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**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE QUEBEC COURT OF APPEAL)**

Court File Nos. 23460 and 23490

IN THE MATTER of a decision of the Quebec Court of Appeal dated January 15, 1993

BETWEEN:

**R.J.R.-MACDONALD INC.  
IMPERIAL TOBACCO LTD.**

**APPELLANTS**

AND:

**THE ATTORNEY GENERAL OF CANADA**

**RESPONDENT**

AND:

**ATTORNEY GENERAL OF QUEBEC  
ATTORNEY GENERAL OF ONTARIO  
CANADIAN CANCER SOCIETY ET. AL**

**INTERVENORS**

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**FACTUM OF THE INTERVENOR  
THE ATTORNEY GENERAL OF ONTARIO**

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**PART I**

**STATEMENT OF FACTS**

1. The Attorney General of Ontario accepts the facts as set out in the factum of the Attorney General of Canada.

10 2. When considering the division of powers issue in respect of the Tobacco Products Control Act, (the TPCA), the only piece of legislation whose constitutional validity is questioned in this appeal, it is useful to summarize the various federal and provincial statutes which address the issue of tobacco use.

20 **A. FEDERAL LEGISLATION**

3. The purpose of the TPCA is to provide "a legislative response to a national public health problem of substantial and pressing concern." (s.3, TPCA). To achieve this objective, the TPCA, subject to certain exceptions:

- 30 (a) prohibits advertising of tobacco products;
- (b) regulates tobacco product promotional activities other than advertising;
- (c) provides labelling requirements for tobacco product packages.

Tobacco Products Control Act, S.C. 1988, c.20

4. The TPCA explicitly contemplates that the provinces may enact additional requirements for the labelling of tobacco product packages. Section 9 of the TPCA, which addresses labelling tobacco product packages with health warnings, provides that:

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s. 9(3) This section does not affect any obligation of a distributor, at common law or under any Act of Parliament or of a provincial legislature, to warn purchasers of tobacco products of the health effects of those products.

5. Although not the subject of challenge, there is also federal legislation entitled the Tobacco Sale to Young Persons Act which prohibits the sale of tobacco to a person under the age of eighteen years and allows vending machines containing tobacco products only in bars or taverns. In addition, the Non-Smokers Health Act, requires federal employers to provide smoke free work environments and limits smoking in federally regulated industries. Finally Bill C-11, "An Act to Amend the Excise Act, the Customs Act and the Tobacco Sales to Young Persons Act", which has passed the House of Commons and is currently before the Senate prohibits the sale of cigarettes in packages of less than 20 cigarettes ("kiddie packs").

Tobacco Sale to Young Persons Act S.C. 1993, c.5

Non-Smokers Health Act S.C. 1988, c.21

Bill C-11 "An Act to amend the Excise Act, the Customs Act and the Tobacco Sales to Young Persons Act"

#### B. ONTARIO LEGISLATION

6. The legislature of Ontario recently enacted the Tobacco Control Act S.O. 1994, c. 10. It received third reading and Royal Assent on June 23, 1994. It is anticipated that the Act will be proclaimed this year and regulations are currently being drafted. The purpose of this Act is to prevent the provision of tobacco to young persons and to regulate its sale and use by others. In particular, the Act:

- (a) prohibits selling or supplying tobacco to a person who is under nineteen years of age;
- (b) prohibits the sale of tobacco in places designated such as hospitals and pharmacies or as prescribed by the regulations;

- 10
- (c) provides for packaging in accordance with the regulations, including health warnings and information;
  - (d) prohibits the sale of cigarettes in packages of less than 20 cigarettes ("kiddie" packs)
  - (e) requires signs posted at places of sale bearing health warnings and prohibitions on sale;
  - (f) prohibits tobacco vending machines;
  - (g) generally prohibits smoking in certain places and provides for designated smoking areas.

Tobacco Control Act S.O. 1994, c.10

20 7. In general, with the exception of labelling requirements, the TPCA and the Ontario Tobacco Control Act address different areas of tobacco regulations. As discussed, the TPCA explicitly contemplates additional provincial regulations in the area of labelling requirements.

C. **OTHER PROVINCIAL LEGISLATION**

30 8. Statutes in many provinces addresses tobacco use. The major pieces of legislation are summarized briefly below:

- a) Newfoundland - prohibits the sale of tobacco to persons under 19 years of age; regulates smoking in a workplace or public place.

Tobacco Control Act, S.N. 1993, c. T-4.1  
Smoke-free Environment Act, S.N. 1993, c. S-16.1.

