

THE ANSWER IS IN THE EVIDENCE: PLAIN PACKAGING, GRAPHIC HEALTH WARNINGS, AND THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT

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“WARNING: Smoking can kill you.”¹

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1. ‘Warning: Smoking Can Kill You’, N.Y. TIMES (Aug. 27, 2012), available at http://www.nytimes.com/2012/08/28/opinion/warning-smoking-can-kill-you.html?_r=0 (last visited Apr. 23, 2014).

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I. INTRODUCTION

Efforts to reduce the number of smokers and the health effects brought on by smoking and second-hand smoke around the world have been on the rise. In 2001, Canada passed the first law of its kind, requiring tobacco companies to put graphic health warnings on their packaging, and in 2011 revised that law to increase the size of the pictorial warning.² Following Canada's lead, Australia passed a similar, but more stringent, requirement on tobacco packaging known as "plain packaging."³ In August 2012, Australia's highest court upheld what is considered to be the "world's toughest law on cigarette promotion."⁴ Australian Attorney-General, Nicola Roxon⁵, believes that other countries will see the success its new packaging requirements have on

2. *Canada to boost package warnings – inside and out*, FRAMEWORK CONVENTION ALLIANCE (Oct. 4, 2012), available at http://www.ftc.org/index.php?option=com_content&view=article&id=598:canada-to-boost-package-warnings-inside-and-out&catid=235:advertising-promotion-and-sponsorship&Itemid=239 (last visited Jan. 21, 2014) [hereinafter FCA].

3. Rod McGuirk, *Australian Cigarette Logo Ban Law Upheld By Court*, HUFFINGTON POST (Aug. 15, 2012), available at http://www.huffingtonpost.com/2012/08/15/australian-cigarette-logo-ban_n_1778145.html (last visited Jan. 21, 2014). A full description of plain packaging is discussed in full in section II.A., *infra* pp. 4-5.

4. McGuirk, *supra* note 3.

5. In October 2012 when this statement was made, Nicola Roxon was the Attorney-General and the minister for Emergency Management for Australia. *Nicola Roxon announces her resignation*, ABC NEWS (Feb. 2, 2013), available at <http://www.abc.net.au/news/2013-02-02/nicola-roxon-announces-her-resignation/4497384> (last visited Jan. 22, 2014). She announced her resignation in February 2013. *Id.*

reducing the number of smokers and that they will adopt similar requirements.⁶ Tobacco companies worry that this law will set a “global precedent” that will have a serious effect on their business.⁷

In the United States, a similar act, the Family Smoking Prevention and Tobacco Control Act (“FSPTCA”), was signed into law in 2009.⁸ This act does not go as far as plain packaging, however, it does require tobacco companies to print graphic health warnings on their tobacco packaging; which is an element of plain packaging.⁹ Sections 201 and 204 specifically require that:

[p]ackaging and advertisements for cigarettes and smokeless tobacco must have revised warning labels with a larger font size. Font colors are limited to white on black background or black on white background. Cigarette package health warnings will be required to cover the top 50 percent of both the front and rear panels of the package, and the nine specific warning messages must be equally and randomly displayed and distributed in all areas of the United States. These messages must be accompanied by color graphics showing the negative health consequences of smoking cigarettes.¹⁰

While sections 201 and 204 were codified in 2009, their fate is still uncertain. Currently, there is a split in the circuits about whether these compelled graphic cigarette-warning labels are constitutional. In April 2012, the Sixth Circuit, in *Discount Tobacco City & Lottery, Inc. v. United States*, held that the provocative warnings were reasonably related to the government’s interest in informing consumers and, therefore, could require tobacco manufacturers to print the images on its products.¹¹ However, in August 2012, the D.C. Circuit in *R.J. Reynolds Tobacco Co. v. FDA* struck down the mandate stating that the “FDA has not provided a shred of evidence—much less ‘substantial evidence’ . . . showing that the graphic warnings [would] ‘directly advance’ its interest in reducing the number of Americans who smoke.”¹² The reason for the split in rulings largely came down to the different

6. McGuirk, *supra* note 3.

7. *Id.* The tobacco companies also argue that the new packaging rules in Australia violate intellectual property rights and devalue their trademark. *Id.*

8. *Discount Tobacco City & Lottery v. United States*, 674 F.3d 509, 520 (6th Cir. 2012).

9. McGuirk, *supra* note 3; Family Smoking Prevention and Tobacco Control Act (FSPTCA) of 2009, Pub.L. No. 111-31, §§ 201, 204, 123 Stat. 1776 (2009) [hereinafter “FSPTCA”].

10. FSPTCA, *supra* note 9.

11. *Discount Tobacco*, 674 F.3d at 569.

12. *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1219 (D.C. Cir. 2012).

standards of review used by each court.¹³ The Court in *Discount Tobacco* applied a lower standard of review because it found graphic health warnings to be factual disclosures, while the Court in *R.J. Reynolds* applied a more stringent standard of review put in place to protect commercial speech.¹⁴

This Note will explore plain packaging and graphic health warnings imposed on tobacco companies. It will focus on conducting a comparative analysis between the respective laws in Australia, Canada, and the United States regarding plain packaging, graphic health warnings, and the jurisprudence regarding compelled corporate speech in the interest of public health.

In the second section, this Note will discuss plain packaging and graphic health warnings by further defining plain packaging and discussing some of the more recent findings on how plain packaging and graphic health warnings affect tobacco consumption.

In the third section this Note will discuss where Australia and Canada currently stand on plain packaging and graphic health warnings. This will be accomplished by examining current laws in each country and court cases addressing the constitutionality of those laws.

The fourth section of this Note will discuss where the United States currently stands on plain packaging and graphic health warnings. This will be accomplished by looking at the FSPTCA and the First Amendment's protection of commercial speech. Additionally, this section will address the circuit split on the FSPTCA concerning its constitutionality. An examination of *Discount Tobacco* and *R.J. Reynolds* will provide a basis for this discussion.

The fifth section of the Note will apply the findings on plain packaging and graphic health warnings from Canada and Australia to the United States' FSPTCA. This will be accomplished by addressing the difference in constitutional regimes and the role of foreign/comparative analysis in the United States to determine whether it violates freedom of expression. Further, this Note will look at the laws of Australia and Canada and propose that the FSPTCA should be found constitutional if this case were to go in front of the United States Supreme Court.

Lastly, this Note will conclude with a discussion on the FSPTCA and will demonstrate how and why the United States Supreme Court should look to precedent set in other countries to determine its constitutionality. Specifically, it will address the interest of public

13. *Discount Tobacco*, 674 F.3d at 558; *R.J. Reynolds*, 696 F.3d at 1212-13.

14. *Discount Tobacco*, 674 F.3d at 558; *R.J. Reynolds*, 696 F.3d at 1212-13.

health in compelled commercial speech. Further, this section will demonstrate that if the United States Supreme Court hears this issue, it should find that the FSPTCA is not in violation of freedom of expression and is constitutional.

II. PLAIN PACKAGING

This section provides background information on plain packaging. Part A begins by defining and describing plain packaging, while Part B discusses the empirical evidence that has been collected on plain packaging and graphic health warnings.

A. Defining Plain Packaging

Plain packaging strips tobacco-packaging products of any logos, trade colors, descriptive words, or specialized font size and style.¹⁵ The brand name is the only graphic image on the package.¹⁶ In fact, all packaging, regardless of brand, is the same neutral color, contains a graphic health warning, and a quit smoking help-line phone number.¹⁷ Depending on the country where the tobacco packaging is distributed, the pictorial health warning sign could cover from 50% to 75% of the front of the package, and from 50% to 90% of the back of the package.¹⁸ It is intended that plain packaging will

1. reduce the attractiveness and appeal of tobacco products to consumers, particularly young people;
2. increase the noticeability and effectiveness of mandated health warnings; and
3. reduce the ability of the retail packaging of tobacco products to mislead consumers about the harmful effects of smoking or using tobacco products.¹⁹

Countries considering implementing plain packaging and/or

15. Melodie Tilson, *Plain Packaging of Tobacco Products*, NON-SMOKERS' RIGHTS ASS'N/SMOKING & HEALTH ACTION FOUND 1 (July 2008), available at <http://www.nsr-adnf.ca/cms/file/files/Plain%20Pkg%20NSRA%20FINAL%20Aug08.pdf> (last visited Jan. 15, 2014).

16. *Id.*

17. *Id.*

18. FCA, *supra* note 2; Rebecca Thurlow, *Australia Cigarette-Packaging Curbs Prompt Suit*, WALL ST. J. (Nov. 21, 2011), available at <http://online.wsj.com/article/SB10001424052970204443404577051361355154868.html> (last visited Jan. 15, 2014).

