

# The Plot Against Plain Packaging

**How multinational tobacco companies colluded to use trade arguments they knew were phoney to oppose plain packaging.**

**And how health ministers in Canada and Australia fell for their chicanery.**

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*The government recognizes that lower taxes and therefore lower prices for legally purchased cigarettes may prompt some people, particularly young Canadians, to smoke more.*

*That is why the government will take strong action to discourage smoking, including legislated and regulatory changes to ban the manufacture of kiddie packs targeted at young buyers, raise the legal age for purchasing cigarettes, increase fines for the sale of cigarettes to minors, drastically restrict the locations for vending machines, and make health warnings on tobacco packaging more effective.*

***We will also examine the feasibility of requiring plain packaging of cigarettes and will also ask the House of Commons Standing Committee on Health to make recommendations in this area.***

*We are also launching immediately a comprehensive public education campaign including a national media campaign to make young people aware of the harmful effects of smoking; new efforts to reach families, new parents and others who serve as role models for children; support of school education programs; increased efforts to reach young women who are starting*

*Prime Minister Jean Chrétien  
House of Commons  
February 8, 1994.*

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# PLAIN PACKAGING TIME LINE

## **June 1986**

CMA Annual general meeting supports motion of Gerry Karr to in favour of plain packaging.

## **June 1987**

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 that measures to allow for plain or generic packaging be included in the Tobacco Products Control Act.

## **May 1989**

New Zealand Coalition Against Tobacco Advertising and Promotion announces it will press for 'generic' packaging of cigarettes.

## **September 1989**

New Zealand's Principal Medical Officer, Dr. Murray Laugesen, prepares a policy paper on "Tobacco promotion through product packaging."

## **October 1991**

U.K. ASH issues a manifesto for tobacco control that includes plain packaging as a recommendation.

## **Spring 1991-1992**

New Zealand researchers (Beade et al) promote plain packaging.

## **April 15, 1992**

Australian Ministerial Council on Drug Strategy (composed of health ministers) proposes large new warnings and asks for a report on plain packaging.

## **October 1992**

The European Smoking agency, BASP, puts out a call for plain packaging.

## **January 6, 1993**

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

## **May 1993**

Rothmans international proposes the development of a global industry committee to address plain packaging.

## **October 25, 1993**

General Election. Liberals win a majority, official opposition goes to the Bloc Quebecois.

## **November 4, 1993**

Jean Chrétien sworn in as Prime Minister.

## **November 29, 1993**

Global industry "Plain Pack Group" officially formed

## **January 1, 1994**

North American Free Trade Agreement goes into effect.

## **January 11, 1994**

Daniel Johnson becomes Premier of Quebec.

## **January 18, 1994**

Canada's new government delivers its Throne Speech (no reference to tobacco) and parliamentary session opens.

## **January 1994**

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

## **February 8, 1994**

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 1994**

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

## **April 12, 1994**

Standing Committee on Health begins hearings on plain packaging.

## **April 16, 1994**

Canada signs new WTO agreements.

## **May 10, 1994**

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 11, 1994**

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**

Standing Committee on Health ends public hearings on plain packaging.

**June 21, 1994**

Standing Committee on Health presents its report on plain packaging "Towards Zero Consumption."

**July 4, 1994**

Purdy Crawford, CEO of IMASCO, speaks in London to a tobacco industry audience about the plain packaging campaign.

**July 5 1994**

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."

**August 31, 1994**

WIPO writes Carla Hill's law firm (Mudge Rose) to tell them that the opinion they gave the Standing Committee was wrong.

**September 12, 1994**

Quebec general election returns Parti Quebecois to power.

**September 21, 1994**

International Chamber of Commerce, after a request from BAT, writes Canada's trade minister, Roy Maclaren, to repeat the (incorrect) opinion that Canada's obligations under the Paris Convention stood in the way of plain packaging.

**October 1994**

9<sup>th</sup> World Conference on Tobacco or Health passes a resolution in favour of plain packaging of cigarettes.

**November 18, 1994**

Health Canada tables response to Standing Committee report.

**January 25, 1995**

Statistics Canada reports no increase in the number of people smoking following the tax rollback.

**February 1995**

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

**May 18, 1995**

Health Canada releases its expert report "When packages can't speak."

**July 24, 1995**

Australian health minister Carmen Lawrence rejects the idea of plain packaging on international trade and legal grounds.

**September 21, 1995**

Supreme Court strikes down Tobacco Products Control Act.

**December 11, 1995**

Health Canada releases a "Blueprint to protect the health of Canadians," a framework for renewed legislation that makes scant mention of plain packaging.

**January 24, 1996**

Cabinet shuffle: Diane Marleau moved to Public Works, David Dingwall appointed as health minister.

**December 6, 1996**

David Dingwall tells parliamentary committee that companies must be allowed to display their trademark names in accordance with Canada's constitution and international law.

**1998**

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.

**1999**

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

## SYNOPSIS

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Plain packaging was thrust abruptly onto the Canadian policy stage in February 1994 in the wake of a crisis over tobacco smuggling. It disappeared just as precipitously 20 months later when the Supreme Court ruled against the *Tobacco Products Control Act* in September 1995.

These dramatic exogenous events perhaps obscured the intensity with which tobacco companies fought – and won – their first public battle against plain packaging (in Canada) and the effectiveness with which they had won a more subtle campaign in Australia.

This paper reviews tobacco industry 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 they 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.

The industry's campaign in Canada was an intensive no-holds-barred fight against a Minister who believed in plain packaging. The Canadian companies set out to discredit her and, within 18 months, with her credibility indeed weakened, she was shuffled out of the health portfolio.

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.

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\* These documents have been taken from two collections: Most are taken from the University of California at San Francisco's British American Tobacco Documents Archive, which is an electronic file of documents taken from BAT's "Guildford Depository." The depository was established as a result of litigation brought against several tobacco companies by the State of Minnesota and Minnesota Blue Cross Blue Shield. The second collection, also housed at the University of California San Francisco is the Legacy Tobacco Documents Library (LTDL), which consolidates U.S. tobacco industry documents made public as a result of the Minnesota and other trials.

## PROLOGUE: TOBACCO IN THE WINTER OF 1994

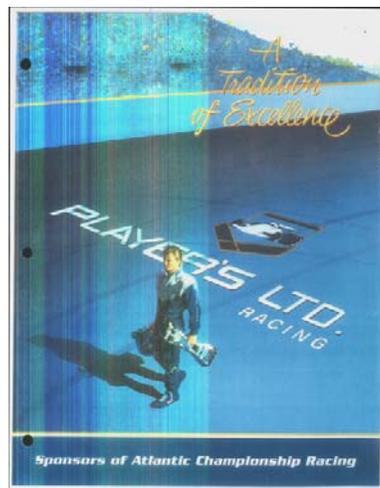
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On February 8, Jean Chrétien rose in the House of Commons and announced significant cuts in tobacco taxes. To counter concerns for the impact this would have on the health of Canadians he promised several compensatory measures, including consideration of 'plain packaging' of cigarettes.