- b) Nova Scotia - prohibits the sale of tobacco to persons under nineteen years of age, the sale of cigarettes in packages of fewer than 20 cigarettes (kiddie packs), and the use of tobacco vending machines, and regulates signs displayed by vendors, including the disclosure of information concerning the effect of tobacco on health, and the use of signs or promotional material utilizing a tobacco brand name.

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Tobacco Access Act, S.N 1993, c.14

- c) New Brunswick - prohibits the sale of tobacco to persons under the age of 19 years and sale of packages containing less than 15 cigarettes (kiddie packs), and regulates signs at point of sale including messages concerning the hazards of tobacco use.

Tobacco Sales Act, S.N.B., 1993, c. T. 6.1.

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- d) Prince Edward Island - prohibits the sale of tobacco to persons under the age of 18 years, restricts the location of vending machines for the sale of tobacco to premises licensed under the Liquor Control Act or premises in which access to the vending machine is supervised and regulates the use of signs at point of sale including information relating to the effect of tobacco on health.

Tobacco Sales to Minors Act, S.P.E.I. 1991, 40 Eliz. II, c. 44.

- e) Quebec - regulates smoking in public places.

30

An Act respecting the Protection of Non-Smokers in certain public places, (Statutes of Quebec p-38.01).

- f) Manitoba - prohibits the sale of tobacco to persons under the age of 18 years and regulates the use of tobacco in public places.

An Act to Protect the Health of Non-Smokers S.M., 1990, c.S125

- g) Saskatchewan - prohibits the sale of tobacco to persons under the age of 16 years; bill introduced and received first reading which prohibits the sale of tobacco to persons under 19 years of age, and regulates signs at the point of sale, the packaging of tobacco and places where tobacco may be used.

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Minors Tobacco Act, R.S.S. 1965 c.381;  
Bill No. 68 of 1994 - "The Young Persons and Tobacco Act".

- 
- h) British Columbia - prohibits the sale of tobacco to persons under the age of 19 years and the sale of packages of fewer than 20 cigarettes ("kiddie packs") and regulates the sale, distribution, advertising, labelling and packaging of tobacco.

Tobacco Product Act R.S.B.C. 1979, c.403, as amended by the Tobacco Product Amendment Act, 1992 S.B.C. 1992, c.81, Tobacco Sales Regulation.

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*PART II  
POINTS IN ISSUE*

9. The constitutional questions in this appeal have been stated as follows:

10 (1) Is the Tobacco Products Control Act, S.C. 1988, c. 20 ("the TPCA"), wholly or in part within the legislative competence of the Parliament of Canada as being a law enacted for the peace, order and good government of Canada pursuant to s. 91 of the Constitution Act, 1867, as being enacted pursuant to the criminal law power in s. 91(27) thereof, or otherwise?

20 (2) Is the TPCA wholly or in part inconsistent with the right of freedom of expression as set out in s. 2(b) of the Canadian Charter of Rights and Freedoms and, if so, does it constitute a reasonable limit on that right as can be demonstrably justified pursuant to s. 1 thereof?

30 10. The position of the Attorney General of Ontario on the validity of the impugned legislation under s. 91 of the Constitution Act, 1867 may be summarized as follows:

(a) Without question, the province has jurisdiction to enact laws to regulate the sale, use and distribution of tobacco for health purposes. Such legislation is validly enacted pursuant to section 92(16) "all matters of a merely local or private nature in the province" and section 92(14) "property and civil rights in the province."

40 (b) The federal TPCA is, in pith and substance, legislation in respect of the matter of national health. More particularly, it prohibits tobacco advertising and provides health warnings on packages to reduce the use of tobacco, a dangerous substance.



- (c) There exists a double aspect with respect to the matter of "health" in terms of the division of powers between the Parliament of Canada and the provincial legislatures under ss. 91 and 92 of the Constitution Act, 1867
- (d) While health is primarily a provincial subject matter under s. 92(16) of the Constitution Act, 1867, it exceptionally may be within the competence of the Parliament of Canada under its s. 91(27) criminal law power, and s. 91 peace, order and good government (p.o.g.) power where it is a matter of national concern. Tobacco advertising qualifies as such a national concern.
- (e) In the case of valid provincial legislation which overlaps or duplicates valid federal legislation, the federal legislation is paramount only in the case of express contradiction where it is impossible to obey both the federal and provincial legislation.

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11. With respect to the application of s. 2(b) of the Charter to the TPCA, the Attorney General of Ontario supports the position of the Attorney General of Canada and adopts its submissions in that regard.

12. The Attorney General of Ontario submits that the constitutional questions should be answered as follows:

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QUESTION 1:

Yes, the TPCA is within the legislative competence of the Parliament of Canada as being a law enacted for the peace order and good government of Canada pursuant to s. 91 of the Constitution Act, 1867, and as being enacted pursuant to the Criminal Law Power in s. 91(27).

