23460

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

Court No: 23460

BETWEEN:

RJR-MACDONALD INC.

APPELLANT

AND:

THE ATTORNEY GENERAL OF CANADA

RESPONDENT

AND:

THE ATTORNEY GENERAL OF ONTARIO,

THE ATTORNEY GENERAL OF BRITISH COLUMBIA,

THE ATTORNEY GENERAL OF SASKATCHEWAN,

CANADIAN CANCER SOCIETY et al.

INTERVENERS

A077

FACTUM OF THE APPELLANT RJR-MACDONALD INC.

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PART I
THE FACTS

1. This is an appeal, by leave of this Court, from a judgment of the Quebec Court of Appeal (Rothman, LeBel and Brossard J.J.A.) dated January 15, 1993 allowing an appeal (Brossard J.A. dissenting in part) from a judgment of the Superior Court (Chabot J.) dated July 26, 1991 granting the Appellant's Motion for Declaratory Judgment and declaring that the Tobacco Products Control Act (S.C. 1988, c. 20) (the TPCA) is *ultra vires* of the Parliament of Canada and inoperative as being inconsistent with section 2(b) of the Canadian Charter of Rights and Freedoms (the *Charter*).

Judgment and Reasons of the Court of Appeal, Case, Vol. 3, p. 362

Judgment of the Superior Court, Case, Vol. 2, p. 181

2. The TPCA came into force on January 1, 1989. Its purpose, as stated in section 3, was "... to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

> (a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
>
> (b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
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> (c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products."

Tobacco Products Control Act, S.C. 1988 c.20, Appendix 1, tab 1

3. With the exception of a prohibition in section 7 against distribution of free samples, the TPCA does not deal directly with the sale, distribution or use of tobacco products. In its actual legal effect it deals essentially with advertising and promotion of tobacco products and health warning messages on tobacco packages.

4. Section 4 bans all forms of advertising by Canadian manufacturers of tobacco products offered for sale in Canada. Tobacco advertising by non-Canadian manufacturers in foreign publications or radio and television broadcasts is exempted by section 4(3). Pursuant to section 18, infringements may be prosecuted by indictment and carry a fine not exceeding $100,000.00 or imprisonment for up to 1 year or both.

5. Sponsorship of cultural or sporting events is permitted by section 6 but brand names cannot be used for such purposes except where such use is required by a contract made before January 25, 1988. Pursuant to section 8, tobacco trade marks may not be used on non-tobacco products. Section 8(3) provides an exemption which applies only to the Dunhill trade mark.

6. Section 9 provides for mandatory health messages to be carried on all tobacco packages in accordance with Regulations. Section 17(f) authorises the Governor in Council to adopt Regulations prescribing the content, position, configuration, size and prominence of such messages. The Regulations enacted in virtue of this enabling power require unattributed health messages on all packages.

Tobacco Products Control Regulations (SOR/89-21) Appendix 1, tab 2.
Tobacco Products Control Regulations (SOR/93-389) Appendix 1, tab 3.

7. The Canadian tobacco manufacturers made an agreement with the Government of Canada in 1972 under which they agreed to carry a health warning

from Health and Welfare on all packages sold in Canada. They did so from 1972 until the new messages required under the TPCA were introduced in 1989. The *Charter* challenge by the Appellant to the messages imposed under the TPCA related only to the fact that they are no longer attributed to Health and Welfare but are made to appear as statements made by the Appellant itself.

8. The Appellant contested the constitutional validity of the TPCA in the Quebec Superior Court by a Motion for Declaratory Judgment dated September 1, 1988 on the grounds that it was ultra vires of the Parliament of Canada and invalid as being inconsistent with section 2(b) of the *Charter*. A similar motion, but limited to specific sections of the Act, was made by Imperial Tobacco Limited (ITL). In the Superior Court, the two cases were heard together and decided on common evidence. The reasons of the Court of Appeal were common in the two appeals to that Court and ITL has now also appealed to this Court.

Motion for Declaratory Judgment, Case, Vol. I, p. 2

9. It was conceded by the Appellant in its pleadings that the objective of reducing tobacco use was of sufficient importance to warrant a restriction of the freedom of expression. The case for the Appellant was that the means adopted to attain that objective could not be justified under section 1.

Motion for Declaratory Judgment, paras. 26 to 32, Case, Vol. 1, pp. 8-9

10. The Appellant's motion and that of ITL were contested in writing and the procedural rules relating to a trial of issues in the Quebec Superior Court were followed. There was extensive discovery and production of documents and pre-trial memoranda were delivered by all parties prior to trial. Documents delivered by the Appellant included virtually all advertising copy and research for a period of more

than 10 years prior to enactment of the TPCA.

Respondent's written contestation, Case, Vol. I, p. 10

Appellant's Memorandum, Case, Vol. I, p. 99

Respondent's Memorandum, Case, Vol. I, p. 100

11. Before the trial began the Respondent delivered a certificate pursuant to section 39 of the Canada Evidence Act, later replaced by a second certificate, certifying that more than 500 documents were being withheld or deleted in part as being confidences of the Privy Council.

Certificate dated July 18, 1989, Case, Vol. 19, p. 3206

Certificate dated November 29, 1989, Case, Vol. 19, p. 3282

12. With respect to division of powers it was the position of the Respondent in the courts below that the TPCA was health legislation designed to reduce the incidence of smoking and valid as relating to a matter of national concern under the peace, order and good government power. It was also contended that the TPCA was valid as being criminal law.

13. With respect to the *Charter* the Respondent denied at trial but conceded in the Court of Appeal that tobacco advertising falls within section 2(b) of the *Charter*. With respect section 1 of the *Charter* the Respondent stated in his pre-trial Memorandum that evidence would be introduced to demonstrate, inter alia:

(i) That tobacco advertising is associated with growth in overall consumption of tobacco products.

(ii) That Parliament had no option other than to enact the impugned measures and that they constituted a minimal impairment of the protected right.

(iii) That measures including an ad-ban were the only effective means of achieving an accelerated decline in tobacco consumption.

