled out the sections in the law which would buttress their opposition to plain packaging (copied below).[283]

Within 24 months, tobacco control had suffered a cut to taxes, a cut to funding, a loss of advertising bans and a supposed end to the development of plain packaging. As an Opposition critic demanded of the health minister in question period that week "I'd like to know exactly what is left of the minister's anti-smoking policy?"[284]

"Only one thing is certain," the industry's plain packaging campaign members were told. "The Supreme Court decision dramatically attars the legal landscape for tobacco products regulation and control for the government – and that includes plain packaging."[285]

Not with a bang, but a whimper, calls for plain packaging were silenced as the health community – inside government and out – focused on replacement legislation for the *Tobacco Products Control Act*. The replacement law (C-71, the *Tobacco Act* introduced late in 1996), by specifically allowing for the use of colour, moved plain packaging off the policy agenda.

The new Minister of Health, David Dingwall, made that clear to the Standing Committee during its (brief) review of C-71 that he was sympathetic to the industry view that their trademarks were protected. He assured parliamentarians that trade marks would be allowed on packages, because otherwise "we would be in violation both of trademark and of the Charter of Rights and Freedoms because the product is not deemed to be an illegal product. That's the balance here." [286]

Scene 9: Echos

Health minister David Dingwall was among those defeated in the 1997 election, which was called only days after the *Tobacco Act* was given royal assent. The election returned a Liberal government, and in the post-election cabinet Allan Rock was moved from the justice portfolio to health.

Allan Rock's first initiatives on the tobacco file were to implement a last-minute promise made by the outgoing health minister to Grand Prix organizers[287] to relax restrictions on tobacco sponsorships. His task was to steward through parliament a bill (C-42) that extended permission for sponsorship advertising off-site by 2 years (until 2001) and on-site for a further 3 years (until 2003). This was seen as a 'cave-in' by health groups to pressure from tobacco companies and racing event organizers.[288]

Soon after completing this task, during National Non Smoking Week in January 1999, Mr. Rock gave a speech to the health community and released consultation papers on several proposed measures.[289] Although his suggestions did not come with the backing of cabinet (they were "offered for *discussion purposes only and do not represent a formal proposal or Health Canada's position)"*[290] they were nonetheless highly welcomed by health groups. Included in the materials released that day were: a consultation paper on new tobacco labelling (proposing 60% warnings),[291] a consumer warning on the use of the terms 'light' and 'mild',[292] a consultation paper on tobacco promotion requirements, including point of sale and packaging restrictions,[293] and an information letter heralding regulations for on new reporting requirements.[294]

Amongst this volume of material but not highlighted in the minister's speech or any press material, were 27 words that suggested that plain packaging was still open for discussion. The department sought comments on the option that "Tobacco products would only be furnished in standardized plain packaging so that the only differentiation between products is the brand name (same as generic packaging)."[295]

The industry again responded with a flurry of trade objections, including a repetition of their claim, against WIPO advice, that the regulations would "expose Canada to legitimate and well-founded complaints under World Trade Organization agreements such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Paris Convention for the Protection of Industrial Property."[296]

The consultation paper presentation of plain packaging as an ongoing option and the industry's responding brief did not receive much public attention. It would not be until 2001 that public health appeals for plain packaging were again reported in the Globe and Mail.[297]

Sections of the Supreme Court ruling identified by Imperial Tobacco as pertinent to plain packaging.[298]

McLachlin J.:

159: On the other hand, there does not appear to be any causal connection between the objective of decreasing tobacco consumption and the absolute prohibition on the use of a tobacco trade mark on articles other than tobacco products. ... There is no causal connection based on direct evidence, nor is there, in my view, a causal connection based in logic or reason . . . . I find that s.5 of the Act fails the rational connection test.

182: (The ban) extends to advertising which arguably produces benefits to the consumer while having little or no conceivable impact on consumption. Purely informational advertising, simple reminders of package appearance, advertising for new brands and advertising showing relative tar content of different brands - all these are included in the ban. Smoking is a legal activity yet consumers are deprived of an important means of learning about product availability to suit their preferences and to compare brand content with an aim to reducing the risk to their health.

184: The government had before it a variety of less intrusive measures when it enacted the total ban on advertising, including: a partial ban which would allow information and brand preference advertising ; a ban on lifestyle advertising only; measures such as those in Quebec's *Consumer Protection Act* to prohibit advertising aimed at children and adolescents ; and labelling requirements only (which Health and Welfare believed would be preferable to an ad ban : A.J. Liston's testimony. In my view any of these alternatives would be a reasonable impairment of the right to free expression, given the important objective and the legislative context.