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QUESTION 2:

No, the TPCA is not inconsistent with s. 2(b) of the Charter and, in any event, can be justified under s. 1 of the Charter.

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**PART III  
ARGUMENT**

**A. PROVINCIAL LEGISLATIVE JURISDICTION**

13. Without question, the province has jurisdiction to enact laws to regulate the sale, use and distribution of tobacco, for health purposes.

10                    RJR MacDonald Inc. v. Canada (A.G.) (1993) 102 D.L.R. (4th) 289 at p. 307 (Que. C.A.)

14. Such laws are within the province's primary jurisdiction over health pursuant to s. 92(16) "all matters of a merely local or private Nature in the Province" and its jurisdiction to regulate individual forms of trade in the province under s. 92(13) "property and civil rights in the province".

R. v. Morgentaler [1993] 3 S.C.R. 463 at p. 490-491

Schneider v. the Queen [1982] 2 S.C.R. 112 at p. 137

Benson and Hedges (Canada) Ltd. v. A.G.B.C. (1972) 27 D.L.R. 257 at p. 272 - 276 (B.C.S.C.) (approved by the Supreme Court of Canada in A.G. Que. v. Kellogg's Co. of Canada [1978] 2 S.C.R. 211 at p. 224)

**B. DOUBLE ASPECT DOCTRINE**

15. While the province clearly can enact laws to regulate the sale, use and distribution of tobacco for health purposes, the double aspect doctrine applies to allow the federal government also to enact laws in this area. The Supreme Court of Canada has applied the double aspect doctrine in a number of recent cases.

Rio Hotel v. N.B. Liquor Licensing Board [1987] 2 S.C.R. 59

Irwin Toy Ltd. v. Quebec [1989] 1 S.C.R. 927

Clarke v. Clarke [1990] 2 S.C.R. 795

R. v. Furtney [1991] 3 S.C.R. 89

10 16. Even when the legal effect of federal and provincial legislation is virtually identical, this does not determine validity since the federal and provincial governments can enact provisions with the same legal effect provided this is done in pursuit of their respective heads of power.

R. v. Morgentaler, supra at p. 498

20 C. CHARACTERIZATION OF THE TOBACCO PRODUCTS CONTROL ACT

17. The pith and substance of the federal legislation is in respect of national health. Prohibiting tobacco advertising and providing health warnings on packages to reduce the use of tobacco, a dangerous product, is consistent with the national public health purpose of the TPCA.

30 18. In response to paragraphs 41-48 of the factum of the Appellant Imperial Tobacco Ltd. and paragraphs 44-45 of the appellant RJR MacDonald, it is respectfully submitted that the characterization of the matter of legislation must involve the examination of its purpose and effects. In respect of effects, this examination primarily  
40 will involve a consideration of the legislation's legal effect rather than its practical effect. Generally, for division of powers purposes, evidence as to practical effect "will not change the legislation's "matter", and only goes to the effectiveness of the statute to fulfil its

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object. The court is not concerned with the wisdom of a statute ..."

R. v. Morgentaler, supra at pp. 482-488

10 19. The purpose and legal effect of the TPCA is clearly in relation to health and it is respectfully submitted that this is the dominant test for division of powers purposes. Further, in respect of the practical effect, a considerable volume of evidence submitted by the Attorney General of Canada has established that advertising affects tobacco use which has adverse consequences for national public health.

20 20. While general jurisdiction over health is provincial under s. 92(16), there is limited federal jurisdiction either ancillary to the express federal heads of power under s. 91 or under the p.o.g.g. power. In this instance, the TPCA can be sustained under the criminal law power and under the p.o.g.g. power.

Schneider v. the Queen, supra at p. 137

30 **D. CRIMINAL LAW POWER**

21. The criminal law power authorizes the federal government to punish conduct that is dangerous to health. A prohibition is not criminal unless it serves a public purpose. Relevant public purposes include "public peace, order, security, health, morality; those are the ordinary although not exclusive ends served by that law".

40 Canadian Federation of Agriculture v. A.G. Quebec  
(Margarine Reference) [1949] 1 S.C.R. 1 at p. 50

22. Under the criminal law power, the federal legislature can prohibit substances injurious to public health. The Supreme Court of Canada has held that the federal government can prohibit, under the Food and Drug Act, the manufacture, preparation, preservation, packing or storing of drugs under unsanitary conditions because the prohibition is aimed at protecting the physical health and safety of the public. The protection of food and other products against adulteration and to enforce standards of purity is properly assigned to the criminal law. Similarly, the federal legislature, under the criminal law power, can prohibit advertising which creates the unsafe condition of encouraging the consumption of tobacco, a substance dangerous to public health.