For tobacco companies, the tax rollback was a decisive victory. The proposal for plain packaging was a potential threat – but one that they were well prepared to fight. After all, by the fall of 1993, tobacco companies had successfully targeted (and weakened) key Canadian tobacco control policies and their counter activities were putting strain on key measures of the national framework to reduce tobacco use.<sup>1</sup>

- **They used court challenges and shell companies to overturn the new ban on tobacco advertising.**

In the winter of 1993-94, the industry had made progress in its efforts to defeat the *Tobacco Products Control Act (TPCA)*. Their challenge to the constitutionality of the law had been successful at its first trial when the Quebec Superior Court agreed with their position that the law was beyond federal jurisdiction and that it was inconsistent with Charter-protected freedoms of expression. The Court of Appeal had subsequently overturned that ruling and agreed with the law,<sup>2</sup> but the Supreme Court was not scheduled to hold a hearing to finally settle the contested issues until late in 1994.



While waiting for the court decision, Health Canada was very cautious in its enforcement policy, and the companies were able to assert their own interpretations of the law. One key new device the companies explored was creating new corporations that had brand names (like Players Ltd. Racing) to create/exploit a loophole in the law which permitted sponsorship promotions for corporations, but not for tobacco brands.

- **They used an integrated approach to driving up smuggling, and then driving government to see that a tax rollback was the only solution.**

Between 1982 and 1992, a five-fold increase in cigarette taxes had led to an almost doubling in the price of cigarettes.<sup>3</sup> 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. To do so, they ended their agreement with the federal government to voluntarily restrict cigarette exports, they

redesigned the packaging of exported cigarettes so as to make them indistinguishable from those legally sold in Canada.

They also launched a sustained lobbying campaign for tax rollback, and engineered a 'tax revolt' by printing protests cards in every cigarette pack.

This manufactured tax revolt exacerbated concerns over smuggling,<sup>4 5 6 7</sup> as did the acceptance by government of the higher industry estimates of smuggling (40%)<sup>8</sup> over those of the health sector (25%).<sup>9</sup>

Their campaign was focused on providing a sole solution to this industry-exaggerated and industry-exacerbated problem of contraband tobacco: a tax rollback.

- **They had played hardball on political fault lines.**

In the late 1980s, tobacco issues were viewed differently on different sides of pre-existing socio-political divisions. Notably, tobacco control was more vulnerable in Quebec (where smoking rates were higher and where the perceived economic benefits of tobacco manufacturing were also higher) and in Canada's first nations (where tobacco was imbued with historic significance and where open trade of contraband tobacco had become a symbol of political autonomy).

The companies had learned how to use anxiety about Quebec independence to bolster their power. Political tension about relations between Quebec and English Canada were high the year that plain packaging was under consideration. The 1993 election had strengthened the presence of parties on both sides of the Quebec/Canada divide: the new prime minister, Jean Chrétien, had a reputation as a staunch federalist and the new leader of the opposition, Lucien Bouchard, had a mandate to promote Quebec sovereignty. The House of Commons was suddenly the locus of debate for Quebec issues. The stakes were high on all sides when another recently appointed Quebec leader, Daniel Johnson,<sup>10</sup> facing his own imminent election, asked Ottawa to lower tobacco taxes.

Purdy Crawford, CEO of IMASCO, explained the Quebec dynamic to his British colleagues in July 1994:

*Quebec was hardest hit by tobacco smuggling and lobbying for a tax rollback on the part of the retail trade was very aggressive. Not surprisingly the separatist opposition Parti Quebecois was "making hay" on the government's lack of success with the issue and the premier was trailing in the polls in an election year. So, as often happens in Canada, national unity became a very real factor in an otherwise unrelated debate.<sup>11</sup>*

# MICHAEL WILSON WANTS YOU TO STEP OUTSIDE FOR A CIGARETTE.



The industry had also learned to use Mohawk territories as both a channel for smuggling and a fifth column for political opposition. Divisions between the Mohawk nations and the non-aboriginal communities were as stark in 1993 as they are 15 years later, but the memory of events at Oka in 1990 as a disaster only partially averted was all the more fresh in the public mind. Then, as now, these communities were the base of the wholesale and distribution end of the contraband tobacco market. Canada's tobacco companies, as shown below in a presentation made by Rothmans, Benson and Hedges in 1994, recognized the value of these political tensions to the contraband market.<sup>12</sup>

**Canada's Native Peoples**

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- ◆ **Do not recognize international borders.**
- ◆ **Appear to have been granted freedom from all forms of taxation in Jay Treaty of 1794.**
- ◆ **Claim that tobacco is required in their religious ceremonies.**
- ◆ **Have been effective in using the courts to successfully settle land claims.**
- ◆ **Have learned to use the media to their advantage.**
- ◆ **Mohawk Warriors are reported to be organized, well equipped and well armed:**
  - **High speed motor boats with night vision**
  - **Armed with AK-47 assault rifles**
  - **Heavily-guarded warehouses**
  - **Supplier to organized crime (Mafia, Asian triads, biker gangs)**

**The straw that broke the camel's back – and led to a plain packaging review.**

In 1993, the federal political landscape was significantly rearranged. The results of the October 25, 1993 general election were unprecedented: The ruling Conservative Party was reduced to only 2 elected members (from 177), and Canada was suddenly faced with a five-party parliament (two parties of which lacked official status), and an official opposition with a mandate to focus on Quebec's interests.

This put the new government under intense pressure to agree with the demands of the Quebec government to lower tobacco taxes. When parliament opened, the Bloc Québécois pounded the government on the issue, raising it daily and often giving it the profile of lead-off question during Question Period. Quebec retailers, working collaboratively with the major tobacco companies, were openly selling illegal cigarettes.<sup>13</sup> The crisis had become full-blown: the protests were, as Michel Descoteaux put it in a memo more fully cited below, "the straw that broke the camel's back" of the tobacco tax strategy.<sup>14</sup>

Within 3 weeks of the Throne Speech<sup>15</sup> (which had been silent on the issue), the Prime Minister rose in the House on February 8, 1994<sup>16</sup> to announce that tobacco taxes would be slashed by up to \$10 a carton. Concerned at the impact of this measure on smoking and consequently health, a number of compensatory measures were announced. These included the imposition of a surtax on tobacco corporate profits, an export tax on cigarettes, the funding of "the largest anti-smoking campaign this country has ever seen," improved tax markings, improved laws on youth access, including a ban on 'kiddie packs'. Last among the initiatives mentioned to mitigate the tax reduction was a commitment to "examine the feasibility of requiring plain packaging of cigarettes and will also ask the House of Commons Standing Committee on Health to make recommendations in this area."