19. *Health Warnings*, AUSTL. GOV'T: DEP'T OF AGING (Dec. 4, 2012), available at <http://www.health.gov.au/internet/main/publishing.nsf/content/tobacco-warn> (last visited Jan. 15, 2014).

graphic health warnings have anywhere from 9-19 graphic pictures, any of which must be on a package at all times.²⁰ According to merchants in Australia, where the plain packages have recently been released into the general market, the plain packages are very hard to differentiate, and make finding specific brands of tobacco or cigarettes hard to locate on the shelf.²¹

B. Packaging Effects on Tobacco Consumption

According to the Australian Minister of Health, “[o]ver the past two decades, more than 24 different studies have backed plain packaging. . .”²² However, according to economists at the Montreal Economic Institute, “empirical research is inconclusive as [to] the actual effectiveness of [plain packaging], some studies suggest that [it] could on the contrary have unintended negative consequences.”²³ In fact, the economists at the Montreal Economic Institute claim that the present graphic health warnings, which “amount [to] partial plain packaging,” have no impact on consumption and could possibly have a negative impact on consumption.²⁴ Most studies that have been conducted agree that removing brand design elements will reduce brand image association.²⁵ However, the real question to be asked is whether the reduction of brand association will lead to a reduction in tobacco consumption. According to BMJ Group, “[t]hese point-of-sale tobacco advertising and cigarette displays create an enticing in-store presence for youth, and a cue to prompt adult smokers to purchase.”²⁶

Economists at the Montreal Economic Institute (“MEI”) claim that

20. FCA, *supra* note 2; Thurlow, *supra* note 18.

21. Benjamin Miller, *Traders fear flak at plain pack*, SYDNEY MORNING HERALD (Oct. 29, 2012), available at <http://www.smh.com.au/small-business/trends/traders-fear-flak-at-plain-pack-20121029-28ebl.html> (last visited Jan. 15, 2014).

22. Press Release, Hon. Nicola Roxon MP & Hon. Tanya Plibersek MP, World Leading Plain Packaging Laws Given a Clean Bill of Health (Aug. 15, 2012), available at http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/1849762/upload_binary/1849762.pdf;fileType=application%2Fpdf#search=%22media/pressrel/1849762%22 (last visited Jan. 15, 2014).

23. Michel Kelly-Gagnon & Youri Chassin, *Plain Packaging and its Unintended Consequences*, MONTREAL ECON. INST. (Aug. 2011), available at http://www.iedm.org/files/note0811_en.pdf (last visited Jan. 15, 2014).

24. *Id.*

25. M. A. Wakefield, D. Germain & S. J. Durkin, *How does increasingly plainer cigarette packaging influence adult smokers' perception about brand image? An experimental study*, 17 BMJ 6 (Sept. 30, 2008), available at <http://tobaccocontrol.bmj.com/content/17/6/416.full> (last visited Jan. 15, 2014).

26. *Id.* (discussing how tobacco packaging that is brightly colored and appealing to the eye is more likely to catch the eye of children and encourage adults to purchase tobacco products).

it is not the appeal of the brand design that encourages tobacco consumption, but rather, the media, peers, and family.²⁷ The economists argue “that no causal relation has been established between plain packaging of cigarettes and tobacco consumption.”²⁸ In other words, according to the MEI, there is no scientific basis for the promotion of plain packaging, which they define as “removing all distinctive elements. . . associated with a product and replacing them with a generic package that usually includes government mandated warnings.”²⁹

Further, smoking rates for teens and adults in the United States are similar to Canada’s, where graphic health warnings, or “partial plain packaging” according to the MEI, have been in effect for over ten years.³⁰ Thus, enhancing the idea that plain packaging and graphic health warnings have no real effect on tobacco consumption. While this study purports to refute plain packaging and graphic health warnings, the MEI has been criticized for being a “think tank.”³¹ Further, the MEI “admitted receiving 3.4% of its total annual budget in 2004 from the tobacco industry” and from 2004 to 2006 it received \$135,000 from Imperial Tobacco Canada.³² Therefore, research by the MEI should be taken with caution.

However, in a more recent study published in January 2013, BioMedical Central validated plain packaging, and thus graphic health warnings.³³ The study concluded that the most likely result of plain packaging and graphic health warnings would be a reduction in smoking for both adults and children, with the greatest reduction in smoking occurring among children.³⁴ This study recognized the absence of empirical evidence to determine if plain packing works.³⁵ Therefore, to study this issue, the expert elicitation method was used to

27. Kelly-Gagnon & Chassin, *supra* note 23.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Exposing Recent Tobacco Industry Front Groups and Alliances*, NON-SMOKERS’ RIGHTS ASS’N SMOKING & HEALTH ACTION FOUND. 12-13 (Oct. 2008), available at http://www.nsra-adnf.ca/cms/file/files/pdf/FrontGroups_Oct_2008.pdf (last visited Jan. 18, 2014).

32. *Id.*

33. Pechey et al., *Impact of Plain Packaging of Tobacco Products on Smoking in Adults and Children: An Elicitation of International Experts’ Estimates*, BMC Public Health 1 (2013), available at <http://www.biomedcentral.com/content/pdf/1471-2458-13-18.pdf> (last visited Jan. 18, 2014). BMC Public Health is committed to maintaining high standards through full and stringent peer review. *Id.*

34. *Id.*

35. *Id.*

quantify the uncertainty.³⁶ Thirty-three tobacco control experts were questioned by telephone and the results were linearly pooled in order to represent the opinion of the “average expert.”³⁷ While the percent reduction in smoking varied between experts, the most important finding from the study was that none of the experts believed plain packaging would increase smoking in either adults or children.³⁸ Rather, the implementation of plain packaging would likely lead to a reduction in tobacco consumption for both adults and children.³⁹ This study directly refutes the finding from economists at the MEI, which states that plain packaging could have negative consequences by encouraging, rather than discouraging, tobacco consumption.⁴⁰

Another study, conducted by researchers at Legacy® and Harvard School of Public Health, provides evidence as to the effectiveness of graphic health warnings in reducing tobacco consumption.⁴¹ Further, the study suggests that the regulation set forth in the FSPTCA in the United States would benefit all groups of race and socio-economic status.⁴² Stating that “[g]iven the disproportionate burden of tobacco-related disease faced by the poor and minorities, mandating strong pictorial warnings is an effective and efficient way to communicate the risk of tobacco use.”⁴³ The study examined reactions to graphic health warnings by 3,371 smokers.⁴⁴ The results of the study showed that graphic health warnings were more effective than text-only cigarette warnings because the smokers indicated that “the labels were more

36. *Id.*

37. Pechey et al., *supra* note 33.

38. *Id.*

39. *Id.*

40. *Id.*

41. Press Release, Harv. Sch. of Pub. Health, Graphic warnings on cigarettes effective across demographic groups (Jan. 14, 2013), *available at* <http://www.hsph.harvard.edu/news/press-releases/graphic-warnings-on-cigarettes-effective-across-demographic-groups/> (last visited Jan. 21, 2014). “Legacy Research Institute maintains an assurance with the Department of Health’s Office of Human Subject Protections to conduct clinical studies, and with the National Institute of Health’s Office of Laboratory Animal Welfare to conduct basic research.” *Accreditation*, LEGACY HEALTH, *available at* <http://www.legacyhealth.org/our-legacy/about-legacy/accreditation.aspx> (last visited Jan. 27, 2014).

42. *Id.*

43. *Id.*

44. Jennifer Cantrell, Donna M. Vallone, James F. Thrasher, Rebekah H. Nagler, Shari P. Feriman, Larry R. Muenz, David Y. He, & Kasisomayajula Viswanath, *Impact of Tobacco-Related Health Warning Labels Across Socioeconomic, Race and Ethnic Groups: Results from a Randomized Web-based Experiment*, PLOS ONE (Jan. 14, 2013), *available at* <http://www.plosone.org/article/info%3Adoi%2F10.1371%2Fjournal.pone.0052206> (last visited Jan. 21, 2014).

impactful, credible, and [had] a greater effect on their intentions to quit.”⁴⁵ Further, the researchers indicated that the study provided evidence as to the effectiveness of graphic health warnings on tobacco products and that the graphic health warnings in the FSPTCA “would achieve the desired effect. . .[and] enhanc[e] the efficiency and cost-effectiveness of [the] warning label policy.”⁴⁶

Regardless of the conclusions from competing studies, no one will really know what effect plain packaging or graphic health warnings will have on tobacco consumption until plain packaging laws have been in effect long enough to measure their impact. Thus, the real questions we must ask ourselves until then is whether graphic health warnings really advance a government interest in the reduction of tobacco consumption, and whether we are willing to limit corporate freedom of speech to find out?

III. TOBACCO PACKAGING IN AUSTRALIA AND CANADA

This section provides a general overview of the status of tobacco packaging in Australia and Canada. Part A discusses the law currently in effect in Australia and the impact of plain packaging on Australian tobacco consumers. Part A.1 discusses the Australian Constitution and intellectual property rights in relation to trade with other countries. Part A.2 explains the recent ruling by Australia’s Highest Court. In Part B, these same topics are explored in Canada’s Tobacco Products Labelling Regulations. Part B.1 then discusses the Canadian Constitution and free speech. Finally in Part B.2, the impending litigation in the Ontario Superior Court and a ruling by the Supreme Court of Canada in *Canada (Att’y Gen.) v. JTI-Macdonald Corp.*, is discussed.

