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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 BETWEEN:

Court No.: 23490

IMPERIAL TOBACCO LTD.

Appellant

- and -

THE ATTORNEY GENERAL OF CANADA

Respondent

AND:

THE ATTORNEY GENERAL OF QUEBEC

Mis-en-cause

AND:

THE ATTORNEY GENERAL OF ONTARIO
THE ATTORNEY GENERAL OF SASKATCHEWAN
THE ATTORNEY GENERAL OF BRITISH COLUMBIA
THE CANADIAN CANCER SOCIETY
THE CANADIAN COUNCIL ON SMOKING AND HEALTH
THE CANADIAN MEDICAL ASSOCIATION
THE HEART AND STROKE FOUNDATION OF CANADA
THE CANADIAN LUNG ASSOCIATION

Interveners

FACTUM OF THE INTERVENERS,
THE CANADIAN CANCER SOCIETY
THE CANADIAN COUNCIL ON SMOKING AND HEALTH
THE CANADIAN MEDICAL ASSOCIATION
THE HEART AND STROKE FOUNDATION OF CANADA
THE CANADIAN LUNG ASSOCIATION

SUPREME COURT
OF CANADA
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PART I - THE FACTS

Introduction

1. This is an appeal by RJR-MacDonald and Imperial Tobacco Ltd. from a judgment rendered on January 15, 1993 by the Quebec Court of Appeal (Rothman, Lebel and Brossard JJ.A.), [1993] R.J.Q. 375. The Court of Appeal unanimously held the *Tobacco Products Control Act*, S.C. 1988, c. 20, (hereinafter "the TPCA") to be *intra vires* the Parliament of Canada. The majority (Brossard J.A., dissenting) also held that the TPCA constitutes a reasonable and demonstrably justifiable limit on freedom of expression, and is therefore in conformity with the *Canadian Charter of Rights and Freedoms*.

2. The Canadian Cancer Society, the Canadian Council on Smoking and Health, the Canadian Medical Association, the Heart and Stroke Foundation of Canada and the Canadian Lung Association ("the Interveners") were granted the right to intervene by this Honourable Court (Major J.) on February 15, 1994.

3. The Interveners agree with and adopt the Attorney General of Canada's statement of facts. The Interveners submit that to address adequately the constitutional questions at issue in this case, it is essential to examine and understand the alarming medical consequences of tobacco use, for it is the underlying objective of the TPCA to help reduce the level of disease and death resulting from tobacco use.

The Interveners

4. The Canadian Cancer Society, the Canadian Council on Smoking and Health, the Canadian Medical Association, the Heart and Stroke Foundation of Canada and The Canadian Lung Association are among the principal non-governmental organizations of health workers and volunteers in Canada concerned with medical, scientific and social research and prevention and treatment of illnesses caused by the use of tobacco products.

5. The Canadian Cancer Society ("CCS") is a national, community-based charitable organization of about 350,000 volunteers, covering 3,000 urban and rural communities across Canada. Its mission is the eradication of cancer and the enhancement of the quality of life of people living with cancer. The CCS achieves its mission through programs of research, public education and patient services. The CCS has encouraged governments to improve public awareness of the significant risks of tobacco use by providing individuals with meaningful and adequate information.

6. The Canadian Council on Smoking and Health ("CCSH") is a national non-profit organization focussing on tobacco and health. Established in 1974, the Council's mission is to reduce tobacco morbidity and mortality. The CCSH is composed of ten provincial chapters, which in turn have over 40 local councils across Canada. Membership includes a broad spectrum of volunteers, health professionals and educators, along with national and provincial health and human service organizations concerned with tobacco use.

7. Established in 1867, the Canadian Medical Association ("CMA") is a voluntary organization representing a majority of the country's medical physicians. The CMA consists of 12 autonomous provincial/territorial divisions as well as a national division. The mission of the CMA is to provide leadership for physicians and to promote the highest standard of health and health care for Canadians.

8. The Heart and Stroke Foundation of Canada (the "Foundation") is a federation of ten provincial foundations, with a volunteer force totalling several hundred thousand people. Since 1956, the Foundation has devoted almost \$400 million to heart and stroke research in every major hospital, university, and medical school in Canada. The Foundation's public policy advocacy activities have included a focus on promoting effective and enforceable non-smoking legislation and regulations.

