

Public Health Protection vs. Freedom of Commercial Expression in the Commonwealth Caribbean: The Case of Barbados and Jamaica

Shajoe J. Lake¹,
Kimberley E. Benjamin¹,
and Nicole D. Foster²

1: O'NEILL INSTITUTE FOR NATIONAL AND GLOBAL HEALTH LAW AT GEORGETOWN UNIVERSITY, WASHINGTON, DC, USA, 2: FACULTY OF LAW, UNIVERSITY OF THE WEST INDIES, CAVE HILL, BARBADOS

Keywords: Freedom of Expression, Commercial Expression, Public Health Protection, Commonwealth Caribbean, Rights and Freedoms

Abstract: This chapter explores the tension between public health protection and the freedom of commercial expression from a Commonwealth Caribbean perspective, using Barbados and Jamaica as case studies. First, it assesses the scope of the right to freedom of expression. Second, it discusses the extent to which public health protection may be invoked to restrict the right. The authors conclude that Commonwealth Caribbean states can justifiably restrict commercial speech about tobacco products and unhealthy food and beverages.

1. Introduction

In response to the growing noncommunicable disease (NCD) epidemic,¹ Commonwealth Caribbean Heads of Government have endorsed the adoption and implementation of a suite of cost-effective, evidenced-based legal interventions.² These interventions, which include restrictions on advertising, promotion and sponsorship of tobacco products and the marketing of unhealthy food and beverage products, are upstream interventions for healthier people and environments.³ However, transforming largely unregulated environments, currently manipulated by Big Tobacco, Food, and Soda,⁴ might require the implementation of measures that infringe commercial operators' constitutional right to freedom of expression.⁵ Notwithstanding this, Commonwealth Caribbean states, having ratified various international human rights treaties,⁶ nevertheless have internationally binding obligations to respect, protect and fulfil human rights, including to prevent commercial operators from interfering with the right to health.⁷

This Chapter explores the tension between regulating the NCD risk factors of tobacco and unhealthy diets and commercial operators' right to freedom of expression. First, it assesses the scope of that right, using the Constitutions of Barbados and Jamaica as case studies. Second, it discusses the extent to which public health may be invoked as a justification for-

Shajoe J. Lake, LL.B, LL.M., is a Fellow at the O'Neill Institute for National and Global Health Law at Georgetown University; **Kimberley E. Benjamin, BSc., LL.B., LL.M.,** is a Fellow at the O'Neill Institute for National and Global Health Law at Georgetown University; **Nicole D. Foster, LL.B, LL.M.,** is a Law Lecturer and Head of the Law and Health Research Unit, Faculty of Law, University of the West Indies, Cave Hill, Barbados.

restricting the right to freedom of commercial expression. It concludes that Barbados and Jamaica, and by extension other Commonwealth Caribbean states, can justifiably restrict commercial expression by imposing restrictions on the sale and marketing of tobacco and unhealthy food and beverage products, provided the measures are reasonable and proportionate public health responses to the NCD epidemic.

2. The Scope of Freedom of Expression

Freedom of expression is a broad and inclusive constitutional right in the Commonwealth Caribbean. In Barbados, this right, contained in section 20(1) of the Bill of Rights,⁸ includes freedom to hold opinions, as well as to receive and communicate ideas and information without interference. In addition, the right

broad right to freedom of expression.¹² For instance, the Barbadian Court of Appeal in *Weel v. Attorney General of Barbados and Another*¹³ acknowledged that there was “highly persuasive authority for the view that the right [to freedom of expression] in section 20(1) [of the Barbados Constitution] undoubtedly includes commercial speech or, in other words, the right to communicate commercial ideas and information to others.”¹⁴ Similarly, the Jamaican court, in its most recent Charter inquiry concerning freedom of expression — *Bignall v. The General Legal Council and the Attorney General of Jamaica*,¹⁵ stated that there was not “any dispute that commercial speech, advertising, in particular, falls for protection under section 13(3)(c) [of the Jamaican Charter].”¹⁶ Commercial operators in the Commonwealth Caribbean enjoy much