(iv) That no form of partial ban could achieve satisfactory results.

Respondent's Memorandum, paras 61, 65, 69, 71, Case, Vol. I, p. 100.

The Evidence

(i) Appellant's evidence

14. The Appellant introduced evidence on the nature and purpose of its advertising through Mr. Peter Hoult who was its Chief Executive Officer at the time the TPCA was enacted. Mr. Hoult said, inter alia;

(i) that advertising is the Appellant's principal competitive tool in a highly competitive and shrinking market; (pp. 6107 - 6109, 6141, 6181)

(ii) that the Appellant's advertising is the product of extensive research, all of which is carried out exclusively amongst adult smokers; (pp. 6164, 6180)

(iii) that all advertising campaigns are targeted to a specific segment of the adult smoking market defined in terms of age or other demographic characteristics. The youngest age group targeted is 18-24; (pp. 6172. 6178, 6260)

(iv) that the purpose of such advertising is to retain the brand loyalty of those already smoking the Appellant's brands and to encourage smokers of competitive brands to switch; (pp. 6126, 6170, 6180-6181, 6243)

(v) that brand advertising does not increase the overall market for cigarettes; (pp. 6181-6183)

Evidence of Peter Hoult, Case, Vol. 32, p. 6107 et seq. (specific pages noted above).

15. In conjunction with ITL the Appellant also introduced expert evidence through Dr. Leonard Reid on the influence of mass media in general and through Mr. Michael Waterson on the effects of advertising in general. Mr. Waterson introduced a study he had carried out which indicated that the rates of decline in tobacco consumption in countries in which tobacco advertising was banned or restricted were generally not as great as in those in which advertising is permitted.

Evidence of Dr. Leonard Reid, Case, Vol. 45, p. 8397

Evidence of Michael Waterson, Case, Vol. 47, p. 8778

Waterson study, RJR 26A, Case, Vol. 39, p. 7314

16. The great bulk of the documentary evidence from the Government of Canada was introduced through Mr. Neil Collishaw who was described as being Health and Welfare's "resident expert" on the tobacco industry and on the effect of advertising bans in other countries. He produced a substantial body of studies, memoranda and letters indicating that the Government of Canada had itself concluded that an advertising ban was unlikely to affect overall consumption and would be purely symbolic. Some of these studies were his own and one was very similar in methodology to the Waterson study.

Government documents re advertising ban, Case, Vol. 4, p. 574

Collishaw study, RJR 33, Case, Vol. 6, p. 979

(ii) Respondent's evidence

17. Virtually all of the direct evidence introduced by the Respondent was given through experts. In particular three university professors. Drs. Cohen, Laroche and Pollay testified on the effect of advertising in general and Dr. Michael Chandler testified with respect to the vulnerability of young people.

Evidence of Dr. Cohen, Case, Vol. 61, p. 11096

Evidence of Dr. Laroche, Case, Vol. 58, p. 10655

Evidence of Dr. Pollay, Case, Vol. 56, p. 10311

Evidence of Dr. Chandler, Case, Vol. 59, p. 10803

18. Empirical evidence on the efficacy of ad-bans was introduced through Dr. Jeffrey Harris and by the production of the report of the Toxic Substances Board of New Zealand (the "TSB Report") which had been published shortly before the trial began. The TSB Report analyzed consumption trends in 22 OECD countries and concluded that the greater the degree of advertising restriction the greater the decline in overall consumption. Dr. Cohen and Dr. Harris both adopted this conclusion as part of their own evidence. Dr. Harris produced statistical studies based on data from the TSB Report and further data provided by one of its authors which he had carried out and which, he said, confirmed the findings of the TSB Report.

Evidence of Dr. Harris, Case, Vol. 50, p. 9316

TSB Report (A.G. 200), Case, Vol. 40, p. 7464

19. In addition the Respondent filed an immense body of extrinsic evidence including in particular numerous reports and studies of the World Health Organization (W.H.O.) and all of the reports of the U.S. Surgeon General from 1964 to 1989. Only one of the W.H.O. studies specifically examined the reasons why young people begin to smoke and compared smoking incidence in two countries where advertising was permitted with that in two other countries in which it was banned. This study was not filed by the Respondent. It was produced by the Appellant as Ex. RJR-102.

W.H.O. Cross National Survey, RJR 102, Case, Vol. 44, p. 8374

20. Substantially more than half of the witnesses presented by the Attorney General dealt with medical issues. While the Appellant cross-examined the medical witnesses it was and is its submission that this evidence would be relevant only if the objective of the TPCA had been challenged.

The judgment at trial

21. The issues as defined in the pleadings and the pre-trial memoranda were tried before Chabot J. over a period of 71 sitting days. With respect to the main issues arising under the *Charter* the trial judge found:

> (i) that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation restricting freedom of expression. (p.257)
>
> (ii) that tobacco use in Canada has been in constant decline in all age groups in Canada for over twenty years notwithstanding the presence of advertising. (p. 251)

(iii) that the presence of advertising did not impede the average consumer from making his or her own decision on whether to smoke or not smoke. (p. 291)

(iv) that the empirical evidence submitted by the Respondent in support of the contention that advertising bans decrease consumption was based on unreliable data and was without probative value. (p. 297)

(v) that even accepted at face value the Respondent's theoretical evidence in support of the proposition that advertising increases overall consumption constituted mere speculation and certainly did not rise to the level of probability. (p. 298)

(vi) that advertising, if it is to have any hope of success, must be directed at specific target groups. (p. 291)

(vii) that the TPCA is not directed only at advertising targeted to young people and that in any event it is highly debatable that young people constitute a vulnerable group. (p. 291)

(viii) that on the evidence, the Respondent had not satisfied the Court that an advertising ban restricted freedom of expression as little as possible. (p. 302)

Reasons of Chabot J., Case, Vol. 2, p. 181 (specific pages noted above)

22. With respect to the division of powers Chabot J. characterized the TPCA as a law regulating the advertising and promotion of a particular product, a matter which he found to be within Provincial legislative competence. He rejected the submission that the TPCA could be characterized as being criminal law or legislation for the peace, order and good government of Canada.

