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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

Court No: 23490

AND BETWEEN:

IMPERIAL TOBACCO LTD.

APPELLANT (APPLICANT)

AND:

THE ATTORNEY GENERAL OF CANADA

RESPONDENT (RESPONDENT)

AND:

THE ATTORNEY GENERAL OF QUEBEC
THE ATTORNEY GENERAL OF ONTARIO
THE ATTORNEY GENERAL OF SASKATCHEWAN
THE ATTORNEY GENERAL OF BRITISH COLUMBIA
CANADIAN CANCER SOCIETY et al.

INTERVENERS

FILED
NOV 14 1994
DÉPOSÉ
SUPREME COURT OF CANADA
COUR SUPREME DU QUÉBEC

JOINT REPLY FACTUM OF APPELLANTS
RJR-MACDONALD INC.
AND
IMPERIAL TOBACCO LTD.

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Appellants' Joint Reply Factum

1. The factum of the Respondent contains a number of assertions, put forward as being statements of fact, with which the Appellants take issue. The challenged statements of fact most relevant to the issues are dealt with in this reply. For convenience, they are grouped by subject matter, with reference to the relevant paragraphs in the Respondent's factum.

I. The effect of advertising

2. The Respondent asserts as a fact that advertising has the effect of increasing consumption.

Paragraph

25: "In fact, advertising of tobacco products has three direct effects: it reinforces smoking behaviour for existing smokers; it encourages brand switching, including maintaining people as smokers by promoting high filtration low-yield brands; and it attracts new smokers".

26: "No one can remain insensitive to tobacco products advertising".

115: "Ample evidence was introduced at trial by the Respondent to support the conclusion that advertising tobacco products has an effect on consumption".

119: "...the Respondent reiterates that all forms of publicity, including the purely informational advertising envisaged by Brossard J.A., induce consumption".

125: "It is simply a question of common sense to conclude that tobacco products advertising contributes largely to the social acceptability of tobacco use and that it counter-acts other efforts to fight tobacco consumption. Common sense also leads to the conclusion that millions spent on publicity have the effect of increasing

sales, or at least of preventing their decline, rather than simply promoting brand switching in an oligopolistic market".

10 3. Nowhere mentioned in the Respondent's factum are the adverse findings of the trial
judge who heard evidence on this issue over a period of several weeks. There was
ample evidence to support these findings which were not disturbed by the Court of
Appeal. That evidence included numerous documents emanating from the
Government of Canada and opinions expressed by Dr. Michel Laroche, one of the
Respondent's marketing experts, in his book, "Advertising Management in Canada"
(Exhibit RJR-179), described as the "leading Canadian text" on advertising by the two
20 other marketing experts appearing for the Respondent.

- 30 ○ Reasons of Chabot, J., Case, Vol. 2, pp. 291-302
- Evidence of Michael Waterson, Case, Vol. 47, pp. 8778 et seq., esp. 8888-8890 and RJR-26A, Case, Vol. 39, p. 7314
- Evidence of Leonard Reid, Case, Vol. 45, p. 8392, esp. 8410-8412
- Evidence of Peter Hoult, Case, Vol. 32, p. 6081, esp. 6181-6183
- Evidence of R. Donald Brown, Case, Vol. 35, p. 6724
- Documents from the Government of Canada relating to the efficacy of an ad-ban, Case, Vol. 4, p. 574 et seq., esp. Vol. 5, p. 787, Vol. 6, p. 1001, 1150, Vol. 7, p. 1194, 1212
- Advertising Management in Canada (extract), Case, Vol. 43, pp. 8159-8160
- Evidence of Richard Pollay, Case, Vol. 56, p. 10465
- Evidence of Joel Cohen, Case, Vol. 62, pp. 11333-11334

II. Advertising and young people

40 4. The Respondent asserts as a fact that young people are particularly vulnerable to tobacco advertising and that they were particularly targeted by Appellants' advertising.

10

15: "Young people are particularly vulnerable to tobacco advertising".

24: "In the Appellants' opinion, as soon as someone over 17 starts to experiment with tobacco, he or she is "fair game" for tobacco advertisers".

27: "Moreover, not only is it impossible to design a campaign which would "spare" non-smokers, particularly the young, but this is obviously not the Appellants' intention".

20

28: "Evidence shows that the Appellants' promotional activities focus on two particular groups: persons concerned with their health, and young people. The Appellants' own documents outline this strategy".