This Chapter explores the tension between regulating the NCD risk factors of tobacco and unhealthy diets and commercial operators’ right to freedom of expression. First, it assesses the scope of that right, using the Constitutions of Barbados and Jamaica as case studies. Second, it discusses the extent to which public health may be invoked as a justification for restricting the right to freedom of commercial expression. It concludes that Barbados and Jamaica, and by extension other Commonwealth Caribbean states, can justifiably restrict commercial expression by imposing restrictions on the sale and marketing of tobacco and unhealthy food and beverage products, provided the measures are reasonable and proportionate public health responses to the NCD epidemic.

includes freedom from interference with one’s correspondence and other forms of communication.⁹ The right to freedom of expression in Jamaica, as outlined in sections 13(3)(c) and (d) of the Jamaican Charter of Fundamental Rights and Freedoms, includes “the right to freedom of expression” and the “right to seek, receive, distribute or disseminate information, opinions and ideas through any media,” respectively.¹⁰ Notably, section 13(3)(c) of the Jamaican Charter is a stand-alone right, while section 13(3)(d) is intended to be “complementing and supplementing [to] the right to freedom of expression where certain form of media is concerned...”, such as broadcast media.¹¹

Neither the Barbadian Bill of Rights nor the Jamaican Charter explicitly mentions a right to freedom of commercial expression. Nor do those instruments state that commercial expression is protected. However, Barbadian and Jamaican courts have acknowledged that commercial expression is protected under the

freedom to advertise their goods and services, including unhealthy food and beverage products.¹⁷

Despite the broad scope of the right to freedom of commercial expression, the right is not absolute and may be restricted, subject to certain criteria being met. Section 11 of the Barbados Constitution, which is the preamble to the Bill of Rights, indicates that the rights or freedoms which follow are “subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”¹⁸ Importantly, section 20(2) of the Barbados Constitution deals specifically with the permissible limitations on the right to freedom of expression, and provides, in part, that “[n]othing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law

in question makes provision [...] that is *reasonably required in the interests of defence, public safety, public order, public morality or public health...*(emphasis added).¹⁹ Conversely, section 13(2) of the Jamaican Charter includes a single limitation clause making the enjoyment of rights and freedoms, including freedom of expression, subject to measures that are “demonstrably justified in a free and democratic society.”²⁰

3. Public Health As A Justified Restriction On The Right To Freedom Of Commercial Expression

In Barbados and Jamaica, for any restriction to be deemed constitutional, that is, to be a justified infringement on constitutional rights, it must *generally* (1) pursue a legitimate aim or have a sufficiently important objective, and (2) be proportionate to that legitimate aim or sufficiently important objective. That general approach reflects the judicial interpretation of the detailed and general limitation provisions in Barbados’ Bill of Rights and Jamaica’s Charter, noted above.

The Tests for Constitutionality

The only inquiry into restrictions on freedom of expression for public health interests within the Barbadian context is found in *Weel*.²¹ In *Weel*, the Barbados Court of Appeal was tasked with determining the constitutionality of a regulation that restricted dentists, like the appellant, from advertising in certain respects. Rule 14(2)(b) of the 1973 Dental Registration Rules provided that “any form of advertising, canvassing or promotion either directly or indirectly for the purpose of obtaining patients or promoting his own professional advantage” was actionable professional misconduct.²² In deciding whether rule 14(2)(b) was constitutional, that is, reasonably required in the interests of public health, the court relied heavily on the approach adopted in the Canadian case of *Rocket v. Royal College of Dental Surgeons of Ontario*²³ and the Trinidadian case of *Suratt v. Attorney General of Trinidad and Tobago*,²⁴ to articulate the aforementioned two-part test. First, whether the rule pursued a legitimate aim, and second, whether it was proportionate to that aim.