### **Imperial Tobacco Canada on<sup>17</sup> "Lobbying for a tobacco tax rollback in Canada"**

"Since the beginning of the 80's, the Canadian tobacco industry has lobbied long and hard to contribute to the tax rollback which took place in February, 1994 ...

#### **Mobilizing smokers**

The most spectacular "untraditional" initiative was called the BOSTON TEA PARTY project, which enlisted the active support of smokers in opposition to high tobacco taxes. This initiative was conducted in the Spring of 1991 by two of the three major Canadian tobacco manufacturing companies. It consisted in printing on the inside shell of cigarette packages a message addressed to the federal Prime Minister calling for a rollback of tobacco taxes. The campaign was supported by an advertising campaign in the media and in retail stores. In a matter of a few months, millions of these messages were delivered to the Prime Minister...

#### **The Export Tax**

In February 1992... the federal government announced the imposition of an export tax which threatened the future of all exports of Canadian-made tobacco products.

In response, one of the major tobacco companies decided to move a portion of its production off shore, and to suspend its leaf negotiations with Canadian

tobacco growers. Eight weeks later, the government came to reason and announced the suspension of the export tax.

#### **Research into the size of the problem**

The industry retained the services of some outside experts which produced a series of report documenting both the size of the problem and ways in which Canadian-made tobacco products were brought back into the country for illegal distribution and sale

In order to make the media and the general public more aware of the findings of these studies, a public relations tour of some of the country's major cities was organized, featuring the author of the reports, Rod Stamler, as the spokesperson on the issue. Simultaneously, private meetings with politicians and government officials were arranged for the author, so that his report could become the document of reference on these aspects of the issue.

#### **More mobilization**

In order to further raise awareness of the acuteness of the problem, the industry joined together with growers, union, wholesalers and retailers to launch a campaign soliciting the support of smokers for a tax rollback (under the aegis of the

Quebec Coalition for Fair Tobacco Taxation). The signatures were collected by retailers who brought them to their member of Parliament and member of the National Assembly in the course of private meetings.

#### **Retailers resort to illegality**

In the winter of 1993-94, frustrated that their efforts had not led to a tax rollback (and badly suffering from the illegal competition of criminal distributors of smuggled cigarettes), a small group of retailers announced publicly that they would undertake their own series of "illegal sales", in effect daring government authorities to arrest and criminally charge them. These events attracted enormous crowds of buyers and considerable media attention as well as a surprisingly high degree of support for their gesture despite the fact that it was clearly illegal (see attached articles on MATRAC).

That last initiative contributed to further increase the pressure on both the federal and provincial governments and probably was the straw that broke the camel's back. On February 8, 1994, the federal government and that of the province of Quebec jointly announced a dramatic tax rollback."

*Michel Descoteaux, Imperial Tobacco, August 1994*

# ACT 1: A NEW IDEA FOR HEALTH PROTECTION

## SCENE 1: THE HEALTH SIDE SETS THE STAGE

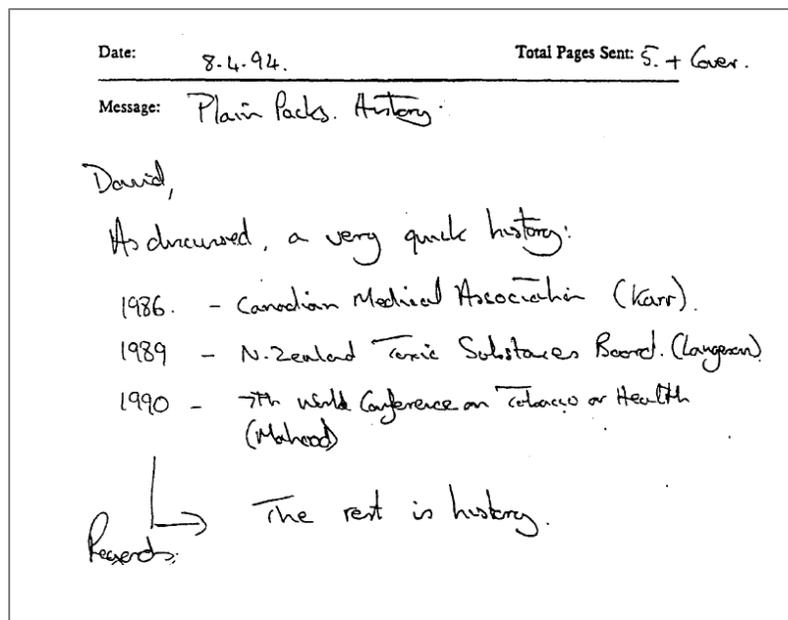
"Despite the potential benefits of plain packaging, the idea is relatively new in the field of tobacco control," Rob Cunningham, now senior policy analyst with the Canadian Cancer Society, wrote in 1996. "No country yet requires the measure."<sup>18</sup>

In 1994, the idea was even newer. So young in fact, that only a handful of policy makers or researchers had had an opportunity to evaluate its potential.

The first records of discussion of plain, or generic, packaging trace to Canada,<sup>19</sup> 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."<sup>20</sup> 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'.<sup>21</sup> The rest, according to a memo from the industry's information clearinghouse, the Tobacco Documentation Centre, was history.<sup>22</sup>

It didn't take long for calls 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.<sup>23</sup>



Despite these early attempts, plain or generic packaging received little public attention until the announcement of a parliamentary review in 1994. The Globe and Mail, for example, first reported on generic packaging only in 1992.<sup>24</sup>

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.<sup>25</sup> 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.<sup>26</sup> Relative to other tobacco policies, little public opinion<sup>27</sup> or other Canadian research on plain packaging was published before or since.

The other countries where plain packaging had received active consideration were New Zealand and Australia. In 1989, plain packaging was recommended by New Zealand's Toxic Substances Board (an agency of the Ministry of Health), and three years later the Australian Centre for Behavioural Research in Canada made similar recommendations.<sup>28</sup>

### **Bibliography of Research on Plain or Generic Packaging Published Prior to 1994 assembled by Rothmans in 1994<sup>29</sup>**

- |  |   |  |
|--|---|--|
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## **ACT II: A NEW STRATEGY FOR TOBACCO COMPANIES**

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### **SCENE 1:**

#### **THE INDUSTRY DISCOVERS A NEW COUNTER STRATEGY**

In the early 1990s, tobacco company headquarters reviewed developments in Canada, Australia, New Zealand, Singapore and other countries where larger health warnings and other changes to package labelling were under development<sup>30</sup> and where calls for generic packaging were surfacing. They considered that in some areas the concept of plain packaging had “already become a problem,” with “defensive measures” already underway.” Importantly, they considered “what still needs to be done.”

