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

Court No: 23490

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

BETWEEN:

IMPERIAL TOBACCO LTD.

APPELLANT (APPLICANT)

AND:

ATTORNEY GENERAL OF CANADA

RESPONDENT (RESPONDENT)

AND:

ATTORNEY GENERAL OF QUEBEC

ATTORNEY GENERAL OF ONTARIO

ATTORNEY GENERAL OF SASKATCHEWAN

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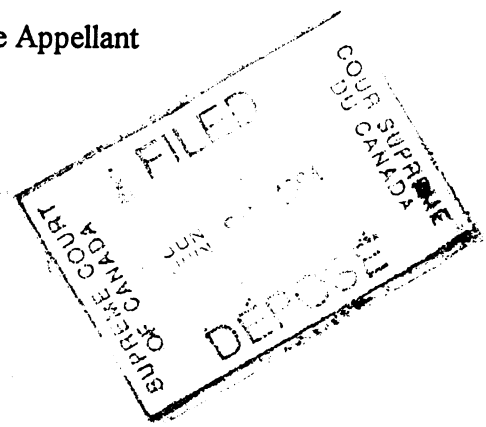

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PART I

THE FACTS

A. SUMMARY OF PROCEEDINGS

1. On August 31, 1988, Imperial Tobacco Limited ("Imperial") filed a motion for declaratory judgment seeking a declaration that sections 4, 5, 6 and 8 of the Tobacco Products Control Act (S.C. 1988, c. 20) (the "TPCA"), which prohibit the advertising of Canadian tobacco products, are *ultra vires* the Parliament of Canada and are unconstitutional as violating section 2(b) of the Canadian Charter of Rights and Freedoms (Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11) ("the Charter").

2. The trial judge ordered that this motion be heard together with a similar motion filed by RJR-Macdonald Inc. ("RJR") (Supreme Court No. 23460) and, as much as possible, in accordance with the rules of procedure applicable to a trial of issues. The hearing began on September 25, 1989 and ended on June 21, 1990. Over 560 exhibits were filed through 28, mostly expert, witnesses. The testimony and pleading cover 71 volumes of transcripts: "une preuve colossale", in the words of the trial judge.

3. The Respondent Attorney General of Canada ("AGC") filed a certificate under section 39 of the Canada Evidence Act (R.S.C. 1985, c. C-5), later replaced by a second slightly different one, claiming "Cabinet confidentiality" over numerous documents. As a result, more than 500 relevant documents and excerpts of documents were simply never shown by the AGC to the trial judge or to the Appellants and are still unavailable.

Judgment at first instance, Case: vol. 2, p. 301

C.A. judgment, *per* Brossard J.A., Case: vol. 3, p. 568

4. The judgment of the Superior Court of Quebec was rendered on July 26, 1991, declaring inoperative not only sections 4, 5, 6 and 8 of the TPCA but the statute as a whole as being both *ultra vires* the Parliament of Canada and an unjustified violation of freedom of expression.

5. The AGC appealed from this judgment, filing a 262-volume joint record. The judgment of the Court of Appeal of Quebec was rendered on January 15, 1993, reversing the judgment below, by a two-to-one majority on the Charter and unanimously on the division of powers, and dismissing the motions for declaratory judgments.

6. The motions for leave to appeal to this Honourable Court by the Appellant and RJR were granted on October 14, 1993. By judgment dated November 26, 1993, it was ordered that a single copy of the entire joint record of the Court of Appeal of Quebec be filed and that the parties file, in appropriate numbers, copies of the exhibits and transcript extracts to which they wish to refer this Court. They are filed as the Appellants' joint Case, to which this factum refers by page number. (In a few instances, reference is made to transcripts or exhibits not included in the Appellants' joint Case. In such cases the factum refers to the Quebec Court of Appeal Joint Record).

B. FACTUAL BACKGROUND

7. Throughout the 1970's and the first part of the 1980's, the Department of Health and Welfare developed and consistently maintained the view that a ban of advertising of tobacco products would not assist in reducing the consumption of such products.

C.A. judgment, *per* Brossard J.A., Case: vol. 3, pp. 518-519

Stock paragraphs for inclusion in Health and Welfare correspondence, 1979: ITL-27(03), Case: vol. 4, p. 669

Letter from Executive Director General, Health Promotion Branch, May 11, 1983: ITL-27(06), Case: vol. 5, p. 784

Letter from the Honourable Minister of Health, Mr. Jake Epp, November 19, 1984: ITL-27(15), Case: vol. 5, p. 961

8. The need to establish a correlation between banning tobacco advertising and reducing overall tobacco consumption, if an advertising ban was to survive a Charter challenge, was known to the government of Canada before introducing the advertising ban of the TPCA, and the government also knew that the evidence of any such correlation was "at best inconclusive".

Memorandum from D. Martin Low of the Department of Justice, July 15, 1987: RJR-47, Case: vol. 6, p. 1001

C.A. judgment, *per* Brossard J.A., Case: vol. 3, p. 519

9. The Honourable Minister of Health and Welfare ("the Minister") made this clear to the House of Commons on May 26, 1986, declaring that an advertising ban "might be good visuals" but that, in reality, it would have "painfully" little effect on the number of smokers.

House of Commons Debate, May 26, 1986, p. 14036: ITL-27(27), Case: vol. 6, p. 1026

10. On October 6, 1986, a Private Member's Bill entitled "The Non-Smokers' Health Act" (Bill C-204) was tabled in Parliament by a member of an opposition party. It would have provided for a total ban of advertising of tobacco products.

11. In a November 7, 1986 briefing, the government's resident expert on tobacco policy, Mr. Neil Collishaw, summarized for the Minister several grounds for the government's continuing opposition to an advertising ban, saying that the value of a ban would be "essentially symbolic", that research showed "no compelling evidence that advertising bans introduced elsewhere reduced consumption", that without such evidence the ban "seriously risks offending section 2(b) of the Charter" and that a ban of Canadian advertisements would place Canadian periodicals at a disadvantage to the "already dominant U.S. offerings".

November 7, 1986 Briefing for the Minister by Mr. Neil Collishaw: RJR-48, Case: vol. 6, p. 1150

12. This advice was repeated in a December 18, 1986 briefing.

December 18, 1986 Briefing for the Minister by Mr. Neil Collishaw: RJR-46, Case: vol. 7, p. 1194

13. On April 30, 1987, without having obtained or commissioned any study contradicting these statements or the opinion consistently held by the Department of Health and Welfare, the Federal Government tabled Bill C-51, which was to become the TPCA.

Mr. Neil Collishaw, Chief, Tobacco Products Unit, testimony on discovery, Quebec Court of Appeal Joint Record: vol. 4, p. 497; also, at trial, Case: vol. 11, p. 2024

14. The Minister, explaining the reasons for the Bill to a committee of the Cabinet, referred explicitly to the Private Member's Bill, expressing the fear that it might pass, "unless it is pre-empted by government initiatives to effectively deal with the tobacco issue". He said: "To effectively pre-empt Bill C-204 and to ensure maximum benefit to the government, it is advisable that this bill be introduced ... at the earliest possible date."

March 19, 1987 Speaking Notes on the Legislative Plan for the Proposed Tobacco Products Control Act: RJR-58, Case: vol. 7, p. 1233 at 1235

Judgment at first instance, Case: vol. 2, p. 253

15. A similar justification was given by the Minister to his caucus. He added: "...the government will be seen to be undertaking an initiative which will also draw considerable public support."

March 25, 1987 Notes for an Address to Caucus: RJR-59, Case: vol. 7, p. 1283 at 1284

16. The Minister acknowledged the risk that the TPCA's constitutionality would be challenged and accepted that risk as an "occasion (for) public debate which will ... help to discourage tobacco consumption".