Correspondingly, the Jamaican Full Court in *Bignall*²⁵ reaffirmed its adoption of the two-part test for constitutionality laid down by C.J. Dickson in *R v. Oakes*²⁶ as the correct test for determining the constitutionality of derogations from Charter rights and freedoms.²⁷ First, the objective of the measure restricting the freedom must be “sufficiently important,”²⁸ addressing societal concerns that are “pressing and substantial.”²⁹ Second, the measure must be

“reasonable and demonstrably justified in a free and democratic society.”³⁰ This second step, which can be considered a proportionality test, involves three components. First, the measure “must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective.”³¹ Second, the measure should “impair the right in question as little as possible.”³² Third, “there must be proportionality between the effects of the limiting measure and the objective — the more severe the deleterious effects of a measure, the more important the objective must be.”³³ Dickson CJ, however, later modified the second criterion of the proportionality test, requiring that the measure impair the right “as least as is reasonably possible.”³⁴

“Legitimate Aim” or “Sufficiently Important” Objective

In *Weel*, the Barbados Court of Appeal, in determining whether rule 14(2)(b) pursued a legitimate aim, relied on the plain language of the rule as its starting point. The court concluded that there was a legitimate purpose, namely “to maintain a high standard of professionalism among dentists and to protect the public from irresponsible and misleading advertising,” and that such was connected to the interest it sought to protect, namely public health.³⁵ It is noteworthy that the Barbadian court considered the rule’s connection to the interest being protected to determine the legitimacy of the aim. Therefore, in determining whether a restriction pursues a legitimate aim, consideration should be given to both the plain language of the rule and its connection to that aim. In other words, clear objectives capable of passing the muster of this first limb, and the second one, as will be shown, are critical.

The Barbadian court, citing the *Rocket* case from Canada,³⁶ considered the difficulty of the “average consumer” to verify claims of competence across professionals. While this consideration relates to the legitimacy of the aim, it also refers to the importance of the measure — to protect consumers. Thus, the importance of the aim should be considered as a feature in determining its legitimacy.

Similarly, in analyzing the limits that may be imposed on freedom of expression in *Bignall*, J. Barnaby, also referenced a Canadian case — *Irwin Toy v. AG*,³⁷ which found a law prohibiting commercial advertising directed at persons under thirteen years old to be constitutional. In *Irwin*, the court reasoned that protecting children from advertising was pressing, substantial and important since commercial advertising can have persuasive effects on children. The *Irwin* court opined that protecting children from manipula-

tion was a substantially important goal. More recent analysis of the extent and impact of children's vulnerability and exposure to marketing generally further justify marketing restrictions in the interests of public health.³⁸

Within the diet-related NCD context, marketing restrictions aimed at reducing "both the exposure of children to, and power of, marketing of"³⁹ unhealthy foods and beverage products would also satisfy the first limb of the test for constitutionality. As C.J. Dickson correctly noted in *Irwin*, children are especially vulnerable to advertising. This vulnerability subjects them to the powerful and pervasive content directed at influencing their diets, often negatively. It is difficult for children to sort and sift through commercial expression around legal but harmful products, such as unhealthy food and beverage products. Indeed, courts would benefit from recognizing conflict-free evidence about the rates of obesity and overweight among Caribbean children, the effectiveness of marketing to children, and how regulating products through advertising restrictions can mitigate the risk of children developing NCDs.⁴⁰

Further, the aim of such marketing restrictions would support the legally binding obligation of states, such as Barbados and Jamaica, to protect children's rights against interference by third parties.⁴¹ Importantly, the fact that such a public health measure is most effective as part of a comprehensive package of other measures also reinforces the legitimacy of appropriately crafted objectives and each measure's rational connection to overarching public health interests. Hence, the sufficiently important aim of NCD prevention among children, the legitimacy of that aim and its rational connection to public health interests, should arguably be difficult to deny.

With respect to tobacco control, it is perhaps undisputable that tobacco control regulations that restrict tobacco advertising would satisfy the first limb of the test for constitutionality. In fact, several Caribbean states have already started to implement comprehensive bans on tobacco advertising, promotion and sponsorship.⁴² Certainly, preventing individuals, including children, from death, disability, impoverishment, and the ill-health associated with the use of and exposure to tobacco is a legitimate aim and a sufficiently important objective. Public health measures to regulate the NCD risk factors of tobacco and unhealthy diets are capable of passing this first limb.

Proportionality

The second limb of the tests in Barbados and Jamaica can be referred to as the proportionality test. At this

stage of the inquiry, courts often assess whether a measure goes beyond what is necessary to achieve its objective.