173: The government is clearly justified in requiring the appellants to place warnings on tobacco packaging. The question is whether it was necessary to prohibit the appellants from attributing the message to the government and whether it was necessary to prevent the appellants from placing on their packaging any information other than that allowed by the regulation.

174: (I)t was for the government to show. . . . This it has failed to do. Again, my colleague La Forest J. responds (in para. 116) with the belief that "a lower level of constitutional scrutiny is justified in this context". . . . I respectfully disagree.

176: I have found as. 4. 6 and 9. .. constitute unjustified infringements on free expression. These provisions spearhead the scheme under the Act and cannot be severed cleanly from other provisions dealing with promotion and trade mark usage. ... I would consequently hold that as. 4, 6, 6.8 and 9 are inconsistent with the Charter and hence are of no force or effect.

EPILOGUE

Since the brief flurry of activity on the file in the 1990s, governments have stopped talking about plain packaging.

Tobacco companies, however, have not stopped talking about intellectual property rights, nor stopped positioning international agreements as being an impediment to health measures designed to reduce smoking.

The blustering position that they developed and honed in the plain packaging debate has also been tried on other tobacco control measures, such as bans on tobacco advertising, larger warnings on packages, and restrictions on deceptive descriptors.

Tobacco companies – often working together across company lines – have repeatedly attempted to use international trade and intellectual property agreements to forestall or block tobacco control measures. Canada is one of the few countries where these threats have succeeded in delaying or defeating proposed measures.

Examples in other countries include:

- **1992 - 1998: Thailand's proposals to require ingredient disclosure**
  Tobacco companies launched repeated efforts to characterize requirements for ingredient disclosure as a breach of GATT/WTO obligations, and successfully engaged the U.S. government in supporting their case. The disclosure requirements finally came into force in April 1998.[299]

- **1993: Changes to Canadian Health Warning Messages (25% of principal display)**
  As discussed earlier, the tobacco industry successfully prompted the EU GATT Inquiry Point to express official concern to the Canadian government about the new requirement for warnings to occupy 25% of the principal display surfaces of packages. The tobacco industry had hoped to have the measure quashed, but succeeded only in having it delayed.[300] The warnings appeared on packages in 1994.[301]

- **1993: Finland's proposals to strengthen its 1977 tobacco law banning advertising.**
  The Finnish Tobacco Manufacturers Association told parliament that "The prohibition against the use of symbols combined with a prohibition to register the trademark of a tobacco product as a trademark for a product other than tobacco product would be incompatible with the fundamental principles of the trademark rights, defined in the Paris Convention binding on Finland."[302] The amendments were passed and came into force in 1994.[303]

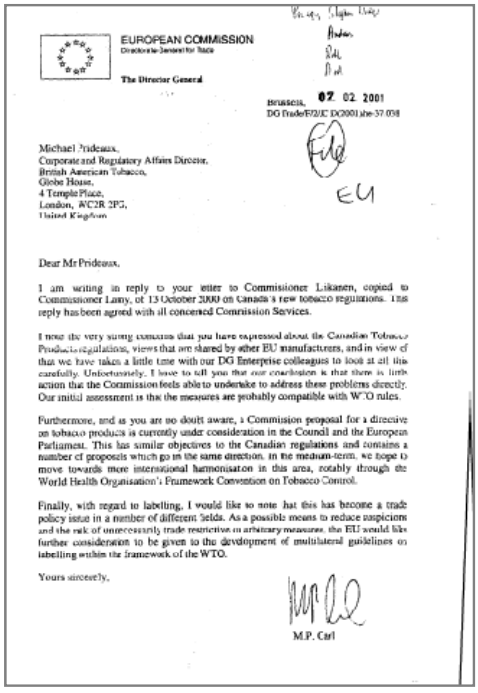
- **1994: South Africa's proposed 25% health warning messages**
  In a letter to the health ministry, Philip Morris claimed that the proposed larger health warnings would infringe their property rights. "Protection of International Property Rights, has provided assurances to international consumer products companies that their trademark rights will be respected and protected against infringement or expropriation. Yet the proposed regulations, which would obscure 25% of the front package and 50% of the back package, would seriously infringe these trademark rights, causing consumer confusion as to source, weakening brand identification and generally amounting to a government expropriation of these valuable property rights. … These are serious infringements of valuable property rights which will expose the South African government to legal challenge."[304] The regulation came into force later that year.[305]