A. Australia

In 2011, Australia passed the first law of its kind requiring tobacco companies to manufacture their products using plain packaging. This took their law a step beyond any other country by requiring more than just graphic health warnings to be printed on tobacco packaging.⁴⁷ The Tobacco Plain Packaging Act 2011 (“TPP Act”) requires that all retailers make the switch from the old packages to the new plain packages by December 1, 2012.⁴⁸ The TPP Act will “restrict tobacco industry logos, brand imagery, colours and promotional text appearing

45. Harv. Sch. of Pub. Health, *supra* note 41.

46. *Id.*

47. Thurlow, *supra* note 18.

48. Roxon & Plibersek, *supra* note 22.

on packs. Brand names will be standard colour, position and standard font size and style.⁴⁹

Further, each package must have a pictorial warning covering 75% of the front of the package and 90% of the back of the package.⁵⁰ This is an increase in size from previous legislation, which went into effect in 2006, that required 30% of the front and 90% of the back of cigarette cartons to have graphic health warnings.⁵¹ According to the Minister of Health, “[n]o longer when a smoker pulls out a packet of cigarettes will that packet be a mobile billboard.”⁵²

These new packages have statements such as “don’t let children breathe your smoke” and “smoking causes blindness.”⁵³ Further, the packages have graphic warnings displaying visually disturbing sights such as diseased lungs, smoker’s eye problems, and cancer of the mouth.⁵⁴ Parliament enacted the TPP Act to achieve two objectives: (1) improve public health, and (2) regulate tobacco packaging in order to reduce appeal, increase effectiveness of the packaging, and increase awareness of the health consequences associated with using tobacco products.⁵⁵ In effect, the second objective is merely a means to achieve the first objective.

1. Australian Constitution and Intellectual Property Rights

All Australians have the right to freedom of speech, association, assembly, religion, and movement.⁵⁶ Further, “Australians are free, within the bounds of the law, to say or write what [they] think privately or publicly, about the government, or about any topic.”⁵⁷ However, the issues concerning recent tobacco litigation involve section 51,

49. *Id.*

50. Thurlow, *supra* note 18.

51. *Health Warnings*, *supra* note 19.

52. Roxon & Plibersek, *supra* note 22.

53. Rod McGuirk, *Australian court OKs logo ban on cigarette packs*, NBC NEWS (Aug. 15, 2012), available at <http://www.nbcnews.com/health/australian-court-oks-logo-ban-cigarette-packs-1B5384435> (last visited Jan. 27, 2013).

54. Jonathan Pearlman, *Tobacco companies to challenge Australian plain packaging legislation*, TEL. MEDIA GROUP (Apr. 17, 2012), available at <http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/9208436/Tobacco-companies-to-challenge-Australia-plain-packaging-legislation.html> (last visited Jan. 21, 2013).

55. *Tobacco Plain Packaging Act 2011* (Cth) No. 148 ch. 3 (Austl.), available at <http://www.comlaw.gov.au/Details/C2011A00148> (last visited Jan. 21, 2012).

56. *Five fundamental freedoms*, AUSTL. GOV’T (2013), available at <http://www.immi.gov.au/living-in-australia/choose-australia/about-australia/five-freedoms.htm> (last visited Jan. 21, 2013).

57. *Id.*

intellectual property rights, and the rights of corporations. Section 51 sets out Parliament's power to make laws affecting peace, order, and good government for the Commonwealth, thus granting parliament general welfare powers.⁵⁸ Specifically pertinent to tobacco litigation in Australia is section 51(xxxi).⁵⁹ According to section 51(xxxi), the Parliament has the power to make laws through "[t]he acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws."⁶⁰ The term "property" takes on a broad definition and tends to extend to property rights created by statute.⁶¹ Further, the Court in *Bank of NSW v. The Commonwealth*, took the word "property" to extend to "inanimate and anomalous interests. . .include[ing] the assumption and indefinite continuance of exclusive possession and control."⁶²

According to the High Court, in order to put into play section 51(xxxi), "it is not enough that legislation adversely affects or terminates a pre-existing right that an owner enjoys in relation to his property; there must be an acquisition whereby the Commonwealth or another acquires an interest in property, however slight or insubstantial it may be."⁶³ However, under section 51(xxxi), the emphasis placed on the acquisition of property was for the benefit of the Commonwealth and not merely the "taking" of private property.⁶⁴ Thus, the difference between merely taking versus acquiring is extremely important in determining if section 51(xxxi) has been violated. In order to acquire property, one must also acquire the proprietary rights to the property.⁶⁵ The property must be "dedicated or devoted to uses" in that it is used for the purpose of the Commonwealth.⁶⁶ Further, "there must be an obtaining of at least *some identifiable benefit or advantage relating to the ownership or use of property*."⁶⁷

Along with questions of infringement on the Australian Constitution through section 51(xxxi), tobacco companies also argued that the TPP Act restricts trademarks in a very harsh manner by requiring tobacco companies to display their company names in a

58. AUSTRALIAN CONSTITUTION s 51.

59. *JT Int'l SA v Commonwealth* [2012] HCA 43 (Austl.).

60. AUSTRALIAN CONSTITUTION s 51(xxxi).

61. *JT Int'l SA* [2012] HCA ¶ 29.

62. *Bank of NSW v. Commonwealth* (1948) 76 CLR 1, 349 (Austl.).

63. *JT Int'l SA* [2012] HCA ¶ 118.

64. *Id.*

65. *Id.* ¶ 144.

66. *Id.*

67. *Id.* ¶ 198.

particular way on their tobacco product packaging.⁶⁸ However, intellectual property law and trademark law in Australia are intended to advance public policy concerns as well as protect private interests of rights-holders.⁶⁹ Thus, a balancing act must take place between public policy and rights holders to determine which interest is more compelling.

2. Highest Court Ruling

On August 15, 2012, the High Court of Australia, in a six-to-one majority, upheld the

Tobacco Plain Packaging Act 2011, thus rejecting big tobacco's challenge on plain packaging.⁷⁰ In arguing their case, the tobacco companies maintained that the Court should adopt a liberal construction of the meaning of "acquisition" in the text of section 51(xxxi).⁷¹ However, the Court stated "[a] liberal construction cannot and does not go as far as the tobacco companies asserted, which would treat any benefit or advantage as a sufficient definition of the constitutional reference to 'property.'"⁷² Relying partially on precedent set forth in *The Grain Pool of Western Australia v. The Commonwealth*,⁷³ *Nintendo Co. Ltd. v. Centronics Systems Pty Ltd.*,⁷⁴ and *Phonographic Performance Co. of Australia Ltd. v. The Commonwealth*,⁷⁵ the Court ruled that eliminating advertising through plain packaging does not amount to an acquisition of property.⁷⁶ Justice Hayne and Justice Bell went on to further state that "[l]egislation that requires warning labels to be placed on products, even warning labels as extensive as those required by the Plain Packaging Act, effect no acquisition of property."⁷⁷

68. Brian Hendy & Steve Krouzecky, *Plain packaging tobacco products: is there a trademark issue?* INTELL. ASSET MGMT. (Nov. 23, 2011), available at <http://www.iam-magazine.com/reports/Detail.aspx?g=33e041ff-901b-41c3-a991-db4ed821cda6> (last visited Jan. 20, 2012).

69. *JT Int'l SA* [2012] HCA ¶ 30.

70. *Roxon & Plibersek*, *supra* note 22.

71. *JT Int'l SA* [2012] HCA ¶ 170.

72. *Id.*

73. *The Grain Pool of Western Australia v Commonwealth*, [2000] HCA 14 (Austl.).

74. *Nintendo Co. Ltd. v Centronics Systems Pty Ltd.* [1994] HCA 27 (Austl.).

75. *Phonographic Performance Co. of Australia Ltd. v Commonwealth*, [2012] HCA 8 (Austl.).

76. Matthew Rimmer, *The High Court and the Marlboro Man: the plain packaging decision*, CONVERSATION (Oct. 18, 2012), available at <http://theconversation.edu.au/the-high-court-and-the-marlboro-man-the-plain-packaging-decision-10014> (last visited Jan. 20, 2012).