#### **Strategic value: shifting the debate from health to property rights**

What was needed, some of their consultants suggested, was a way to re-focus attention away from health issues and the health ministry (where the industry was on less solid footing and where the decisions were reached by health officials) and into an industrial issues and industry ministries (where the industry had more friends and decisions were reached by those who did not have direct health responsibilities).

It was in Australia, New Zealand and Canada that industry consultants were especially keen to see these proposals fought on the issues of property rights. The New Zealand Tobacco Institute decided in May 1993 that regulations over packaging and labelling should not be “contested as a health issue, a children’s smoking issue, or a consumer information Issue” but rather:<sup>31</sup>

*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.*

Of all the international trade approaches, trademark protection was the most attractive for this purpose. 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 Canadian tobacco consultant John Luik explained this rationale to a New Zealand colleague, urging him in December 1993 to focus on WIPO:<sup>32</sup>

*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 ? †*

**Strategic value: buying time (in the hopes that government will change its mind)**

Although WIPO and Intellectual Property agreements were preferred, as they were without health exceptions, the companies were not shy to use other agreements if the need was called for. They realized that a trade objection could be a way to buy time when faced with an unfriendly government decision.

In the spring of 1993, Rothmans, Benson and Hedges (RBH) in Canada, saw an opportunity to delay new health warnings and hope that the election of a new Prime Minister would result in an abandonment of the proposed new black and white health warning messages. (Brian Mulroney was resigning and the Conservative Party leadership election would take place on June 13, 1993.) They were not shy to describe their strategy to their multinational colleagues: "For Canada we are trying to get an extension of the 60 days comments period to allow it to run out past the date the Progressive Conservatives choose a new leader, i.e. Prime Minister."<sup>33</sup>

To accommodate their Canadian operations, the European headquarters of the Canadian companies followed this strategy and worked behind the scenes to get an object filed by the European Union under GATT technical barriers to trade (TBT) procedures.<sup>34 35 36</sup> On May 24, 1993, their efforts paid off when the EU GATT Inquiry point wrote the Canadian authorities<sup>37</sup> 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."

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† John Luik was correct in identifying the health exceptions in the GATT and TRIPS agreements as problematic for the tobacco industry. As would be discovered in 1994, his enthusiasm for invoking the intellectual property protection afforded by the Paris Convention for the Protection of Industrial Property was entirely misplaced. The truth about the Paris Convention will be revealed in Act II, Scene 4.

The delay, however, failed to satisfy the tobacco companies' concerns. 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." Rothmans would not give up, he suggested as he would be seeing the EU trade officials later that week to discuss Canada, Australia and Singapore."<sup>38</sup>

## SCENE 2: THE INDUSTRY DEVELOPS A GLOBAL PLAN

By the spring of 1993, Rothmans saw 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<sup>39</sup> in the other for-profit multinational companies to consider a joint approach to plain packaging and larger health warnings.<sup>40</sup> 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.

By late summer his proposed group had met, and by November had fully taken shape.<sup>41 42 43</sup> 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). This would be the team that 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.

The Plain Pack Group originally settled on three key actions:<sup>44</sup>

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 ?)*

- 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 a clear common-law duty on manufacturers to be knowledgeable about all aspects of the products they sell.)<sup>45</sup>

Despite any enthusiasm with which these objectives were designed, they proved hard to fulfill. Over the next year they would discover that there was very little real basis for trade and IP agreements to block plain packaging (although threats of them might). They would also learn that WIPO was not receptive to their arguments, and that it was sometimes difficult to get other groups to agree with their concerns.

### **SCENE 3: THE COMPANIES FACE SET BACKS AND DISAPPOINTMENTS**

#### **Few friends and allies.**

In March 1994, when the multinational Plain Pack Group met again to review progress,<sup>46</sup> they had little success to report. Their intentions to contact a dozen or so organizations and multinational companies who might come to their defence had no apparent success.

BAT, in a worried tone, sent a message to its troops that summer:<sup>47</sup>

*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)

That summer, 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.<sup>48</sup>

### **Little joy in trade agreements**

Nor were they making much headway in solidifying their legal arguments about international trade and IP law.

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."<sup>49</sup> Even the GATT ploy successfully used to get a delay on Canadian warnings (discussed above) was originally seen as having "just a slim chance" of success.<sup>50</sup>

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).<sup>51</sup> In addition, they had received consistent external advice that they did not have a case.

- In 1992, the Australian companies had sought and received advice that they had no basis for legal challenge under the Paris Convention.<sup>52</sup>
- By 1994, the tobacco industry has also received definitive answers from the British Consul-General in Australia that the U.K. would not support a GATT challenge.<sup>53</sup> (See below).
- By the summer of 1994, and the World Intellectual Property Organization had written more than once to say that there were no restraints under the Paris Convention to plain packaging, and that Carla Hills' opinion was wrong.<sup>54</sup>
- An early internal legal analysis for BAT concluded "the only antecedent of G.A.T.T Panels (supported by WHO recommendations) seems to be contrary to the industry's interests."<sup>55</sup>
- In 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."<sup>56</sup> In the same paper, he candidly concludes:<sup>57</sup>

*The international trade argument by itself will not however be sufficient to ward off the threat of plain packs.*

A bibliography compiled in 1994 by the Tobacco Documentation Centre and shared with the Plain Pack Group listed five commissioned legal opinions on the subject of plain packaging and nine more on the related subject of pack labelling<sup>58</sup> - 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 given 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.<sup>59</sup>

This conclusion was shared with the highest levels of BAT's management: to the Tobacco Strategy Group<sup>60</sup> as well as BAT's General Managers.<sup>61</sup> In May of 1994, his presentation (four slides from which are shown below) was circulated to all member companies of the Plain Pack Group.<sup>62</sup>

### **The source of little joy**

Both John Clutterbuck and David Bacon made pessimistic overall assessments of the worth of trade agreements as tools to fight off the threat of large health warnings and plain packaging. Their pessimism was well-founded. The four trade agreements that might have been helpful to them one way or another all have provisions that run counter to tobacco companies' interests.

**GATT and TRIPS:** Tobacco industry consultant John Luik correctly identified that countries could and probably would invoke the health exceptions present in both of these agreements as a means of defending plain packaging initiatives.<sup>63</sup> Article XXb of GATT allows for measures to be exempt from GATT if they are "necessary to human, animal or plant life or health." Article 8 of the TRIPS agreement specifies that members may "adopt measures necessary to protect public health and nutrition."