- **1996: Hong Kong Smoking Public Health Amendment Bill 1996, which restricted advertising and required health warning messages**
  The Tobacco Institute of Hong Kong protested that "The Bill's proposals also would effectively diminish the commercial value of trade marks lawfully registered and used in Hong Kong, without any compensation to the trade mark owner. They may also violate the Paris Convention for the Protection of Intellectual Property and that part of the General Agreement on Tariffs and Trade (GATT) dealing with Trade Related Aspects of Intellectual Property Rights (TRIPS). This would send a powerful message to the international community concerning the respect which Hong Kong has for intellectual property rights.[306] Philip Morris developed speaking notes for its representatives that echoed this view.[307] The law was passed in 1997.[308]

- **1997: New Zealand proposals to increase the size of its warnings**
  In a submission to the government, the Tobacco Institute of New Zealand charged that the proposals were "an unwarranted and unjustifiable interference with the intellectual property rights of tobacco companies and "contrary to New Zealand's international obligations undertaken in the WTO/TRIPS Agreement which New Zealand has ratified and by which it is legally bound."[309] The regulations were adopted in 1999.

- **1998: South Africa's Tobacco Products Control Amendment Bill, B117**
  The response of the Tobacco Institute of Southern Africa to this legislative proposal was to claim that the measures were a technical barrier to trade. "The implementation of this Bill will probably result in a violation of some of South Africa's international obligations… A state cannot escape its international legal obligations *vis à vis* other states by relying on its domestic law. … Severe embarrassment and even international litigation could result.[310] The law was passed in 1999.[311]

- **1999: Sri Lanka's proposed National Authority on Tobacco and Alcohol.**
  BAT's subsidiary, the Ceylon Tobacco Company, challenged the proposed law as raising "serious issues … under a number of international agreements to which Sri Lanka is a signatory, including the Paris Convention for the Protection of Industrial Property, the Agreement on Trade Related Intellectual Property Rights and Agreement on Technical Barriers to Trade.)[312] Sri Lanka passed legislation to establish this authority in 2006.[313]



EUROPEAN COMMISSION
Directorate-General for Trade

The Director General

Brussels, 07 02. 2001
DG Trade/F2/JC D(2001)br-37 058

Michael Prideaux,
Corporate and Regulatory Affairs Director,
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London, WC2R 2PG,
United Kingdom

EU

Dear Mr Prideaux,

I am writing in reply to your letter to Commissioner Liikanen, copied to Commissioner Lamy, of 13 October 2000 on Canada's new tobacco regulations. This reply has been agreed with all concerned Commission Services.

I note the very strong concerns that you have expressed about the Canadian Tobacco Products regulations, views that are shared by other EU manufacturers, and in view of that we have taken a little time with our DG Enterprise colleagues to look at all this carefully. Unfortunately, I have to tell you that our conclusion is that there is little action that the Commission feels able to undertake to address these problems directly. Our initial assessment is that the measures are probably compatible with WTO rules.

Furthermore, and as you are no doubt aware, a Commission proposal for a directive on tobacco products is currently under consideration in the Council and the European Parliament. This has similar objectives to the Canadian regulations and contains a number of proposals which go in the same direction. In the medium-term, we hope to move towards more international harmonisation in this area, notably through the World Health Organisation's Framework Convention on Tobacco Control.

Finally, with regard to labelling, I would like to note that this has become a trade policy issue in a number of different fields. As a possible means to reduce suspicions and the risk of unnecessarily trade restrictive or arbitrary measures, the EU would like further consideration to be given to the development of multilateral guidelines on labelling within the framework of the WTO.

Yours sincerely,

M.P. Carl

- **1999: Changes to Canadian Health Warnings Messages (50% of principal display)**
  The industry again attempted to engage the EU in another trade challenge against Canada's new health warnings but were, however, summarily rebuffed. The EU Director General for Trade, Mr. Carl, asserted the proposed Canadian measures were "probably compatible with WTO rules." [314] The warnings have been on packages since 2000.[315]

- **2000: The European Union Directive on Tobacco Advertising**
  In a meeting with the European Parliament Committee on Environment, Public Health and

Consumer Policy, the industry said that because descriptors, like 'light' were part of a trademark, and therefore "a prohibition of use of such a combined trademark would violate the TRIPS Agreement and the Paris Convention."[316] [317] The industry commissioned an extensive argument regarding trade agreement impediments to implementing the directive.[318]

- **2000: the Framework Convention on Tobacco Control.**
  British-American Tobacco's Submission to the WHO's Framework Convention on Tobacco Control warned that " The WHO's proposals to ban tobacco advertising and descriptors such as 'Lights', could infringe commercial and intellectual property rights guaranteed in international law and could clash with provisions embodied in national constitutions protecting freedom of speech.[319] [320] Japan Tobacco suggested that "the FCTC proposal to ban descriptors raises concerns over the infringement of commercial and intellectual property rights guaranteed in the World Trade Organization Agreement on Technical Barriers to Trade, Agreement on Trade-Related Aspects of Intellectual Property Rights, and the Paris Convention of 1967."[321]

