ORIGINAL

IN THE

Supreme Court of Canada

(ON APPEAL FROM THE QUEBEC COURT OF APPEAL)

Court No: 23460

BETWEEN:

RJR-MACDONALD INC.

Appellant

-and-

ATTORNEY GENERAL OF CANADA

Respondent

Court No: 23490

AND BETWEEN:

IMPERIAL TOBACCO LTD.,

Appellant

-and-

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 HEARTH AND STROKE FOUNDATION OF CANADA,

THE CANADIAN LUNG ASSOCIATION,

Interveners

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PART I - THE FACTS

1. This is an appeal from a judgment rendered on January 15, 1993 by the Quebec Court of Appeal (Rothman, Lebel and Brossard JJ.A.; vol. 3, Appellants' Joint Case; [1993] R.J.Q. 375, hereinafter cited to R.J.Q.). The Court of Appeal unanimously held the *Tobacco Products Control Act* (S.C., 1988, c.20, hereinafter "the TPCA") to be *intra vires* Parliament. The majority (Brossard J.A., dissenting) also held that the TPCA constituted a reasonable limit, which is demonstrably justified, on the freedom of expression protected under s. 2(b), and is therefore in conformity with the *Canadian Charter of Rights and Freedoms*;

2. The Respondent disagrees with the Appellants' statements of facts. These statements ignore the fact that tobacco consumption is a complex, multifaceted problem. The Appellants suggest that the TPCA's constitutional validity can be determined solely on the basis of the abstract advantages of advertising in general. The constitutional analysis, however, must focus on the real issue at bar, which is Parliament's ability to restrict the commercial promotion of a product harmful to health;

3. To adequately address the constitutional questions at issue in this case, it is essential to properly identify the social problem which tobacco consumption represents. To that effect, the Respondent will briefly discuss the following: (1) The evolution of medical science concerning the effects of tobacco products consumption on health; (2) Nicotine and addiction; (3) The social profile of users of tobacco products; (4) The vulnerability of young people; (5) Some facts concerning the Appellants; (6) Advertising of tobacco products; (7) Measures recommended by international organizations and measures adopted by other

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countries to fight tobacco consumption; (8) The fight against tobacco consumption in Canada; and (9) Enactment of the TPCA;

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*, R.S.C. 1985, c. C-5. A Certificate was issued by the Clerk of the Privy Council stating that the documents constituted "confidences of the Queen's Privy Council for Canada". Counsel for the Appellant RJR-MacDonald Inc. (hereinafter "RJR") eventually abandoned its challenge to the Certificate. As for the Appellant Imperial Tobacco Ltd (hereinafter "ITL"), it filed a motion challenging the Certificate's validity, as well as the constitutionality of sections 37 and 39. Following arguments on this motion, and after the trial judge had taken the matter under reserve, ITL withdrew its challenge. It is noteworthy that the constitutionality of s. 39 of the *Canada Evidence Act* was confirmed in *Canada (Minister of Industry, Trade and Commerce)* v. *Central Cartage Co. et al. (#1)* (1990), 109 N.R. 357 (F.C.A.), per Iacobucci J.A., leave to appeal to S.C.C. denied 17.01.91, no. 22057;

- See Annex 1

THE SOCIAL PROBLEM

1. The evolution of medical science concerning the effects of tobacco products consumption on health

5. Tobacco products have been used for a long time. However, scientific evidence that tobacco consumption causes serious illnesses, such as cancer, coronary and pulmonary diseases, is relatively recent. In fact, it was with the first Report of the Surgeon General of the United States in 1964 that the medical

community was alerted to the harm caused by tobacco consumption. Since then, numerous medical studies have been conducted and have concluded that tobacco products are injurious, not only to the health of those who use them, but also to non-smokers and even foetuses;

- See Annex 2

6. At trial, several experts, including epidemiologists, testified, not in order to establish the Appellants' civil liability, but rather to inform the court of the effects of tobacco products on the health of Canadians. In Canada, in 1989, over 30,000 premature deaths per year were attributable to tobacco use. As a result of consuming tobacco products, thousands of Canadians suffer from numerous serious illnesses, such as chronic bronchitis, emphysema, coronary diseases and various forms of cancer;