77. *Id.* (citing *JT Int'l SA* [2012] HCA 42). However, Justice Heydon, in his dissent,

Interestingly, the Court noted that the object of the TPP Act is to improve public health by discouraging people from using tobacco products, but whether this object could be met by these means was not, and could not, be presently known.⁷⁸ However, the Court did go on to say the tobacco companies did not make any effort to argue, “that the measures were not appropriate to achieve the statutory objectives or disproportionate to them, or that the legislation was enacted for purposes other than those relating to public health.”⁷⁹ Further, the Court stated that this was a “rare form of regulation,” because it made companies advertise that their product should not be used.⁸⁰ It will be interesting to see if the tobacco companies bring suit addressing these issues. The issues noted by the Court that were not addressed seem to be more in line with the idea of freedom of expression recognized in the United States Constitution and the Canadian Charter of Rights and Freedoms because they employ more of a balancing test to determine whether a regulation is constitutional. These protections afforded by the Canadian Charter of Rights and the United States Constitution will be discussed in detail below.⁸¹

B. Canada

Canada has taken many steps to try to reduce tobacco consumption.⁸² In the 1980’s “[p]er capita cigarette consumption [in Canada] was among the highest in the world, with over 40% of fifteen to nineteen-year olds reported to be daily smokers.”⁸³ In an attempt to reduce tobacco consumption, Canada has, according to Sweanor, “checked all the boxes.”⁸⁴ Meaning that after having imposed high taxes on cigarette sales, it has essentially eliminated all advertising and promotion of cigarettes.⁸⁵ Additionally, it has reduced the number of retail displays, it has implemented laws that require graphic health warnings, and it has required that additional health information come in

argued that the government was encroaching on the acquisition of the property clause. *JT Int’l SA* [2012] HCA § 170.

78. *JT Int’l SA* [2012] HCA ¶ 371.

79. *Id.* ¶ 372.

80. *Id.*

81. The Canadian Charter of Rights and Freedom is discussed in full in section III.B.1., *infra* pp. 16-19; The United States Constitution and free expression is discussed in full in section IV.B., *infra* pp. 24-25.

82. David Sweanor, *A Canadian’s Perspective: Limits of Tobacco Regulation*, 34 WM. MITCHELL L. REV. 1595, 1596 (2008).

83. *Id.*

84. *Id.* at 1598.

85. *Id.* at 1596.

every package of tobacco.⁸⁶ By implementing all of these regulations, Canada was able to reduce its per capita consumption for fifteen to nineteen-year olds in 2006.⁸⁷ While this has no doubt been a victory for tobacco control efforts, Canada has not recently seen any major reductions in consumption.⁸⁸

In 1995, the Federal government of Canada considered and rejected a proposal implementing plain packaging.⁸⁹ However, Canada was the first country to require tobacco companies to manufacture tobacco packaging with graphic health warnings.⁹⁰ In 2000, Canada adopted the Tobacco Products Information Regulations (“TPIR”) under the Tobacco Act, which required “graphic health warnings” on tobacco packaging and “mandated the inclusion of health messages” in the tobacco packaging.⁹¹

Fast-forward eleven years and the TPIR has been replaced by the Tobacco Products Labelling Regulations (Cigarettes and Little Cigars) (“TPLR-CLC”).⁹² According to Health Canada, the TPLR-CLC is “an important component of the Federal Tobacco Control Strategy, which aims to reduce the smoking rates in Canada.”⁹³ The TPLR-CLC sets forth four major differences from the TPIR by requiring that: (1) graphic health warnings cover 75% of the front and back of cigarette and little cigar packages; (2) new graphic health warning messages and new health information messages, (3) a pan-Canadian toll-free quit line and web address be displayed; and (4) easy-to-understand toxic emission standards be displayed.⁹⁴ Further, both the health warning messages and the health information messages are enhanced with colors.⁹⁵

Currently, Canada requires that 75% of the front and back of the

86. *Id.*

87. Sweanor, *supra* note 82, at 1598.

88. *Id.* at 1596; Tilson, *supra* note 15.

89. Kelly-Gagnon & Chassin, *supra* note 23.

90. Press Release, Physicians for a Smoke-Free Can., Australian court ruling shows that governments should stand up to tobacco industry bullying, (Aug. 15, 2012), *available at* http://www.smoke-free.ca/eng_home/2012/news_press_15_Aug_2012.htm (last visited Jan. 20, 2012).

91. *Tobacco Products Information Regulations*, HEALTH CAN. (Nov. 30, 2011), *available at* <http://www.hc-sc.gc.ca/hc-ps/tobac-tabac/legislation/reg/prod/index-eng.php> (last visited Jan. 22, 2014).

92. *Id.*

93. *Tobacco Products Labelling Regulations (Cigarettes and Little Cigars)*, HEALTH CAN. (May 7, 2012), *available at* <http://www.hc-sc.gc.ca/hc-ps/tobac-tabac/legislation/reg/label-etiquette/index-eng.php> (last visited Jan. 22, 2014).

94. *Id.*

95. *Id.*

packaging contain a graphic pictorial health warning.⁹⁶ This is an increase from 2010, when graphic health warnings only covered 50% of the front and back of the packaging.⁹⁷ According to Cynthia Callard of Physicians for a Smoke-Free Canada, the government is not doing enough and has fallen behind in researching.⁹⁸ While the Canadian government has hoped to reduce litigation by not implementing plain packaging, tobacco companies have challenged the increased regulations imposed by the TPLR-CLC.⁹⁹ Tobacco companies argue that the regulation violates their constitutional right to freedom of expression, which is guaranteed by section 2(b) of the Canadian Charter of Rights and Freedoms.¹⁰⁰

1. *Canadian Charter of Rights and Freedoms and Freedom of Expression*

“Everyone has the following fundamental freedoms: . . . (b) freedom of thought, belief,

opinion and expression, including freedom of the press and other means of communication.”¹⁰¹ In *Irwin Toy Ltd. v. Quebec*, the Supreme Court of Canada ruled that freedom of expression extended to commercial expression by corporations.¹⁰² Thus, the term “everyone,” referenced in 2(b) of the Charter, includes corporations.¹⁰³ The Court justified extending freedom of expression to corporations because it would allow the consumer to obtain necessary information so the consumer could make a decision about what products to purchase.¹⁰⁴

96. Kelly-Gagnon & Chassin, *supra* note 23.

97. *Id.*

98. See Physicians for a Smoke-Free Can., *supra* note 90.

99. *Id.*

100. See Leah McDaniel, *Tobacco Advertising Rules Go Back to Court...Again*, CENTRE FOR CONST. STUD. (May 24, 2012), available at <http://ualawccsprod.srv.ualberta.ca/ccs/index.php/constitutional-issues/25-other/68-tobacco-advertising-rules-go-back-to-court-again> (last visited Jan. 22, 2014).

101. Canadian Charter of Rights and Freedoms, s. 2(b), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982 (U.K.).

102. *Irwin Toy Ltd. v. Quebec (Att’y Gen.)*, [1989] 1 S.C.R. 927 (Can. Que.). The Supreme Court of Canada further upheld the idea that freedom of expression extends to corporate speech in 2007 in *JTI-Macdonald. Canada (Att’y Gen.) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610 (Can.).

103. Canadian Charter of Rights and Freedoms, *supra* note 101.

104. See *Ford v. Quebec (Att’y Gen.)*, [1988] 2 S.C.R. 712, 766-67 (Can. Que.). Specifically, the court in *Ford* ruled that commercial expression enjoys protection from the Charter because it “plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy.” *Id.* at 766.

Further, the government can only strip someone's (person or corporation) freedom of expression by providing a "demonstrably justified" reason supported by some evidence for stripping that freedom.¹⁰⁵ Specifically, Section 1 of the Charter states "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."¹⁰⁶

The courts interpretation of Section 1 of the Charter puts in place a proportionality analysis to determine if the government's interest in restricting freedom of expression is justified. In order to determine if the government has satisfied its burden, the Court in *R. v. Oakes* created a proportionality test.¹⁰⁷ The three-part test of proportionality states:

There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question . . . Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".¹⁰⁸

Therefore, if the government wants to limit someone's freedom of expression it must be "demonstrably justified."¹⁰⁹ The "demonstrably justified" test set out in *Oakes* can be translated into a four-part test. First, the government must have an interest of "sufficient importance."¹¹⁰ Second, its means must be rationally connected.¹¹¹ Third, its means must impair as little as possible.¹¹² Lastly, the effects of the limitation must be proportional to the objective.¹¹³ The Court in *Oakes* went on to state that the government's objective must be

105. See Canadian Charter of Rights and Freedoms, *supra* note 101; see also *JTI-Macdonald Corp.*, 2 S.C.R. at 664.

106. See Canadian Charter of Rights and Freedoms, *supra* note 101.

107. *R. v. Oakes*, [1986] 1 S.C.R. 103, 139 (Can.).

108. *Id.*

109. See Canadian Charter of Rights and Freedoms, s. 1, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.); see *Oakes*, 1 S.C.R. at 139.

110. *Oakes*, 1 S.C.R. at 139.