Reasons of Chabot J., Case, Vol. 2, p. 231

The judgment in appeal

23. On appeal to the Quebec Court of Appeal the judgment at trial was reversed. That Court rejected the Respondent's submission that the TPCA was valid as criminal law but found unanimously that it was legislation relating to a particular aspect of public health and that it was valid under the national concern aspect of peace, order and good government.

Reasons of Brossard J.A., Case, Vol 3, p. 369 at 372 to 395
Reasons of Lebel J.A., Case, Vol 3, p. 434 at 484 to 573

24. With respect to the *Charter* the Court of Appeal agreed that the TPCA infringed freedom of expression but found, Brossard J.A. dissenting in part, that it was justified under section 1. Brossard J.A. agreed with the majority with respect to unattributed package warnings but found that the ban on advertising was not justified under section 1.

Reasons of Lebel J.A., Case, Vol 3, p. 369 at 396 to 433
Reasons of Brossard J.A., Case, Vol 3, p. 434 at 485 to 573

25. The Court of Appeal did not interfere with Chabot J.'s findings of fact. The majority found however that he had erred in assessing those facts on the basis of the tests set out by this Court in Oakes. They concluded that those tests were substantially attenuated if not overturned by later decisions of this Court, particularly in Butler and Keegstra.

Reasons of LeBel J.A., Case, Vol. 3, p. 421

26. With respect to rational connection Brossard J.A. found that the test is satisfied if;

> " ... suivant la balance de probabilités, il est démontré qu'il est au moins possible que le but recherché sera atteint par le biais du moyen choisi."
>
> Reasons of Brossard J.A., Case, Vol. 3, p. 551 (his emphasis)

27. The majority rejected this finding. In their view the test was as follows;

> "Il faut plutôt déterminer si, sur la base de l'information disponible, le choix adopté fait partie des mesures qui, possiblement, pour un législateur agissant raisonnablement, permettront d'atteindre l'objectif recherché."
>
> Reasons of LeBel J.A., Case, Vol. 3, p. 418

28. The findings of the trial judge on the efficacy of an advertising ban were thus found to be irrelevant.

> "Sur ce point, l'on reconnaîtra volontiers qu'il n'existe pas, dans le dossier, de preuve démontrant que, suivant le critère de la preuve civile de la balance, l'interdiction de ces formes de publicité réussirait à atteindre cet objectif. Il en va tout autrement de conclure qu'il n'existe pas de telle possibilité et que toute base raisonnable fait défaut pour le choix législatif arrêté par le Parlement fédéral."
>
> Reasons of LeBel J.A., Case, Vol. 3, p. 425

29. With respect to the test of minimal impairment the majority found;

> "Assez curieusement, d'ailleurs, sur ce point, pour s'attaquer à l'utilité des moyens retenus, les intimées plaident en substance que le parlement ne serait pas allé

> assez loin. Les moyens employés apparaissent plutôt simples et conformes au critère de l'atteinte minimale. Ils n'interdiraient pas la consommation. Ils ne permettraient pas de contrôler la publicité étrangère. Ce type d'argument confirmerait plutôt le caractère approprié et raisonnable des mesures adoptées à l'intérieur du critère de l'atteinte minimale."
>
> Reasons of LeBel J.A., Case, Vol. 3, p. 432

30. In assessing the nature and value of the form of expression in issue the majority said

> "La législation concerne cependant une forme de discours commercial qui recherche uniquement la promotion de l'intérêt des intimés à commercialiser, distribuer et vendre un produit reconnu comme nocif. Au niveau de la liberté d'expression, il ne se retrouve absolument rien d'autre."
>
> Reasons of LeBel J.A., Case, Vol. 3, p. 431

PART II
POINTS IN ISSUE

31. The points in issue with respect to the division of powers are the following:

(i) Did the Court of Appeal err in its characterization of the TPCA?

(ii) Did the Court of Appeal err in holding that the TPCA meets the requirements of the national concern branch of the Parliament of Canada's authority to legislate for the peace, order and good government of Canada?

(iii) Did the Court of Appeal err in holding that the question whether the operative sections of the Act would advance its stated purpose was irrelevant to the issue of vires?

32. The points in issue with respect to the *Charter* are the following:

(i) Did the majority below err in finding that the rational connection test is satisfied if it can be said merely that there was information available on which a legislator acting reasonably could have concluded that it was possible that the impugned legislation would achieve its objective?

(ii) Did the majority below err in supporting their conclusion that the test of rational connection was met because there was a body of opinion in favour of an advertising ban and because that ban constituted a social experiment?

(iii) Did the majority below err in holding that the TPCA satisfied the test of minimal impairment because it did not ban smoking, because it did not ban foreign advertising and because some information remains available on tobacco packages?

(iv) Did the majority below err in their appreciation of the nature and value of the form of expression in issue?

(v) Did the Court of Appeal err in finding that unattributed warning messages are justified?

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33. It is the Appellants' submission that this is an appeal in which the *Charter* issues should be decided whatever may be the Court's finding on the division of powers.

34. There are strong indications that if this appeal succeeds on division of powers one or more provinces would substantially re-enact the TPCA. It is in the public interest that the *Charter* implications of such a step be determined by this Court in order to minimize the prospect of further lengthy litigation.

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35. Moreover, the judgment of the majority below is founded on the proposition that this Court has departed from the standards of justification delineated in The Queen v. Oakes. That decision is frequently relied upon by other courts in Canada. The judgment in appeal creates uncertainty on this important issue which will persist until the matter is resolved by this Court.

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PART III

ARGUMENT

A. Division of Powers

(I) Peace, order and good government

36. The first step in resolving an issue of division of powers is to identify the "matter" of the law in question. A law's "matter" is "its leading feature or true character, often described as its pith and substance." Both the purpose and the effect of a law are relevant in determining its true character.