In *Weel*, in applying the proportionality test, the Barbados Court of Appeal considered whether rule 14(2)(b) was reasonably required in the interest of public health. It again considered the language of rule 14(2)(b) and stated "[o]n its plain words, appropriate advertising is permissible under this rule. Its ambit of the prohibition on advertising extends only to advertising 'for the purpose of obtaining patients or promoting his own professional advantage.'"⁴³ The specific restriction identified within rule 14(2)(b) was perceived as being "limited and narrowly drawn" and striking a fair balance between an individual's right and society's interest in obtaining information about dentists.⁴⁴ Rule 14(2)(b) was therefore proportionate to the objectives. The Jamaican Full Court took a similar approach in *Signall*,⁴⁵ albeit centering its analysis of the proportionality test on the latitude that the legislature has to select the most appropriate measure to meet its policy objective.

The significance of clear objectives is also pertinent to this limb of the test. It is upon the objective that the public health measure will be assessed to determine its necessity and proportionality. It is perhaps trite that blanket bans are generally considered to be disproportionate to achieve legislative aims. However, within the NCD context in the Caribbean, the other extreme -- zero restrictions, should also be recognized as having a disproportionate burden on public health as well as economic wealth and social wellbeing, notably of these low- and middle-income countries, and subpopulations within them, such as children and persons living in poverty.⁴⁶ Further, the absence of any restrictions on commercial operators and arguably, the adoption of ineffective measures, may also conflict with the aforementioned human rights obligations of these Caribbean states.

What then is the balance to be struck between the right to freedom of commercial expression and public health interests in Barbados and Jamaica? A fair balance between these competing interests will not necessarily be some midway point, if that can even be identified. Instead, given the specific objective of the public health measure, such as the earlier marketing restrictions aimed at reducing the exposure to and power of marketing of unhealthy beverages and food products to children, a fair balance may arguably be struck at different points depending on the exposure and power of marketing within specific environments,⁴⁷ as well as any applicable considerations for decision-making, such as the best interests of the

child.⁴⁸ For instance, with respect to school environments, the balancing of competing interests, such as commercial operators' free speech versus children's health and other rights, must take the best interests of the child as a primary consideration.⁴⁹ The least restrictive means, and the fair balance to be struck, may see more protective measures against the corporate "vectors of disease" preying on children in school settings compared to strictly adult environments.⁵⁰

The reality is that the mostly unregulated exercise of freedom of commercial expression in Barbados and Jamaica means that unhealthy food and beverage

may not be captured within the "deceptive and misleading" parameters, but which is nonetheless harmful to health, is not only permissible but necessary and proportionate to the objectives in focus. The objective of addressing the exposure and power of pervasive marketing can only be effectively achieved with comprehensive marketing restrictions.

With respect to tobacco control measures, the aim of reducing exposure to advertising associated with tobacco products would also be afforded constitutional safe harbour by satisfying the second limb of the test of constitutionality. For instance, it is almost

trite that tobacco advertising, promotion, and sponsorship bans are rationally connected to the objective of reducing tobacco consumption, and not so severe as to outweigh the objective of reducing tobacco consumption.

There is also value in appreciating that the prohibition in *Irwin*⁵³ was not the least restrictive, a distinguishing feature from *Weel*, in which the court was detained with this exercise. The *Irwin* court considered that it would not "in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups."⁵⁴ This is a powerful statement, underscoring the latitude the Jamaican legislature has, to implement the most effective public health measure, and the Jamaican courts to uphold such

as constitutional.

Ultimately in *Weel*, the Barbados Court of Appeal highlighted the "public interest in obtaining relevant and appropriate information about dentists"⁵⁵ and found the advertisement to be "one of naked commercialism aimed at attracting patients ostensibly by providing less expensive services than that provided by other dentists."⁵⁶ In finding *Weel*'s advertisement to be "misleading and disparaging of the services provided by other dentists," the court rejected any contemplation of constitutional protection as commercial or professional speech.⁵⁷ Adopting this approach, it is submitted that commercial speech that fails to disclose known harms should also be considered misleading and deceptive.⁵⁸

4. Conclusion

Undoubtedly, freedom of commercial expression, captured in the freedom of expression provisions of the Constitutions of Barbados and Jamaica, is not abso-