9. The Canadian Lung Association (the "Association") is one of Canada's oldest voluntary health organizations, consisting of ten

provincial member organizations. The mission of the Association is to improve respiratory health for all Canadians. The Association provides a wide variety of programs to help people cope with lung illnesses.

10. The Interveners are supported by 22 other Canadian health organizations in supporting the validity of the TPCA. These health organizations are the Royal College of Physicians and Surgeons of Canada, Canadian Nurses Association, Canadian Public Health Association, Allergy Foundation of Canada, Canadian Association of Medical Oncologists, Canadian Association of Occupational Therapists, Canadian Association of Pathologists, Canadian Centre on Substance Abuse, Canadian Chiropractic Association, Canadian Dental Association, Canadian Hospital Association, College of Family Physicians of Canada, National Cancer Institute of Canada, Non-Smokers' Rights Association, Physicians for a Smoke-Free Canada, Canadian Centre for Drug Free Sport, Canadian Thoracic Society, Canadian Nurses' Respiratory Society, Canadian Physiotherapy Cardio-Respiratory Society, Canadian Haematology Society, Canadian Urologic Oncology Group and Canadian Pharmaceutical Association.

Perspective of the Interveners regarding the TPCA

11. The Interveners urged Parliament to enact the restrictions on tobacco advertising and the health warning requirements set out in the TPCA. The Interveners were among the principal organizations in the vanguard of support for the enactment of the TPCA. Representations were made by the Interveners to the Parliamentary committee studying the legislation.

Annexes to the Factum of the Attorney General of Canada
(hereinafter referred to as "AGC Annexes"): Vol. 20, Annex 33(a)

12. In the representations made to Parliament, the Interveners and other members of the Canadian medical and health community provided detailed background information concerning the medical consequences of tobacco use. The Interveners unanimously supported, and continue to

support, the TPCA as part of a multi-faceted approach to reduce and ultimately eliminate disease and death caused by the use of tobacco products. A multi-faceted approach to achieving this objective is supported by both the U.S. Surgeon General and by the World Health Organization. The compelling medical testimony presented to the committees was consistent with the medical evidence which was subsequently adduced at trial in the present case.

AGC Annexes: Vol. 1, Annex 2(b); Vol. 15, Annex 27 and 28; Vol. 20 Annex 33

Medical Facts in Support of the Legislative Objective

13. The underlying objective of the TPCA is to help reduce the alarming level of disease and death which is caused by tobacco use. It is therefore essential to review the magnitude of the medical problem which underscores the importance of this objective.

14. Tobacco is the only product legally available in Canada today which, when used precisely as intended, is known to be harmful and often fatal. It is beyond any doubt that tobacco use is a principal cause of deadly cancers, heart disease and lung disease. The U.S. Surgeon General reports that tobacco use will cause the death of about one in four regular tobacco smokers.

AGC Annexes: Vol. 1, Annex 2.1(a), esp. at 35133; Vol. 2, Annex 3.1(c)

15. Among young Canadians who continue using tobacco, six times more will die prematurely of disease caused by smoking than will die from car accidents, suicide, murder and AIDS, combined. Yet all tobacco-caused disease and death is fully preventable. In fact, tobacco use is the leading preventable cause of death in Canada.

AGC Annexes: Vol. 2, Annex 3.1(c), esp. at 37698, 37699

Components of Tobacco and its Addictive Nature

16. Tobacco smoke from cigarettes contains about 4,000 chemicals, several hundred of which are toxic and over fifty of which are known cancer-causing chemicals. Tobacco in chewing tobacco and snuff is also toxic and carcinogenic.

AGC Annexes: Vol. 2, Annex 3.1(c), esp. at 37667-8

17. Scientists agree that nicotine found in tobacco is a "powerfully addictive drug". Pharmacological and behavioral processes that determine nicotine addiction are similar to those that determine addiction to drugs such as heroin and cocaine. According to the U.S. Surgeon General, a tolerance develops to the actions of nicotine such that repeated use results in diminished effects and can be accompanied by a desire for increased intake. For most tobacco users, nicotine ingestion is a crucial component of their repeated use.

AGC Annexes: Vol. 3, Annex 5(a); Annex 5(b), esp. at 37434

18. The expert evidence of physicians, adduced at trial, revealed that many patients with severe lung disorders, notwithstanding the onset of their disease and their willingness to undergo treatments recommended by their physician, are still unable to follow their physician's sternest warning and break their tobacco smoking behavior, so powerful is their addiction to tobacco.