- **2001: European Union ban on 'light' descriptors**
  Japan Tobacco International filed a complaint in mid-September 2001 with the European Court of First instance claiming that the ban on 'light' and 'mild' was a violation of intellectual property laws.[322] The law came into force, as predicted, on September 30, 2003.[323]

- **2002: Canadian proposals to ban 'light' descriptors**
  Philip Morris filed a notice claiming that any bans on trademarks would be an expropriation, inconsistent with Chapter 11 of NAFTA, saying that they had "invested substantial sums to develop brand identity and consumer loyalty for these low yield products."[324] Canada has yet to impose regulations banning these terms, although a voluntary agreement was reached with Philip Morris' subsidiary and other tobacco companies.[325]

- **2008. UK Discussion paper on plain packaging**
  On World No Tobacco Day, 2008, the UK government issued a discussion paper on tobacco control measures, including the potential for plain packaging.[326] By September 2008, tobacco companies operating in the UK, including Philip Morris,[327] JTI,[328] the Imperial Group[329] and BAT[330] responded that such measures were an infringement of the Paris Convention or other international treaties. Their position was supported by others, including the European Communities Trade Mark Association[331]

What will the future hold?

In the past decade or so, tobacco industry sabre-rattling, bullying and bluster about international agreements has led to worthwhile tobacco control measures being cancelled or unreasonably delayed in Canada, Australia, New Zealand, Thailand and Sri Lanka. Governments were fooled in the past, but there are some reasons to hope that tobacco companies will be less able to bully and fool them in the future.

Trade agreements have matured and governments' understanding of them has improved

The World Trade Agreements have now been in place for over a decade. When they first came into force in the early 1990's, they were not widely understood and greatly feared, even by government officials and government lawyers who were unsure of just how far such trade agreements would intrude on national sovereignty. Now, after about 15 years of experience with these agreements, jurisprudence on their application has accumulated, and there is more understanding of them in government circles and more orderly application of their provisions.

Significantly, governments have realized that, properly applied, trade agreements intrude less on public health measures and other health and social legislation than once feared, and even when there is a conflict, it does not mean that the health measure needs to be abandoned.[332]

Consequently, tobacco industry fear-mongering about trade agreements is less likely to be accepted at face value than it has been in the past. While the tobacco industry had some success in persuading government officials to rattle trade sabres on the tobacco industry's behalf in the 1990s,[333] in more recent years, their renewed attempts to do so have been more likely than not to be rebuffed.[334]

The Framework Convention on Tobacco Control

Now, too, governments can invoke the new Framework Convention on Tobacco Control (FCTC), in force since 2005.

The FCTC co-exists with WTO agreements. It is not subservient to them, nor does it trump them. The relationship between the two agreements was discussed at length between the parties, and the final decision on how to define their mutual standing was thoughtfully determined. In the end, the drafters of the FCTC assert in its preamble[335] that the "Parties to this Convention [are] determined to give priority to their right to protect public health" and that they recognize "the need to be alert to any efforts by the tobacco industry to undermine or subvert tobacco control efforts."

In addition, the FCTC has its own dispute settling mechanism in Article 27. The very existence of the FCTC and its nearly universal ratification, with 152 Parties, guarantees that public health protection will have at least equal billing with free trade in future tobacco control dramas, and that challenges between countries about the legitimacy of measures like plain packaging would arguably be managed through the FCTC process and not through the WTO dispute settlement mechanisms.

Knowledge is power

The previously secret tobacco industry documents upon which much of this drama has been based only began to enter the public domain in 1998, and many of these documents have only come to light since 2006. As a result of these documents, we now know that the tobacco companies knew very early on that international trade agreements would not offer them the protection for which they fondly hoped from plain packaging and other national tobacco control measures.

Knowledge that trade agreements offered "little joy" did not deter the tobacco industry from offering in dozens of countries on hundreds of occasions repeated public assertions and solemn testimony by tobacco industry executive, lawyers and paid "experts" that plain packaging and other proposed tobacco control measures would violate trade agreements, when they knew perfectly well that this was untrue.

Such assertions were a key part of a long-term international lobbying campaign of sabre-rattling, bullying and bluster to beat back proposed tobacco control measures in Canada and many other corners of the globe.

Armed with a better understanding of trade agreements, a new global tobacco control treaty and full knowledge that tobacco industry rhetoric is empty, governments should have no fear of launching new tobacco plain packaging initiatives and other valuable tobacco control measures. The next time around, the plain packaging drama promises to have a very different ending. Big Tobacco won the early battles, but the war on tobacco and the campaign for plain packaging are not yet over.

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