30: "In fact, demographic and psychographic studies conducted for the Appellants dealt with teenagers as young as 15".

30

5. The statement that young people are particularly vulnerable to tobacco advertising is supported exclusively by reference to the expert report filed by Dr. Michael Chandler. The cross-examination of Dr. Chandler, not included in the Respondent's materials, reveals *inter alia* that he had never studied the effect of advertising on children or adults. Contrary views were expressed by Dr. Laroche in "Advertising Management in Canada" and in studies referred to in the 1979 Report of the Surgeon General. Here again, the adverse findings of the trial judge are not mentioned.

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- o Evidence and cross-examination of Michael Chandler, Case, Vol. 58, p. 10642 et seq., esp. 10664
- o Advertising Management in Canada, Case, Vol. 43, p. 8162
- o 1979 Surgeon General's Report, Exhibit AG-146(L), Case, Vol. 44, pp. 8321-8329
- o Reasons of Chabot, J., Case, Vol. 2, p. 291

10 6. The evidence of Peter Hoult the President of RJR-MacDonald Inc. ("RJR") was that the youngest age group targeted for advertising was 18 to 24 and that marketing research was confined exclusively to persons at least 18 years of age who were already smokers. At the relevant time the legal age established by the Government of Canada for purchasing tobacco products was 16. The Respondent's marketing witnesses, who had examined all of the marketing documents of the Appellants covering a period of more than 10 years prior to enactment of the TPCA, were unable to identify to the Court a single study carried out by Appellant RJR involving any person under 18 or any person not already a smoker. Dr. Pollay agreed that research involving the target group was essential to any successful advertising campaign.

- 20
- Evidence of Peter Hoult, Case, Vol. 32, pp. 6164, 6180
 - Cross Examination of Richard Pollay, Case, Vol. 57, p. 10516-10517
 - Cross Examination of Joel Cohen, Case, Vol. 62, pp. 11285-11286
 - Reasons of Chabot, J., Case, Vol. 2, p. 291

30 7. Similarly, there was evidence that Appellant Imperial Tobacco Ltd. ("ITL") never produced any advertisement resulting from any market research involving non-smokers or persons under the legal age for purchasing tobacco products. ITL did commission an exploratory study to determine whether it was possible to use marketing techniques to affect the public's view of tobacco products generally and even to expand the market or forestall its decline. This study did seek responses of youth and of non-smokers to various queries. The study confirmed ITL's view that it could not affect the overall tobacco market using advertising of any kind. The trial judge made no findings adverse to ITL on this issue.

- 40
- Project Viking, AG-21 A-D, esp. AG-21B, Case, Vol. 25, p. 2673
 - Testimony of R. Donald Brown, V.P. Marketing, Case, Vol. 34, pp. 6523-6524, Vol. 35, p. 6724, Vol. 36, pp. 6825-6832, 6835-6836, Vol. 38, p. 7241

- Testimony of Ian Brown, author of the Viking study, C.A. Joint Record, Vol. 18, pp. 3127, 3176-3180, 3196-3197, 3199-3200

- 10 8. The Respondent's statements concerning the effect of advertising in general, its particular impact on the young and the Appellants' marketing practices should be read with the further assertion, in paragraph 10, that young women "...constitute the most rapidly increasing group of smokers." The Respondent does not specify when this increase is said to have occurred.
- 20 9. Both the specific statement by the Respondent regarding young women and the implication that smoking prevalence was also increasing in other groups but to a lesser extent are directly contrary to the evidence and to the findings of the trial judge.
- 30 10. The evidence, including that now specifically relied on by the Respondent in Annex 6 to its factum, was that for many years prior to the enactment of the TPCA, smoking prevalence in Canada declined substantially. Contrary to what is now asserted by the Respondent the greatest declines were in the youngest age groups measured by Statistics Canada (15-19) both for males and females.
- Evidence of Neil Collishaw, Case, Vol. 8, pp. 1450-1453
 - Exhibit RJR-40, Case, Vol. 80, at p. 14640
 - Evidence of Roberta Ferrence (Respondent's Annex 6 at p. 37795)
 - Evidence of Jeffrey Harris (Respondent's Annex 6 at p. 38495)
- 40 11. The trial judge found on the evidence that tobacco use in Canada had been in constant decline for over twenty years prior to enactment of the TPCA notwithstanding the presence of advertising.