AGC Annexes: Vol. 2, Annex 3.2(b), esp. at 36867-68; Annex 3.2(c), esp. at 36914-15

Tobacco Use in Canada

19. Most Canadian tobacco smokers start smoking regularly in their teens. About 1 in 5 tobacco smokers begin smoking regularly as early as age 13. Teenage girls now constitute the most rapidly increasing group of smokers.

AGC Annexes: Vol. 4, Annex 6.1(a), esp. at 37768, 37784-88; Annex 6.1(d), esp. at 38493

20. In 1986, 6.7 million Canadians over the age of 15 years smoked tobacco products. This means that 28 per cent of Canadians over the age of 15 were tobacco smokers. Among younger Canadians, approximately the same percentage of males and females smoke tobacco, although more older smokers are men.

AGC Annexes: Vol. 4, Annex 6.1(a), esp. at 37769-37775, 37790

21. Current tobacco smoking levels vary widely depending on level of education. Only 14 per cent of Canadians with university degrees smoke tobacco, compared with 32 per cent of Canadians who did not finish high school. This margin is even more notable among young Canadian males, among whom only 8 per cent of those with university degrees smoked tobacco compared with 60 per cent of those who did not finish high school.

AGC Annexes: Vol. 4, Annex 6.1(a), esp. at 33777-84

Tobacco Use as a Cause of Disease and Death

a) Cancer

22. Epidemiology is the study of the cause of disease in human populations. It has played a central role in the identification of tobacco as a serious cause of a broad range of disease in humans. Epidemiological studies have concluded that tobacco use causes cancer in several organs exposed directly to tobacco smoke, particularly the lungs, mouth, throat and larynx; it causes cancer of the esophagus which is exposed to tobacco smoke particles; it causes cancer of the pancreas, presumably through blood-borne tobacco smoke carcinogens; and it causes cancer of the bladder and renal pelvis, presumably through tobacco smoke carcinogens excreted in the urine.

AGC Annexes: Vol. 2, Annex 3.1(c), esp. at 37664, 37668

23. The expert report of Dr. Donald Wigle, adduced at trial, underlines the indisputable role tobacco use plays in causing these diseases:

In terms of the scientific evidence available, the causal role of smoking in the major diseases described above is firmly established beyond all reasonable doubt. This conclusion is accepted by all leading health professional organizations and by many governments and international agencies including: - the Canadian Medical Association, Canadian Public Health Association, Health and Welfare Canada, Canadian Cancer Society, Canadian Lung Association, Canadian Council on Smoking and Health, U.S. Surgeon General, U.S. Department of Health and Human Services, World Health Organization and the International Agency for Research on Cancer.

AGC Annexes: Vol. 2, Annex 3.1(c), esp. at 36799

24. Overall, cancer mortality rates for current tobacco smokers is double that of never-smokers. Smoking tobacco is associated with about 30 per cent of all cancer deaths. The overall cancer mortality rate has been increasing for Canadian men for many years and for Canadian women since the mid-1970's, due almost entirely to the rapidly rising rate of lung cancer mortality.

AGC Annexes: Vol. 2, Annex 3.1(c), esp. at 37675-76, 37698

(i) Lung Cancer

25. A landmark Canadian study revealed that, on average, men who smoke tobacco have an increased risk of lung cancer almost fifteen times that of never-smokers. The risk is even greater for heavy smokers. Up to one in four heavy smoking men will develop lung cancer in his lifetime. Moreover, because lung cancer tumors usually develop slowly, the tumors develop for many years before symptoms appear and the five-year survival rate for lung cancer is less than 10 per cent.

AGC Annexes: Vol. 2, Annex 3.1(c), esp. at 37676-82

26. The U.S. Surgeon General reports that about 85% of all lung cancer deaths is caused by tobacco smoking. Lung cancer is easily the largest

cause of cancer death for Canadian men, and has recently become the most important cause of cancer death for women. Lung cancer deaths for Canadian women have increased almost threefold between 1970 and 1986, paralleling a similar increase in tobacco use among Canadian women over a period commencing approximately twenty years earlier. In fact, there is a remarkable correlation between yearly per capita tobacco consumption levels in Canada and lung cancer mortality rates about twenty years later.