The Queen v. Morgentaler [1993] 3 S.C.R. 463 at 481.

37. Examined in the light of its actual legal effect, the TPCA is a law regulating the advertising and promotion of a single class of products. If such is its "matter" as the trial judge found, it is ultra vires of the Parliament of Canada.

A.G. Quebec v. Kellogg's Co. of Canada [1978] 2 S.C.R. 211.

A.G. Quebec v. Irwin Toy [1989] 1 S.C.R. 922.

38. Against this section 3 asserts a purpose related to public health. Public health however is itself a class of subject primarily within provincial jurisdiction. Conscious perhaps of this difficulty, the drafters of section 3 included an assertion that the TPCA constitutes a "legislative response to a national public health problem of substantial and pressing concern" to support federal jurisdiction under the national concern branch of the peace order and good government power. (POGG)

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

39. It is trite law that jurisdiction cannot be acquired by such an exercise in draftsmanship. Jurisdiction under the national concern branch of POGG could arise here only if it is shown that the TPCA in its operational effect deals with some matter, originally local or private, which has become one of national concern and which cannot be dealt with by the provinces.

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Re Anti-Inflation Act [1976] 2 S.C.R. 373 at 399.

40. Public health in relation to the use of tobacco is not a "matter" which can qualify under the national concern branch of POGG. The Court of Appeal erred in finding that the TPCA exhibits the requisite singleness and specificity for inclusion within that power. A power to ban advertising and promotion, but not the sale or consumption, of any product considered dangerous has a scale of impact on provincial jurisdiction which is not reconcilable with the fundamental distribution of legislative power under the Constitution.

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Re Anti-Inflation Act, supra, at 458.

R. v. Wetmore, [1983] 2 S.C.R. 284, at 294.

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

41. The Court of Appeal likewise erred in its application of the "provincial inability" test. That test depends inter alia upon a finding that a failure by one province to act may have "grave consequences" for residents of other provinces.

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Labatt Breweries of Canada v. A.G. Canada, [1980] 1 S.C.R. 914, at 945.

R. v. Wetmore, supra, at 296.

R. v. Crown Zellerbach Canada Ltd., supra at 431.

42. Brossard J.A. said that his view on this subject might have been different if other provinces had followed the example of British Columbia and had banned local advertising of tobacco products. Federal jurisdiction under POGG does not arise simply because one or more provinces may choose to deal with a matter within their jurisdiction in a manner which does not find favour with the Federal government or that of another province.

Reasons of Brossard J.A., Case, Vol. 3, p. 484

43. Moreover a decision by one province to permit billboards, point of sale advertising or sponsorships of local events could not have any effect in other provinces much less give rise to "grave consequences".

44. The Court of Appeal concluded that the absence of evidence showing a relationship between smoking and advertising was not relevant in the context of division of powers. There is apparent support for this proposition in the reasons of Laskin C.J. in the Anti-Inflation reference. However, the impugned statute was supported in that case as resting on the emergency aspect of POGG. This case concerns permanent legislation and asserts an exclusive federal jurisdiction similar to that over aeronautics or the pollution of marine waters.

Reasons of Brossard J.A., Tab 9, p. 24.
Re Anti-Inflation Act, supra, per Laskin C.J. at 424 - 425.

45. Where a law in its pith and substance relates to a matter within jurisdiction its efficacy is normally irrelevant. If, however, in the absence of an emergency the Parliament of Canada may invoke POGG to invade spheres of jurisdiction which are clearly provincial to attain a purpose self-defined as being of national concern

without any showing that the means chosen will attain that purpose, it is difficult to see what limits can be placed on that power.

46. On this basis a national health concern could equally justify legislation dealing with workplace and occupational standards, the sale and distribution of alcoholic beverages or highway traffic and a purpose defined in terms of international competitiveness could justify school curriculum regulation. The national concern branch of POGG was never intended to have such an effect, much less so in the absence of any demonstrated connection between the area of provincial jurisdiction invaded and the "matter" deemed to be of national concern.

47. The Court of Appeal also based its conclusion on what Brossard J.A. saw as the practical difficulties which would arise should one or more provinces ban advertising in national or international media. Provincial legislation in all fields is subject to the constraint of territoriality but this cannot be a sufficient reason to apply the provincial inability test. That test would be emptied of content if it were satisfied whenever provincial powers are territorially limited.

Re Upper Churchill Water Rights [1984] 1 S.C.R. 297 at 328 - 335

(II) Criminal law

48. The presence of criminal sanctions in the TPCA does not mean that the Act is criminal law. This Court most recently confirmed in Morgentaler that the mere fact that a law prohibits an act with penal consequences does not bring that law within section 91(27).

The Queen v. Morgentaler, supra, at 489.

49. What is required is that the prohibition be directed against "some evil or injurious or undesirable effect upon the public". A "criminal public purpose or object is thus pivotal". The TPCA cannot be brought within the criminal law as thus defined. It is a typical regulatory statute which imposes a penal sanction simply as a means of ensuring compliance.

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The Queen v. Morgentaler, supra, at 489 - 490.

50. The thesis that the TPCA is criminal law cannot be reconciled with the exemption for foreign advertising. The same act which is said to be criminal when carried out by a Canadian is not criminal when carried out by a foreigner. This exemption confirms the regulatory nature of the law and is utterly inconsistent with the criminal law thesis.

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(III) Severability

51. The ban on tobacco advertising enacted in section 4 specifically includes radio and television advertising which were voluntarily discontinued by all Canadian tobacco manufacturers in 1972. Nevertheless in this minor aspect the TPCA is within federal jurisdiction.

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52. Sections 9 and 17 dealing with health warnings relate to the purpose stated in section 3(c) of "...ensuring the effective communication of pertinent information to consumers of tobacco products." The Appellant does not challenge the right of the federal government to convey health information to the public and by agreement carried government health warnings on its packages from 1972 until the enactment of the TPCA. Read without qualification, section 17 extends beyond the purpose of effective communication and authorizes regulations which could involve a virtual expropriation of the Appellant's packages and a consequent denial of its right to

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advertise and promote its products. It is this latter aspect which underlies the challenge to these sections on division of powers grounds.