**Paris Convention for the Protection of Industrial Property:** John Luik, however, was not correct in his assessment of the value of the Paris Convention to the tobacco industry's cause. Two strongly-worded letters from WIPO, the administrative home of the Paris Convention, made it quite clear that the Paris Convention governed only trade mark registration, not trade mark use. Countries were free to adopt plain packaging for cigarette packages.

**NAFTA:** This agreement applies only to Mexico, the United States and Canada. Chapter 11 of this agreement does allow for investors to claim compensation from states for the expropriation of intellectual property, but a carefully-crafted requirement for plain packaging would not necessarily be expropriation; it could simply be a restriction on the use of trade mark.

## Industry response - international

- Plain pack group
  - Terms of reference
    - Review attacks on designs and trademarks
    - Identify opportunities for action
  - Membership
    - BAT, PMI, RJR, Rothmans, Rheemstma, Imperial UK, Gallaher
    - Strong legal accent



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.

## Plain pack group

- Examining
  - Treaties & conventions
  - Industry bodies
    - All with trade mark protection interest
  - GATT/TRIPS

## Findings

- Current conventions & treaties ..... little protection
- GATT/TRIPS little joy
- Other industry groupings little support
- Domestic political solutions needed



Because treaties and trade agreements do not block plain packaging, the companies must focus their efforts on political campaigns at a national level.



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.

## International role

- Promote issue to groups such as ICC, WIPO
- Promote international debate
- Publication & distribution of papers & materials
- Provision of an "expert" bank

## **SCENE 4: THE FAILED SEDUCTION OF WIPO**

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.<sup>64</sup>

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.<sup>65</sup> 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."<sup>66</sup>

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:<sup>67</sup>

*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.*<sup>68</sup>

Ludwig Baeumer did not reply quickly, and Latham followed up with reminder letters in both April and June of that year,<sup>69 70</sup> as well as meeting requests.<sup>71</sup>

Baeumer's reply, written on July 6, 1994,<sup>72</sup> 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."

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.<sup>73</sup>

On August 31, 1994 Mr. Baeumer gave a detailed response<sup>74</sup> to Carla Hills' views<sup>75</sup> on the application of the Paris Convention to plain packaging – and only strengthened his dismissal of the tobacco industry's position.<sup>76</sup> (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.<sup>77</sup>

*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.<sup>78</sup>

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,<sup>79 80</sup> was published, it included a chapter on "plain packaging and international trade treaties."<sup>81</sup> 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."<sup>82</sup>*

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### **MAY 3, 1994 - CARLA HILLS TO THE HOUSE OF COMMONS:<sup>83</sup>**

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.

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

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## AUGUST 31, 1994 – WIPO TO RALPH OMAN ABOUT CARLA HILLS:<sup>84</sup>

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 6quinruies of the Paris Convention, which is mentioned in the aforementioned letter of Mudge Rose, it is to be noted that Article 6 inquires 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 6aunauiies 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

## 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.”<sup>85</sup>

### 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.

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

Although this project was managed at a global level, and funded by the headquarters of these companies,<sup>86</sup> it had a particularly Canadian flavour: the editor (John Luik) and 4 of the commissioned authors were Canadian<sup>87</sup> (Zalman Amit, Concordia University; Jamie Cameron, Osgoode Hall Law School; Richard Dearden, Gowling Strathy & Henderson law firm; Rod Stamler, Lindquist, Avey Macdonald, Baskerville accounting). The chapter originally contributed by Rod Stamler was not included in the final published version.<sup>88</sup>

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

<p><b>Chapter 1:</b> <i>Predictors of smoking initiation among adolescents: A review of Conrad, Flay and Hill (1992)</i> Zalman Amit &amp; Brian R Smith, Center for Studies in Behavioral Neurobiology, Concordia University.</p> <p><b>Chapter 2:</b> <i>Plain Packaging of cigarettes &amp; the onset of smoking among youth: A review of the existing unpublished literature.</i> Zalman Amit &amp; Brian R Smith, Center for Studies in Behavioral Neurobiology, Concordia University.</p> <p><b>Chapter 3:</b> <i>Advertising, sponsorship of sports events &amp; packaging as predictors of the onset of smoking among youth</i> Zalman Amit &amp; Brian R Smith,</p>	<p>Center for Studies in Behavioral Neurobiology, Concordia University</p> <p><b>Chapter 4:</b> <i>Plain Packs &amp; the onset of smoking</i> W Fred Van Raaij, Rotterdam Schools Management, Erasmus University, The Netherlands</p> <p><b>Chapter 5:</b> <i>Plain Packs, smoking initiation &amp; consumption</i> Roderick Power, Department of Psychology, Macquarie University</p> <p><b>Chapter 6:</b> <i>Adding value to brands through packaging</i> Leslie de Chernatony,</p> <p><b>Chapter 7:</b> <i>Effects of plain packaging on the cigarette consumption</i></p>	<p><i>process</i> Claude R Martin, Jr., University of Michigan</p> <p><b>Chapter 8:</b> <i>Plain packaging &amp; international trade treaties</i> Julius L Katz, Hills &amp; Company, Washington, DC Richard G Dearden, Gowling, Strathy and Hendersen, Ottawa, Ontario</p> <p><b>Chapter 9:</b> <i>Cigarette packages, tobacco consumption &amp; the Charter: The role of perception &amp; harm in constitutional analysis</i> Jaime Cameron, Osgoode Hall Law School, York University, Toronto</p> <p><b>Chapter 10:</b> <i>Plain packaging &amp; public policy</i> John C Luik, Niagara-on-the-Lake, Ontario</p>
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**Pushing their own 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<sup>89</sup> into writing a strongly worded letter to Canada's trade minister, opposing plain packaging in Canada on trademark grounds.<sup>90</sup> 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.<sup>91</sup>

BAT continued to instruct its public relations officials to counter proposals for plain packaging with arguments that it would violate intellectual property laws,<sup>92</sup> 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.<sup>93</sup> 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."<sup>94</sup>

## Landing big fish in Australia

In 1992, new package requirements were under consideration in Australia as a result of a recommendation by the Australian Ministerial Council on Drug Strategy for larger health warning messages and steps towards generic packaging.<sup>95</sup> The industry responded with a strategy aimed at ensuring that the new warnings in Australia were no larger than those in the European Union, and that the position of the Victorian state government that supported the EU standard was the one that would prevail.<sup>96 97</sup> They noted that trade arguments had the added strategic advantage of being managed at the federal, and not the state level.

