Plain Packaging for Tobacco Products

Plain packaging for tobacco products may soon be implemented in Canada. Plain packaging in this context means that tobacco company brand elements consisting of colours, logo and design elements of the brand will not be allowed to be used on product packaging. However, there are potential conflicts between government and suppliers and manufactures of tobacco products. The issues are becoming increasingly politicized.

The Supporters

The World Health Organization is actively lobbying to support the implementation of plain packaging. They have prepared and posted on their website an evidence brief.¹

An abstract of their position is set out below:

“Evidence shows that the packaging of tobacco products is designed for badge products targeting specific groups, particularly women and young people, and that attractive packaging tends to weaken warnings about the harmful health effects of the products. To preserve the effectiveness of the health warnings – a requirement under Articles 11 and 13 of the WHO Framework Convention on Tobacco – the guidelines on the implementation of these articles recommend the adoption of plain-packaging measures. Studies have revealed that plain packaging reduces the attractiveness of the product, particularly to women and young people. They also show that, when combined with large pictorial health warnings, plain-packaging measures increase awareness about the risks related to tobacco consumption, encouraging more people to quit and fewer to start. In that these measures merely regulate the use of logos or colours for public health

purposes, they are in compliance with international trade and intellectual property law.”

The Canadian Cancer Society is also highly energized concerning this issue and has caused a video to be prepared and posted on its website. They suggest that there is increasing global momentum to implement plain packaging for tobacco products,

“Plain packaging is an important and logical next step for Canada to curb tobacco marketing, reduce smoking and save lives,” says Rob Cunningham, Senior Policy Analyst, Canadian Cancer Society. “Cigarette packages should not be mini billboards promoting tobacco use. We urge Health Canada to follow the lead of Australia and other countries and take action to implement plain packaging in order to reduce the appeal of these cancer-causing products.”

The Opposition

Tobacco companies have actively opposed and attacked plain packaging legislation. Philip Morris Asia challenged the Australian tobacco plain packaging legislation under the 1993 Agreement between the Government of Australia and the Government of Hong Kong for the Promotion and Protection of Investments. However the panel hearing the dispute, on 18 December 2015 issued a unanimous decision finding that it had no jurisdiction to hear Philip Morris Asia’s claim.

Honduras requested consultations under the World Trade system with Australia concerning the Australian laws and regulations that impose trademark restrictions and other plain packaging requirements on tobacco products and packaging. Honduras

claims that Australia's measures appear to be inconsistent with Australia's obligations under the TRIPS Agreement, among other grounds.

A panel has been established to hear the dispute. Argentina, Brazil, Canada, Chile, China, Cuba, the Dominican Republic, Ecuador, the European Union, Guatemala, India, Indonesia, Japan, Korea, Malawi, Malaysia, Mexico, New Zealand, Nicaragua, Nigeria, Norway, Oman, Panama, Peru, the Philippines, Singapore, South Africa, Chinese Taipei, Thailand, Turkey, Ukraine, the United States, Uruguay, Zambia and Zimbabwe have reserved their third-party rights. The panel expects to issue its final report to the parties not before the first half of 2016. Similar proceedings have been initiated by Ukraine, the Dominican Republic, Cuba and Indonesia.

The International Trademark Association (“INTA”) has submitted an amicus brief to the panel. INTA contends that the plain packaging measures implemented by Australia erode internationally protected IP rights under the Paris Convention, the Trans-Pacific Partnership (“TPP”) Agreement and other agreements.

In addition to the above tobacco companies can attack relevant legislation implementing plain packaging on the basis that such legislation does not comply with domestic legislation. For example in 1995, the Supreme Court of Canada struck down provisions of the Tobacco Products Control Act that broadly prohibited all advertising and promotion of tobacco products, subject to specific exceptions, and required that unattributed warning labels be affixed on tobacco product packaging, as contrary to Charter of Rights and Freedoms.

The Government Position

In response to these proceedings a number of governments have commenced a campaign to preclude tobacco companies from initiating investor-state dispute
settlement proceedings under the relevant treaties. For example, the recently concluded TPP contains the following provision:

“A party may elect to deny the benefits of Section B of Chapter 9 (Investment) with respect to claims challenging a tobacco control measure of the Party. Such a claim shall not be submitted to arbitration under Section B of Chapter 9 (Investment) if a Party has made such an election. If a Party has not elected to deny benefits with respect to such claims by the time of the submission of such a claim to arbitration under Section B of Chapter 9 (Investment), a Party may elect to deny benefits during the proceedings. For greater certainty, if a Party elects to deny benefits with respect to such claims, any such claim shall be dismissed.”

The Canadian Position

The recently elected Liberal government has indicated that it plans to force tobacco companies to sell their cigarettes in packages that lack distinctive brand designs aimed at enticing smokers to buy their products. This was part of an election promise and has now been escalated to a part of the mandate of the Health Minister. This mandate seems to be a top priority for a majority government.

At the present time there is no indication how quickly the government will move, or when the necessary legislation or regulations will move forward.

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These comments are of a general nature and not intended to provide legal advice as individual situations will differ and should be discussed with a lawyer.