March 25, 1987 Notes for an Address to Caucus: RJR-59 Case: vol. 7, p. 1283 at 1291

See also January 20, 1987 Briefing Information Document: RJR-51, Case: vol. 7, p. 1212

C. THE ACT IN QUESTION

17. The TPCA is not a total ban of tobacco advertising. It is a total ban of advertising of Canadian tobacco products. It explicitly exempts all foreign advertising, though it be seen in Canada, of non-Canadian tobacco products, though they be sold in Canada.

TPCA s. 4(2), s. 5

18. It bans branded sponsorship of athletic and cultural events, though it allows sponsorship in the corporate name of any tobacco manufacturer.

TPCA s. 6

19. It deprives tobacco manufacturers of the right to use their trademarks save on tobacco product packages (subject to heavy regulatory encroachment), but exempts one particular manufacturer, Dunhill, from this measure.

TPCA ss. 8 and 17

Judgment at first instance, Case: vol. 2, p. 200

Correspondence between the Minister and Alfred Dunhill Limited, 1987: ITL-27(65), Case: vol. 7, p. 1330

20. The TPCA leaves quite untouched the manufacture, sale, purchase or consumption of tobacco products, or any of the consequences to health said by the AGC to arise from the consumption of tobacco. Its advertising ban is, however, all-encompassing, doing away with advertising of whatever nature, big or small, pictures or text, lifestyle or not, outdoor or indoor, in publications of whatever readership and without regard to the content of the advertisement, as long as it is Canadian.

21. The TPCA dictates what Canadian manufacturers, distributors and retailers are allowed to say to their customers about tobacco products and what the consumers of these legal products are allowed to hear, see and read about them.

22. The purpose clause of the TPCA, section 3, is an undisguised attempt to bootstrap the legislation. The Minister has confirmed that the reference to a "free and democratic society" was added in an attempt "to make the bill as watertight as possible against a challenge". The reference to a "national public problem of substantial and pressing concern" is a self-serving repetition of the test expounded by this Court in R. v. Crown Zellerbach Canada Ltd., discussed below.

R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401

January 25, 1988 Statement by the Minister to a Parliamentary Committee: AG-142C, Quebec Court of Appeal Joint Record vol. 123, p. 25350

D. POSITIONS OF THE PARTIES AT TRIAL

23. The AGC told the Court that he would introduce evidence demonstrating that brand advertising of tobacco products induces people to smoke, that it misleads people about the risks associated with smoking, that it drowns out the government-sponsored anti-smoking message and that there was no alternative other than a total ban of advertising to attain the objectives proclaimed in section 3 of the TPCA. The AGC maintained that these facts would demonstrate that TPCA is justified under section 1 of the Charter.

AGC's Summary Statement of Fact and Law filed under Rule 18 of the Rules of Practice of the Superior Court of Quebec ("R.P.S.C."), Case: vol. 1, p. 101 at 10, 16, 17, para. 34-36, 38, 61, 65, 75

24. The tobacco manufacturers submitted that tobacco advertising is not meant to and, in fact, does not influence the behaviour of non-smokers. It is prepared, for each brand, for a well-identified segment of people who already smoke. The goal is to maintain brand loyalty of smokers already smoking that brand, to weaken the brand loyalty of those smoking competing brands and to prevent loss of market share to imported brands. That is, tobacco manufacturers advertise for the same reason that, for example, oil companies do, not to increase the total market for the product but to maximize the advertiser's share of whatever the market is.

Judgment at first instance, Case: vol. 2, pp. 232, 263

C.A. judgment, *per* Brossard J.A., Case: vol. 3, p. 555

Imperial's Summary Statement of Fact and Law (Rule 18, R.P.S.C.), Case: vol. 1, p. 100, para. 23, 26, 27, 29

RJR's Summary Statement of Fact and Law (Rule 18, R.P.S.C.), Case: vol. 1, p. 99, para. 18-23

25. They submitted accordingly that advertising is an important tool of competition and that the TPCA's exemption of advertising originating outside Canada was unfair and would only shift brand share to non-Canadian brands without reducing overall consumption of tobacco. They also submitted that there is nothing misleading in tobacco advertising and that it did not appear that advertising had had any effect on anyone's awareness of the risks of smoking.

26. They submitted that there is therefore no justification under section 1 of the Charter for interfering so heavily with the freedom to communicate regarding a legal product.

27. On the question of division of powers, they submitted that the TPCA constitutes the regulation of a particular industry and that there was nothing indicating that provincial regulation of tobacco advertising would be ineffective.

Imperial's Summary of Fact and Law (Rule 18, R.P.S.C.), Case: vol. 1, p. 100, para. 22

E. FINDINGS OF FACT

28. The trial judge made a great number of findings of fact. The Court of Appeal interfered with none of them, despite the AGC's submissions that it should.

29. Among the findings of fact made by the trial judge, after a lengthy trial, are:

a) Tobacco consumption has been in continuous decline for more than 20 years in all age groups, despite the significant sums spent in advertising by the tobacco industry during that same period;

Judgment at first instance, Case: vol. 2, p. 292

b) There is no evidence that the average tobacco consumer is incapable of discernment in respect to tobacco advertising;

Judgment at first instance, Case: vol. 2, p. 291

c) There is no evidence that tobacco advertising, even "lifestyle" advertising, is necessarily false and misleading;

Judgment at first instance, Case: vol. 2, pp. 265, 283, 291

d) Mass communication such as advertising can only be successful if targeted for a particular audience;

Judgment at first instance, Case: vol. 2, p. 291 (see also C.A. judgment, *per* Brossard J.A., Case: vol. 3, p. 555 as to the absence of "generic" advertising)

e) The evidence demonstrated that the fight against tobacco consumption is a sufficiently important objective to justify legislation which infringes a Charter guaranteed right;

Judgment at first instance, Case: vol. 2, p. 257

f) It is illusory to believe that the banning of tobacco advertising will free the social environment of reminders of cigarettes or inducements to smoke. Films, books, videos, television shows, rock stars and other "cultural icons" are constant reminders of the presence of tobacco in our social environment;

Judgment at first instance, Case: vol. 2, p. 295

g) Before the advertising ban came into effect, 65% of magazines sold in Canada originated in the United States. The "icons" (such as the Marlboro Man) of particular concern to the AGC's experts appear regularly in that advertising. That advertising continues to be seen by Canadians of all ages;

Judgment at first instance, Case: vol. 2, p. 294

h) There has been no study of the likely impact of the TPCA on Canadian tobacco consumption taking into account the continuing presence of foreign tobacco advertising;

Judgment at first instance, Case: vol. 2, p. 295

i) There has been no study on the likely impact of the TPCA's unattributed health messages;

Judgment at first instance, Case: vol. 2, pp. 295, 300

j) The link the State tried to establish between protecting health and advertising is tenuous and uncertain. The evidence of a rational link between the TPCA's restrictions and the objectives sought was deficient if not non-existent;

Judgment at first instance, Case: vol. 2, pp. 295, 298

k) The evidence in the government's possession at the time the Act was passed failed to demonstrate that a ban of advertising would affect consumption;

Judgment at first instance, Case: vol. 2, p. 295

l) The New Zealand Toxic Substances Board Report, on which the AGC had relied heavily, is flawed by serious methodological errors and a lack of scientific rigour depriving it, to all intents and purposes, of all probative value;

Judgment at first instance, Case: vol. 2, p. 296

m) The only evidence advanced by the AGC to demonstrate a relationship between tobacco advertising and overall tobacco consumption was devoid of any probative value and the sole witness produced by the AGC to establish a correlation between banning tobacco advertising and total tobacco consumption lacked the scientific objectivity that the Court was entitled to expect from an expert.