- Reasons of Chabot, J., Case, Vol. 2, p. 251

III. Addiction

12. The Respondent asserts as a fact that:

10

Paragraph

8: "Nicotine, the drug found in tobacco, is addictive".

164: "Tobacco contains nicotine, an addictive drug, which rapidly prevents people from freely choosing to use or not to use the product".

20

13. The evidence does not support the statement that nicotine "rapidly prevents people from freely choosing to use or not to use the product". The expert evidence of the Respondent is to the contrary. The record shows that millions of Canadians have given up smoking and that nearly all did so without any outside help. There are almost as many ex-smokers as smokers in the Canadian population.

- o Evidence of Dr. Benowitz, Case, Vol. 73, pp. 13430, 13464
- o Evidence of Dr. Kozlowski, Case, Vol. 72, pp. 13196-13197, 13158
- o Evidence of Dr. Ferrence, Case, Vol. 74, p. 13623

30

14. Moreover, the statement that nicotine is addictive depends entirely upon the meaning of *addiction*. The two addiction experts who appeared for the Respondent disagreed with each other on the meaning of the term. Both agreed that the term has no precise popular meaning. Dr. Benowitz conceded in cross-examination that advising people that cigarettes are "addictive" would not convey any accurate information unless the intended meaning of the word was explained.

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- o Evidence of Dr. Benowitz, Case, Vol. 73, pp. 13430, 13453-13457
- o Evidence of Dr. Kozlowski, Case, Vol. 72, p. 13193

15. Documentary evidence showed that the Director General of the Canadian Drugs Directorate considered that *addiction* was a discredited word, long abandoned by the scientific community as having no scientific meaning but carrying a heavy moral connotation, which should not be applied to smoking.

10

- o Exhibit RJR-221, Case, Vol. 71, pp. 12968-12988
- o Exhibit RJR-65, Case, Vol. 71, pp. 12989-12991

IV. Risk awareness

16. The Respondent states, in paragraph 161, that "...all Canadians must be alerted to the health hazards caused by tobacco" and, in paragraph 163, that:

20

"The population has learned to consume alcohol only under certain conditions relating to time, place and age. Public education concerning tobacco in that sense is only just starting."

17. Government of Canada studies in the record show that Canadians have long viewed smoking as a very serious health hazard. In the National Health Risk Study published by Health and Welfare Canada in 1984, it was noted that:

30

"The data reveal that people believe smoking has serious health consequences. In fact, the predominant qualitative risk characteristic of smoking is its harmful consequences."

and that:

"People are more likely to have received information about smoking, alcohol and illegal drugs, than about any other potential risk. Given that communicating about these risks is Health and Welfare Canada's responsibility, the data suggest the responsibility is being carried out effectively."

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- o National Health Risk Study, Exhibit RJR-78, Case, Vol. 79, p. 14471 at 14528
- o Evidence of Dr. Turcotte, Case, Vol. 69, p. 12728

10 **V. Alcohol Advertising Regulations**

18. The Respondent asserts *inter alia* in paragraph 163 of his factum that:

"Simply regulating tobacco advertising as is done with alcohol advertising would not work."

20 19. There is no evidence in the record in support of this statement. The CRTC regulations concerning television advertising for beer and wine, although specifically put forward by the Appellants as a less intrusive alternative to an advertising ban, were never once referred to by the Respondent in the Courts below.

VI. The extent of the advertising ban

30 20. The total ban on tobacco advertising enacted by the TPCA is referred to in the Respondent's factum as a "severe restriction" on advertising. It is stated in paragraph 156 that:

156. "The TPCA does not deprive consumers of relevant information. In the first place, it permits point of sale information about which brands are available as well as the prices of those products".

21. Section 5(1) of the TPCA provides in part that:

10 "5. (1) Notwithstanding section 4, a retailer may
(a) expose tobacco products for sale at the retailer's place of
business;
(b) post in that place, in the prescribed form, manner and
quantity, signs that indicate, otherwise than by their brand
names or trade marks, the tobacco products offered for sale
and their prices."

[emphasis added]

20 **VII. Cabinet documents**

22. Paragraph 4 of the Respondent's factum reads in part as follows:

4: "The Court should be advised that, in the course of the
trial, the Appellants requested the production of
Cabinet documents, as defined by sections 37 and 39
of the Canada Evidence Act."