They set about to marshal support for their claim that the package reforms would “extinguish” their existing intellectual property, even though earlier in 1992 “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” and were “advised that there is no basis for any legal challenge against State and Territorial Governments on these grounds.”<sup>98</sup>

The Australian companies commissioned an opinion from law professor Michael Pendleton and the law firm Clayton Utz to counter the April 1992 recommendations. These lawyers gave a different analysis and advocated that the industry challenge these measures as a “contravention of Australia’s International Obligations” and an “inconsistency under s. 109 of the [Australian] Constitution.”<sup>99</sup>

The companies also approached the vice-consul (commercial) of the British Consul General in Sydney, Peter Hughes to request assistance from the U.K. government in their “dealings with government in Australia” over package reforms. A letter was sent in August 1992,<sup>100</sup> and a meeting was held with him the following April<sup>101</sup>. Mr. Hughes obligingly made an inquiry of the British industry ministry, but the answer he received and forwarded in July 1993<sup>102</sup> was consistent with virtually all the external advice the companies received: there

### **Letter from Ray Earwicker, Department of Trade and Industry (UK) to Peter Hughes, UK Vice- Consul (commercial), Sydney (July 1993)**

I have consulted my colleagues in ITP and the Patent Office about these claims, as requested and their Joint view is that these claims do not hold water....

The Patent Office has advised that it is possible to register as a trade mark the whole of what appears on 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.” ....

ITP do not consider that that any breach of Article IX of the GATT is involved (see Copy of Article attached), unless foreign products are discriminated against in the marking however that this is likely to be the case. Where there could be a case would be if the Australians, in applying the revised regulations, were to make unreasonable conditions, contrary to say, paragraph 3 or 5 of Article IX but in the absence of such actions, ITP do not see that Wills have a case.

<http://bat.library.ucsf.edu/tid/tj143a99>

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”

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<sup>103</sup>

*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 & HO 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.*

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.<sup>104</sup> 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.”

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.”<sup>105</sup>

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.

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



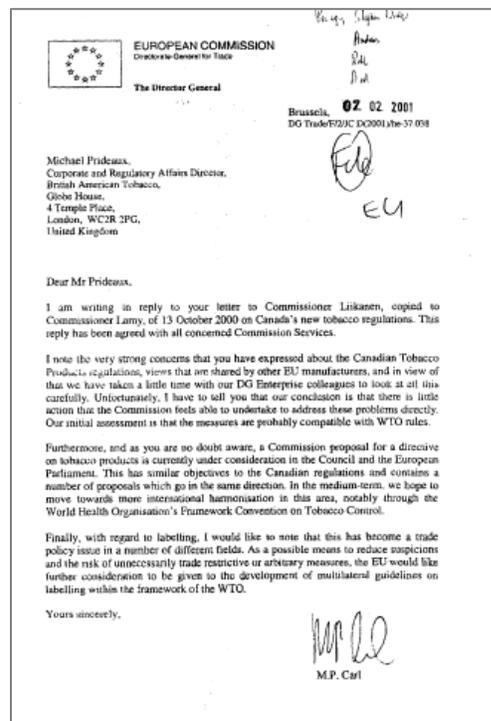
## Although some got away

Although public calls for plain packaging virtually disappeared after 1996, the tobacco companies continued to use intellectual property arguments to discourage governments from increasing the size of health warnings, or from removing package descriptors.

In October 2000, facing significantly larger health warnings in Canada, BAT director of Corporate and Regulatory Affairs wrote the EU Commissioner for Enterprise and Information Society, Erkki Liikanen, to protest the new Canadian health warnings. This was essentially the same manoeuvre that had succeeded, seven years earlier, in delaying the Canadian health warning messages. This time, the EU did not bite. BAT's request was summarily turned down four months later in a reply from M.P. Carl, the Director General for Trade of the European Commission.<sup>106</sup>

*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."*



## **ACT III: ON THE FRONT LINE IN CANADA**

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Industry activities in Canada to forestall plain packaging paralleled those of the multinational corporate headquarters. Indeed, Canada was the proving grounds to test the effectiveness of their new defence against package reforms.

**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.

### **SCENE 1: PLANNING A CAMPAIGN**

Just as their head offices worked together to develop a global strategy to counter plain packaging, the Canadian branch operations similarly worked in concert. The companies coordinated their efforts through the Canadian Tobacco Manufacturers Council, but they individually reported events to their respective senior managers.

These accounts were more than mere news bulletins – the head offices were actively involved in the development of the strategy. Before the hearings began, Philip Morris International's David Dangoor wrote his senior colleague, William H. Webb to suggest that

the Canadian campaign be coordinated with efforts in other countries:<sup>107</sup> "In view of this issue and any spill over effects, as well as all other recent developments, I believe it would be of great benefit if we arrange a brainstorming meeting between our corporate affairs colleagues in the U.S., Australia and Canada as soon as possible." It would be understandable for both men to take a special interest in Canadian developments, as they had both been promoted to senior positions at Philip Morris International after serving as president of the Canadian branch, Rothmans, Benson and Hedges.

### The strategy

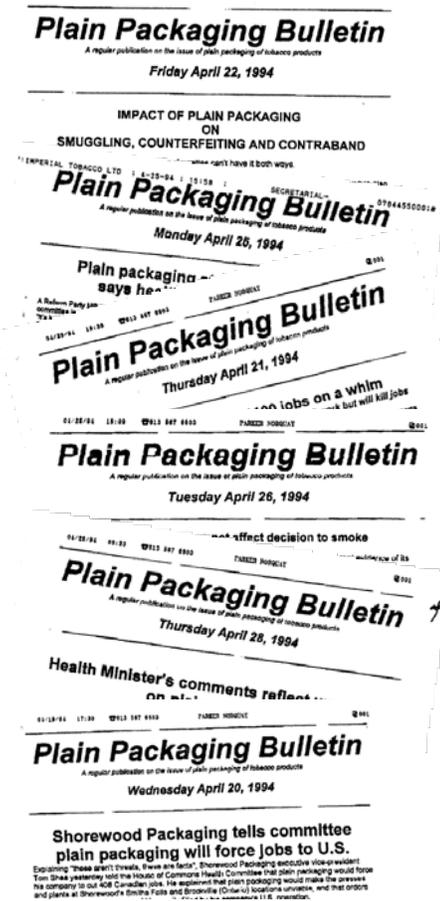
On March 9, 1994, barely a month after taxes were rolled back and the plain packaging study announced, John McDonald of Rothmans, Benson and Hedges, provided his assessment of the situation and the initial plans in a memo to Jacqui Smithson, who was coordinating Rothmans efforts on plain packaging at an international level.<sup>108</sup>

"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."