Undoubtedly, freedom of commercial expression, captured in the freedom of expression provisions of the Constitutions of Barbados and Jamaica, is not absolute. It may be subject to certain limitations, including limitations in the interest of public health. The growing body of evidence of the efficacy of marketing bans and further, of an integrated package of measures, provides a solid foundation on which to craft public health policies that incorporate these measures.

age product marketing is pervasive. Consequently, the means used to limit said unregulated freedoms in the interest of public health, may, even in their least restrictive manner, nonetheless appear broad. Here, due consideration must also be given to whether the *Irwin*⁵¹ framework would equally apply to comprehensive advertising bans, that is, bans on all advertisements relating to unhealthy food and beverage products. While adults may not be as vulnerable as children from a biological or psychological perspective, unregulated environments increase everyone's vulnerability. Parents' responsibility for children and children's pester power over parents strongly suggest that their vulnerabilities are not mutually exclusive and both need to be protected. Whilst such an argument may appear paternalistic, the reality is that in both Barbados and Jamaica, Consumer Protection legislation⁵² already aims to protect all consumers from deceptive and misleading advertising. Going beyond, to protect consumers from commercial speech which

lute. It may be subject to certain limitations, including limitations in the interest of public health. The growing body of evidence of the efficacy of marketing bans and further, of an integrated package of measures, provides a solid foundation on which to craft public health policies that incorporate these measures. Based on the similar approach of the Barbadian and Jamaican courts to the interpretation of limitations on freedom of expression, albeit dealing with textually different provisions, it seems likely that appropriately designed public health policies would be able to withstand judicial scrutiny, should the issue arise. Indeed, evidence will play a critical role in making these determinations. However, so too should the binding obligations on these Caribbean states to respect, protect and fulfil human rights and related features, such as the best interest of the child. In this regard, close-knit Caribbean jurisdictions should design robust conflict of interest policies to safeguard the entire regulatory process and manage risks of corporate capture by those whose freedoms must inevitably be limited for public health.

Note

Mr. Lake reports grants from Bloomberg Philanthropies during the conduct of the study. The remaining authors have no conflicts to disclose.