53. Although this point was not taken by the Respondent in the courts below it would be open to this Court to preserve the constitutionality of these sections by reading them down so as to confine their operational effect to their stated purpose. On this basis the doctrine of severability could reasonably apply.

A.G. Alberta v. A.G. Canada [1947] A.C. 503 at 518.

A.G. Manitoba v. Metropolitan Stores Limited [1987] 1 S.C.R. 110 at 125.

B. The *Charter*

(I) Introduction

54. It is clear, and it was conceded by the Respondent in the court below, that the ban on advertising is a limitation of the freedom of expression guaranteed by section 2(b) of the *Charter*. The issue is whether this limitation is reasonable and demonstrably justified pursuant to section 1.

A.G. Quebec v. Irwin Toy Limited, supra at 978.

55. The trial judge addressed this issue in the light of the principles laid down in Oakes and subsequent judgments of this Court and concluded on the basis of his findings of fact that the TPCA was not saved by section 1. As this Court has already noted the majority in the Court of Appeal found to the contrary because, in their

view, more recent judgments of this Court have attenuated the tests of rational connection and minimal impairment described in Oakes.

RJR Macdonald Inc. v. A.G. Canada [1994] 1 S.C.R. 311 at 325 - 326.

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56. Before turning to these specific tests the Appellant will deal with issues arising from the context of this appeal and to the finding below concerning the applicability of Oakes. The Appellant's submissions with respect to unattributed health warnings will conclude this portion of the argument.

(II) The context

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(i) Commercial advertising

57. The majority in the Court of Appeal held that commercial advertising is not central to the guarantee of freedom of expression and that the only *Charter* value in this case is the right asserted by the Appellants to advertise products known to be harmful in order to make profits. LeBel J.A. observed that there was absolutely no other value in issue.

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Reasons of LeBel J.A., Case, Vol. 3, p. 431.

58. This finding is erroneous. Advertising provides a channel of communication between the advertiser and the consumer through which information on existing and new products may be conveyed. The interest of the consumer in receiving such information is a further and equally important value protected by section 2(b). The TPCA bans the communication of all product information without distinction and in doing so violates the right of the consumer as much as that of the advertiser.

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Ford v. A.G. Quebec [1988] 2 S.C.R. 712 at 756

59. One aspect of the consumer's interest may be illustrated by evidence given at trial by the Assistant Deputy Minister of Health and Welfare. He testified that the government had urged Canadian tobacco manufacturers to produce and promote lower tar products because the government believed that they were safer than higher tar products, an opinion confirmed by two expert witnesses appearing on behalf of the Respondent. Under the TPCA however, advertisements for a new lower tar, or indeed tar free, brand or promoting an existing brand because of its low tar and nicotine levels are banned.

Evidence of Dr. Liston, Case, Vol. 18, p. 3101 - 3106.

Evidence of Sir Richard Doll, Case, Vol. 66, p. 12098.

Evidence of Dr. Lynn Kozlowski, Case, Vol. 72, p.p. 13318 - 13320.

60. The view that commercial advertising is not "central" rests on the thesis that the inherent value of expression and the degree of *Charter* protection to which it is entitled varies depending on the motives of the speaker and that economic motives are less worthy than others. In a *Charter* context, these propositions are untenable.

61. The motive of the speaker has no necessary connection with the value of speech to the listener. From a *Charter* perspective, the value to the consumer of information on a make of car or brand of cigarette stands on the same footing as the value of a work of art to the connoisseur.

62. From the perspective of the speaker also, motive is equally irrelevant even when it can be discerned. A work of art or of literature may arise from the pursuit of truth or artistic perfection or simply the desire or need to make money. Many famous works fall into the latter category but they are none the less entitled to the

full protection of the guarantee. A freedom dependant on so elusive and subjective a standard as motive is no freedom at all.

63. This Court has held that not all forms of expression are equally worthy of protection and that some may be limited more easily than others.

> Re ss. 193 and 195.1(1) of the Criminal Code [1990] 1 S.C.R. 1123 at 1136.
>
> Royal College of Dental Surgeons v. Rocket [1990] 2 S.C.R. 232 at 247.

64. Commercial advertising provides an example. Because it proposes a commercial transaction it must be truthful and not misleading. It may be regulated to ensure that it is not directed to those who may not legally purchase the product as, for example, in the case of prescription drugs. Where a service involving professional expertise is advertised claims which cannot be assessed by lay consumers may be made subject to regulation and limitations.

65. Apart, however, from restrictions appropriate to the context of commercial activity there is no sound basis in law for the thesis that commercial advertising is inherently less worthy of protection than any other form of expression.

(ii) The product advertised

66. The advertising at issue in this case is for tobacco products. There was extensive evidence at trial linking cigarettes with a number of serious diseases. This Court has already made reference to "... the widespread and serious medical

problems directly attributable to smoking" and to the "... undeniable importance of the public interest in health".

RJR Macdonald v. Attorney General of Canada supra at pp. 353 - 354.

67. The health issues bear directly to the question whether the TPCA pursues a purpose of sufficient importance to warrant the restriction of a guaranteed right. The courts below found that it did. This point was conceded by the Appellant in its pleadings and has never been in issue.

68. However the TPCA does not ban or restrict smoking. It bans advertising. Unless advertising and overall consumption of tobacco products are linked there is no nexus between the public interest in health and the advertising ban. The trial judge found that no such nexus had been established. The majority in the Court of Appeal agreed but found that it was not necessary. This subject is dealt with below in paragraphs 91 to 93 under the heading Rational Connection.

(iii) The genesis of the TPCA

69. For a number of years prior to the introduction of the TPCA Health and Welfare Canada had examined the potential effectiveness of a ban on tobacco advertising. The conclusion consistently reached was that such a ban would not be effective. When Health and Welfare requested an opinion on the *Charter* implications of such a ban from the Department of Justice in 1985 it advised that brand advertising affects brand share rather than overall consumption. The evidence of the Appellant at trial was precisely to the same effect.