Judgment at first instance, Case: vol. 2, pp. 296-297

n) The AGC failed to establish a link between advertising bans and consumption. However, even were one to accept the evidence tendered at face value, which the Court of first instance decided it could not do and which the Court of Appeal declined to do, that evidence does not exceed the level of speculation and does nothing more than establish " a possibility" that banning advertising could influence tobacco consumption;

Judgment at first instance, Case: vol. 2, pp. 297-298

o) The State had at its disposal other options which would have infringed less on freedom of expression. However, the State never tried to determine which alternative would best achieve its objectives while infringing least on the Charter right;

Judgment at first instance, Case: vol. 2, pp. 300-301 and 339-361(Annex to Appellant's written argument, adopted by trial judge)

p) There is no evidence that the advertising of tobacco products has attained a stage in Canada giving it a singleness, distinctiveness and indivisibility which would clearly distinguish it from matters of provincial interest;

Judgment at first instance, Case: vol. 2, p. 225

q) The provinces, far from showing an inability to act regarding tobacco advertising, have shown a rare harmony and both the will and the capacity to cooperate with each other in the matter;

Judgment at first instance, Case: vol. 2, p. 230

r) There has been no broadcast advertising of tobacco products in Canada since 1972.

Judgment at first instance, Case: vol. 2, p. 211

F. THE EVIDENCE

30. Beyond the trial judge's explicit findings of fact, the evidence is clear on a number of issues.

31. Advertising is a prime tool of competition and is especially important when price-based competition is hampered by so large a slice of price going to tax. Competition based on product innovation is slow-moving and highly risky, even if one is allowed to advertise the new product.

AGC expert Joel B. Cohen's testimony: Case: vol. 62, p. 11338

Imperial's Roy Donald Brown's testimony: Case: vol. 34, pp. 6600-6601; Case: vol. 35, pp. 6676-6677

RJR's Peter Hoult's testimony: Case: vol. 32, pp. 6106-6107, 6232

32. Advertising communicates to consumers, for example, the brand's availability, package changes and their significance, and differences between images associated with

each brand. In this respect, tobacco advertising is no different from advertising for any other well-known consumer product.

Judgment at first instance, Case: vol. 2, p. 278

See also C.A. judgment, *per* Brossard J.A., Case: vol. 3, p. 554

Imperial's Roy Donald Brown's testimony: Case: vol. 34, pp. 6573-6581, 6583-6584, 6590, 6598-6601; Case: vol. 35, pp. 6626-6628, 6631, 6637, 6640, 6644, 6676-6678; Case: vol. 36, p. 6902; Case: vol. 37, p. 7083; Case: vol. 38, pp. 7214-7216

RJR's Peter Hoult's testimony: Case: vol. 32, pp. 6112, 6235, 6237, 6246, 6254, 6268; Case: vol. 33, pp. 6300, 6312, 6320, 6431

33. The attributes of the the brands are chosen and developed to respond to a demand coming from people who smoke.

AGC expert Michel Laroche's testimony: Case: vol. 58, pp. 10744-10746

Imperial's Roy Donald Brown's testimony: Case: vol. 34, pp. 6511, 6530, 6551

34. The advertising of these attributes is carefully designed to respond to consumer preferences, in words and pictures best suited to the target smokers' comprehension. In short, advertising is necessarily a two-way expression, from the manufacturer to the consumer and back again, about choices, offer, demand and the continuing effort to bring them all into harmony.

Imperial's Roy Donald Brown's testimony generally: Case: vols. 34, 35

PART II

POINTS IN ISSUE

35. There are three issues in dispute:

a) Is the TPCA's ban of advertising, found at sections 4, 5, 6 and 8, *ultra vires* the Parliament of Canada?

b) Is that ban an infringement on the freedom guaranteed by section 2(b) of the Charter?

c) If it is, is it demonstrably justified in a free and democratic society?

36. The Appellant's position on all of these issues is that adopted by the trial judge.

37. Even in the event this Honourable Court should reverse the Court of Appeal on the question of division of powers, it is respectfully submitted that it is in the public interest that it should also deal with the Charter issue, both to avoid needless further litigation in relation to any provincial advertising bans and to put to rest any debate as to whether this Honourable Court has, as the Court of Appeal suggests, implicitly reversed itself on the application of the Oakes' test to Charter cases.

PART III

THE ARGUMENT OF THE APPELLANT IMPERIAL TOBACCO LIMITED

A. DIVISION OF POWERS

38. The Appellant submits that the TPCA constitutes the regulation of a particular industry, and therefore falls within exclusive provincial jurisdiction. It submits as well that the TPCA cannot be supported on the grounds advanced by the AGC, that is as legislation for "peace, order and good government" or as an exercise of Parliament's criminal law power.

The TPCA is properly characterized as regulation of a particular industry, and is thus properly a provincial matter

39. The regulation of a particular industry is a provincial matter. Legislation prohibiting advertising, generally or in relation to a particular activity, falls within provincial legislative jurisdiction.

> Quebec (A.G.) v. Kellogg's Company of Canada, [1978] 2 S.C.R. 211 at 225 *per* Martland J.
>
> Irwin Toy Ltd. v. Quebec (A.G.), [1989] 1 S.C.R. 927 at 953 *per* Dickson C.J., Lamer J. and Wilson J.
>
> Benson and Hedges (Canada) Limited v. British Columbia (A.G.), [1972] 5 W.W.R. 32 (B.C. S.C.)
>
> Labatt Breweries of Canada Limited v. Canada (A.G.), [1980] 1 S.C.R. 914

40. The TPCA establishes a regulatory scheme to restrict the marketing of a particular product, otherwise legal, by prohibiting a particular commercial activity, namely the advertising of the particular product.

The TPCA should not be characterized as legislation in relation to public health

41. The characterization of legislation for constitutional purposes must involve the examination of its purpose and of its effects.

R. v. Morgentaler, [1993] 3 S.C.R. 463 at 482 *per* Sopinka J.

42. The TPCA's only direct operational effect, that is, its only "legal effect", is on advertising. The TPCA has no effect on what goes into tobacco products, on what comes out of them, on how or where they may be sold or to whom, where or near whom they may be consumed, who consumes them or on any of the supposed consequences of their consumption. It can therefore not be said to be legislation in relation to health.

R. v. Morgentaler, *supra,* at 482 *per* Sopinka J.

Benson and Hedges (Canada) Limited v. British Columbia (A.G.), *supra,* decision cited with approval in Quebec (A.G.) v. Kellogg's Company of Canada, *supra,* at 223-224 *per* Martland J.

43. The Quebec Court of Appeal acknowledged that the direct effect of the TPCA is to regulate the advertising of tobacco products but characterized the TPCA as public health legislation on the basis of the Act's stated objectives and an admittedly unproven and indirect effect on the consumption of tobacco products.

C.A. judgment, *per* Brossard J.A., Case: vol. 3, pp.458-459, adopted by LeBel J.A., Case: vol. 3, p. 373

44. Because the TPCA seeks to achieve its objective through indirect means, its characterization for purposes of division of power cannot rest solely on its own statement of objectives (s. 3 of the TPCA), particularly in the face of a finding of fact by the trial judge, on a voluminous record, that the AGC had failed to establish any correlation between the indirect means chosen by Parliament to achieve its stated objectives (banning tobacco advertising) and those stated objectives (reducing tobacco consumption).

Judgment at first instance, Case: vol. 2, pp. 216, 298

C.A. judgment, *per* Brossard J.A., Case: vol. 3, p. 458; adopted by LeBel J.A., Case: vol. 3, pp. 372-373

R. v. Morgentaler, *supra* at 483 *per* Sopinka J.

Fowler v. R., [1980] 2 S.C.R. 213 at 224, 226 *per* Martland J.

45. In such circumstances, to allow federal jurisdiction to rest entirely on a statute's purpose clause and "a rational connection, however abstract and theoretical", as held by the Quebec Court of Appeal, particularly where federal jurisdiction is claimed under Parliament's peace, order and good government power, would open the door to a broad attribution of power to Parliament in matters clearly within provincial jurisdiction.