30 23. No cabinet documents were requested by the Appellants except those which fell
within the exemptions from Cabinet confidentiality set out in Sections 39(2)(b) and
39(4)(b) of the *Canada Evidence Act*. The letter of request dated November 28, 1989,
and subpoena, delivered to counsel for the Respondent, specifically restricted the
request to documents falling within those exemptions. Dr. Albert Liston, the only
witness called by the Respondent from within the government and for whom the
request was intended, testified some four months after the letter had been delivered
40 to counsel. He told the Court that he had never been made aware of the request and
in consequence that it would take some months to respond. Since the trial was
scheduled to finish during the week in which Dr. Liston testified the matter was
dropped.

- o Letter of request dated November 28, 1989, RJR-204, Case, Vol. 21, p. 3822
- o Evidence of Dr. Liston, Case, Vol. 17, pp. 2990-3012

10 **VIII. Medical issues**

24. It was and is the Appellants' contention that the extensive medical evidence introduced by the Respondent, which involved some 20 expert witnesses, was unnecessary, given that the stated legislative objective of reducing the prevalence of smoking was not challenged by the Appellants. Nevertheless, a number of statements made by the Respondent as being uncontroverted statements of fact are open to question on the evidence and call for a response.

25. For example, the Respondent asserts as a fact that "In Canada, in 1989, over 30,000 premature deaths per year were attributable to tobacco use."

26. This assertion is based on a study entitled "Mortality Attributable to Tobacco Use In Canada" written by Messrs. Wigle, Collishaw, and Tostowaryk and published in the Canadian Journal of Public Health in 1988. The reliability of this study cannot be assessed without consideration of the facts which emerged in the cross-examination of Dr. Wigle, not reproduced by the Respondent, which disclosed, *inter alia*:

(i) that the study was rejected by the Canadian Medical Association Journal to which it was first submitted for publication. As reported in the rejection letter, the "main objections" included the following:

(1) "The application of stratified relative risks derived from 'old' American data to the current Canadian population"

(2) "The inexplicable irregularity of those relative risks"

(3) "The technical problem of attribution of death to smoking, especially in regard to death from coronary heart disease in which there are important etiologic co-factors and a number of confounding variables that are not accounted for in the paper."

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- o Rejection letter, Exhibit RJR-162, Case, Vol. 63, p. 11579
- o Reviewer's report, Exhibit RJR-162, Case, Vol. 63, pp. 11581-11586

(ii) that the study was then submitted to the Canadian Journal of Public Health. Dr. Wigle was a member of the editorial board of that journal. One of the two reviewers proposed that it be rejected *inter alia* because it was based on unpublished data, its methodology was simplistic and its validity was doubtful.

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- o Reviewer's report, RJR-163, Case, Vol. 63, pp. 11589-11590

The second reviewer's only comments were the following:

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"These are extremely important data! Please make available to potential users (activists in the campaign against smoking) by publishing as soon as possible. The paper is well written and in my opinion needs no revision. There are just a few typos."

- o Reviewer's report, RJR-163, Case, Vol. 63, p. 11588

(iii) that the study does not deal with "premature" deaths but includes all deaths from age 35 to 84. Of the smoking attributed deaths, 50% occurred over the age of 70 and 13% over the age of 80.

40

- o Exhibit RJR-159, Case, Vol. 219, p. 45422

27. The Respondent asserts, in paragraph 7, that "...It is now clear that only a modest reduction in harm can be achieved through lower tar and nicotine levels."

10 28. There is evidence in support of this statement but there is also evidence to the contrary. Sir Richard Doll, a renowned epidemiologist, who testified for the Respondent did not agree. He said that, with respect to lung cancer, the use of low tar cigarettes reduces the risk "substantially". There is no finding of fact in this regard.

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

20 29. The Respondent states, in paragraph 143, that "...For instance, it is clearly established that tobacco consumption causes lung cancer."

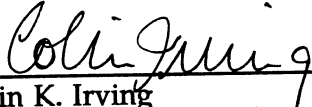
30 30. Sir Richard Doll testified that in the major study of British doctors which he carried out, about one in ten lifetime heavy cigarette smokers contracted lung cancer. It was his evidence, moreover, that there is no single cause for any form of cancer.

- o Evidence of Sir Richard Doll, Case, Vol. 64, p. 11673, and at 11758

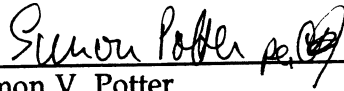
ALL OF WHICH IS RESPECTFULLY SUBMITTED.

MONTREAL, November 10, 1994

MONTREAL, November 10, 1994

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