111. *Id.*

112. *Id.*

113. *Id.*

“pressing and substantial.”¹¹⁴ If an act by the government does not satisfy all four elements then it is seen as unjustifiably infringing on section 2(b) of the Charter and cannot be upheld.¹¹⁵

2. *The Supreme Court of Canada and the Ontario Superior Court*

Imperial Tobacco Ltd. and *JTI-Macdonald Corp.* represent the most recent challenges to

the increase in size of graphic health warnings from 50% to 75% under the TPLR-CLC filed in the Ontario Superior Court.¹¹⁶ It is unclear how the Ontario Superior Court will handle this new challenge. However, in 2007, the Supreme Court of Canada in *Canada (Attorney General) v. JTI-Macdonald Corp.* found the portion of the Tobacco Act that increased graphic health warnings from 33% to 50%, constitutional.¹¹⁷ While the court did find that the graphic health warnings were an infringement on free expression, it stated that the restriction did not violate section 1 of the Charter because it was pressing and substantial, and “demonstrably justified in a free and democratic society.”¹¹⁸

In making its decision, the Court in *JTI-Macdonald Corp.* set out three reasons why the regulation was justified.¹¹⁹ First, the Court stated that the graphic health warnings were an effective way to notify the public of the health dangers associated with smoking and that this conclusion was supported by a “mass of evidence.”¹²⁰ This justification satisfies the second element set out in *Oakes*.¹²¹ The Court further saw the tobacco companies’ resistance to the increase in the size of the graphic health warning as evidence that the warnings have an effect on consumers and is a threat to tobacco companies.¹²² Second, the Court found that the increase in warning size was justified and reasonable because evidence demonstrated that larger warnings might have greater effects on consumption, and other countries that already required larger

114. *Id.* at 138-39.

115. *See* Canadian Charter of Rights and Freedoms, *supra* note 101; *Oakes*, 1 S.C.R. at 103.

116. *McDaniel*, *supra* note 100.

117. *Id.*

118. *JTI-Macdonald*, 2 S.C.R. at 628. The Court went on to describe how to determine if a government objective is “demonstratively justifiable” by referencing a three part proportionality test set out in *Oakes*. *Id.* at 628-29.

119. *McDaniel*, *supra* note 100.

120. *JTI-Macdonald*, 2 S.C.R. ¶ 135.

121. *Oakes*, 1 S.C.R. at 139.

122. *JTI-Macdonald*, 2 S.C.R. ¶ 136.

warnings than Canada supported this requirement.¹²³ This justification, it can be argued, satisfies the third element set out in *Oakes* because other countries have implemented more stringent regulations, therefore, the TPLR-CLC is not more extensive than necessary because it is not as extensive as other similar regulations in other countries.

Lastly, the Court found that the regulation was proportional in that “[t]he benefits flowing from the larger warnings are clear. The detriments to the manufactures’ expressive interest in creative packaging are small.”¹²⁴ This justification satisfies the last element set out in *Oakes* because it addresses the proportionality of the regulation in relation to its objective, deeming that based on the competing interests of public health and the interests of the tobacco companies, public health has a greater importance and deserves more protection than the tobacco companies. While the Court did not address whether the objective set out by the TPLR-CLC was “demonstrably justified” or of “sufficient importance” directly, it was not necessary because the Supreme Court of Canada had already ruled that previous graphic health warnings were constitutional.¹²⁵ Therefore, the Supreme Court already determined that reducing tobacco consumption among adults and teens was “demonstrably justified” and of “sufficient importance.”

IV. TOBACCO PACKAGING IN THE UNITED STATES

This section provides a general overview of the status of tobacco packaging in the United

States. Part A discusses the FSPTCA that was passed in 2009 to regulate tobacco packaging. Next, Part B discusses the commercial speech test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission* and then begins the discussion of the current split between the Sixth Circuit and the D.C. Circuit on the constitutionality of the FSPTCA. Part B.1 explains the ruling in *Discount Tobacco* in regards to the FSPTCA., while Part B.2, explains the ruling in *R.J. Reynolds* in regards to the FSPTCA.

123. *Id.* ¶¶ 137-38.

124. *Id.* ¶ 139.

125. McDaniel, *supra* note 100.

A. The Family Smoking Prevention and Tobacco Control Act

On June 22, 2009, President Obama signed the FSPTCA.¹²⁶ According to the FDA the act “gives the Food and Drug Administration (FDA) the authority to regulate the manufacture, distribution, and marketing of tobacco products to protect the public health.”¹²⁷ Further, it requires tobacco companies to print bigger, more prominent warning labels on cigarette and smokeless tobacco packaging.¹²⁸ The goal of the FSPTCA is to “curb the trend of new users becoming addicted before they are old enough to understand the risks and ultimately dying too young of tobacco-related diseases.”¹²⁹

To further the goal of the FSPTCA, the FDA has required tobacco companies to revise their warning labels with larger font sizes and limit the “color and design of packaging and advertisements, including audio-visual advertisements.”¹³⁰ It has also required that tobacco companies limit their font colors to white on black background or black on white background while also prohibiting the use of terms such as “light,” “low,” or “mild.”¹³¹ Further, with the implementation of the FSPTCA, tobacco companies are required to place graphic health warnings on the top 50% of the front and the back of their cigarette packaging.¹³² The FDA has created nine graphic warning messages, which “must be accompanied by color graphics showing the negative health consequences of smoking cigarettes.”¹³³ Further, these nine graphic health warnings must be “equally and randomly displayed and distributed in all areas of the United States.”¹³⁴ Smokeless tobacco product packaging has similar requirements as cigarette packaging.¹³⁵ The graphic warning label must cover 30% of both principle display panels, “and the four specific required messages must be equally and

126. Stephanie Jordan Bennett, *Paternalistic Manipulation Through Pictorial Warnings: The First Amendment, Commercial Speech, and the Family Smoking Prevention and Tobacco Control Act*, 81 Miss. L.J. 1909, 1910 (2012).

127. U.S. FOOD & DRUG ADMIN., OVERVIEW OF THE FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT: CONSUMER FACT SHEET, *available at* <http://www.fda.gov/tobaccoproducts/guidancecomplianceregulatoryinformation/ucm246129.htm> (last visited Jan. 21, 2013) [hereinafter “FSPTCA fact sheet”].

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. FSPTCA fact sheet, *supra* note 127.

133. *Id.*

134. *Id.*

135. *Id.*

randomly displayed and distributed in all areas of the United States.”¹³⁶

Currently, the status of the FSPTCA is unknown.¹³⁷ Certain provisions of the FSPTCA are being litigated to determine their constitutionality.¹³⁸ The rulings in *Discount Tobacco* and *R.J. Reynolds* are currently under appeal and, until they are resolved, the future of the FSPTCA is unknown.¹³⁹ These cases effectively created a circuit split on the issue of the constitutionality of the FSPTCA because different standards of review were applied. With such a prominent split in decisions between circuits, it is likely this issue will not be resolved until it reaches the United States Supreme Court.

B. *The Central Hudson Test and the Circuit Split*

On August 24, 2012, the D.C. Circuit court in *R.J. Reynolds* handed down a decision that created a split between the D.C. Circuit and the Sixth Circuit on the constitutionality of whether the FDA could require tobacco companies to print graphic health warnings on their products.¹⁴⁰ The court in *R.J. Reynolds* ruled that the government could not require tobacco companies to “go beyond making purely factual and accurate commercial disclosure[s] and undermine its own economic interest – in this case by making ‘every single pack of cigarettes in the country [a] mini billboard’ for the government’s anti-smoking message” – because it would violate the First Amendment.¹⁴¹ In contrast, the court in *Discount Tobacco* found that the FSPTCA was permissible under the First Amendment.¹⁴²

Both cases analyzed the constitutionality of regulating commercial speech through provisions of the FSPTCA using the test set out in *Central Hudson*.¹⁴³ Under *Central Hudson*, the Court determined that if

136. *Id.*

137. *Family Smoking Prevention and Tobacco Control Act Litigation Update*, available at http://publichealthlawcenter.org/sites/default/files/tclc-fs-tobaccocontrolact-litigation-update-4-2013_0.pdf (last visited Jan. 28, 2014)

138. *Id.*

139. *Id.*

140. Nicholas J. Wagoner, *D.C. Circuit Creates Circuit Split Over Graphic Cigarette Warning Labels*, CIRCUIT SPLITS (Aug. 27, 2012), available at <http://www.circuitsplits.com/2012/08/dc-circuit-creates-circuit-split-over-graphic-cigarette-warning-labels.html> (last visited Jan. 22, 2014).

141. *R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*, 696 F.3d 1205, 1212 (D.C. Cir. 2012). The D.C. Circuit, unlike the Sixth Circuit, found the requirements of the federal law to go beyond ordinary disclosure requirements and, therefore, different standards of review were applied. *Id.*

142. *Discount Tobacco*, 674 F.3d at 551.

