

Caribbean Domestic legal claims and lessons learned



Sheryl Dennis Wright , BA, LLB, LLM, LEC

*Consultant on Health Law and Regulation, PAHO Subregional Program
Office for the Caribbean*

PAHO



Judicial review Claim

Carreras Limited

British American Tobacco (Brands) Inc

AND The Minister of Health

1st Applicant

2nd Applicant

Respondent

(Claim No. 2013HCV 05568)



Judicial review



- Judicial review is a process under which a **government's executive, legislative, or administrative actions are subject to review** by the judiciary.
- Simply put, it is a type of court proceeding in which a **judge reviews the lawfulness of a decision or action made by a public body.**



The Claim



The Industry challenged the Minister's Promulgation of the Tobacco Regulations

- In the affidavit sworn by BAT, they outlined that:
 - the “application [was] brought against [the Minister] in his capacity as Cabinet Minister and an officer of the Government of Jamaica.”
 - BAT and Carreras are adversely affected by the promulgation of the Regulations, hence the claim for ***“leave to seek judicial review”***



The Applicants ...

...

- ✓ Applied for orders to quash the labelling provisions of the Regulations.
- ✓ Asserted that the Minister acted ultra vires when he promulgated the labelling provisions of the Regulations.
- ✓ Asserted that the required size of the GHWs infringes the Applicants' rights to exhibit their products properly.



The Applicants (Industry) requested...



- An order of certiorari to quash Regulation 3- ***that all tobacco products shall contain permanently affixed on their products n health warnings advising tobacco users of the risks***
- Permission to apply for an order for certiorari to quash:
 - Regulations 6 (multiple packaging)
 - Regulation 8 (labeling of individual units)
 - Regulation 20 (transitional period of 6 months)
 - First Schedule (labeling provisions)
 - Part II (Detailed Requirements – Health Warnings)
 - “definition of public place” and workplace”





CIVIL DIVISION
OCT 15 2013

Filed on behalf of: The Applicants
Deponent: John J. Koach
Exhibits: "JK1" - "JK2"
Sworn: October 10, 2013
Filed: October 15, 2013

**AFFIDAVIT IN SUPPORT OF NOTICE OF APPLICATION
FOR COURT ORDERS**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2013 HCV 05568

MINISTRY OF HEALTH & ENVIRONMENT
NOV 25 2013
LEGAL DEPARTMENT

BETWEEN	CARRERAS LIMITED	1 st APPLICANT
	BRITISH AMERICAN TOBACCO (BRANDS) INC.	2 nd APPLICANT
AND	THE MINISTER OF HEALTH	RESPONDENT

I, John J. Koach, being duly sworn make oath and say as follows:

1. My address for the purpose of these proceedings is c/o British American Tobacco (Brands) Inc, at 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808, United States of America. I am the Secretary of British American Tobacco (Brands) Inc. (hereinafter referred to as "the Company") and as such, I am duly authorized to make this affidavit on its behalf.
2. The statements contained in this Affidavit are derived from my personal knowledge and also from the records of the Company, to which I have access and are true to the best of my knowledge, information and belief.
3. The Company was duly incorporated under the laws of Delaware in the United States of America; its registered office is at 2711 Centerville Road, Suite 400, Wilmington, Delaware 19808, United States of America.
4. The Respondent is THE MINISTER OF HEALTH of 2-4 Kings Street in the parish of Kingston. He is a member of Cabinet appointed by the Prime Minister of Jamaica and his responsibilities include, *inter alia*, promulgation of

Other Industry allegations



- Part II is void because it is disproportionate to the harm it seeks to prevent.
- Breach of intellectual property rights.
- Provisions are void for uncertainty/provisions too wide.
- Overreach by the Minister.





7. The Company was established to own, maintain and protect intellectual property rights, including trade marks, and to license the use of those trade marks in connection with the manufacturing and sale of products using those trade marks throughout the world, including Jamaica.



8. The Company is the owner of distinct types of constitutionally protected property rights that are being violated as a result of the Tobacco Regulations, including: (a) intellectual property rights in relation to trade marks and copyright; and (b) rights in connection with goodwill established in connection with the distinctive "get-up" associated with different brands (hereinafter collectively referred to as "the Company's Intellectual Property Rights").



Part II



PART II. *Packaging and Labeling*

Labeling.

3.—(1) All tobacco products shall contain, permanently affixed on their packages, health warnings advising tobacco users and tobacco product users of the risk to health posed by the use of tobacco and tobacco products, in accordance with the standards specified in the First Schedule.