Memorandum of Opinion, July 1985, Case, Vol. 6, p. 1001

Government documents re advertising ban, Case, Vol. 4, p. 574

70. In May 1986 Lynn McDonald of the NDP questioned the then Minister of Health on the subject of an advertising ban in the House of Commons. Reflecting the advice provided over the years by the responsible officials in his department the Minister responded as follows;

> "I am saying to her very directly that if she is an expert in this field at all, and if she has looked at the effect that the banning of advertising has on reducing the number of smokers, then she will know that it is painfully few. There are other steps which one has to take. It might be good visuals and she often deals with visuals rather than actualities. I deal with actualities."
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> Extract from Hansard, ITL-27 (26), Case, Vol. 6, p. 1024

71. In the autumn of 1986 Ms. McDonald introduced a private member's bill (C-204) which included a ban on all tobacco advertising in Canada. That bill was subsequently selected to receive debating time. Concerned lest the NDP sponsored bill should be enacted to the embarrassment of the government, the Minister of Health and Welfare decided to preempt the McDonald Bill and the TPCA was hastily introduced.

> "Support for this Bill is growing and it may well pass, unless it is pre-empted by government initiatives to effectively deal with the tobacco issue. To effectively pre-empt Bill C-204, and to ensure maximum benefit to the government, it is advisable that this Bill be introduced in first reading at the earliest possible date, March 27."
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> Minister's Speaking Notes to Caucus, RJR 58, Case, Vol. 7, p. 1233

72. The TPCA banned all forms of Canadian advertising for tobacco products but unlike Bill C-204 it provided an exemption for American tobacco advertising carried

in American magazines circulated in Canada. American magazine circulation represents approximately 65% of the total circulation of all magazines in Canada. As the trial judge found no study was carried out to determine the effect of this exemption.

Reasons of Chabot J., Case, Vol. 2, p. 295

73. The purpose clause, now section 3, was added at the third reading stage in part for the stated purpose of shielding the Act from legal challenge under the *Charter*. That section asserts that the ban on advertising is "reasonable in a free and democratic society". It is not surprising that the government should have felt the need to protect the Act from legal challenge given its own view of its potential efficacy and the opinion it had received from the Department of Justice. Far from assisting the Respondent's case, however, this assertion serves only to underline the government's well founded doubts about the constitutionality of the Act.

The Queen v. Morgentaler, supra, at 483.

74. The majority below erred in dismissing the conclusions reached by government officials on the efficacy of an ad-ban as being irrelevant. The fact that the government investigated the issue through its own experts, and concluded that it would amount only to "good visuals", bears directly on the defence of justification under section 1.

Reasons of Lebel J.A., Case, Vol. 3, p. 430

75. The language of section 1 and dicta of this Court make it clear that rights guaranteed by the *Charter* may be restricted only for compelling reasons. Rights

which may be restricted because a government finds it expedient to do so are not guaranteed in any meaningful sense.

(III) The Queen v. Oakes

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76. The judgment of the Court of Appeal rests squarely on the finding that later decisions of this Court, particularly those in Keegstra and Butler, have in effect overturned the judgment in Oakes.

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

Butler v. The Queen [1992] 1 S.C.R. 452.

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77. This Court stated in Oakes itself and has since reiterated that the proportionality tests which it described were not to be applied mechanistically. It has always been clear that the particular context of each case must be taken into account. Chabot J. specifically directed himself to this effect. There is however no basis for the finding below that Oakes is no longer applicable. To the contrary the Oakes analysis has been repeatedly reaffirmed.

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Reasons of Chabot J., Case, Vol. 3, pp. 255, 258 - 259.

R. v. Oakes, [1986] 1 S.C.R. 103 at 136 to 140.

Ford v. A.G. Quebec, supra, at 769.

Re ss 193 and 195.1(1) of the Criminal Code, supra, at 1135, 1136.

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R. v. Keegstra, supra, at 768.

78. Some academic writers have criticized the Oakes tests as unduly limiting legislative freedom. There are, however, sound reasons for imposing strict standards

of justification where legislatures seek to suppress or limit fundamental rights and freedoms. These reasons are explained at some length in Oakes itself and they remain valid.

79. The reliance below on Butler and Keegstra was misplaced. Those judgments had to do with materials which were found to be harmful per se in their direct effect on the reader and which, in addition, may induce the commission of acts of violence. In both cases this Court had to balance the right of freedom of expression against the competing *Charter* values of equality and multiculturalism. Consideration of Canada's obligations under international human rights covenants was required. Neither of these latter features is present here.

80. Tobacco advertisements are not materials which "seriously offend values fundamental to our society" as this Court described the offending materials in Butler and Keegstra. They are not harmful per se and it is manifest that Parliament did not see them in that light. If it had, the exemption for foreign tobacco advertising would have been unthinkable.

Butler v. The Queen, supra at 496.

81. "Harm" within the sense of the TPCA could be attributed to tobacco advertising only if it induces non-smokers to take up smoking or deters smokers from quitting. That was precisely the contention advanced by the Respondent at trial and rejected by the trial judge.

82. In Butler this Court analyzed various forms of pornography and assessed the harm associated with each. The result was a careful description of the classes of pornography which did and those which did not fall within the relevant provisions of the Criminal Code. Even for those limited classes affected there is no question of

prior restraint. The pornographer may still publish. The sanction he risks lies with the decision of a judge or jury in the event of prosecution. Harm, in the sense described by this Court, must be proven in each case.

Butler v. The Queen, supra, at 484.

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83. The provisions concerning hate literature upheld by this Court in Keegstra apply only to statements of a strictly limited and carefully defined character. Truth is a complete defence. As in Butler there is no question of prior restraint.

R. v. Keegstra, supra, at 773-783.

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84. Under the TPCA the tobacco manufacturer is not free to publish. Truth is irrelevant. The ban is not limited to defined classes of expression; all forms of advertisement are banned.