AGC Annexes: Vol. 1, Annex 2.2(c), esp. at 34136; Vol. 2, Annex 3.1(c), esp. at 37676-82

(ii) Oral, Esophageal, Urinary and other Cancers

27. Tobacco use is also a major cause of tongue, mouth, laryngeal, esophageal, pancreatic, bladder and renal pelvic cancers. A Canadian study suggested that more than eight out of every ten cases of laryngeal cancer in men is caused by tobacco smoking, and that the risk of male smokers developing laryngeal cancer is more than eight times that of never-smokers. Further, tobacco smoking is the major cause of mouth, throat and esophageal cancer in Canada.

AGC Annexes: Vol. 2, Annex 3.1(c), esp. at 37682-88

b) Coronary Heart Disease and Stroke

28. Tobacco smoking is the major preventable cause of cardiovascular death in Canada. Tobacco smokers have two to four times the risk of sudden heart attack death that non-smokers have, and almost half of all coronary heart deaths among men are attributable to smoking. Recent figures demonstrate that more Canadians died of cardiovascular death caused by tobacco smoking than caused by high blood pressure and serum cholesterol combined.

AGC Annexes: Vol. 2, Annex 3.1(c), esp. at 37669-71

29. Tobacco smoking is believed to be a major causal factor for strokes. Epidemiological studies demonstrate that Canadians between the ages of

35 and 79 who smoke more than twenty cigarettes a day had an increased risk of fatal stroke which was two and a half times that of never-smokers.

AGC Annexes: Vol. 2, Annex 3.1(c), esp. at 37672-4

c) Lung Disease

30. Further, tobacco smoking is the major cause of emphysema and bronchitis (chronic obstructive pulmonary disease). Between 80 and 90 per cent of all COPD and COPD deaths are caused by smoking.

AGC Annexes: Vol. 1, Annex 2.2(d), esp. at 35156; Vol. 2, Annex 3.1(c), esp. at 37688

d) Summary

31. In summary, over 30,000, and more likely over 35,000 Canadians die each year from a disease caused by their tobacco smoking. Among any given group of 100,000 young Canadian males who smoke tobacco today, more than 20,000 will likely die of disease associated with tobacco use.

AGC Annexes: Vol. 2, Annex 3.1(c), esp. at 37693, 37697

Environmental Tobacco Smoke

32. There is increasingly conclusive evidence that tobacco smoke causes disease and death among non-smokers as well as smokers. Sidestream smoke from burning cigarettes, and smoke exhaled by smokers, contains essentially the same mix of harmful chemicals and carcinogens as mainstream cigarette smoke. In fact, sidestream smoke contains greater amounts of certain carcinogens, including carbon monoxide, than mainstream smoke because the cigarette burns at a lower temperature when the smoker is not inhaling.

AGC Annexes: Vol. 1, Annex 2.2(c), esp. at 34120, 34121, 34135-36

33. The U.S. Surgeon General has stated that it is certain that a "substantial proportion" of lung cancers that occur in non-smokers are

due to environmental tobacco smoke. Indeed, certain studies have concluded that the risk of non-smoking women developing lung cancer is three to four times higher when married to men who smoke tobacco than when married to non-smokers. Moreover, infants of parents who smoke tobacco have increased risk of hospitalization for bronchitis and pneumonia as against infants of non-smoking parents, and have a slower rate of growth in lung function than infants of non-smoking parents.

AGC Annexes: Vol. 1, Annex 2.2(c), esp. at 34121, 34138

Pregnant Mothers and Fetuses

34. Fetuses are the most vulnerable group of persons exposed involuntarily to tobacco chemicals and carcinogens. Smoking tobacco during pregnancy is an important cause of both low birth rate and infant mortality.

AGC Annexes: Vol. 1, Annex 2.2(c), esp. at 34134; and 2.2(e), esp. at 36599

Tobacco Advertising is aimed the Level of Tobacco Consumption

35. The Appellants challenge the rationality of the TPCA by asserting that all of their marketing efforts are directed at maintaining their own share of the market among confirmed smokers and persuading confirmed smokers of other brands to switch brands. Contrary to the assertions of the Appellants, it is apparent from their own documents and logically self-evident that tobacco advertising is also aimed at non-smokers, especially young people, and smokers who are contemplating quitting. A market research document commissioned by and prepared for one of the Appellants refers to the smoking behaviour of young people and trends for starting smoking. This marketing document refers to the importance of directing marketing efforts towards "expanding the market, or at very least forestalling its decline". The fact that people are quitting smoking is referred to as a "problem" in the same marketing document.