To counter this environment "[t]he C.T.M.C. has put together an action plan which may involve some coalition building (tobacco growers, packaging suppliers, wholesalers, distributors, etc., etc.)." 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**,<sup>109</sup> 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).<sup>110</sup>



- They worked to prompt an energetic public debate. (Their campaign manager, David Small, coordinated messaging through frequent bulletins and an aggressive media campaign).<sup>111</sup>
- They created their own body of evidence by publishing their own materials and papers. (They soon commissioned market research from Decima<sup>112</sup> and hired university-based researcher, Zalton Amit, to counter the findings of the Canadian Cancer Society).<sup>113</sup>
- They created their own experts. (They engaged John Luik coordinate ‘academics who would argue against plain packaging,’ and engaged former Mountie Rod Stampler to say that plain packaging would lead to contraband).<sup>114</sup>

### **The tactics**

By early April of 1994, the Canadian companies were in pitched battle against plain packaging. Imperial Tobacco later described how the CTMC was authorized to “plan, coordinate and executed” the campaign “much along the lines of a political campaign.”<sup>115</sup> Their activities included:

- Daily conference calls among all companies allowed them to develop their tactics to respond to changing events.<sup>116</sup>
- Working (through consultant, Mark Resnick) with the House of Commons Committee Clerk to draw up a list of witnesses friendly to the industry.<sup>117</sup>
- Giving friendly witnesses “strategic and tactical advice.”<sup>118</sup>
- Keeping more than 200 allies “aware of developments and key issues through daily Plain Packaging Bulletin” that was faxed to them, sometimes daily.<sup>119</sup>
- Influencing media coverage by “Feed[ing] selected journalists material attacking motives of Health Minister and undermining credibility of anti-smoking lobby.”<sup>120</sup>

## **SCENE 2: THE PARLIAMENTARY HEARINGS ON PLAIN PACKAGING**

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. 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.<sup>121</sup>

Two days later, when the Cancer Society appeared before the committee to offer its research findings, the CTMC countered with a review they had commissioned from Concordia professor, Zalton Amit, which eviscerated the CCS-funded study.<sup>122</sup> The following week, industry-coordinated witnesses focused on job losses that would result (Shorewood Printers argued that their plant would close and that printing would be relocated to the United States). The industry’s synopsis of that hearing frankly noted that this argument failed to impress the committee: “The key point of today’s hearings is that some members are saying they are not concerned about job losses, they are only concerned about whether plain packaging will cut consumption.”<sup>123</sup>

Throughout the rest of April, 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.<sup>124</sup> When the plain packaging focus was interrupted to allow the committee to question the Minister on the Estimates (an annual and historic 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.<sup>125</sup>

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 hundreds of millions of dollars.”<sup>126</sup> 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.”<sup>127</sup>

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,<sup>128 129</sup> as



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."<sup>139</sup>

Rothmans, Benson and Hedges was even more bullish. "RBH management is pleased with the outcome of the hearings," David Dangoor wrote to William Webb.<sup>140</sup>

*The industry is now in better shape than originally expected. It was believed that the committee would "white wash" the proposal and that the industry would have to fight a proposal for plain packaging at the cabinet level.*

*The anti-tobacco groups are very upset. They feel they have lost at the Federal level and will now focus their battle on the Provincial level.*

*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 4: 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.<sup>141</sup> 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."<sup>142</sup> 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 some sort of draft legislative framework as recommended by the committee to be introduced when the study hacking plain packaging is completed.*



Citizen's Jane Taber as saying that the plain packaging study was "a total waste of time," and that "it's just a tragedy that while the health-care system is falling apart, we're dealing with something so irrelevant." Her motives were also impugned: "This is a make-work project for our committee. This is a last desperate gasp to save face - [she is] trying to protect her job and make it look like she is doing something."<sup>145</sup>

- On April 27, 1994, reporting on Ms. Marleau's appearance before the Committee, the Globe and Mail cited Reform Party health critic Dr. Grant Hill: "Our system is literally crumbling around the minister's ears. And her reaction to that: plain packaging for cigarettes. She's lost her marbles."<sup>146</sup>

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.<sup>147</sup> "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.<sup>148</sup> "Health advocates, bureaucrats, opposition MPs, Liberal insiders - even some of her cabinet colleagues -- are united: Marleau is cabinet's worst performer and should be replaced," concluded the Ottawa Citizen's Doug Fischer on May 9, 1994.<sup>149</sup>

A few weeks after Purdy Crawford spoke to BAT headquarters about the plain packaging campaign, the Globe and Mail ran a two-page story on the floundering career of the health minister.<sup>150</sup>

## SCENE 6: 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 150 days expired on November 18, 1994). The reply<sup>151</sup> 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:<sup>152</sup> "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."*<sup>153</sup>

Despite this apparent victory, the industry's campaign did not stall. A week after the government's announcement that it would delay a decision, another meeting of "Canadian businesses and workers who will be hurt by plain packaging" met in Toronto to "plan the next steps in their fight against the scheme."<sup>154</sup> The last Plain Packaging Bulletin counselled the campaign team: "The new year does not end the campaign. The tough part is still to come."<sup>155</sup>

## **SCENE 7:**

### **WATCHFUL WAITING**

During the winter of 1994-95, public discussion on plain packaging was mostly suspended while researchers completed the study commissioned by Health Canada,<sup>156</sup> which would be released, much later than expected, on May 19, 1995.

The change in government in 1993 had made experienced political advisors available to the tobacco companies. In 1994, Jodi White, now head of Canada's Public Policy Forum, moved from a position of Chief of Staff to the Prime Minister (Kim Campbell) to vice-president, Corporate Affairs, at Imperial Tobacco's holding company, IMASCO Ltd. There she was "responsible for issues management and strategic positioning across the spectrum of public affairs, government relations and public policy."<sup>157</sup>

Three months after Health Canada announced it would delay a decision on plain packaging, she provided a summary of the perceived threats to Imperial Tobacco's business operations from public policy change. Plain packaging was not the only threat they faced, nor even the largest one. She positioned plain packaging as one of a number of policies promoted by an "anti-tobacco industry" (and she was particularly concerned about the growing demand for controls on smoking in public places). Plain packaging, she calculated, would not affect