(IV) Rational connection

30 85. The majority below reversed the trial judge because they found that the test of rational connection is met if it can be said that on the information available a legislator could reasonably have concluded that the means adopted might possibly achieve their end. On this basis, there is no burden of justification and legislation could be stuck down only where a court concludes that Parliament has acted in a manner which is completely irrational.

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86. The evidence in this case provides a striking illustration of the potential of such a test to sterilize the *Charter*. The TSB Report purported to show that advertising bans and restrictions had been successful in reducing consumption in a

number of countries. That report provided "information" which could easily satisfy the test of rational connection as defined by the majority below.

87. No one responsible for the preparation of the TSB Report appeared as a witness. However two expert witnesses for the Respondent adopted its conclusions and one of them used its data in his own evidence. It was thus possible at trial to explore the accuracy and objectivity of the TSB Report through cross-examination. In the result it was rejected as having no probative value.

Reasons of Chabot J. Case, Vol. 2, p. 296

RJR Memorandum of Argument adopted by Chabot J., Case, vol. 2, p. 310

88. There are hardly any social issues today which have not attracted the attention of special interest groups. Studies and other "information" such as the TSB Report emanating from such groups invariably support their view of the correct policy choice. Advocacy disguised as science is no basis for restricting fundamental rights but the majority test invites just such a result.

89. The majority below supported their conclusion by reference to the testimony of expert witnesses called by the Attorney General, whose evidence had been rejected by the trial judge, as indicating that there was a body of opinion in favour of an advertising ban. The majority also upheld the TPCA in part on the basis that it was a social experiment the results of which could only be known in the future.

Reasons of Lebel J.A. Case, Vol. 3, p. 426 - 431

90. This reasoning is inconsistent with the very existence of constitutionally guaranteed rights and freedoms. No form of freedom of expression would ever be

suppressed in a democratic society unless there was a body of opinion in favour of doing so. To take a single example there was, and is, a substantial body of opinion in favour of the ban on English commercial signs struck down by this Court in Ford. That ban could also have been upheld as a social experiment whose results could only be known in the future.

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Ford v. A.G. Quebec, supra.

91. Where the legislative objective and the means selected to achieve it correspond rational connection will require little or no demonstration. In the present case the objective and the means do not correspond. The advertising ban cannot be said to be either reasonable or demonstrably justified in the absence of reliable evidence linking advertising to consumption. The judges below all agreed that there was no such evidence.

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Ford v. A.G. Quebec, supra, at 491.

A.G. Quebec v. Irwin Toy Limited, supra, at 778 - 779.

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92. The extent to which the TPCA fails the test of rational connection is highlighted by the dissenting reasons of Brossard J.A. It was his view that rational connection is established if the evidence shows on a balance of probabilities that it is at least possible that the law would attain its objective. This falls well short of the standard set by this Court but even on this attenuated basis he found that rational connection was not shown.

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Reasons of Brossard J.A. Case, Vol. 3, p. 551

93. The TPCA was introduced for reasons of expediency by a government which on the evidence of its own internal experts had no reason to believe and did not in fact believe that it would achieve its stated objective. As enacted it was not designed or tailored to achieve that objective. The trial judge applied the correct legal test of rational connection and his findings of fact are conclusive. Those findings, which mirror precisely those of Health and Welfare itself and their expression by the Minister in the House, establish that there is no rational connection between the impugned ad-ban and the stated objective of the TPCA.

(V) Minimal impairment

94. On the issue of minimal impairment the majority below concluded that an advertising ban applying to Canadian advertisers constitutes a minimal impairment of the right of freedom of expression because the use of the advertised product was not banned, because the ban exempted tobacco advertising by foreign manufacturers in foreign publications widely available in Canada, and because information on the contents and characteristics of the product remain available on the packages themselves.

Reasons of LeBel J.A., Case, Vol. 3, p. 432

95. The reasons of the majority below deprive the minimal impairment test of all meaning. That test involves the question whether a guaranteed right has been restricted to a greater extent than necessary. The fact that the TPCA does not ban smoking has no bearing on this question. The fact that foreigners are permitted to exercise a right denied to Canadians cannot possibly justify that denial. To the contrary it is a strong indication that the ban is arbitrary and unfair. The only information available to the consumer on packages is that which the TPCA requires or permits. Nothing further may be added. The fact that some expression is

compelled by the government cannot serve to justify the suppression of other expression.

96. This Court has stated that Parliament cannot be held to the absolutely least intrusive alternative and that a perfect law is not required. As recently stated in Ramsden, the issue is whether Parliament could have chosen an alternative means which would have achieved the objective as effectively. This Court has also stated however that there must be a sound evidentiary basis for the government's conclusion and that a total ban on a form of expression is more difficult to justify than time, place or manner restrictions.

Black v. Law Society of Alberta, [1989] 1 S.C.R. 591 at 633

A.G. Quebec v. Irwin Toy, supra, at 999.

Royal College of Dental Surgeons v. Rocket, supra, at 250 - 251.

City of Peterborough v. Ramsden, [1993] 2 S.C.R. 1084 at 1105 - 1106.

97. The first question must be whether there was a compelling need to impose any restriction on a guaranteed right. In a free society the proper answer to "bad" speech is "good" speech rather than censorship. If a restriction really is required, the second question would involve the extent of the restriction.

98. In this case it was never determined that the objective of reducing tobacco consumption actually required any limitation of the right to advertise much less a total ban. There is nothing to show that the dissemination of more information would not achieve the same objective as well or better.

99. Even if there had been compelling reasons to restrict advertising less intrusive alternatives to a total ban which were clearly available were not considered and no evidentiary basis to support the means selected was offered.

100. Beer and wine advertising on television and radio has long been regulated by the CRTC. Under those regulations, no advertisements may be directed to persons under 18 and no advertisement may promote overall consumption. Under this latter rule there is an express exemption for brand preference advertising. Similar rules are in effect in a number of provinces. These rules are coherent only on the basis that brand preference advertising does not promote overall consumption. They plainly offer a less restrictive alternative which might well accomplish the very purpose supposedly sought by the TPCA.