AGC Annexes: Vol. 10, Annex 17(c), esp. at 13423, 13428

36. As regards persons contemplating quitting, one of the Appellant's marketing documents states that the extent to which unsuccessful quitters "can be reassured and satisfied has a major impact on the extension of a viable tobacco industry". As regards young people, another such marketing document speaks of having marketing imagery "reach those difficult to reach, non-reading young people". These documents suggest that the overall level of consumption is a focus of tobacco advertising, a fact which cuts at the very heart of the Appellants' case.

AGC Annexes: Vol. 10, Annex 17(c), esp. at 13486; Vol. 11, Annex 17(h), esp. at 14949

A Tobacco Advertising Ban has Widespread International Support

37. A ban on tobacco advertising has received substantial support from both governmental and non-governmental agencies around the world. The World Health Organization, which is the United Nation's principal health organ, has repeatedly called for an advertising ban on all tobacco products. The European Council has adopted directives banning broadcast advertising of tobacco products and mandating health warning on tobacco product packaging. That Council has before it directives which would ban all direct and indirect advertising of tobacco products.

AGC Annexes: Vol. 14, Annex 24; Vol. 15, Annex 30

38. Tobacco advertising is prohibited by law in Singapore, Iceland, Norway, Finland, Portugal, and more recently New Zealand, France, Thailand and Australia. A comprehensive study by the New Zealand Toxic Substance Board of thirty-three countries found that cigarette sales decline most persistently in the countries with complete tobacco advertising bans. While the Board concluded that it was difficult to measure precisely the likely effect on consumption of a total advertising ban with an econometric model, it recommended such a ban.

AGC Annexes: Vol. 14, Annex 24

39. A widely accepted and authoritative source of information on smoking and health is the U.S. Surgeon General. In his 1989 report,

which was admitted into evidence without cross-examination, the Surgeon General concluded:

"The most comprehensive review of both the direct and indirect mechanisms concluded that the collective empirical, experiential, and logical evidence makes it more likely than not that advertising and promotional activities do stimulate cigarette consumption. However that analysis also concluded that the extent of influence of advertising and promotion on the level of consumption is unknown and possibly unknowable."

AGC Annexes: Vol. 14, Annex 24(x), esp. at 35649

PART II - POINTS IN ISSUE

40. The points in issue are those set out in the constitutional questions formulated by the Right Honourable Chief Justice of Canada on the 4th day of November 1993:

- "1. Is the *Tobacco Products Control Act*, S.C. 1988, c. 20 (the "TPCA"), wholly or in part within the legislative competence of the Parliament of Canada as being a law enacted for the peace, order and good government of Canada pursuant to sec. 91 of the *Constitution Act*, 1867; as being enacted pursuant to the criminal law power in sec. 91(27) thereof; or otherwise?
2. Is the TPCA wholly or in part inconsistent with the right of freedom of expression as set out in s. 2(b) of the *Canadian Charter of Rights and Freedoms* and, if so, does it constitute a reasonable limit on that right as can be demonstrably justified pursuant to s. 1 thereof?"

41. The Interveners endorse and support the Attorney General of Canada's submission that the TPCA is *intra vires* Parliament both as a matter of criminal law and as a matter of national concern falling within Parliament's legislative authority over peace, order and good government. Further, the Interveners support the submission of the

Attorney General of Canada that the TPCA constitutes a reasonable limit, which is demonstrably justified, on freedom of expression protected under s. 2 (b) and therefore is fully in conformity with the *Canadian Charter of Rights and Freedoms*."

PART III - ARGUMENT

A. DIVISION OF POWERS

42. The Interveners support and endorse the Attorney General of Canada's submission on this issue.

B. THE CHARTER ISSUE

43. Section 1 of the *Charter of Rights and Freedoms* recognizes that the rights and freedoms protected under the *Charter* are fundamental but not absolute. This Court has consistently held that the application of section 1 of the *Charter* must be carried out having regard to the nature and importance of the legislative objective and of the right or freedom in issue. In this regard, it must be emphasized that commercial expression, as opposed to political, social or academic expression, is the protected form of expression at issue in the context of the Appellants' challenge to the TPCA. In *Rocket v. Royal College of Dental Surgeons of Ontario* (1990), this Court unanimously held:

While the Canadian approach does not apply special tests to restrictions on commercial expression, our method of analysis does permit a sensitive, case-oriented approach to the determination of their constitutionality. Placing the conflicting values in their factual and social context when performing the s. 1 analysis permits the courts to have regard to special features of the expression in question. As Wilson J. notes in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, not all expression is equally worthy of protection. Nor are all infringements of expression equally serious.

Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232 at 246-247 per McLachlin J.

44. It bears repeating that the protected form of expression in the present case is the commercial promotion, generally in an image-oriented and non-informative manner, of a product which is harmful and ultimately causes the death of about one out of every four people who use it regularly. The four-part test set out by this Court in *R. v. Oakes* (1986) must be approached with this fact in sharp focus.

R. v. Oakes, [1986] 1 S.C.R. 103

(1) Pressing and Substantial Legislative Objective

45. The purpose of the TPCA is declared in section 3:

"3. The purpose of this Act is 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

(c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products".

46. In order to attain the underlying purpose of reducing the level of disease and death associated with tobacco use, the TPCA seeks to restrict most commercial inducements to use tobacco, and seeks to warn Canadians of the hazards of tobacco use. It is clear from section 3 of the

TPCA that the noxious and often fatal effects of tobacco use have been proven to the satisfaction of the Parliament of Canada.

47. The Interveners have reviewed in Part I of this factum the medical, scientific and social facts on tobacco, tobacco consumption and the alarming level of disease and death caused by the use of tobacco products. This review has underlined how critically important are legislative measures aimed at reducing tobacco consumption, and thereby reducing resulting levels of disease and death. Indeed, the Appellants have conceded that the objective of the TPCA is pressing and substantial.

(2) Legislative Means are Rationally Connected to the Objective

48. The Trial Judge held that the economic and social science evidence adduced at trial did not prove, in a civil evidentiary sense, that the promotion of tobacco products increases the overall level of consumption of tobacco. He therefore concluded that there was insufficient evidence that the TPCA would achieve the objective of reducing tobacco consumption.

49. However, as the Quebec Court of Appeal held in reversing the Trial Judge, the jurisprudence of this Court in respect of s. 1 of the *Charter* does not require conclusive proof that the legislative measure will successfully achieve the legislative objective. Rather, what is required is proof that Parliament had a "reasonable basis" for believing that the legislative measure would achieve its objective.

50. Thus, in *Dickason v. University of Alberta* (1992) Mr. Justice Sopinka, in dissent but not on this point, wrote:

The rationale for this approach in the latter case is that in dealing with governmental actors, it is often difficult, if not impossible, to prove in the ordinary way whether a particular measure will in fact achieve its objective. Accordingly, if Parliament, a legislature or other governmental body had a reasonable basis for concluding that the measure would achieve its objective, that is ordinarily a basis for concluding that

there is a rational connection between the measure and the governmental objective. (emphasis added)

Dickason v. University of Alberta, [1992] 2 S.C.R. 1103 at 1195-1196 per Sopinka J.

51. This "reasonable basis" approach was recently confirmed by the majority of this Court in *Rodriguez v. Attorney General of British Columbia* (1993).

Rodriguez v. Attorney General of British Columbia, [1993] 3 S.C.R. 519 at 614 per Sopinka J.

52. In seeking to establish the existence of a reasonable basis for Parliament's belief that the law in question would likely be successful in achieving the objective, the inquiry is not limited to medical, scientific or social science evidence in existence at the time of the enactment of the legislation. Either side may adduce post-enactment evidence supporting or negating the reasonableness of Parliament's basis for believing that the measure would likely achieve its objective.

Irwin Toy Limited v. Attorney General of Quebec, [1989] 1 S.C.R. 927 at 984 per Dickson C.J.

53. While the Trial Judge found that the relationship between tobacco advertising and overall tobacco consumption levels had not been proven conclusively, the difficulty in conclusively proving this relationship is not a proscription of Parliamentary action if there is a reasonable basis for presuming or believing the existence of such a relationship. In *Irwin Toy* (1989), *Keegstra* (1990) and *Butler* (1992), this Court presumed the existence of a relationship between the legislative measure and the objective where the relationship could not be proved in the ordinary way.