References

1. Pan American Health Organization, *Noncommunicable Diseases in the Region of the Americas: Facts and Figures* (Washington, DC, 2019) (In 2016, NCDs were responsible for 78% of all deaths in the Caribbean region).
2. See e.g. Caribbean Community (CARICOM), *Declaration of Port-of-Spain: Uniting to Stop the Epidemic of Chronic NCDs*, September 16, 2007, available at <<https://caricom.org/declaration-of-port-of-spain-uniting-to-stop-the-epidemic-of-chronic-ncds/>> (last visited March 16, 2022). See also Jamaica Public Health (Tobacco Control) Regulations, 2013 and the Jamaica Public Health (Tobacco Control) (Amendment) Regulations, 2014 (these regulations include, *inter alia*, the use of graphic health warnings on all tobacco packages, on 60% of the back and front of the package and prohibition of misleading descriptors such as “light,” “ultralight,” and “mild”) as well as the Jamaica Television and Sound Broadcasting Regulations, 1996 (as amended) (which includes a ban on tobacco advertising on domestic television and radio, and restrictions on outdoor advertising and brand marking). See also Barbados Health Services (Smoking) Regulations, 2017 (which prohibit *inter alia* the sale or advertising of tobacco products to minors and as well as restrictions on the marketing of electronic smoking devices) and the Barbados Broadcasting Regulations, 2000 (which prohibit licensed broadcasters from broadcast advertising that is false and misleading and licensees must ensure that any advertisements broadcast regarding spirituous liquor, wine, beer, or cigarettes do not explicitly urge the purchase or use of these products). In the area of unhealthy diets, the CARICOM Regional Organisation for Standards and Quality (CROSQ), recently embarked on a process to revise the regional standard for pre-packaged foods to include front-of-package warning labels (to be followed by domestic implementation). This process is still ongoing.
3. See K.D. Raine et al., “Restricting Marketing to Children: Consensus on Policy Interventions to Address Obesity,” *Journal of Public Health Policy* 34, no. 2 (2013): 239-253; L.S. Taillie et al., “Governmental Policies to Reduce Unhealthy Food Marketing to Children,” *Nutrition Reviews* 77, no. 11 (2019): 787-816; L. Henriksen, “Comprehensive Tobacco Marketing Restrictions: Promotion, Packaging, Price and Place,” *BMJ Tobacco Control* 21, no. 2 (2012): 147–153.
4. See B. McGaw, *Industry Interference in the Caribbean*, presentation at *The Subregional Workshop on the Use of Law to Address Noncommunicable Diseases in the Caribbean*, March 3-5, 2020, available at <<https://www.paho.org/sites/default/files/presentation-tabacco-industry-interference-bmcgaw.pdf>> (last visited April 7, 2022). See also Global Health Advocacy Incubator, *Facing Two Pandemics: How Big Food Undermined Public Health in the Era of Covid-19*, Full Report, (November 2020) at 6, available through <<https://advocacyincubator.org/two-pandemics/#:~:text=The%20Global%20Health%20Advocacy%20Incubator,consumers%20at%20even%20greater%20risk>> (last visited April 7, 2022).
5. See Constitution of Barbados, § 20 (1966) and Constitution of Jamaica, § 13 (rev. 2011). See also *Antigua Times v. AG* [1975] 3 All ER 81 (for a discussion on the standing of legal persons to bring constitutional claims).
6. See United Nations Human Rights Treaty Body, *Ratification Status*, available at <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CESCR&Lang=en> (last visited March 16, 2022) (All independent CARICOM Member States (Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, St. Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago) have ratified the United Nations Convention on the Rights of the Child whilst 12 (Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago) out of 14 independent CARICOM Member States have ratified/acceded to the International Covenant on Economic, Social and Cultural Rights).
7. United Nations Human Rights Office of the High Commissioner, *Statement by the United Nations Special Rapporteur on the Right to Health on the Adoption of Front-of-Package Warning Labelling to Tackle NCDs*, July 27, 2020, available at <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26130&LangID=E>> (last visited March 16, 2022) [hereinafter cited as UN Special Rapporteur 2020 Statement]; Anand Grover (Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health), *Report on Unhealthy Foods, Non-communicable Diseases and the Right to Health*, U.N. Doc. A/HRC/26/31 (April 1, 2014); A. Garde, S. Byrne, N. Gokani, and B. Murphy, *A Child Rights-Based Approach to Food Marketing A Guide for Policy Makers*, Technical Report. UNICEF (2018) [hereinafter cited as UNICEF Marketing Report 2018]; I. Barbosa, B. Rios, and A.T. Ramirez, “State Obligations in the Context of Unhealthy Diets: Paving the Way Within the Inter- American Human Rights System,” *Revista Internacional de Derechos Humanos* 11, no. 1 (2021) 43-72.
8. Constitution of Barbados, § 20(1) (1966) (“Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes the freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to communicate ideas and information without interference and freedom from interference with his correspondence or other means of communication”). See also T.S. Robinson, A. Bulkan, and A. Saunders, *Fundamentals of Caribbean Constitutional Law* (London: Sweet and Maxwell, 2015): at 421 [hereinafter Robinson et