First
Schedule.

(2) The size of the area for the health warning mentioned in paragraph (1) shall be at least seventy-five *per centum* of each principal display surface of each tobacco product package.

(3) No tobacco product, including an individual stick, shall be sold or offered for sale without health warnings.

(4) A person who contravenes this regulation commits an offence.

Obscuring
warnings.

4.—(1) Every person who sells or offers for sale or supplies any product, uses any device or other item that is intended to be used, or that can be used to cover, obscure, mask, alter, or otherwise disguise the health warnings on tobacco product packages or on messages and signs thereon, commits an offence.

Tug-o-war?

- There were discussions and suggestions regarding whether aspects of the Bill could be relaxed.
- The industry proposed alternative options to the provisions.
- There is evidence that the Health Ministry pushed back.





Judge (now Sykes, Chief Justice) asked the parties to step outside the courtroom to have further discussions.

Carreras subsequently withdrew its claim at the Hearing of the matter before Judge in Chambers on December 18, 2013.

In the meantime ...



- The Public including civil society was given a period within which to submit concerns regarding the Regulations.



- A Committee of Parliament was set up to review the Regulations. They provided a number of recommendations, SOME of which were adopted to enable a more practical application of some provisions. Some provisions were strengthened (the opportunity was used to include regulation of e-cigarettes).



- **No Withdrawal** - The Decision was taken to review the Regulations with a view to ensuring clarity and enforceability, proper implementation and application to particular sectors.

**Claim No. 2018 HCV
01602**

**Wisynco Group Limited
(food and beverage
company)**



v

**Heart Foundation of
Jamaica Ltd**



Water war - Wisynco sues Heart Foundation over campaign against sugary beverages

Share this Story:



Published: Tuesday | April 24, 2018 | 12:00 AM | Lavern Barrett/Senior Gleaner Writer



IMAGE courtesy of The Jamaica Gleaner

Purpose of the health campaign

To bring to the attention of Jamaicans:

- the dangers of health and life of obesity/overweight
- The fact that SSBs is a major contributor to obesity/overweight
- To encourage Jamaicans to reduce their intake of SSBs

Flavoured water

9 teaspoons
of sugar



ARE YOU DRINKING YOURSELF SICK?

You are probably having sweet drinks that equal more than 50 teaspoons of sugar a day.

This may bring on obesity which could lead to type 2 diabetes, heart disease or even some cancers.

Drink water instead!





The allegations...

In or about Nov 2017, the HFJ launched the health campaign **“Are you drinking yourself sick? Drink water instead”**

The campaign featured a number of commercials aired on local television, radio, advertising in the press, Billboard placements and social media.

It was alleged that HFJ posted on their Instagram page information referring to the purported sugar quantity of one of Wisynco’s products, **“CRANWATA”**, and warning Jamaicans about excessive sugar intake under a public education campaign dubbed **“Are you drinking yourself sick?...”**





The case of the industry (WISYNCO)

Wisynco alleged that the information posted on Instagram conveyed false and defamatory information about its beverage.

The company consequently sought:


- A Declaration that the information posted is defamatory
- An injunction barring HFJ from repeating it
- The claimant does not seek damages because the reputational damage is not quantifiable




HFJ's Defence

Instagram post contained the following words and images...



Flavoured Water
480 mL




35 g sugar
9 teaspoons



ARE YOU DRINKING YOURSELF SICK?
Drink water instead!




Energy drink
600 mL



70 g sugar
17.5 teaspoons



ARE YOU DRINKING YOURSELF SICK?
Drink water instead!



HFJ's Defence



- ✓ ...Some of the words alleged were not included by the Defendant (HFJ) but placed there subsequent to the posting of the words and images
- ✓ The Defendant denies that the words and or images are defamatory of the Claimant and or any of its products
- ✓ The post was made on February 28, 2018 and the words “Cran Wata” were inadvertently and unintentionally included in the Defendant’s Instagram post
- ✓ That on the Defendant becoming aware of the use of the words “Cran Wata”, the Instagram post was deleted on HFJ’s own volition on March 1, 2018
- ✓ That flavoured Water are available for sale in Jamaica by suppliers including the claimant

HFJ's Defence



versus



The Claimant

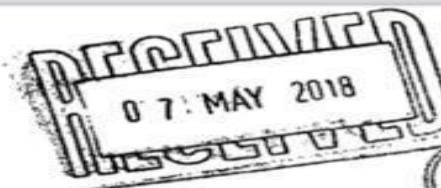
- ✓ does not market any water called “Cran Wata”
- ✓ Does not market its water in bottles similar in style and shape to the bottles represented in the Instagram post
- ✓ Does not offer for sale **water in bottles containing 600ML**. This 600 ML bottle contains **at least 35 grams (9 teaspoons of sugar)**
- ✓ Offers for sale flavoured water containing sugar of **35 or more grams (9 teaspoons or more)**