C.A. judgment, *per* Brossard J.A., Case: vol. 3, p. 458; adopted by LeBel J.A., Case: vol. 3, pp. 372-373

46. Characterizing legislation for constitutional purposes based on the effects of the legislation requires examining the legislation's direct effects, not a purported, indirect effect. It is established constitutional law that the effectiveness of the direct effects of federal legislation need not be demonstrated in order find federal jurisdiction.

Starr v. Houlden, [1990] 1 S.C.R. 1366 at 1405 *per* Lamer J.

R. v. Morgentaler, *supra,* at 482-483, 485-488 *per* Sopinka J.

Switzman v. Elbling, [1957] S.C.R. 285 at 302-303 *per* Rand J.

Re Anti-Inflation Act, [1976] 2 S.C.R. 373 at 387-388, 425-426, *per* Laskin C.J.C.

Fowler v. R., *supra*, at 224, 226 *per* Martland J.

47. The TPCA's only direct effect or "legal effect" is on advertising, not on public health and no practical effect on public health was demonstrated. Therefore, an examination of both the statute's objectives and effects does not support its characterization as being in relation to public health.

48. It is not only permissible but essential to consider the material the legislature had before it when the statute was enacted. In the present case, that material confirms the Appellant's submission that the TPCA should not be characterized as public health legislation for the purposes of constitutional analysis. The history of the TPCA shows clearly that its drafters held no belief that it would advance public health. The Department of Health and Welfare had consistently maintained and believed that there was no evidence that tobacco advertising bans reduce consumption and the TPCA was enacted without the

government having come into possession of any scientific evidence demonstrating that an advertising ban would reduce consumption: the decision to introduce Bill C-51 was a politically motivated ploy to pre-empt a private member's bill. (para. 7-16, *supra*)

R. v. Morgentaler, *supra*, at 483-485 *per* Sopinka J.

Judgment at first instance, Case: vol. 2, pp. 253, 295, 301 referring to 339-361, especially at 354

C.A. judgment, *per* Brossard J.A., Case: vol. 3, pp. 518-519

Public health is not a federal sphere

49. In any event, matters concerning public health generally are within provincial jurisdiction. That is, even if the legislation is in relation to public health, it is the AGC who has the burden of showing federal jurisdiction for this particular statute under the peace, order and good government clause or otherwise.

Schneider v. R., [1982] 2 S.C.R. 112 at 137 *per* Dickson J.

R. v. Morgentaler, *supra*, at 490-491 *per* Sopinka J.

Canada (A.G.) v. Montreal (City of), [1978] 2 S.C.R. 770 at 793 *per* Beetz J.

The T.P.C.A. cannot be supported under the "national concern" branch of Parliament's peace, order and good government power

50. This Court has "set a high threshold" for finding jurisdiction under the national concern branch of p.o.g.g.

Ontario Hydro v. Ontario (Labour Relations Board), [1993] 3 S.C.R. 327 at 352 *per* Lamer C.J.

51. The reference in s. 3 of the TPCA to "a national public health problem of substantial and pressing concern" is a self-serving addition which cannot assist in the proper characterization of the legislation. Substance, not form, must govern constitutional characterization.

January 25, 1988 Statement by the Minister to a Parliamentary Committee: AG-142C, Quebec Court of Appeal Joint Record: vol. 123, p. 25350

R. v. Morgentaler, *supra*, at 496 *per* Sopinka J.

52. The TPCA satisfies none of the four conditions set forth by this Court to find federal jurisdiction under the national concern branch of p.o.g.g.: it does not relate to a matter that has become a "national concern", it does not possess the requisite "singleness, distinctiveness and indivisibility", it is irreconcilable with the fundamental division of powers in Canada and there is no "provincial inability" to deal effectively with its subject matter.

R. v. Crown Zellerbach Canada Ltd., *supra*, at 431-432 *per* Le Dain J.

53. Federal jurisdiction over diffuse topics such as "containment and reduction of inflation" and "the environment" cannot arise from the p.o.g.g. power. Likewise, simply invoking "public health" is not sufficient to ground p.o.g.g. jurisdiction. The TPCA must be examined with specificity. When so examined, it is readily apparent that the TPCA regulates a particular kind of marketing, which is clearly within provincial jurisdiction.

Reference Re Anti-Inflation Act, *supra*, at 419 *per* Beetz J. (inflation)

Friends of Oldman River Society v. Canada, [1992] 1 S.C.R. 3 at 63-64 *per* La Forest J. (the environment)

Schneider v. R., *supra*, at 142 *per* Estey J. (public health)

54. Federal p.o.g.g. jurisdiction extends only to matters "integral" to a matter of national concern. In this case there is not an integral but a disputed, unproven and, admittedly, at best an indirect connection between tobacco advertising and public health.

Ontario Hydro v. Ontario (Labour Relations Board), *supra*, at 352 *per* Lamer C.J. and at 380 *per* La Forest J.

55. The TPCA is legislation in relation to advertising. This does not transcend provincial jurisdiction. It cannot be said to have acquired national dimensions or to have become a matter of national concern. The Charter aside, each province may regulate the advertising and promotion of tobacco products, as the provinces do for alcohol, as British Columbia does for tobacco products or as Quebec does with advertising aimed at children.

Benson and Hedges (Canada) Limited v. British Columbia (A.G.), *supra*, at 44 *per* Hinkson J.

Irwin Toy Ltd. v. Quebec (A.G.), *supra*

Labatt Breweries of Canada limited v. Canada (A.G.), *supra*

Schneider v. R., *supra*

Quebec (A.G.) v. Kellogg's Company of Canada, *supra*

C.A., *per* Brossard J.A., Case: vol. 3, p. 479 (Assuming characterization of the TPCA as regulation of advertising, the matter cannot be claimed to extend beyond provincial jurisdiction.)

56. Even if the TPCA were legislation in direct relation to tobacco consumption, the evidence before the Court does not indicate that the problem of tobacco consumption has acquired the requisite national dimension transcending the power of each province to meet and solve in its own way. Indeed, the finding of fact that tobacco consumption has been declining for the past 20 years belies the argument that the matter has become one of national interest for purposes of constitutional characterization.

Judgment at first instance, Case: vol. 2, p. 292

Schneider v. R., *supra*, at 131 *per* Dickson J.

57. Nor is there any evidence that there was any practical need for federal legislative intervention rather than for intervention on a province by province basis. The provinces and territories displayed a willingness to cooperate in dealing with the advertising of tobacco products yet were never requested by the federal government to act in this respect.

Judgment at first instance, Case: vol. 2, p. 230

Testimony of Mr. Neil Collishaw: Quebec Court of Appeal Joint Record: vol. 54, pp. 10693-10694

58. The Court of Appeal relied on a "provincial inability" to stop the flow of newspaper, magazine and broadcast advertisements at provincial borders. This supposed inability is not supported by any evidence. It ignores important areas of provincial regulation immune to "overflow" advertising such as billboard advertising, in-store advertising or sponsorship activity. It assumes as regards other areas that publishers and

advertisers would deliberately violate provincial laws. In any event, it amounts to relying on a purported provincial inability to regulate effectively certain forms of tobacco advertising in order to justify federal jurisdiction over all forms of tobacco advertising.

C.A. judgment, *per* Brossard J.A., Case: vol. 3, pp. 484-486; adopted by LeBel J.A., Case: vol. 3, p. 395

59. The majority of the Court of Appeal goes so far as to suggest that a provincial inability to regulate international flows of tobacco advertising justifies federal jurisdiction, even though the TPCA expressly exempts from its ban all international flows of advertising.

C.A. judgment, *per* LeBel J.A., Case: vol. 3, p. 395

60. Indeed, the evidence showed that American magazines accounted for 65% of all periodicals sold in Canada. Those magazines still come into Canada today and they still contain advertisements for American tobacco products available for sale in Canada. There has been no broadcast advertising of tobacco products since 1972.