- al.] (Barbados has a conventional model constitution whose origin benefitted from the 1960 constitutional model in Nigeria, which in turn was derived from the European Convention on Human Rights. In the Caribbean, conventional model constitutions are also found in The Bahamas, Belize, Organisation of Eastern Caribbean States (OECS) and the overseas territories of Anguilla and Bermuda.)
9. See Constitution of Barbados, *supra* note 5.
 10. Constitution of Jamaica, *supra* note 5, § 13(3)(c) (“the right to freedom of expression”) and §13(3)(d) (“the right to seek, receive, distribute or disseminate information, opinions and ideas through any media”). See also Robinson et al., *supra* note 8 (which explains that the Jamaican Constitution is borrowed from the Canadian Charter).
 11. *Maurice Tomlinson v. Television Jamaica Ltd., CVM Television Ltd. and the Public Broadcasting Corporation of Jamaica* [2013] JMFC Full 5, paras 78-79 (for discussion on the aim of sub-section d).
 12. See *Weel v. Attorney General of Barbados and Another* (2011) 78 WIR 22; *Bignall v. The General Legal Council and the Attorney General of Jamaica* [2022] JMFC Full 1.
 13. *Weel v. Attorney General of Barbados* and another (2011) 78 WIR 22.
 14. *Id.* at para 18 (reliance was placed on the Canadian case of *Rocket v. Royal College of Dental Surgeons of Ontario* [1990] 2 SCR 232, (1990) 71 DLR (4th) 68).
 15. *Bignall v. The General Legal Council and the Attorney General of Jamaica* [2022] JMFC Full 1.
 16. *Id.* at para 97.
 17. See *Cable and Wireless (Dominica) Ltd v. Marpin Telecoms and Broadcasting Company Ltd.* [2000] UKPC 42 (a case from Dominica before the Judicial Committee of the Privy Council, concerning the interpretation of sections 10(1) and (2) of Dominica’s constitution, the equivalent to sections 20(1) and 13(3)(c) of the Barbadian Bill of Rights and the Jamaican Charter, respectively, where the Privy Council acknowledged that “freedom of expression may protect the transmission of information for commercial purposes or profit”). See also “Wisynco sues Heart Foundation over Sugary Drinks Campaign,” *Jamaica Observer*, April 25, 2018, available at <https://www.jamaicaobserver.com/latestnews/Wisynco_sues_Heart_Foundation_over_sugary_drinks_campaign?profile=1373> (last visited Feb. 12, 2022) (a food and beverage commercial operator in Jamaica filed, but then subsequently withdrew, a defamation suit against a Jamaican civil society organization, citing allegations of “false and misleading information” about its sugary beverages and brands in an advertising campaign advocating for sugary beverage taxes, *inter alia*).
 18. Constitution of Barbados, *supra* note 5, § 11 (1966).
 19. *Id.* § 20(2).
 20. Constitution of Jamaica, *supra* note 5, § 13(2).
 21. *Weel*, *supra* note 13.
 22. *Id.* at para 9. See also Barbados Dental Registration Rules, S.I 1973 No. 78, Rule 14(2)(b) (“...professional misconduct on the part of a dental practitioner includes any act or thing done by him that is contrary to the generally recognized duty and responsibility of a dental practitioner to his patient or that is contrary to dental ethics...and, without limiting the generality of the foregoing, includes...(b) any form of advertising, canvassing or promotion either directly or indirectly for the purpose of obtaining patients or promoting his own professional advantage...”).
 23. *Rocket v. Royal College of Dental Surgeons of Ontario* [1990] 2 SCR 232, (1990) 71 DLR (4th) 68 at 78 (“...the court must be satisfied of three things: 1. The measures designed to meet the legislative objective must be rationally connected to the objective; 2. The means used should impair as little as possible the right or freedom in question; and 3. There must be proportionality between the effect of the measures which are responsible for limiting the charter right and the legislative objective of the limit on those rights. In effect, this involves balancing the invasion of rights guaranteed by the charter against the objective to which the limitation of those rights is directed.”).
 24. *Suratt v. Attorney General of Trinidad and Tobago* (2007) 71 WIR 391 (The court explained that limitation on rights must pursue a legitimate aim and be proportionate to that aim).
 25. *Bignall*, *supra* note 15.
 26. *R v. Oakes* [1986] 1 SCR 103 (Can.).
 27. See *Bignall*, *supra* note 15; *Maurice Tomlinson v. Television Jamaica Ltd. et al.*, [2013] JMFC Full 5; *Maurice Tomlinson v. Television Jamaica Ltd. et al.* [2020] JMCA Civ 52.
 28. *Bignall*, *supra* note 15 at para 94.
 29. *Id.* at para 83.
 30. *Id.* at para 73.
 31. *Id.*
 32. *Id.* at para 94.
 33. *Id.*
 34. *Id.* at para 74. See e.g. *R v. Edwards Brooks and Art Ltd.* [1986] 2 SCR 713; *The Jamaica Bar Association v the Attorney General and The General Legal Council* [2020] JMCA Civ 37, para 518 (The Jamaican Court of Appeal endorsed Dickson CJ’s modification to the Oakes test).
 35. *Weel*, *supra* note 13 at para 33.
 36. *Rocket*, *supra* note 23 at para 34.
 37. *Irwin Toy Limited v. The Attorney General of Quebec* [1989] 1 S.C.R. 927 (Can.).
 38. UNICEF Marketing Report 2018, *supra* note 7.
 39. World Health Organization, *Set of Recommendations on the Marketing of Food and Non-Alcoholic Beverages to Children* (2010): at 8 (Recommendation 2). See also World Health Organization, *Report of the Commission on Ending Childhood Obesity*, ISBN 978 92 4 151006 6 (2016) available at <<https://www.who.int/publications/i/item/9789241510066>> (last visited April 7, 2022); WHO UNICEF Lancet Commission Report, “A Future for the World’s Children? A WHO-UNICEF-Lancet Commission,” *Lancet* 395, no. 10224 (2020): 605-658 available at <[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(19\)32540-1/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(19)32540-1/fulltext)> (last visited April 7, 2022) (which speaks to the pervasive and predatory nature of marketing tactics of commercial operators and calls for specific policy recommendations on the part of governments to restrict such marketing tactics).
 40. *Id.*
 41. UN Special Rapporteur 2020 Statement, *supra* note 7.
 42. See e.g. Tobacco control legislation in the Commonwealth Caribbean which incorporate comprehensive bans on tobacco advertising, promotion and sponsorship that is compliant with Article 13 of the World Health Organization Framework Convention on Tobacco Control (WHO FCTC) include: Tobacco Control Act 2018 of Antigua and Barbuda; Tobacco Control Act 2017 of Guyana, Tobacco Act 2013 of Suriname. Health Services Regulations 2017 and the Jamaica Tobacco Control Regulations 2013 do not currently impose WHO-FCTC compliant bans on tobacco advertising, promotion and sponsorship. However, the proposed Tobacco Control Act 2020 of Jamaica is expected to be compliant with Article 13 of the WHO FCTC.
 43. *Weel*, *supra* note 13 at para 37.
 44. *Id.* at paras 40-41.
 45. *Bignall*, *supra* note 15.
 46. UN Special Rapporteur 2020 Statement, *supra* note 7. See also notes 7 and 39 and accompanying text *infra*.
 47. W.E. Parmet and J.A. Smith, “Free Speech and Public Health: A Population-Based Approach to the First Amendment,” *Loyola of Los Angeles Law Review* 39, no. 1 (2006): 363-446.
 48. United Nations Committee on the Rights of the Children, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)* (May 29, 2013), available at <https://www2.ohchr.org/english/bodies/crc/docs/gc/crc_c_gc_14_eng.pdf> (last visited March 16, 2022) [hereinafter United Nations Committee on the Rights of the Children, *General Comment No. 14*]. See also A. Garde and S. Byrne, “Combating obesity