Irwin Toy Ltd. v. Attorney General of Quebec, *supra*
R. v. Keegstra, [1990] 3 S.C.R. 697
R. v. Butler, [1992] 1 S.C.R. 452

54. Moreover, there is a very substantial international body of opinion, adduced at trial, supporting the use of advertising restrictions as a method of achieving a reduction in overall levels of tobacco consumption. No credible evidence was adduced by the Appellants to the contrary. The

World Health Organization and the European Council have all supported bans on tobacco advertising. In addition, tobacco advertising bans have been enacted in a growing number of democratic nations. Ultimately, the question this Court must ask is whether the impugned legislative measures are reasonably directed at the legislative objective, as opposed to arbitrary or irrational. It is submitted that the TPCA easily meets this test.

55. Finally, it is submitted that the fact that the TPCA is an indirect method of attempting to achieve Parliament's aim is no objection to its constitutionality. The legislation at issue in *Butler*, involving the relationship between obscene material and presumed harm to women, was an equally indirect measure aimed at achieving a broader objective.

R. v. Butler, supra

(3) Minimal Impairment

56. The Interveners adopt and support the submissions of the Attorney General of Canada on this issue

(4) Effects of Charter Infringement not Disproportionate to Objective

57. The final component of the *Oakes* test requires that the Court evaluate the relative importance of the *Charter* infringement against the legislative objective, in order to ensure that the gravity of the infringement is not out of all proportion to the importance of the legislative objective.

58. On the one hand, the TPCA infringes the Appellant's right to commercial promotion of a product which is harmful and often fatal when used as intended. This form of expression is far from the core of political, social and academic expression which lies at the heart of the *Charter* protection. This Court has already recognized that the values which underlie the protection of freedom of expression relate to the search for truth and to the ability of each citizen to make free and informed decisions.

R. v. Butler, supra
Irwin Toy Ltd. v. Attorney General of Quebec, supra at 976 per
 Dickson C.J.

59. The Appellants' advertisements have been almost entirely image-oriented and largely divorced of informative content. Neither the search for truth nor the enhancement of consumers' ability to make informed decisions are fostered by this form of expression.

Cunningham, Rob, "*RJR-MacDonald Inc. v. Canada (Attorney General): Reflections from the Perspective of Health*," (forthcoming publication in the McGill L.J.)

Moon, Richard, "Lifestyle Advertising and Classical Freedom of Expression Doctrine", (1991) 36 McGill L.J. 76-129

60. On the other hand, the underlying objective of the TPCA is of paramount importance. The reduction of the overall level of tobacco use in Canada is truly a matter of national concern. Tobacco use is the largest preventable cause of death in Canada. About one person in four who regularly uses tobacco will die as a result of a disease caused by such use. The number of deaths resulting from AIDS, which many Canadians consider an epidemic, is a tiny fraction of the number of deaths resulting from tobacco use. Upwards of 35,000 Canadians die every year as a result of disease caused by tobacco use. Moreover, the rights of non-smokers to be free from airborne carcinogens must be considered.

AGC Annexes, Vol. 1, Annex 2.1(a), Vol. 2, Annex 3.1(a)

61. It is submitted that in balancing the gravity of the *Charter*-infringement against the importance of the legislative objective, the objective of the TPCA is substantially more important than the effect of the infringement.

PART IV - ORDER SOUGHT

62. The Interveners respectfully request that the appeal be dismissed with costs in all courts, and that the constitutional questions be answered as follows:

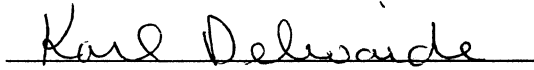
1. The *Tobacco Products Control Act* ("TPCA") S.C. 1988, c. 20 is wholly within the legislative competence of the Parliament of Canada;
2. The TPCA constitutes a reasonable limit which is demonstrably justified on the freedom of expression protected under s. 2(b) and, therefore, is fully in conformity with the *Canadian Charter of Rights and Freedoms*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

September 29, 1994



Robert W. Cosman



Karl Delwaide



Richard B. Swan

Counsel for the Interveners
The Canadian Cancer Society
Canadian Council on Smoking and
Health
The Canadian Medical Association
Heart and Stroke Foundation of
Canada
The Canadian Lung Association

PART V

TABLE OF AUTHORITIES

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<i>R. v. Oakes</i> , [1986] 1 S.C.R. 103	14
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