Market Segment	Industry Response	ITL Market Share	ITL Margin	ITL Cost Structure
Federal, provincial markings	Consumers unresponsive to warnings ○	Consumers unresponsive to warnings ○	Cost increase may be difficult to pass on in short term ○	Significant cost to change packaging ●
Health warnings on inserts	Consumers unresponsive to warnings ○	Consumers unresponsive to warnings ○	Cost increase may be difficult to pass on in short term ○	Significant cost to insert warnings ●
Sponsorships	Industry demand independent of brand name recognition ○	Brand awareness and positioning could be diminished ●	No impact in a single-price market ○	Could save money, unless funds were taxed by government into a pool for sponsors ○
Location of Consumption	Potential long term impact on consumption level ○	Not affected by overall industry decline ○	Does not change pricing or margin structures ○	No significant impact unless volume declines dramatically ○
Excise Duty	Demand appeared to be relatively inelastic during periods of escalating prices ○	Not affected by overall industry decline or by overall price increases ○	Prices could rise with taxes ○	Higher cost of carrying inventory ○
Ear marked taxes	Good campaign can significantly reduce consumption ○	Not affected by overall industry decline ○	Depends on capability to pass taxes on to consumers ○	Could be significant ○
Health Ministry Funding (Florida)	Does not affect demand ○	Does not affect particular brands ○	Cost may be passed on to consumer ○	Potentially high cost of funding ○
Licensing Board	Consumers may not purchase product as frequently ○	Less POS / availability to influence brand selection ○	Does not change price structure ○	No significant impact unless volume declines dramatically ○
Product Liability	Could increase rate of decline ●	Could be directed towards ITL ●	Cost could be difficult to pass on to consumers ○	Could be significant based on value of judgement ○
Generic Packaging	Not affected by plain packages ○	Reduced brand equity could cause share losses ○	Reduced brand equity could create better opportunity for discount brands ○	Initial cost of changing packaging is high; longer term cost will decline ○

● = High Negative Impact    ○ = Medium Negative Impact    ○ = Low Negative Impact

SOURCE: SUBGROUP DISCUSSIONS WITH ROGER ACKMAN, ANDREW CHAN, MARIUS DAGNEAU, MICHEL DESCOTTEAU, BENOT DORVAL, BARBARA HARTLEY, BILL SAUNDERS

the overall volume of cigarettes sold as much as smoking bans, the use of licensing boards to curb retail, product liability suits or ear-marked taxes – but it would cut into Imperial Tobacco's market share and it would reduce the profit margins on each package they sold.<sup>159</sup>

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.<sup>160</sup> A study by Health Canada researcher, Dr. Don Wigle, that 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."<sup>161</sup>

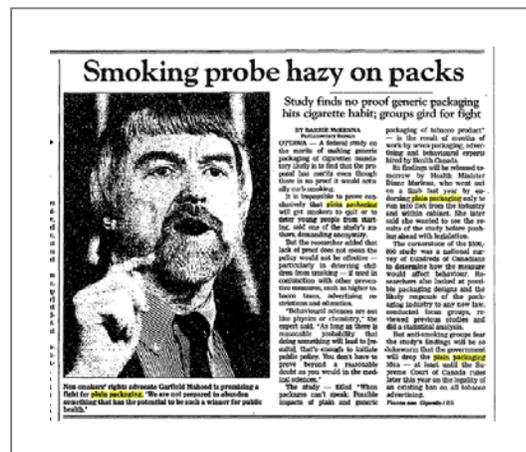
If there was no increase in smoking as a result of tax rollbacks, then the political rationale for plain packaging and other measures that were introduced to compensate for reduced tobacco taxes was weakened. The industry had a new campaign message: "If he [Gar Mahood] and Diane Marleau were wrong about lower prices, do you suppose it's possible they are also wrong about plain packaging? Could be."<sup>162</sup>

No wonder the industry cheered when funding for "largest anti-smoking campaign in Canada's history" was cut barely a year after it was announced. The budget of 1995 announced a \$65 million cut to the \$180 million tobacco control budget announced barely a year earlier.<sup>163</sup>

## 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"<sup>164</sup>) 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.<sup>165</sup>

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.”<sup>166</sup>

### **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<sup>167</sup> 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.”<sup>168</sup>

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.”<sup>169</sup> The tobacco companies quickly pulled out the sections in the law which would buttress their opposition to plain packaging (copied below).<sup>170</sup>

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?”<sup>171</sup>

“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.”<sup>172</sup>

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." <sup>173</sup>

## **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<sup>174</sup> 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.<sup>175</sup>

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.<sup>176</sup> 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*")<sup>177</sup> 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),<sup>178</sup> a consumer warning on the use of the terms 'light' and 'mild',<sup>179</sup> a consultation paper on tobacco promotion requirements, including point of sale and packaging restrictions,<sup>180</sup> and an information letter heralding regulations for on new reporting requirements.<sup>181</sup>

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)."<sup>182</sup>

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."<sup>183</sup>

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*.<sup>184</sup>

**Sections of the Supreme Court ruling identified by Imperial Tobacco as pertinent to plain packaging.**<sup>185</sup>

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

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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.<sup>186</sup>
- **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.<sup>187</sup> The warnings appeared on packages in 1994.<sup>188</sup>
- **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."<sup>189</sup> The amendments were passed and came into force in 1994.<sup>190</sup>
- **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."<sup>191</sup> The regulation came into force later that year.<sup>192</sup>

- **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."<sup>193</sup> Philip Morris developed speaking notes for its representatives that echoed this view.<sup>194</sup> The law was passed in 1997.<sup>195</sup>
- **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."<sup>196</sup> 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."<sup>197</sup> The law was passed in 1999.<sup>198</sup>
- **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."<sup>199</sup> Sri Lanka passed legislation to establish this authority in 2006.<sup>200</sup>

- 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."<sup>201</sup> The warnings have been on packages since 2000.<sup>202</sup>
- 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."<sup>203</sup><sup>204</sup> The industry commissioned an extensive argument regarding trade agreement impediments to implementing the directive.<sup>205</sup>
- 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."<sup>206</sup> <sup>207</sup> 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."<sup>208</sup>
- 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.<sup>209</sup> The law came into force, as predicted, on September 30, 2003.<sup>210</sup>
- 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."<sup>211</sup> Canada has yet to impose regulations banning these terms, although a voluntary agreement was reached with Philip Morris' subsidiary and other tobacco companies.<sup>212</sup>

## **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.<sup>213</sup>

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,<sup>214</sup> in more recent years, their renewed attempts to do so have been more likely than not to be rebuffed.<sup>215</sup>

### **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<sup>216</sup> 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.

- They knew in 1992 that the General Agreement on Tariffs and Trade offered them no protection against ingredient disclosure regulation.<sup>217</sup>
- They knew in 1994 that the Paris Convention for the Protection of Industrial Property offered them little protection from plain packaging legislation.<sup>218</sup>
- They knew in 1997 that the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) would not prevent governments from banning or restricting the use of their intellectual property. It would only offer them protection from disclosure of their trade secrets.<sup>219</sup>
- By 1994, in their own internal documents, they had concluded that, for them, there was “little joy” to be found in trade agreements.<sup>220</sup>

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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