

Goodmans^{LLP} Update

Parliament Gives Green Light on Plain Packaging Requirements for Tobacco Products

Parliament recently passed Bill S-5, *An Act to amend the Tobacco Act and the Non-smokers' Health Act and to make consequential amendments to other Acts* (the "Bill"). The Bill provides the legislative foundation for implementing standardized packaging requirements for tobacco products in Canada.

Background

In the [Minister of Health Mandate Letter](#) dated November 12, 2015, the Minister was tasked by the Trudeau government with "introduce[ing] plain packaging requirements for tobacco products, similar to those in Australia and the United Kingdom." The Bill is a manifestation of that mandate.

New Bill

While the Bill does not itself set out the specific requirements for plain packaging of tobacco products, it amends the *Tobacco Act* (renamed the *Tobacco and Vaping Products Act* by the Bill) to permit the implementation of a new regulatory framework that requires plain packaging of tobacco products in Canada. By way of example, new regulations could require the use of standardized colours and fonts on tobacco product packaging, or the exclusion of brand elements such as logos from packaging.

The key sections of the Bill relating to plain packaging are summarized in the [Legislative Summary of the Bill](#), and include:

- *Section 25*: specifies that promotion "by means of the packaging" is included in the existing prohibition against promoting tobacco products, except in accordance with regulations.
- *Section 27*: prohibits the promotion of tobacco products, including through packaging, by using "terms, expressions, logos, symbols or illustrations" that are contrary to regulations.
- *Section 30*: prohibits the sale of tobacco products that are packaged contrary to the *Tobacco and Vaping Products Act* or regulations.
- *Section 53*: establishes that complying with the *Tobacco and Vaping Products Act* will not lead to the invalidation of trademark registrations under certain sections of the *Trademarks Act*. This is significant because the *Trademarks Act* provides that a trademark is invalid if it has been abandoned or if it is not distinctive at the time proceedings challenging the registration's validity are commenced. In addition, while the Bill does not expressly refer to summary expungement proceedings for non-use under section 45 of the *Trademarks Act*, it indicates that the absence of trademark use as a result of compliance with the Bill will constitute special circumstances excusing the absence of use.

It is expected the Bill will receive royal assent soon and entry into force of these sections will be staggered.

Implications

The Bill raises legal issues regarding trademark use, freedom of speech, and compliance with international trade agreements. Tobacco companies have commenced legal challenges to plain packaging requirements in other countries, and may launch similar suits in Canada once the Bill comes into force. The government is likely to respond to any such legal challenges, at least in part, by referencing the public health and safety benefits that organizations, such as the [World Health Organization](#), associate with plain packaging of tobacco products.

The legal viability of the Bill and associated regulations may have implications for other products, such as marijuana. The federal government recently proposed strict regulations regarding packaging of cannabis products, which remain subject to the legislative approval process.

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