143. *Id.*; *R.J. Reynolds* 696 F.3d at 1212.

commercial speech is to be protected under the First Amendment, the speech must first involve or concern a legal transaction.¹⁴⁴ If the speech meets that threshold, and is also not misleading or untruthful, then it is afforded protection under the First Amendment and the government must prove that: (1) the regulation serves a substantial interest, (2) the regulation's means directly advance that interest, and (3) the regulation's means are not more extensive than necessary.¹⁴⁵ If the government proves those three elements, then the regulation will likely be found constitutional. However, if a regulation deals with purely factual disclosures of product information, then the commercial speech is not afforded the same heightened protection under *Central Hudson*, and instead it is afforded rational-basis review.¹⁴⁶ At issue between the circuits was the difference in the standard of review applied to graphic health warnings under the FSPTCA.¹⁴⁷ However, both circuits addressed whether graphic health warnings directly advance the government interest and whether they are not more extensive than necessary, which are both key components to the *Central Hudson* test.¹⁴⁸

C. *Discount Tobacco City & Lottery, Inc.*

On March 19, 2012, the Sixth Circuit issued its decision in *Discount Tobacco* upholding almost all aspects of the FSPTCA.¹⁴⁹ The Court concluded that tobacco marketing is a major cause of youth smoking.¹⁵⁰ It stated that “[the tobacco companies] would have us believe that there is no causal connection between product advertising and the consumer behavior of children, [but] such a claim stretches the bounds of credibility, even in the absence of the extensive record submitted by the government, which indicates the contrary.”¹⁵¹ Further, the Court stated that the massive amount of money spent on tobacco

144. Brian E. Mason, *Tobacco Manufacturers and the United States Government: Ready for Battle*, 15 SMU SCI. & TECH. L. REV. 555, 564 (2012).

145. *Id.*

146. *Id.*; *Discount Tobacco*, 674 F.3d at 558.

147. *Discount Tobacco*, 674 F.3d at 551; *R.J. Reynolds*, 696 F.3d at 1212. A discussion on the standard of review will be discussed for each case in full in sections IV.B.1. & IV.B.2., *infra* pp. 26-31.

148. *Discount Tobacco*, 674 F.3d at 551; *R.J. Reynolds*, 696 F.3d at 1233.

149. *Tobacco Product Sales Regulation*, NEW ENG. L. BOS. (Feb. 12, 2013), available at <http://tobaccopolicycenter.org/tobacco-control/recent-cases/tobacco-product-sales-regulation> (last visited Jan. 22, 2014).

150. *Discount Tobacco*, 674 F.3d at 541.

151. *Id.* at 539-40.

advertising (approximately \$13 billion in 2005)¹⁵² was largely for “(1) attracting new young adult and juvenile smokers, and (2) brand competition in the young adult and juvenile market.”¹⁵³ The Court, relying on and giving substantial deference to Congress’s findings, reasoned through empirical data that it was unlikely tobacco companies spent \$13 billion on advertising to get adults to switch brands when in reality tobacco users were extremely brand loyal and unlikely to switch products.¹⁵⁴

In reaching its decision, the Court discussed different aspects of the FSPTCA.¹⁵⁵ Most notably it discussed graphic health warnings, Modified Risk Tobacco Product (MRTP) Regulation, and the ban on the use of color and graphics.¹⁵⁶

First, the Court, in a two-to-one decision, upheld the requirement that tobacco companies print graphic health warnings on the top 50% of cigarette packages and 20% of all tobacco advertising.¹⁵⁷ To come to this part of its conclusion, the Court did not apply the *Central Hudson* test because it reasoned that the tobacco companies engaged in providing misleading information to its consumers.¹⁵⁸ The Court stated that the tobacco companies “knowingly and actively conspired to deceive the public about health risks and addictiveness of smoking for decades.”¹⁵⁹ Further, the Court relied on evidence gathered by Congress (through international experience)¹⁶⁰ to conclude, “larger warnings [including graphic health warnings] materially affect consumers’ awareness of the health consequences of smoking and decisions regarding tobacco use.”¹⁶¹

Second, the Court found that the MRTP did not unconstitutionally restrain commercial speech because it met the requirements set out in *Central Hudson*.¹⁶² The Court reasoned that the government could prevent tobacco companies from placing words such as “light,” “mild,” “low,” or similar identifiers on its packaging because it had a substantial

152. *Id.* at 540.

153. *Id.*

154. *Id.* at 521, 540.

155. *Discount Tobacco*, 674 F.3d at 520-21.

156. *Id.*

157. *Id.* at 518.

158. *Id.* at 527.

159. *Id.* at 562.

160. Mason, *supra* note 144, at 584 (stating that Congress heavily relied on the international consensus found in the World Health Organization Framework Convention on Tobacco Control in drafting the Tobacco Control Act).

161. *Discount Tobacco*, 674 F.3d at 530.

162. *Id.* at 537.

interest in protecting consumers from misunderstanding these terms by interpreting them as less harmful.¹⁶³ To determine that the government had established a substantial interest, the Court relied on Congressional evidence establishing a pattern of deceptive advertising and the likelihood of future deception.¹⁶⁴ Lastly, the Court found that the government had satisfied the elements under the *Central Hudson* test, requiring the regulation's means to directly advance the interest and not be more extensive than necessary because "[t]here [was] no indication that the provision suppresses non-commercial speech relating to nonspecific tobacco products."¹⁶⁵ The Court went on to further state that while there may be less restrictive means to deal with the harm associated with the MRTPR, the MRTPR was not more extensive than necessary.¹⁶⁶ The Court stated that "the government is at play in the major leagues, and the alternatives suggested by [the tobacco companies] have already been tried and found wanting."¹⁶⁷

Third, the Court ruled that the ban on the use of color and graphics was too broad because it would apply in situations where the tobacco packaging would have no appeal to youth.¹⁶⁸ The Court stated that the government could prove that it had a "substantial interest in alleviating the effects of tobacco advertising on juvenile consumers."¹⁶⁹ However, it was not able to prove the second prong of the *Central Hudson* test because the restriction was too broad.¹⁷⁰ The Court did suggest that a more narrowly tailored provision would pass constitutional muster under *Central Hudson*.¹⁷¹

D. *R.J. Reynolds Tobacco Co.*

In August 2012, the D.C. Circuit ruled that the FSPTCA's requirement that tobacco companies place graphic health warnings on their packaging was unconstitutional.¹⁷² In making its decision, the Court applied the *Central Hudson* test, arguing that this case involved compelled commercial speech.¹⁷³ The Court made this decision based

163. *Id.* at 534.

164. *Id.* at 535.

165. *Id.* at 536.

166. *Discount Tobacco*, 674 F.3d at 537.

167. *Id.*

168. *Id.* at 548.

169. *Id.*

170. *Id.*

171. *Discount Tobacco*, 674 F.3d at 548.

172. *R.J. Reynolds*, 696 F.3d at 1219.

173. *Id.* at 1217-18.

on the previous ruling in *United States v. Philip Morris*, where compelled commercial speech was entitled to intermediate scrutiny.¹⁷⁴ Specifically the Court in *Philip Morris* stated that “the Supreme Court’s bottom line is clear: the government must affirmatively demonstrate its means are narrowly tailored to achieve a substantial government goal.”¹⁷⁵

Under the first prong of the *Central Hudson* test, the Court states that the FDA intended the graphic health warnings “engage current smokers to quit and dissuade other consumers from ever buying cigarettes.”¹⁷⁶ The Court further stated that the only interest the graphic health warnings purports to have is the “substantial interest in reducing the number of Americans, particularly children and adolescents, who use cigarettes and other tobacco products.”¹⁷⁷ The Court did not address whether this interest is a “substantial government interest,” but rather, assumed that the FDA’s interest was substantial.¹⁷⁸ Therefore, the Court moved directly into determining if the FDA offered substantial evidence, meaning more than mere conjecture or speculation, demonstrating that the graphic warnings directly advanced the government’s interest.¹⁷⁹

Under the second prong of the *Central Hudson* test, the Court ruled that the FDA must provide evidence that the graphic health warnings would reduce smoking rates, rather than just educate consumers.¹⁸⁰ Stating that the “FDA has not provided a shred of evidence – much less the ‘substantial evidence’ required by the APA – showing that the graphic health warnings will ‘directly advance’ its interest in reducing the number of Americans who smoke.”¹⁸¹ Further, the Court was unwilling to use evidence from other countries¹⁸² to show that the graphic health warnings would reduce smoking rates because the evidence could not demonstrate that the graphic warnings themselves directly caused the reduction in tobacco use.¹⁸³ Other tobacco control

174. *Id.*

175. *United States v. Phillip Morris*, 566 F.3d 1095, 1142-43 (D.C. Cir. 2009); *R.J. Reynolds* 696 F.3d at 1217.

176. *R.J. Reynolds*, 696 F.3d at 1218.

177. *Id.*

178. *Id.*

179. *Id.* at 1219.

180. *Id.*

181. *R.J. Reynolds*, 696 F.3d at 1219.

182. This is contrary to *Discount Tobacco* where the Court was willing to accept evidence provided by Congress that relied heavily on international consensus. *Mason*, *supra* note 144, at 584.

183. *R.J. Reynolds*, 696 F.3d at 1218-19.

measures had been put in place¹⁸⁴ at the same time making it impossible to differentiate between the other control measures and the graphic health warnings.¹⁸⁵ The Court argued that as a result, this evidence merely provided speculation and conjecture.¹⁸⁶

Further, the Court stated that studies in Canada and Australia do no more than provide “mere speculation to suggest that respondents who report increased *thoughts* about quitting smoking will actually follow through on their intentions.”¹⁸⁷ Moreover, the Court cites other Australian and Canadian studies that suggest the large graphic health warnings might convince smokers to reduce their tobacco consumption.¹⁸⁸ The Court is quick to note that these studies did not show that the graphic health warnings actually reduced consumption, and therefore, they were not substantial enough to show that the graphic health warnings would directly advance the FDA’s interest.¹⁸⁹ However, by referencing other nations the Court opened the door to possible jurisprudence and recognition of foreign nations policy measures.