Judgment at first instance, Case: vol. 2, pp. 211, 294

61. That is, one of the two areas that might arguably have been the legitimate subject of federal legislation, namely advertising originating abroad, is untouched in law by the TPCA and the other, broadcast advertising, is untouched in fact.

62. Even leaving aside these obstacles to the Court of Appeal's finding of a "provincial inability", the finding is doubly tenuous. Any finding of "provincial inability" can repose only on the double assumption that a provincial measure such as the TPCA ban would have an intraprovincial effect and that this effect might be weakened by some interprovincial overflow of advertising from a non-banning province. Yet on the evidence, there is no link between advertising and consumption or between advertising and the awareness of health risks.

The Temperance Cases

63. It is respectfully submitted that the Court of Appeal erred in its strict adherence to the Privy Council's temperance cases, commencing with Russell v. The Queen (1882), 7 A.C. 829.

Russell v. The Queen (1882), 7 A.C. 829

C.A. judgment, *per* LeBel J.A., Case: vol. 3, pp. 379-381

C.A. judgment, *per* Brossard J.A., Case: vol. 3, pp. 481-483

64. First, the case at bar is factually distinct. The Canada Temperance Act directly addressed the consumption and sale of alcohol, while both the consumption and sale of tobacco products are left quite untouched by the TPCA.

65. In any event, strict adherence to the temperance cases would perpetuate a constitutional anachronism. Whatever their historical significance, the temperance cases do not withstand scrutiny under the national concern doctrine as set out in Crown Zellerbach and Ontario Hydro. Professor Hogg, with characteristic reserve, comments: "it is not easy to see the national concern in Russell". He suggests that Russell was simply wrongly decided.

P.W. Hogg, Constitutional Law of Canada, 3d ed. (Toronto: Carswell, 1992) at 17-16, 17-31, 17-32

Also see: A.S. Abel, "The Anti-Inflation Judgment: Right Answer to the Wrong Question", (1976) 26 U.T.L.J. 409 at 422-423 and D. Gibson, "Measuring National Dimensions", (1976) 7 Man. L.J. 15 at 33, 36

The TPCA cannot be supported under Parliament's criminal law power

66. The regulation of a particular matter is not criminal law just because it is accompanied by prohibitions with sanctions. Nor does the mere labelling of something as criminal entitle Parliament to assert legislative jurisdiction over it.

C.A. judgment, *per* Brossard J.A., Case: vol. 3, p. 468 and authorities cited

67. Because the TPCA does not directly remove or limit any purported threat to public health, it cannot be characterized as criminal law.

Benson and Hedges (Canada) Limited v. British Columbia (A.G.), *supra*, at 45-46 *per* Hinkson J.

Labatt Breweries of Canada Limited v. Canada (A.G.), *supra*, at 934-935 *per* Estey J.

68. Legislation is supportable under the criminal law power only if it serves a "public purpose commonly recognized as being criminal in nature" or involves conduct "having affinity with some traditional criminal law concern". Neither the conduct directly affected by the TPCA (advertising of tobacco products) nor the conduct purportedly indirectly affected by the TPCA (consumption of tobacco products) bears any affinity with a traditional criminal law concern.

R. v. Swain, [1991] 1 S.C.R. 933 at 998-999 *per* Lamer C.J.

Reference Re Section 5(a) of the Dairy Industry Act, [1949] S.C.R. at 49, 50 *per* Rand J., aff'd [1951] A.C. 1979 (P.C.) (the "Margarine Reference")

Devine v. Quebec (A.G.), [1988] 2 S.C.R. 790 at 810-811

C.A. judgment, *per* Brossard J.A., Case: vol. 3, p. 467; adopted by majority, Case: vol. 3, pp. 375-376

69. The TPCA prohibits all Canadian tobacco advertising, however truthful and however informative, and cannot therefore be categorized as prevention of deception.

70. The TPCA does not apply to tobacco advertising originating abroad. Also, certain administrative exceptions to the TPCA have been granted for Canadian publications containing advertising for imported tobacco products. These exceptions to the advertising ban confirm that the TPCA cannot be characterized as legislation concerned with conduct considered criminal.

Three Letters of Exemption by Mr. A.J. Liston, March 9, 1989: RJR-232, Case: vol. 7, p. 1388

B. THE CHARTER

71. It is respectfully submitted that the TPCA infringes on freedom of expression and that this infringement cannot be justified under section 1 of the Charter since

a) no rational connection has been demonstrated between its ban of advertising and the objectives set out for it,

b) it has not been demonstrated that other available measures, less intrusive than a total ban of Canadian advertising of tobacco products, would not be equally effective,

c) the particular ban chosen by the TPCA is arbitrary and unfair and

d) it has not been demonstrated that the ill effects of the TPCA's ban do not outweigh the positive effects, if any.

Respect for the individual and lifestyle choices

72. The "emphasis on individual conscience and individual judgment lies at the heart of our democratic political tradition" which requires the "ability of each citizen to make free and informed decisions".

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 at 336, 346 *per* Dickson C.J.

Switzman v. Elbling, *supra*, esp. at 306 *per* Rand J.

73. This extends to the citizen's economic choices, which can only be made freely in the context of free-flowing information relevant to those choices.

Rocket v. Royal College of Dental Surgeons, [1990] 2 S.C.R. 232 at 241-242 *per* McLachlin J.

Reference Re. Ss. 193 and 195.1 (1) (c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123 at 1206 *per* Wilson J. dissenting

74. Respect for the individual requires the State to avoid subordinating the individual's "choices to any one conception of the good life".

Rodriguez v. British Columbia (A. G.), [1993] 3 S.C.R. 519 at 554 *per* Lamer C.J., 588 *per* Sopinka J. and 618 *per* McLachlin J.

R. v. Morgentaler, [1988] 1 S.C.R. 30 at 166 *per* Wilson J. dissenting

Commercial advertising is expression protected by the Charter

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75. The advertising of products legally offered for sale is unquestionably expression protected by section 2 of the Charter. It conveys a meaning, is "an important aspect of individual self-fulfilment and personal autonomy", is important to recipients of the advertising in "fostering informed economic choices" and is not done in any form which falls outside the ambit of that protection.

Judgment at first instance, Case: vol. 2, p. 278; C.A. judgment, *per* LeBel J.A., Case: vol. 3, p. 316

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Ford v. Quebec (A.G.), [1988] 2 S.C.R. 712 at 767

Reference Re. Ss. 193 and 195.1 (1) (c) of the Criminal Code (Man.), *supra*, at 1186 *per* Lamer C.J.

Irwin Toy v. Quebec (A.G.), *supra*, at 976, 977, 978 *per* Dickson C.J., Lamer J. and Wilson J.

Rocket v. Royal College of Dental Surgeons, *supra*, at 241-245, 247 *per* McLachlin J.

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The burden is on the Attorney General to demonstrate justification under section 1

76. The Attorney General has the burden of demonstrating that the limits of the TPCA are justified in a free and democratic society; that is,

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a) that the objectives of the TPCA are of sufficient importance to warrant the overriding of a constitutionally protected freedom and are consistent with the principles integral to a free and democratic society,

b) that the TPCA was carefully designed to achieve the objective in question,

c) that the measures of the TPCA are not arbitrary, unfair or based on irrational considerations,

d) that the means chosen interfere as little as possible with freedom of expression, and

e) that the effects of those means must be proportional to the objective which has been identified as being of "sufficient importance".

R. v. Oakes, [1986] 1 S.C.R. 103 at 136-139 *per* Dickson C.J.

77. These criteria of proportionality are not rigid. They can be applied with flexibility to meet the particular circumstances of a particular case and the varying contexts in which the state seeks to demonstrate justification. Nonetheless, the Oakes test remains the precedent which governs the logic of justification under section 1 of the Charter. The trial judge instructed himself properly on this point.

