Fasken Campbell Godfrey
BARRISTERS AND SOLICITORS

Toronto
Toronto Dominion Bank Tower
P.O. Box 20
Toronto-Dominion Centre
Toronto, Canada M5K 1N6

Telephone 416/366-8381
Facsimile 416/364-7813
416/362-2381

Fasken Martineau
Toronto
416/366-8381
Montreal
514/397-7400
Quebec
418/640-2000
Vancouver (Affiliated)
604/687-9444
London
71/929-2894
Brussels
2/640-9796

J. Michael Robinson, Q.C.
Direct Line: (416) 865-4424

May 11, 1994

DELIVERED

Mr. Garfield Mahood
Executive Director
Non-Smokers' Rights Association
344 Bloor Street West
Suite 308
Toronto, Ontario
M5S 3A7

Dear Sir:

Re: Proposed Canadian Legislation requiring "Plain Packaging" for Cigarettes and Tobacco Products

You have recently consulted us for our opinion on whether the above-noted proposed legislation (the "Plain Packaging Legislation") being considered now by the Health Committee of the House of Commons would, if enacted, violate Canada's international trade obligations. Your inquiry of us was prompted by press reports that U.S. tobacco manufacturers were to appear before the Committee to allege that Plain Packaging Legislation would violate such obligations.

We proposed, and you concurred, that we consult with Professor Jean-Gabriel Castel of the Osgoode Hall Law School at York University, one of Canada's leading international law authorities. We did so and determined that the most effective way to produce the legal opinion in the time available was for Dr. Castel to prepare the main opinion in consultation with us so that it would be in a form with which we would concur.

In the process of settling our opinion, the writer and Dr. Castel attended, at your request, in Ottawa on Tuesday, May 10, 1994, to hear the testimony before the Committee of Mr. Julius Katz representing R. J. Reynolds Tobacco Company and Philip Morris International Inc. With Mr. Katz were a Canadian and a U.S. trade lawyer. Mr. Katz and his delegation delivered to the Committee an opinion dated May 3, 1994 of the law firm of Mudge Rose Guthrie Alexander & Ferdon signed by Carla A. Hills (the "Hills Opinion"). We have had an opportunity to review that opinion in the process of settling ours. We discovered nothing in the Hills Opinion which we had not already considered. On the other hand, we noted that several important aspects of the issue dealt with in our opinion were not dealt with in the Hills Opinion.

As will be apparent from the attached opinion of Dr. Castel, with which we concur, we disagree with the conclusion reached by Ms. Hills.

Finally, we would make the following observations to supplement the attached opinion of Dr. Castel.

1. NAFTA Private Party Right to Arbitration and Compensation Respecting Investments

NAFTA Chapter 11, Section B, provides that an investor of a party (including a private person such as a U.S. tobacco company) may submit to arbitration a claim that another Party (viz. Canada) has breached an obligation under, *inter alia*, Part A (the main part) of the Investment Chapter. Thus, it is open to U.S. (or Mexican) tobacco companies to invoke Section B and require an arbitration decision on their claim that the Plain Packaging Legislation's adverse effects on their trademarks are a measure tantamount to nationalization or expropriation of such an investment under Article 1110. As is apparent from Dr. Castel's opinion attached, he and we are very dubious that the Plain Packaging Legislation could be construed as a measure tantamount to expropriation or nationalization. Also, the investment will, in many cases, be in shares of a corporation which owns the trademark and there is no suggestion that any such shares would be taken. We also have doubts that the trademark interest clearly constitutes an investment within the meaning of paragraph (g) of the definition thereof in Article 1139, namely tangible property acquired for a business purpose (to paraphrase that part of the definition of investment).

For the various other reasons explained in those portions of Dr. Castel's opinion dealing with NAFTA, particularly the availability of health exemptions appearing in several places in NAFTA, we are of the opinion that, even if the relevant trademark interests were deemed to be investments and the Plain Packaging Legislation were deemed to be a measure tantamount to nationalization or expropriation, an arbitration of the question would be decided in favour of Canada.

Notwithstanding our opinion, we felt it important to point out that NAFTA does create this new private right for an investor to demand an arbitration. Such arbitration would be conducted under international arbitration rules (either the *ICSID Additional Facility Rules* or the *UNCITRAL Arbitration Rules*) before an international arbitration tribunal and pursuant to the other provision for such arbitrations in Part B of Chapter 11 of NAFTA. The award of the arbitrator must be enforced by the Canadian courts. It would be registrable and enforceable as if it were a judgment of the Canadian court because of the *United Nations Convention On The Recognition and Enforcement of Arbitral Awards* to which Canada and all ten provinces are parties (Ontario's adoption of the Convention being by way of its *International Commercial Arbitration Act*).