In conclusion, the Court stated that the government’s attempt to “level the playing field” in this way was not appropriate.¹⁹⁰ The Court cited the recent Supreme Court case, *Sorrell v. IMS Health*, which stated that even regulations backed by persuasive evidence are subject to scrutiny before they can be permitted.¹⁹¹ Therefore, the government must show a substantial interest in which the regulation directly advances in order for the regulation to pass constitutional muster.¹⁹² In this case the government failed to present sufficient evidence that the regulation would directly advance the government interest, and as a result, the regulation did not pass constitutional muster under the *Central Hudson* test.¹⁹³

184. When Canada implemented graphic health warnings it also mandated the inclusion of health messages within the tobacco packaging. *Tobacco Products Information Regulations*, *supra* note 91.

185. *R.J. Reynolds*, 696 F.3d at 1219.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *R.J. Reynolds*, 696 F.3d at 1221.

191. *Id.* at 1222 (citing *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2671 (2011)).

192. *Id.*

193. *Id.*

V. IS THE FAMILY SMOKING PREVENTION TOBACCO CONTROL ACT CONSTITUTIONAL?

This section discusses why the Supreme Court of the United States (“Supreme Court”) should determine that the FSPTCA does not violate commercial speech protected by the First Amendment.¹⁹⁴ First, this section discusses whether the FSPTCA is constitutional by addressing the provision that implements graphic health warnings. Part A will discuss the policy measures set forth in Australia and how they can be applied to help establish the constitutionality of the FSPTCA. Part B will discuss the court rulings and policy measures in Canada and how they affect the constitutionality determination. Lastly, Part C will discuss graphic health warnings under the FSPTCA and why the Supreme Court should look to policy measures in Canada and Australia. Further it will discuss why deference should be given to Canadian courts to find the FSPTCA constitutional under the *Central Hudson* test.

A. Australia and Canada's Part in Determining the Constitutionality of the FSPTCA

While the FSPTCA does more than implement graphic health warnings, the split between the D.C. Circuit and the Sixth Circuit, shows that the provision addressing graphic health warnings is the most controversial. Both Australia and Canada now require graphic health warnings on all tobacco packaging.¹⁹⁵ While it is hard to determine whether the efforts in Australia have been effective, it is hard to deny that Canadian tobacco regulation helped reduce the amount of youth smokers within the last fifteen years.¹⁹⁶

1. Australia's Plain Packaging Guides the Way for the FSPTCA

Australia has gone further than the FSPTCA in terms of regulating tobacco marketing. Australia has implemented plain packaging and graphic health warnings while the FSPTCA requires tobacco companies to print large graphic health warnings on its tobacco packaging.¹⁹⁷ While the Australian plain packaging provisions require graphic health warnings and strip tobacco-packaging products of any logos, trade

194. The Supreme Court usually addresses issues on which circuits are split once three circuits have addressed the issue, however, because this is a conflict over the constitutionality of an administrative regulation it may be heard sooner. Wagoner, *supra* note 140.

195. Roxon & Plibersek, *supra* note 22; Kelly-Gagnon & Chassin, *supra* note 23.

196. Sweanor, *supra* note 82, at 1597.

197. Roxon & Plibersek, *supra* note 22; FSPTCA fact sheet, *supra* note 127.

colors, descriptive words, or specialized font size and style,¹⁹⁸ it can be, and will likely be, a way of measuring graphic health warnings affect on tobacco consumption, especially on youth. It is unlikely the U.S. will ever go as far as Australia and implement plain packaging because the U.S. Constitution protects freedom of speech more stringently than the Australian Constitution.¹⁹⁹ This largely has to do with the difference in limited, as opposed to, required speech. If the government compels restrictions on commercial speech, then heightened scrutiny is necessary.²⁰⁰ However, if speech is limited to simple factual disclosures, heightened scrutiny is not necessary and rather, rational-basis review is required.²⁰¹

The High Court in Australia admitted that it was not certain whether plain packaging would advance the goals of the TPP Act.²⁰² Further, Australian Attorney-General, Nicola Roxon, stated that she believed plain packaging would reduce tobacco consumption, but also noted that because Australia was the first country to try this approach other countries would have to watch to determine if this was the route they wish to take.²⁰³ It is just too soon to know whether plain packaging will have the desired effects the government hopes it will have. This uncertainty, especially among youth tobacco consumers, is precisely the problem the Court in *R.J. Reynolds* had with implementing graphic health warnings.

Presently, it is unclear whether implementing plain packaging and graphic health warnings will advance the Australian government's interest in reducing tobacco consumption. While this is currently problematic, once the TPP Act has been in place for a few years, the problem will diminish because reliable, statistical evidence will be available. Further, it should be noted that tobacco companies strongly oppose plain packaging and graphic health warnings, which does suggest that these restrictions may have a positive effect on reducing tobacco consumption. It also suggests that these efforts would directly advance the government's interest. Fortunately for the tobacco companies, the FSPTCA is not trying to implement plain packaging. Rather, the FSPTCA wants to implement graphic health warnings, a less restrictive approach, and something that has been done in Canada for

198. Tilson, *supra* note 15.

199. *Five fundamental freedoms*, *supra* note 56; U.S. CONST. amend. I.

200. *R.J. Reynolds*, 696 F.3d at 1212.

201. *Discount Tobacco*, 674 F.3d at 558.

202. *JT Int'l SA* [2012] HCA ¶ 170.

203. McGuirk, *supra* note 3.

over ten years.

2. *Canada's Graphic Health Warnings Set a Precedent for the FSPTCA*

The Canadian Charter of Rights and Freedoms is very similar to the U.S. Constitution, especially with regards to the protection of speech.²⁰⁴ Further, Canadian courts implement a proportionality test similar to the *Central Hudson* test found in the U.S. to determine if the government's interest in restricting freedom of expression is justified.²⁰⁵ Taking that into consideration, Canada has required tobacco companies to print graphic health warnings on their packaging for over ten years.²⁰⁶ Currently, Canada's graphic health warnings cover 75% of the front and back of cigarette packaging.²⁰⁷ While Canada did implement other means of reducing tobacco consumption when it implemented graphic health warnings,²⁰⁸ it would be wrong to say that graphic health warnings had no effect on the reduction of tobacco consumption. While the effect that each portion of the TPLR-CLC had on tobacco consumption may not be certain, it is safe to say that the graphic health warnings had some positive effect on reducing tobacco consumption. Further, the Supreme Court of Canada found TPLR-CLC was justified.²⁰⁹

The Supreme Court of Canada applied the *Oakes* proportionality test when determining whether the TPLR-CLC violated the freedom of expression provisions contained in the Canadian Charter of Rights and Freedoms.²¹⁰ The *Oakes* test requires that the regulation be designed to achieve the state objective, "impair as little as possible," and that the means be proportional to the state objective.²¹¹ The Court found that the TPLR-CLC was "demonstrably justified" and that the objective was "pressing and substantial."²¹² Further, the Court stated that there was a "mass of evidence" to support this conclusion.²¹³ Canada looked to

204. Canadian Charter of Rights and Freedoms, *supra* note 101.

205. *Oakes*, 1 S.C.R. at 139.

206. Sweanor, *supra* note 82, at 1596.

207. *Tobacco Products Information Regulations*, *supra* note 91.

208. When Canada implemented graphic health warnings it also mandated the inclusion of health messages within the tobacco packaging. *Id.*

209. McDaniel, *supra* note 100.

210. *Oakes*, 1 S.C.R. at 139.

211. *Id.*

212. *JTI-Macdonald*, 2 S.C.R. 610. The Court went on to describe how to determine if a government objective is "demonstratively justifiable" by referencing a three part proportionality test set out in *Oakes*. *Id.*

213. *JTI-Macdonald*, 2 S.C.R. 601, para. 135.

other countries to determine whether the graphic health warnings were effective.²¹⁴ The Court did not know how much effect larger warnings would have on tobacco consumption but found that this notion was supported through other countries implementing larger graphic health warnings than they required.²¹⁵

Lastly, the Court determined that the detriments of implementing larger graphic health warnings were minor in comparison to the benefits the public would receive. Thus, the larger graphic health warnings were justified.²¹⁶ One of the key points from looking at the Canadian law is that the proportionality test set out in *Oakes* is very similar to the proportionality test contained in *Central Hudson*. This is important because this directly advances the idea that the Supreme Court should consider the jurisprudence of the Canadian court decision. The other important key point is that the policy measures set out in Canada have been effective and the Supreme Court should take this into consideration when addressing the proof of direct advancement.