genic commercial practices through the implementation of the best interests of the child principle,” in A. Garde, J. Curtis, and O. De Schutter, eds., *Ending Childhood Obesity: A Challenge at the Crossroads of International and Economic and Human Rights Law* (Edward Elgar Publishing, 2020): at 251-281.

49. United Nations Committee on the Rights of the Children, *General Comment No. 14*, at para 6.
50. M. Mialon, “An Overview of the Commercial Determinants of Health,” *Global Health* 16 (2020): 1-7, available at <<https://doi.org/10.1186/s12992-020-00607-x>> (last visited March 16, 2022).
51. *Irwin Toy Limited*, *supra* note 37.
52. Consumer Protection Act of Jamaica, 2005, §28 (“No person shall, in the course of trade or business, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.”); Consumer Protection Act of Barbados, Cap 326B, §12.(1) (“A person shall not, in trade or commerce as a supplier, engage in conduct that is, or is likely to be, misleading or deceptive.
- (2) Nothing in this Part is to be construed as limiting the generality of subsection (1). 13. A person shall not, in trade or commerce as a supplier, (a) falsely represent that goods are of a particular standard, quality, grade, composition, style or model or have had a particular history or a particular previous use...”)
53. *Irwin Toy Limited*, *supra* note 37.
54. *Id.* at 89.
55. *Weel*, *supra* note 13 at para 40.
56. *Id.* para 41.
57. *Id.* at paras 32 and 41.
58. See L.O. Gostin and G.H. Javitt, “Health Promotion and the First Amendment: Government Control of the Informational Environment,” *Milbank Quarterly* 79, no. 4 (2001): 547-578 at 563, iv.