CRTC Regulations, Appendix 1, tab 4.

Provincial Regulations, Appendix 1, tab 5.

101. The CRTC regulations were specifically invoked by the Appellant as a less intrusive alternative in its originating motion of September 1, 1988. The trial did not begin until October 1989. The Respondent thus had ample time to gather the necessary evidence if it felt that the CRTC regulations were ineffective or that they could not be adapted to tobacco products.

Motion for Declaratory Judgment, Case, Vol. I, p. 2, para. 32

102. No evidence whatever was introduced by the Respondent on this subject. The only witness called by the Respondent from within the government was unaware of the CRTC regulations and they are not referred to in any of the government documents produced. They remain in force to this day.

Evidence of Dr. Liston, Case, Vol. 17, p. 2985.

103. While the CRTC regulatory model was apparently never considered another alternative to a total ban was being considered by his department when the Minister decided to preempt the McDonald bill. This alternative, which was preferred by Health and Welfare, did not include an advertising ban. Its exact nature remains unknown however because the documents in which it is explained and discussed were partially blacked out allegedly pursuant to section 39 of the Canada Evidence Act.

104. Two certificates under section 39 were filed and the claim of confidentiality was expanded in the second certificate. As a result the record contains a number of documents which had been delivered without deletions or with limited deletions prior to the second certificate and which were delivered a second time with deletions or more extensive deletions thereafter.

Partially deleted documents, Case, Vol. 21, p. 3842

105. It is therefore possible to assess the validity of the claim of cabinet confidentiality albeit for a very limited number of documents. In every case the claim is manifestly unfounded. The validity of the claim made for the remaining documents cannot be verified but must be open to serious question.

106. This Court has pointed out that a degree of deference by the courts is appropriate where a government has made a reasonable decision on the often difficult question of where precisely a legislative line should be drawn.

A.G. Quebec v. Irwin Toy, supra, at 989 - 990.

107. No such deference is due here. The choice of a total ban was not based on any assessment of the need for so extreme a step or any reasoned rejection of less

intrusive alternatives which were available. Unjustified steps were taken to deny information to the court on one such alternative. No attempt was made to identify and protect a potentially vulnerable group from allegedly persuasive forms of advertising and no distinction was made between different forms of advertising.

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108. In dealing with the age group 12 to 19, the trial judge found the proposition that they are particularly vulnerable to advertising to be highly debatable. In any event, the law is not directed to the protection of the young. It bans all Canadian advertising to whomever it may be directed and rests on the premise that the entire population is somehow vulnerable. This was indeed the position of the Respondent in the courts below. Thus it was submitted in the Court of Appeal that;

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> "Tous les Canadiens doivent être protégés des incitations à la consommation des produits et être informés des méfaits de ces produits."
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> Factum of the A.G. Canada (Court of Appeal), para. 532, p. 223.
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> Reasons of Chabot J., Case, Vol. 2, at p. 291.

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109. Excluding the reference to the legitimate role of providing information this submission reflects an unacceptably paternalistic view of the relationship between government and the individual and implies a credulity and vulnerability in the population at large which neither the evidence nor common sense bears out.

110. It is contrary to the letter and to the spirit of the *Charter* for the government to suppress a flow of information because that information is not consonant with the

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government's view of how people should behave. Such a step amounts to saying that the government knows the "correct" decision and the individual should be kept

in ignorance of any other view. This is entirely at odds with the notion of personal autonomy and responsibility and amounts simply to censorship.

The Queen v. Big M Drug Mart [1985] 1 S.C.R. 295 at 346.

The Queen v. Morgentaler [1988] 1 S.C.R. 30, at 166 - 167.

111. The trial judge was correct in finding that the TPCA does not meet the test of minimal impairment. The reversal of that finding by the Court of Appeal rests squarely on the error made by the majority in failing to apply the appropriate test.

(VI) Unattributed warning messages

112. Sections 9 and 17 of the TPCA authorize and the Regulations require tobacco manufacturers to print health messages on all their packages. The content, form, size and location of these messages is determined by the government but they may not be attributed to their real author and appear, therefore, to be the manufacturer's own statement. The prohibition against attribution constitutes a further infringement of section 2(b) of the *Charter*.

Banque Nationale du Canada v. Union des Employés de Commerce [1984] 2 S.C.R. 269 at 296.

Slaight Communications Inc. v. Davidson [1989] 1 S.C.R. 1038 at 1080.

113. It was found as a fact by the trial judge that nothing was done to determine whether unattributed messages would have any greater impact than messages attributed to their true author. The evidence showed that Canadians of all ages have an extremely high level of awareness of the health risks of smoking but there was no

evidence indicating that health messages, attributed or not, have any effect on consumption.

Reasons of Chabot J., Case, Vol. 2, p. 295.

Health and Study, RJR-78, Case, Vol. 79, p. 14471

Exhibit RJR-76, Case, Vol. 77, p. 13980.

Exhibit RJR-73, Case, Vol. 78, p. 14158.

1989 Surgeon General's Report, Ex. AG 146-V, Case, Vol. 46, p. 5326.

114. The TPCA requires the Appellant to make statements which appear to be but are not its own simply because government officials "felt" that it would be preferable to prohibit attribution. This requirement fails the test of rational connection and minimal impairment.

Evidence of Dr. Liston, Case, Vol. 18, p. 3150.

PART IV
ORDER SOUGHT

115. The Appellant seeks an order declaring

(i) that the Tobacco Products Control Act (SC 1988 c 20) is ultra vires of the Parliament of Canada;

(ii) that the Tobacco Products Control Act is invalid as infringing section 2(b) of the Canadian Charter of Rights and Freedoms.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

MONTREAL, June 6th, 1994

Colin K. Irving

Colin K. Irving
of Counsel for the Appellant

PART V

TABLE OF AUTHORITIES

"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."