R. v. Edwards Book and Art Ltd., [1986] 2 S.C.R. 713 at 768-769 *per* Dickson C.J.

Judgment at first instance, Case: vol. 2, pp. 257-259, 293-303

78. With respect, the Court of Appeal of Quebec, however, was incorrect in concluding that the effect of this Court's decisions in Butler, Keegstra and Dickason was that the Oakes test had been so modified that the AGC need only show that the measure lies within the "realm of possibilities".

C.A. judgment, *per* LeBel J.A., Case: vol. 3, p. 417; *per* Brossard J.A., Case: vol. 3, p. 551 (The Oakes test is satisfied "if, on a balance of probabilities, it is demonstrated that it is at least possible" that the statute's objective will be achieved.)

R. v. Butler, [1992] 1 S.C.R. 452

R. v. Keegstra, [1990] 3 S.C.R. 697

Dickason v. University of Alberta, [1992] 2 S.C.R. 1103

79. In Butler, Keegstra and Dickason, the alleged justifications of the impugned provisions were not repudiated by the record and by findings of fact as are those advanced by the AGC in the case of the TPCA.

80. With respect, the Court of Appeal was also incorrect in holding that for legislation of a socioeconomic character in general, and for the TPCA in particular, the AGC could discharge his burden of demonstrating the justification of infringements to Charter-guaranteed rights merely by showing "the existence of a body of opinion" that such legislation may be useful, without any inquiry as to whether such opinion is well-founded.

C.A. judgment, *per* LeBel J.A., Case: vol. 3, p. 417,426

81. If the Court of Appeal is right, there is no need for evidence in Charter cases, save for evidence as to the mere existence of "a body of opinion". The minority judgment of the Court of Appeal held that the evidence of the AGC concerning the effectiveness of the TPCA in reducing overall tobacco consumption did not even amount to "a probability of a possibility."

C.A. judgment, *per* LeBel J.A., Case: vol. 3, p. 426; *per* Brossard J.A., Case: vol. 3, p. 557

82. It is difficult to conceive of any legislation, adopted through the full legislative process, for which there exists no body of opinion supporting its alleged effectiveness or whose justification cannot be said to lie even within "the realm of possibilities".

83. It is respectfully submitted that it is precisely because of the need to demonstrate that an infringing measure is justified that this Court has so often emphasized the need for a proper evidentiary foundation in the determination of Charter issues.

Hy & Zel's Inc. v. Ontario (A.G.), [1993] 3 S.C.R. 675 at 693-694 *per* Major J.

MacKay v. Manitoba, [1989] 2 S.C.R. 357 at 361 *per* Cory J.

R. v. Edwards Books and Art Ltd., *supra*, at 762, 767 *per* Dickson C.J.

84. Any standard less than the balance of probabilities is inconsistent with the requirement set forth in section 1 of the Charter that the infringement be "demonstrably" justified and would effectively relieve the legislator of its burden of justification under section 1.

85. Where the legislation is drafted in the knowledge that the Attorney General will be unable to demonstrate the justification of the Charter infringement, even using the flexibility implicit in the balance of probability test, then the legislator, in fact, has chosen

to legislate notwithstanding the Charter. This is inconsistent with the requirements of section 1.

86. In summary, the AGC had the burden of demonstrating, at the minimum on the civil balance of probabilities, that the important objectives of the TPCA would be met by the measures chosen, that the TPCA's good effects would be sufficient to outweigh the deleterious effects of banning Canadian advertising of tobacco products, that there was no reasonable choice but to go as far as the TPCA does and that there is nothing arbitrary, unfair or irrational about the measures chosen.

87. Both Courts below have unanimously confirmed that the AGC failed to demonstrate on the balance of probabilities that the TPCA will have any effect consistent with the Act's declared objectives.

There is no rational connection

88. The Appellant does not contest the purposes set forth at section 3 of the TPCA, that of protecting the health of Canadians, of protecting young persons and others within the limits of the Charter, of enhancing awareness of the risks associated with tobacco use.

89. The Appellant contests the means chosen.

90. The means chosen are so sweeping and so ill-designed to achieve any part of the stated purpose that they have at best a tenuous connection to the objectives held out by section 3.

Judgment at first instance, Case: vol. 2, pp. 295, 298

91. The decision to go ahead with the TPCA was made in the face of repeated and long-standing advice from the government's own advisers that tobacco advertising bans introduced elsewhere had not materially affected tobacco consumption and that an advertising ban in Canada would be symbolic at best.

Judgment at first instance, Case: vol. 2, pp. 295-296; C.A. jugment, *per* Brossard J.A., Case: vol. 3, p. 519

November 7, 1986 Briefing for the Minister by Mr. Neil Collishaw: RJR-48, Case: vol. 6, p. 1150

92. Tobacco advertising is not designed to influence people to smoke nor is it able to do so; it is designed to persuade smokers to remain faithful to the advertised brand or to switch to that brand from some comparable competitive brand. It is aimed at targeted sub-groups of people who already smoke. This is standard market segmentation for consumer products.

Judgment at first instance, Case: vol. 2, pp. 288-291; C.A. judgment, *per* Brossard J.A., Case: vol. 3, pp. 555-557

AGC expert Richard W. Pollay's testimony: Case: vol. 57, pp. 10583-10584, 10604

AGC expert Joel B. Cohen's testimony: Case: vol. 61, pp. 11145-11154

93. The AGC relied heavily on the expert Jeffrey Harris and on the New Zealand Toxic Substances Board Report to establish the alleged rational connection between prohibiting tobacco advertising and reducing consumption, but both were explicitly rejected by the trial judge as being devoid of probative value. This finding was left undisturbed by the Court of Appeal despite strenuous efforts by the AGC to have it overturned.

Judgment at first instance, Case: vol. 2, pp. 296-298; C.A. judgment, *per* LeBel J.A., Case: vol. 3, p. 422, *per* Brossard J.A., pp. 514, 519-520, 557

94. Until he changed his opinion after the introduction of the TPCA, the resident government expert, Mr. Neil Collishaw, considered that the evidence indicated that the presence or absence of advertising has no demonstrable effect on consumption.

Judgment at first instance, Case: vol. 2, p. 295

C.A. judgment, *per* Brossard J.A., Case: vol. 3, p. 520

Briefings for the Minister, November and December 1986, RJR-48, RJR-48, Case: vol. 6, p. 1150 and vol. 7, p. 1194

Speeches prepared for government M.P.s, November 1986, ITL-27(41), Case: vol. 6, p.1107, esp. at p. 1112

Mr. Neil Collishaw's Testimony: Case: vol. 11, pp. 1962-1970

Response to Bill C-204, March 1987, ITL-27(55), Case: vol. 7, p. 1225 esp. at p. 1227, 1230

Response to Bill C-204, March 1987, ITL-27(56), Quebec Court of Appeal Joint Record, vol. 231, p. 47472, esp. p. 47476

Mr. Neil Collishaw's Testimony: Case: vol. 11, pp. 2021-2025, 2028-2030

95. Even if a rational link had been established between advertising and overall tobacco consumption, the exemption of foreign advertising is a complete answer (though not the only one) to the AGC's case on rational connection. The TPCA expressly excludes all advertising appearing in imported publications, thereby allowing "a substantial circulation of magazines ... that contain cigarette advertising" (the AGC's expert Richard W. Pollay's reference to unbanned foreign advertising). No evidence and no expert suggests even in a cursory way that the TPCA ban, incorporating the foreign advertising exemption, may have any effect on Canadian consumption of tobacco.

Judgment at first instance, Case: vol. 2, pp. 294-295

Richard W. Pollay's Testimony: Case: vol. 57, pp. 10535-10539

96. As for a rational connection between the TPCA and the objective of enhancing Canadians' awareness of risks associated with tobacco use, though there is evidence regarding general levels of awareness, there is no evidence that this awareness would be higher in the absence of all advertising or in the absence of Canadian advertising.