R. v. Wetmore [1983] 2 S.C.R. 284 at p. 286-289

Reference as to the Validity of Section 5(a) of the Dairy Industry Act; Canadian Federation of Agriculture v. A.G. for Quebec (Margarine Reference) (1951) A.C. 179 at p. 196-197

23. Contrary to paragraph 70 of the factum of the appellant of Imperial Tobacco Ltd. and paragraph 50 of the appellant RJR MacDonald Inc., the fact that there are exemptions in the TPCA does not demonstrate that it is not criminal law. In R. v. Morgentaler the court held that a provincial law prohibiting abortions in clinics was criminal law aimed at prohibiting what the legislature viewed as socially undesirable conduct, notwithstanding the fact that the legislature allowed for abortion in hospitals.

R. v. Morgentaler, supra at p. 514

#### E. PEACE, ORDER AND GOOD GOVERNMENT

24. The TPCA is a valid law enacted pursuant to the national concern branch of the p.o.g.g. power. In limited circumstances, the federal parliament may make laws in

relation to national health under the p.o.g.g. power. For a matter to qualify as a matter of national concern, it must have a singleness, distinctiveness and indivisibility that clearly distinguishes it from matters of provincial concern and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution. In determining whether the matter has the requisite singleness, distinctiveness and indivisibility, it is relevant to consider what would be the effect on extra-provincial interests of a provincial failure to deal effectively with the control or regulation of the intra-provincial aspects of the matter.

R. v. Crown Zellerbach Canada Limited, [1988] 1 S.C.R. 401 at p. 432

Schneider v. the Queen, *supra* at p. 137

Labatt v. Attorney General of Canada [1980] 1 S.C.R. 914 at p. 934

R. v. Morgentaler, *supra*, at p. 489

25. Federal regulation of tobacco advertising and labelling has the requisite singleness, distinctiveness and indivisibility required under the p.o.g.g. power because it prohibits an activity which creates the unsafe condition of encouraging consumption of tobacco a substance dangerous to public health, which is analogous to other substances which have been regulated under the p.o.g.g. power and because its regulation has some basis in an enumerated head: the criminal law power.

26. Federal legislation concerning alcohol and narcotics has been upheld under the p.o.g.g. power. Tobacco is an analogous substance because it is a substance which has a dangerous effect on health.

RJR MacDonald Inc. v. Canada (A.G) (1993) 102 D.L.R. (4th) 289 at p. 307, 348-349

Russell v. the Queen (1882), 7 App. Cas. 829

A.G. Ont. v. A.G. Canada [1896] A.C. 348 (the Local Prohibition Case)

A.G. Ont. v. Canada Temperance Federation [1946] A.C. 193

The Queen v. Hauser [1979] 1 S.C.R. 984

27. A material factor in this analysis is that, as with the Temperance cases, the challenged legislation in this case has some base in one of the federal enumerated powers, namely, criminal law which gives it some fixity as being within federal competence.

Re: Anti-Inflation Act [1976] 2 S.C.R. 373 at p. 398

28. Further, the TPCA has the requisite singleness, distinctiveness and indivisibility because there is an effect on extra-provincial interests of a provincial failure to deal effectively with the control of the intra-provincial aspects of the tobacco advertising and labelling. Advertising and cigarette packages cross provincial borders and, without federal intervention, residents of Ontario may be adversely affected by other provinces' inadequate regulatory regimes.

R. v. Crown Zellerbach, *supra* at p. 434

29. In respect of the provincial inability test, "it is because of the interrelatedness of the intra-provincial and extra-provincial aspects of the matter that it requires a single or uniform legislative treatment". An exclusive reliance on provincial legislation in this field would not meet the national objective of choking demand for tobacco products through severe restrictions on advertising. At best, one would have a checkerboard of legislation which could only address the provincial aspects of the problem and would thereby prejudice a uniform national solution to the problem of tobacco consumption.

R. v. Crown Zellerbach, *supra* at p. 434

30. It is important to emphasize however, that although federal legislation may meet the "provincial inability" test, the province still retains its jurisdiction to deal with the same legislative problem:

"The "provincial inability" test must not, however, go so far as to provide a rationale for the general notion, hitherto rejected in the cases, that there must be a plenary jurisdiction in one order of government or another to deal with any legislative problem"

R. v. Crown Zellerbach Canada Ltd., *supra* at p. 434

RJR MacDonald Inc. v. Canada (A.G.) at p. 347, 349

Attorney General for Ontario v. Canada Temperance Federation *supra*, at p. 205-206

31. In paragraph 57 of its factum Imperial Tobacco Ltd. argues that the federal government does not have jurisdiction under p.o.g.g. because there is a substantial degree of cooperation between the two levels of government in this area. However, as was said



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in the Reference Re: Anti - Inflation Act, in respect of the p.o.g.g. power "Co-operative federalism may be consequential upon a lack of federal legislative power, but it is not a ground for denying it."