B. FSPTCA's Graphic Health Warnings are Constitutional

If the Supreme Court is to hear issues regarding the constitutionality of graphic health warnings it should consider foreign legal attempts to affect change and it should be influenced by and recognize jurisprudence from other countries. The issue that appears in the circuit split addresses the current law regarding corporate speech.²¹⁷ The legitimacy of the FSPTCA depends on whether it is an imposition on the freedom of expression of corporations similar to that observed in Canada. A key difference in the circuit split is the difference in the standard of review.²¹⁸ The Sixth Circuit found graphic health warnings were factual disclosures that were not entitled to the heightened scrutiny set out in *Central Hudson*,²¹⁹ while the D.C. circuit applied the more stringent standard of review set out in *Central Hudson* for compelled commercial speech.²²⁰ Whether the more stringent standard is applied to graphic health warnings should not matter because they will likely

214. *Id.* para. 137-38 (citing policy precedent set out in Australia, Belgium, Switzerland, Finland, Singapore, Brazil and the European Union).

215. *Id.*

216. *Id.* ¶ 139.

217. *Discount Tobacco City & Lottery, Inc. v. United States*, 674 F.3d 509, 527 (2012); *R.J. Reynolds*, 696 F.3d at 1208.

218. *Discount Tobacco*, 674 F.3d at 527; *R.J. Reynolds*, 696 F.3d at 1217.

219. *Discount Tobacco*, 674 F.3d at 558.

220. *R.J. Reynolds*, 696 F.3d at 1234-35. The Sixth Circuit applied rational-basis review, while the D.C. Circuit applied intermediate scrutiny. *Id.*

pass constitutional muster under *Central Hudson* if the Supreme Court looks to law (both policy measures and court rulings) from other countries.²²¹

Under the *Central Hudson* test, a regulation on commercial speech must serve a substantial interest, its means must directly advance the interest, and its means must not be more extensive than necessary.²²² The court in *R.J. Reynolds* did not think there was enough evidence to support the requirement of graphic health warnings in the FSPTCA.²²³ However, in *R.J. Reynolds*, the Court failed to look to Canadian or Australian law to make its decision.²²⁴ It did, however, concede that reference to other nations success is relevant to the determination of whether graphic health warnings advance the interest.²²⁵ The issues that must be addressed to determine if the graphic health warnings under the FSPTCA pass constitutional muster under *Central Hudson* are: (1) whether the means directly advance the interest, and (2) whether the means are not more extensive than necessary.²²⁶

With new studies being conducted and more policies being put in place, it is only a matter of time before enough evidence is gathered to demonstrate that graphic health warnings reduce tobacco consumption. Further, this issue is not yet before the Supreme Court. Health agencies in favor of implementing graphic health warnings still have time to collect more evidence that graphic health warnings will have the desired effect. The Court in *R.J. Reynolds* was not willing to infringe on commercial speech until it was more certain that the graphic health warnings would have the desired effect. At this time, lack of evidence is the only thing standing in the way of implementing graphic health warnings. However, if deference is given to other countries' policies and judicial decisions the lack of evidence in this country becomes less persuasive.

The role of uncertainty in innovative policy making makes the application of *Central Hudson* difficult. How we determine the effectiveness of innovative legislation can be a problem. Therefore, there is a need for deference to other countries in determining whether the means (graphic health warnings) advance the government's interest.

221. *Disount Tobacco*, 674 F.3d at 565-66.

222. Mason, *supra* note 144, at 564.

223. *R.J. Reynolds*, 696 F.3d at 1219.

224. *Id.*

225. *Id.* The D.C. Circuit stated that there was not an adequate amount of evidence directly advancing the interest, however, it did this by direct reference to empirical data from other countries. *Id.*

226. Mason, *supra* note 144, at 564.

The fact that the Ontario Superior Court found TPLR-CLC was justified speaks directly to how the Supreme Court should view the FSPTCA and graphic health warnings. The Supreme Court generally does not give deference to other nation's courts; however, Canada's rights on commercial speech are so similar to the U.S. that it would be negligent not to consider how its courts have ruled on the issue. Therefore, the Supreme Court should look to national court jurisprudence of other countries.

Further, the Supreme Court should look to national policy experiences of other countries. The Courts in both *Discount Tobacco* and *R.J. Reynolds* opened the door to this type of national policy analysis.²²⁷ Canada has had great success in reducing the number of smokers through the TPLR-CLC. Further, the study just released by the BioMedical Center supports the implementation of plain packaging and graphic health warnings that Australia has adopted.²²⁸ The BioMedical center stated that plain packaging and graphic health warnings would reduce child consumption by 2% (nearly 100,000 people) and adult consumption by 1% (nearly 500,000 people) in two years.²²⁹ While plain packaging does more than just implement graphic health warnings, a reduction in tobacco consumption by 3% (nearly 9,417,421 people in the U.S.) is a significant number. Further, tobacco company opposition demonstrates presumed efficacy, which the Supreme Court in Canada found compelling.²³⁰ There are significant differences between Australia's plain packaging and Canada's graphic health warnings, however, it is hard to deny that graphic health warnings will not have some impact on tobacco consumption, especially among youth.

Lastly, implementing graphic health warnings would not be more extensive than necessary.²³¹ Graphic health warnings are certainly not the only way to reduce tobacco consumption. Economists at the MEI point to media, peers, and family as the reason people are encouraged to use tobacco.²³² However, if you look at regulations in Australia and Canada they both have more heavily restricted tobacco packaging than the FSPTCA proposes. The U.S. has one of the least restrictive regulations on tobacco packaging. With that in mind, there is no way to conclude that a graphic health warning covering 50% of tobacco

227. *Discount Tobacco*, 674 F.3d at 565-66; *R.J. Reynolds*, 696 F.3d at 1219.

228. Pechey et al., *supra* note 33, at 1.

229. *Id.* at 3.

230. *JTI-Macdonald*, 2 S.C.R. 610, ¶ 136.

231. Mason, *supra* note 144, at 564.

232. Kelly-Gagnon & Chassin, *supra* note 23.

packaging is more extensive than necessary when other countries regulations go further. This is again a place where the role of uncertainty comes into play. Because implementation of graphic health warnings is an innovative policy in the U.S., deference to other countries is necessary.

Additionally, it is much easier to regulate the tobacco companies than to regulate an individuals peers and family. We can educate people, but what they decide to do in their personal life and how they decide to pass that on to others is entirely different.

Another option would be to restrict the sale of tobacco products to everyone born after a certain date.²³³ While this could be an effective measure for future discussion, it also suggests that implementing graphic health warnings are not more extensive than necessary because other proposals to regulate tobacco consumption are more ambitious. Lastly, we have already extensively regulated the media; therefore, regulating tobacco packaging by implementing graphic health warnings is the next logical step to reducing tobacco consumption.

VI. CONCLUSION

As efforts to reduce tobacco consumption continue to grow, and more countries implement plain packaging or graphic health warnings, the question of whether these efforts are effective will become easier to answer. The reasons for implementing graphic health warnings in the U.S. are clear; there is a substantial government interest in reducing the number of people, old and young, consuming tobacco. However, some courts are still unclear about whether the means the government has set forth will achieve this substantial government interest in a manner consistent with the First Amendment. Moreover, the standard of review is debated.

Other countries have taken greater efforts to reduce tobacco consumption by implementing plain packaging and/or graphic health warnings. Canada has required tobacco companies to print graphic health warnings on their packaging for over ten years and has seen a great reduction in tobacco consumption. Further, Australia recently implemented plain packaging in its efforts to reduce tobacco consumption. While it is too early to see the full effects of plain packaging and graphic health warnings, the recent study conducted by the BioMedical Center endorsed plain packaging and graphic health

233. Richard A. Daynard, *Stubbing Out Cigarettes for Good*, N.Y. TIMES (Mar. 3, 2013), available at http://www.nytimes.com/2013/03/04/opinion/two-paths-to-the-gradual-abolition-of-smoking.html?_r=0 (last visited Jan. 25, 2014).

warnings by stating that plain packaging will have the desired effect of reducing tobacco consumption and will not encourage people to smoke more.²³⁴ Further, the recent study conducted by Legacy® and the Harvard School of Public Health determined that graphic health warnings will produce the greatest reduction of tobacco consumption among all races and socio-economic statuses in the U.S.²³⁵

Reducing tobacco consumption is a serious issue today. Regulating commercial speech by requiring tobacco companies to put graphic health warnings on their packaging does affect our constitutional rights. However, when it comes to public health and the health of our children this becomes a more pressing issue. The court in *R.J. Reynolds* was correct to be cautious and require the government to prove its case.²³⁶ However, as time passes and the effects of other country's policies on tobacco control can be felt, it will be clear that graphic health warnings reduce tobacco consumption. Further, the amount of opposition demonstrated by tobacco companies suggests that graphic health warnings would directly advance the government interest. With the uncertainty of the efficacy of an innovative policy such as the FSPTCA, deference to other country's policy measures and foreign court rulings is necessary. We want to ensure that our constitutional rights are not infringed without good cause, however, good cause has been shown and it is time to take action.

234. Pechey et al., *supra* note 33, at 1.

235. Harv. Sch. of Pub. Health, *supra* note 41.

236. See *R.J. Reynolds*, 696 F.3d at 1221-22.