Further, HFJ also alleged that:

- ✓ Steps were taken to allow the post to be no longer accessible via google search
- ✓ Prior to filing the claim the Claimant (Wisynco) did not notify the Defendant (HFJ) that the Instagram post was accessible via google search



THE OUTCOME



FORMAL ORDER

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2018 HCV 01602

BETWEEN WISYNCO GROUP LIMITED CLAIMANT

AND HEART FOUNDATION OF JAMAICA LTD DEFENDANT

IN CHAMBERS

BEFORE THE HONOURABLE MS. JUSTICE JUDITH PUSEY (AG)

THE 1ST DAY OF MAY 2018

UPON THE APPLICATION FOR COURT ORDERS COMING ON FOR HEARING this day and UPON HEARING Ms. Alexis Robinson instructed by Myers Fletcher & Gordon, Attorneys-at-Law for the Claimant and Mr. Ransford Braham Q.C. and Miss Kimberly Melissa Morris instructed by BRAHAMLEGAL, Attorneys-at-Law for the Defendant IT IS HEREBY ORDERED as follows:

1. Notice of Application for Court Orders (Injunction) is withdrawn.
2. This claim is discontinued.
3. Costs in the claim and application to the Defendant to be agreed or taxed.

BY THE COURT


JUDGE

Filed by BRAHAMLEGAL of Suites 1 & 2, 32 Lady Musgrave Road, Kingston 5, Attorneys-at-Law for the Defendant herein. Telephone (876) 927-9061; Facsimile (876) 927-9060.



The outcome...

- Wisynco withdrew the claim on May 1, 2018
- They gave the impression that they were sorry for the “poor” NGO and out of benevolence withdrew the case.
- They were ordered to pay costs

LESSONS



- ✓ Don't be afraid of industry challenges.
- ✓ Countries can take comfort in judicial recognition of the sovereign right of states to regulate and advocate in the interests of public health.
- ✓ Governments may rely on the body of jurisprudence which underscores that the right to health justifies limitations on economic freedoms.
- ✓ Be keen on research and apply caution in delivery and advocacy.
- ✓ Accord careful consideration to the process adopted in the design and implementation of measures to ensure the measure is robust in the face of potential legal challenges under domestic, regional and international laws and agreements.



LESSONS from both cases



1. Careful consideration ought to be given to the process adopted in the design, implementation and enforcement of tobacco control and other public health measures. In the case of tobacco, maintaining focus on the evidence-based text of the treaty and its Guidelines is critical to effective implementation, and countering industry challenges.



2. Identifying and engaging a 'champion' is a critical vehicle to forging strategic connections at the highest levels to amplify the 'cause', drive political will, facilitate high-level buy-in and respond to challenges.





3. Robust and sustained public sensitization is critical. Providing evidence-based information will aid in garnering public support in the face of industry challenges.



4. The value of engagement with the WHO FCTC Knowledge Hubs including the Knowledge Hub on litigation, PAHO and other organizations such as CTFK, GHAI and civil society collaboration cannot be overstated. Civil society groups for instance often draw on their global network to provide evidence and support, especially where there is a need to address challenges before Parliament.





5. Fortitude is needed. The journey is marathon, not a sprint

Given the likely long road and challenges associated with the implementation of public health measures, it takes ongoing commitment to the cause and unwavering fortitude on the part of public health proponents





The industry and its allies usually allege that some tobacco control measures are unconstitutional based on the supposed “right” to advertise and market their products, the “rights” of citizens to consume those products in public or in the workplace, and the “rights” of owners and employers to permit such consumption.

HOWEVER...

In several tobacco industry–initiated legal challenges, courts have emphasized the right to health in their rulings upholding the challenged tobacco control laws.



USEFUL PUBLICATIONS ON TOBACCO LITIGATION

Check how courts outside the Caribbean region have addressed the issues

WHO publication from 2021 summarizing several cases regarding litigation and emerging products <https://www.who.int/publications/i/item/9789240024182>

<https://www.who.int/publications/i/item/9789240024182>

<https://tobaccoplaybook.net/en/016-judicial-statements.html>

<https://tobaccoplaybook.net/en/017-judicial-statements-cont.html>