Reference Re: Anti-Inflation Act, supra at p. 421

10 32. Because the federal legislation is not aimed at health generally, but at the limited national health concern of prohibiting tobacco advertising and providing health warnings on packages to reduce the use of tobacco, a dangerous substance, it has a scale of impact on provincial jurisdiction that is reconcilable with the distribution of legislative powers.

20 F. PARAMOUNTCY

30 33. In the event of conflict between federal and provincial legislation, federal legislation prevails. However, the test for conflict expressly approved by the Supreme Court of Canada on numerous occasions is that "there would seem to be no good reason to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other."

Multiple Access Ltd. v. McCutcheon [1982] 2 S.C.R. 161 at p. 191.

40 Clarke v. Clarke [1990] supra at p. 831

Irwin Toy Ltd. v. Quebec (P.G.) supra at p. 963

Rio Hotel Ltd. v. N.B. Liquor Licensing Board supra at p. 64-65

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34. Mere duplication does not constitute conflict. It is the "ultimate in harmony".

Multiple Access Ltd. v. McCutcheon, *supra* at p. 190

35. There is no conflict in cases where the federal government explicitly provides that its legislation is supplementary to provincial laws. In the TPCA, the federal government explicitly provides that its labelling requirements concerning health product does not affect any obligation under a law of a provincial legislature.

Irwin Toy Ltd. v. Quebec (P.G.) *supra* at p. 961-964

36. There is no conflict when the federal government establishes a set of minimum national standards and the provincial governments impose additional duties.

Irwin Toy Ltd. v. Quebec (P.G.) *supra* at p. 964  
Hogg, Constitutional Law of Canada 16-5

37. Accordingly, if the TPCA is valid federal legislation, the Ontario Tobacco Control Act provisions are nevertheless valid because they are not in conflict with any of the provisions of the TPCA.

Irwin Toy Ltd., *supra* at p. 964

Hogg, Constitutional Law of Canada 16-5

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PART IV - THE ORDER SOUGHT

38. The appeal should be dismissed and the constitutional questions should be answered as follows:

1. The Tobacco Products Control Act ("TPCA") S.C. 1968, c. 20 is wholly within the legislative competence of the Parliament of Canada;
2. The TPCA constitutes a reasonable limit which is demonstrably justified on the freedom of expression protected under s. 2(b) and, therefore, is fully in conformity with the Canadian Charter of Rights and Freedoms.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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Tanya Lee  
Counsel for the Intervenor,  
the Attorney General of Ontario

SIGNED AT TORONTO, this 28th day of September, 1994

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*PART V*  
*TABLE OF AUTHORITIES*

1. RJR MacDonald Inc. v. Canada (A.G.) (1993) 102 D.L.R. (4th) 289 (Que. C.A.)
2. R. v. Morgentaler [1993] 3 S.C.R. 463
3. Schneider v. the Queen [1982] 2 S.C.R. 112
4. Benson and Hedges (Canada) Ltd. v. A.G.B.C. (1972) 27 D.L.R. 257
- 10 5. A.G. Que v. Kellogg's Co. of Canada [1918] 2 S.C.R. 211
6. Rio Hotel v. N.B. Liquor Licensing Board [1987] 2 S.C.R. 59
7. Irwin Toy Ltd. v. Quebec [1989] 1 S.C.R. 927
8. Clarke v. Clarke [1990] 2 S.C.R. 795
9. R. v. Furtney [1991] 3 S.C.R. 89
- 20 10. Reference as to the Validity of Section 5(a) of the Dairy Industry Act; Canadian Federation of Agriculture v. A.G. for Quebec (Margarine Reference) (1951) A.C. 179
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12. R. v. Crown Zellerbach Canada Limited, [1988] 1 S.C.R. 401
13. Labatt v. Attorney General of Canada [1980] 1 S.C.R. 914
14. Russell v. the Queen (1882), 7 App. Cas. 829
- 30 15. A.G. Ont. v. A.G. Canada [1896] A.C. 348 (the Local Prohibition Case)
16. A.G. Ont. v. Canada Temperance Federation [1946] A.C. 193
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- 40 20. Hogg, Constitutional Law of Canada 16-5