Were the U.S. private parties (tobacco companies) to succeed in convincing an arbitration tribunal that their opinion on Canada's NAFTA obligations is the correct one, they would be entitled to compensation equivalent to the fair market value of the expropriated investment (the trademarks) immediately before the deemed expropriation took place. The valuation criteria would include going concern value, asset value and other criteria, as appropriate, to determine fair market value, plus interest. That compensation would have to be freely transferable (i.e. Canada could not block the successful party receiving the compensation outside of Canada). All of this is detailed in NAFTA Article 1110.

These investment dispute settlement and enforcement measures explain why the U.S. tobacco companies have been publicly stating that they would be entitled to compensation in the hundreds of millions of dollars. (Of course, such entitlement assumes that they are right and we and Dr. Castel are wrong in our interpretation of NAFTA.) These private party rights in NAFTA are unprecedented in international trade treaties.

2. Opinion Subject to Specific Plain Packaging Legislation

We have not seen the proposed Plain Packaging Legislation. Thus, our opinion and Dr. Castel's are subject to review and possible amendment after we have seen the text of any legislation which may be introduced. We have assumed, for purposes of this opinion, that the use of the U.S. owner's trademark would be materially restricted or even completely prohibited but that the manufacturer (who will also be either the trademark owner or its licensee) would be named on the package.

3. General Qualification

Opinions on the appropriate interpretation and application of international treaty obligations can never be entirely free from doubt due, in part, to the usual absence of binding judicial interpretation of such treaties in domestic and international courts and to the fact that such treaties are written in the broad and general language of diplomacy, which is appropriate to treaties between sovereign states but which lacks the precision normally found in domestic statutes. This was one of the reasons we recommended consulting a leading international law academic such as Dr. Castel. His broad experience in international arbitrations and in the interpretation of international treaties gives his opinion particular cogency.

You are authorized to provide copies of this opinion and Dr. Castel's opinion enclosed to members of the House of Commons Health Committee. Please consult the writer before any additional distribution of it, or parts of it, is made.

Please communicate with the writer if you have any questions arising out of either opinion.

Yours very truly,

FASKEN CAMPBELL GODFREY

Per: J. Michael Robinson

JMR/nb.

J. Michael Robinson, Q.C.

Fasken Campbell Godfrey

J. MICHAEL ROBINSON, Q.C.

PRINCIPAL AREAS OF PRACTICE:

Director, International Practice Group, Fasken Campbell Godfrey and

(a) domestic and international banking and other finance and mergers and acquisitions and other finance;

(b) regulation and operation of domestic and foreign banks and other financial institutions;

(c) international trade and investment, including joint ventures.

EDUCATION:

B.A., (English and Philosophy), University of Western Ontario, 1961

LL.B., University of Toronto, 1964

CALLED TO THE BAR:

Ontario, 1966; Q.C. 1981

SELECTED POSITIONS:

Partner, Fasken Campbell Godfrey (1972) and Fasken Martineau;

Crown Agent for (Advisor to) Departments of Justice and External Affairs (Canada) for the Trade Negotiation Office respecting the Canada/U.S. Free Trade Agreement (Financial Services) (1985/86);

Canadian Counsel to the Mexican Ministry of Finance and Central Bank of Mexico on all financial services aspects of the North American Free Trade Agreement (1991 -);

Part-time faculty member, Osgoode Hall Law School, teaching International Business Transactions (1982 - 1983);

Canadian Reporter for and Editorial Advisor to International Financial Law Review, Euromoney Publications, London (1982 -);

Co-Chairman, Capital Markets Forum, Section on Business Law, International Bar Association (1992 -);

Vice Chairman, Senior Vice Chairman and Chairman, Committee on Issues and Trading of Securities, Section on Business Law, International Bar Association (1980-1990);

Member, Advisory Board, Ontario Centre for International Business, Business and Trade Law Programme (1988 -);

Member, Advisory Board, Centre for International Studies, University of Toronto (1993 -);

Member, Advisory Counsel, Asia Pacific Centre for the Resolution of International Business Disputes of the American Bar Association (1989 -);

Fasken Campbell Godfrey

J. MICHAEL ROBINSON, Q.C.

SOME RECENT PUBLICATIONS:

International Securities: Law and Practice (Euromoney Publications, London, 1985);

Marketplace North America, a Legal Guide to Trade Remedies, joint publication of Fasken Martineau, Professor J-G Castel and The Stern Group, Toronto, 1990;

International Banking, a Legal Guide (Canada Chapter), Euromoney Publications, London, 1991;

Numerous Articles and Notes in International Financial Law Review and International Corporate Law including: Canada/U.S. Financial Services under the Free Trade Agreement; Canada's State Immunity Act; Inter-company Guarantees in Leveraged Buy-outs; Capital Adequacy Tests for Banks; Hidden Trap for Foreign Banks under the Canadian Bank Act, Canada's Defensive Position in the NAFTA Negotiations, etc.

SELECTED DIRECTORSHIPS:

United Overseas Bank (Canada)

Saab Scania Canada, Inc.

AT&T Capital Canada, Inc.

BUSINESS TELEPHONE: 416/865-4424

HOME TELEPHONE: 416/485-8012

(Rev. 1/94)