97. The fact that people continue to smoke does not mean that they are ill-informed or duped.

Health Behavior in School Children - A W.H.O. Cross-National Survey, 1986: RJR-102, Case: vol. 44, p. 8374, regarding the well-informed but increasingly smoking Finnish boys

AGC expert Fernand Turcotte's testimony: Case: vol. 69, p. 12730

98. In Keegstra and Butler, the evidentiary burden to demonstrate the rational connection between the objective of the legislation and the means adopted by Parliament for achieving those objectives was obviously lighter because the harm Parliament sought to control was the precise target of the legislation; the expression targeted was in itself harmful and objectionable because it causes "severe psychological trauma suffered by members" of victimized groups or because it is simply dehumanizing. Here, the harm

cannot be found in the message itself but in a behaviour which supposedly, but only supposedly, follows the message.

99. In Butler, furthermore, there is no restriction on any expression at all unless that expression is itself harmful. The harm of the expression is an element of the obscenity offence, and must be proven before there can be a conviction. Under the TPCA there is a "prior restraint" in that any expression, however anodyne, indeed however beneficial, is prohibited.

R. v. Hawkins, (1993) 15 O.R. (3d) 549 at 566 (C.A.) *per* Robins J.A.

100. Section 8 of the TPCA prohibits the use of any tobacco trademark (unless it be the Dunhill trademark) on other than tobacco products. There is no evidence that the appearance of tobacco-related trademarks on, for example, lighters or shirts or on other non-tobacco products interferes in any way with achieving any of the stated objectives of the TPCA.

Judgment at first instance, Case: vol. 2, p. 292

101. In summary, Oakes requires asking the question, what would be the consequence if the TPCA were struck down? There is no probability found by any judge so far that it would hamper at all the attaining of any of the objectives set forth in section 3 of the TPCA.

The measures are arbitrary and unfair

102. It is arbitrary and unfair to ban the advertising of Canadian tobacco products without any clear likelihood that it will do any good.

103. It is arbitrary and unfair to subject to prosecution anyone who affixes to a non-tobacco product a tobacco trademark unless it happens to be a Dunhill trademark.

The TPCA fails to meet the test of minimal impairment

104. The Appellant submits that a party seeking to uphold a prohibition of expression should persuade the Court that regulating the expression's content would not have attained the legislative objective.

Irwin Toy v. Quebec (A.G.), *supra*, at 998 *per* Dickson C.J., Lamer J. and Wilson J.

105. Prohibitions of expression which go further than necessary to accomplish a legislative objective, however laudable, should be struck down.

Edmonton Journal v. Alberta (A.G.), [1989] 2 S.C.R. 1326, particularly in contradistinction to Canadian Newspapers Co. v. Canada (A.G.), [1988] 2 S.C.R. 122

Ford v. Quebec (A.G.), *supra*, at 779-780

Peterborough (City of) v. Ramsden, [1993] 2 S.C.R. 1084 at 1107 *per* Iacobucci J.

Judgement at first instance, Case: vol. 2, pp. 300-301, 339-361

106. The TPCA is just the kind of "general ban on advertising" that this Court has referred to as being unacceptable.

Irwin Toy v. Quebec (A.G.), *supra*, at 991 *per* Dickson C.J., Lamer J. and Wilson J.

Rocket v. Royal College of Dental Surgeons, *supra*, at 251 *per* McLachlin J.

107. The TPCA clearly bans some expression entirely without in any way furthering the objectives of the TPCA. The aims of the TPCA do not reasonably require, and the record discloses no requirement, that Canadians be deprived, for example, of purely informational advertising or of simple reminders of package appearance or of advertising disclosing availability of different or of new brands.

Rocket v. College of Dental Surgeons, *supra*, at 251 *per* McLachlin J.

Judgment at first instance, Case: vol. 2, pp. 300-301; C.A. judgment, *per* Brossard J.A., Case: vol. 3, p. 555

108. The AGC had the burden of explaining to the Court why an absolute ban on commercial expression is necessary to achieve the TPCA's objectives and why available measures less intrusive than the TPCA would not be sufficient to the purpose.

Ford v. Quebec (A.G.), *supra*, at 759

Rocket v. College of Dental Surgeons, *supra*, at 251 *per* McLachlin J.

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R. Sharpe, "Commercial Expression and the Charter", (1987) 37 U. of T.L.J. 229 and 257, an article termed "very helpful" in Ford v. Quebec (A.G.), *supra* at 759

109. However, the AGC avoided the duty imposed by the Oakes' test of showing to the Court what alternative measures were available to the government and why they were rejected in favour of the total ban of Canadian advertising of a legal product.

Judgment at first instance, Case: vol. 2, pp. 300-301, C.A. judgment, *per* Brossard
20 J.A., Case: vol. 3, p. 568

110. Nothing was done to answer the question whether it was necessary to ban Canadian tobacco advertising rather than to limit it or to control it or to oversee it or even to leave it entirely alone.

Judgment at first instance, Case: vol. 2, p. 301

111. The government had before it a variety of less intrusive alternatives and rejected
30 them all, though never finding that any would be less effective than a total ban of Canadian advertising: indeed, the government consciously chose the avenue of greatest impairment.

Judgment at first instance, Case: vol. 2, pp. 300-301, 339-361

C.A. judgment, *per* Brossard J.A., vol. 3, pp. 562-563

112. For example, the government at various times considered or had before it the following alternatives to a full advertising ban, all of which would have had less of an
40 impact on protected rights, and yet chose to impose a complete ban on advertising without any evidence, or without even seeking evidence, that the alternatives would have been less effective:

A ban short of a total ban of Canadian advertising, such as the prohibition of all advertising save those types explicitly permitted

Memorandum to the Departmental Tobacco Work Group by Allistair Thomson, April 7, 1986: ITL-27(22), Case: vol. 6, p. 1014

Letter from the Minister to the President of the Canadian Tobacco Manufacturers' Council, June 19, 1986: ITL-27(28), Case: vol. 6, p. 1029

Canadian Tobacco Manufacturers' Council Brief on Cigarette and Cigarette Product Advertising and Promotion Code, July 8, 1986: ITL-27(31), Case: vol. 6, p. 1038

A ban or regulation only of lifestyle advertising (or even of all advertising depicting people)

Judgement at first instance, Case: vol. 2, p. 300

C.A. judgment, *per* Brossard J.A., Case: vol. 3, pp. 558, 565

Letter from the Minister to Norman McDonald, October 9, 1986: ITL-58, Case: vol. 6, p. 1087, referred to by Albert J. Liston in his testimony at Case: vol. 18, pp. 3158-3164

Memorandum Concerning a Meeting to Review Tobacco Policy Options, March 20, 1985: ITL-27(19), Case: vol. 5, p. 968

Agenda for Meetings Between the Minister and the Canadian Tobacco Manufacturers' Council, April, 1986:ITL-27(24) TAB 44, Quebec Court of Appeal Joint Record: vol. 230, pp. 47272-47282

Canadian Tobacco Manufacturers' Council Brief on Cigarette and Cigarette Product Advertising and Promotion Code, July 8, 1986: ITL-27(31), Case: vol. 6, p. 1038

Memorandum to the Departmental Tobacco Work Group by Allistair Thomson, April 7, 1986: ITL-27(22), Case: vol. 6, p. 1014

Non-legislative Options, May, 1986: ITL-27(25) TAB 45, Quebec Court of Appeal Joint Record: vol. 230, pp. 47283-47285

Testimony of Mr. Neil Collishaw: Case: vol. 10, p. 1842

Measures such as those which already exist in Quebec's Consumer Protection Act (R.S.Q., C. 40.1), to prohibit advertising aimed at children or advertising in media aimed at children

Memorandum to the Departmental Tobacco Work Group by Allistair Thomson, April 7, 1986: ITL-27(22), Case, vol. 6, p. 1014

Non-legislative Options, May, 1986: ITL-27(25) TAB 45, Quebec Court of Appeal Joint Record: vol. 230, pp. 47283-47285

Memorandum Concerning a Meeting to Review Tobacco Policy Options, March 20, 1985: ITL-27(19), Case: vol. 5, p. 968

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Canadian Tobacco Manufacturers' Council Brief on Cigarette and Cigarette Product Advertising and Promotion Code, July 8, 1986: ITL-27(31), Case: vol. 6, p. 1038

Testimony of Mr. Neil Collishaw: Case: vol. 10, p. 1826

Prohibiting tobacco-related sponsorship of events of particular interest to youngsters

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Measures such as those which already exist with regard to broadcast advertising of alcoholic beverages, designed to allow only that brand-preference advertising which satisfies a Board that it will not stimulate overall consumption and that it is directed at people over the age of eighteen.

Non-legislative Options, May, 1986: ITL-27(25) TAB 45, Quebec Court of Appeal Joint Record: vol. 230, pp. 47283-47285

30 Labelling requirements, which Health and Welfare Canada believed to be preferable to an advertising ban

Albert J. Liston's testimony, Case: vol. 18, pp. 3145, 3155-3182

See generally, Judgment at first instance, Case: vol. 2, pp. 300-301, 339-361 (Appellant's annex to its written argument, adopted by the trial judge in his reasons for judgment)

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113. The government never satisfied itself that any of these alternative policies or any combination of them would be any less effective than an advertising ban, or that the much vaunted "comprehensive program" would be any the less effective without the total ban of Canadian advertising.

Judgment at first instance, Case: vol. 2, pp. 301, 339-361

Mr. Neil Collishaw's Testimony: Case: vol. 9, pp. 1702, 1719-1720, 1721-1722

Mr. Neil Collishaw's Testimony: Case: vol. 10, pp. 1812-1813, 1820-1821, 1826-1827, 1836-1840, 1842-1843, 1845-1846, 1852, 1854, 1893-1895, 1897-1898

Mr. Neil Collishaw's Testimony: Case: vol. 11, pp. 1941-1942, 1949, 2015, 2023-2025, 2041-2042, 2045-2046, 2055-2056, 2061-2062, 2066, 2068-2069, 2071-2072

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114. Health and Welfare repeatedly proposed to the Minister a "recommended option", which was less intrusive than a complete ban. This "recommended option" was never communicated to the Court but was systematically deleted from any documents produced by the AGC.

Judgment at first instance, Case: vol. 2, pp. 300-301; C.A. judgment, *per* Brossard J.A., Case: vol. 3, p. 568

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115. In a similar context, this Court has held that "the fact that (the government) did not even consider anything less than a blanket prohibition is ... revealing." In the present case, the government chose to enact the TPCA without even considering the relative effectiveness of the many alternatives it had had before it for many years.

Black v. Law Society of Alberta, [1989] 1 S.C.R. 591 at 633 *per* La Forest J.

116. In short, the TPCA maximizes the infringement on Canadian freedom of
30 expression while incorporating exemptions which must, even if the AGC's logic is correct, undermine whatever effectiveness the TPCA can be alleged to have.

117. Moreover, while the legislature is to be afforded a margin of appreciation in assessing social science evidence and matching means with ends, the notion that the entire adult population of the country constitutes a vulnerable group in need of protection is unacceptable.

40 Judgment at first instance, Case: vol. 2, pp. 283, 291

Irwin Toy v. Quebec (A.G.), *supra*, pp. 987, 990, 993, 998-999 *per* Dickson C.J., Lamer J. and Wilson J.

Butler v. State of Michigan, 352 US 380 (1956) at 383, regarding obscenity legislation found by the Supreme Court of Michigan "to reduce the adult population of Michigan to reading only what is fit for children".

Proportionality: the TPCA's deleterious effects must be taken into account

118. As a result of the TPCA, millions of customers lose an important tool by which they learn of Canadian manufacturers' production of a product in the variety, in the strength, with the taste, in the format and with the packaging to suit the customer's preferences.

119. Canadian manufacturers cannot advertise a new product or a new format or a new variety or a lower strength of cigarette. This must surely reduce the incentive to develop any such product. (For years, the Canadian government advised consumers to switch to lower tar cigarettes and encouraged manufacturers to develop lower tar cigarettes and to advertise them so as to move consumers "down tar"; the AGC's experts still agree that it would be better for a smoker who does not quit to smoke a lighter cigarette.)

C.A. judgment, *per* Brossard J.A., Case: vol. 3, p. 555-556

Sir Richard Doll, AGC expert, Case: vol. 66, p. 12099

120. Canadian manufacturers cannot correct misimpressions arising in consumers' minds about the products they buy, whether those misimpressions arise from rumours or from simple aging of package get-up.

Imperial's R.D. Brown: Case: vol. 35, p. 6684

121. Canadian manufacturers cannot inform their customers that the cigarettes they buy have or have not changed since the government changed the method of calculating declared tar and nicotine levels. The government apparently consciously prefers to leave these people uninformed on this question.

Judgment at first instance, Case: vol. 2, p. 278

Albert J. Liston's testimony: Case: vol. 18, pp. 3137-3143

122. Canadian manufacturers cannot use advertising to combat the advertising still reaching Canadian smokers from foreign sources and which buttress the images of non-Canadian cigarettes. The Canadian manufacturers will probably lose market share.

AGC expert Richard W. Pollay's testimony: Case: vol. 57, p. 10532

Letter from the Minister to the Surgeon General, May 8, 1987: RJR-63, Case: vol. 7, p. 1316

Imperial's Roy Donald Brown's testimony: Case: vol. 35, pp. 6686-6689

123. The TPCA is at once gratuitously overbroad in engulfing expression which cannot be an obstacle to the stated objective and unprincipled in allowing patently unfair exceptions which clearly compromise any effect its proponents hope for.

The TPCA is incompatible with a free and democratic society

124. Advertising bans of products which Canadians have a right to buy if they want to, even of products deemed harmful or dangerous, directly infringe on the value of individual autonomy, a fundamental value inherent in the rights and freedoms enshrined in the Charter, particularly if the purpose of the ban is not only to control the individual's awareness of a permissible option but also to control what the individual believes about that option.

M.L. Miller, "The First Amendment and Legislative Bans of Liquor and Cigarette Advertisements", (1985) Columbia L.R. 632, 651-653

Irwin Toy Ltd. v. Quebec (A.G.), *supra*, at 975 *per* Dickson C.J., Lamer J. and Wilson J.

125. The TPCA is fundamentally censorship designed to expose Canadians of all ages and of whatever maturity only to State-approved messages, without regard to any competing messages' truthfulness or usefulness or to the desire of the recipient to receive it.

Judgment at first instance, Case: vol. 2, p. 300

126. The TPCA has nothing to do with anyone's right to manufacture, buy, sell, possess or consume tobacco products, or with what can go into them, but everything to do with what Canadians of all ages have a right to say, write, hear, read and see about them.

127. This type of legislation is inimical to the very concept of a free and democratic society.

PART IV

THE ORDER SOUGHT

128. The Appellant seeks an order declaring:

i) that sections 4, 5, 6 and 8 of the Tobacco Products Control Act are *ultra vires* the Parliament of Canada;

ii) that sections 4, 5, 6 and 8 of the Tobacco Products Control Act are invalid in that they are an unjustified infringement of the rights guaranteed by section 2(b) of the Canadian Charter of Rights and Freedoms.

129. The Appellant also seeks an order condemning the Attorney General of Canada to pay the costs of these proceedings in all three Courts.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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PART V

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"NOTICE TO THE RESPONDENT: Pursuant to subsection 44(1) of the *Rules of the Supreme Court of Canada*, this appeal will be inscribed by the Registrar for hearing after the Respondent's factum has been filed or on the expiration of the time period set out in paragraph 38(3)(*b*) of the said Rules, as the case may be."