- See Annex 3

7. Medical science in this field is in constant evolution. Hence, a few years ago, it was generally believed that certain tobacco products, designed to deliver to the smoker lower levels of nicotine and tar, were less harmful to the health of their users. It is now clear that only a modest reduction in harm can be achieved through lower tar and nicotine levels. All tobacco products, including smokeless tobacco, are very harmful to health;

- See Annex 4

2. Nicotine and addiction

8. Tobacco consumption used to be considered a simple habit. However, scientific research has now established that the pharmacological and behavioural

processes that determine tobacco addiction are similar to those of other drugs, such as heroin and cocaine. Nicotine, the drug found in tobacco, is addictive;

- See Annex 5

9. Tobacco is not comparable to any other consumer product. No other consumer product, when used as intended, has the same harmful impact on health, combined with physiological and psychological effects which cause addiction;

3. The social profile of users of tobacco products

10. The onset of smoking occurs almost exclusively during teenage years. A significant number of young people experiment with smoking between the ages of 9 and 12. 1989 data from the Appellant ITL shows that 20% of male smokers and 22% of female smokers begin regular cigarette use by age 13. 22.9% of young men between the ages of 15 and 19 smoke regularly, while that number reaches 26.9% for young women. The latter constitute the most rapidly increasing group of smokers;

- See Annex 6.1

11. While men have historically smoked more than women, by 1986 Canadian women were almost as likely to smoke as men (26% compared to 31%);

- See Annex 6.2

12. In 1986, there were more smokers among people with less formal education (60% of those with no high school education smoked on a daily basis

compared to 8% of those with a university degree). Male blue-collar workers smoked more than male professionals (38% as opposed to 22%);

- See Annex 6.3

13. Tobacco consumption is prevalent everywhere in Canada. In 1986, 22% of British Columbians consumed tobacco. These figures reached 34% in Quebec; 26% in Ontario; 28% in the Prairies; and 31% in the Atlantic provinces;

- See Annex 6.4

14. Statistics for 1989 show that nearly 28% of Canadians over age 15 smoked. This figure translates to over 6,700,000 smokers;

- See Annex 6.5

4. The vulnerability of young people

15. Young people are particularly vulnerable to tobacco advertising. A specialist in child psychology, Dr. M. Chandler, testified on behalf of the Respondent. The Appellants did not introduce any evidence to refute Dr. Chandler's conclusions, which were as follows:

> 1) Due to a lack of detailed knowledge regarding the persistent cognitive and socio-emotional immaturities of both children and adolescents, many persons mistakenly view them as less vulnerable than is justified. They are not miniature adults.
>
> 2) Because learning what it might mean to be an adult is a principal developmental task of both children and adolescents, they are active consumers of materials intended for "adult eyes only". This puts the lie to any easy assumption that such youth can be insulated from advertising campaigns presumably aimed at adults.
>
> 3) The literal and stereotypic character of young children's thinking makes them especially gullible, and prone to influence by cigarette advertisements.
>
> 4) The cognitive immaturities of adolescents, as well as still younger children, seriously limit their ability to adequately comprehend the distant and probabilistic relations that exist between smoking and certain of its negative health consequences.

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5) Adolescents are predisposed, as a function of their persistent cognitive immaturity, to view public disagreements between "experts" as evidence that everything is simply a matter of subjective opinion, and a licence to "do their own thing". A warning by Health and Welfare Canada on a publicly advertised product would provide them with just the sort of evidence they feel is required to justify doing whatever impulsive thing occurs to them at the moment.

6) Because of their sense of invulnerability, their lack of future time perspective, their impaired sense of personal continuity and their need to win approval through "daring" activities, adolescents are **active** risk takers. This fact leaves them poorly prepared to arrive at a balanced judgment about the claims of cigarette advertisements.

7) Having helped eliminate the misleading association that advertising has created between smoking and an enviable life-style, the present ban on cigarette advertising can only serve to reduce the common view among today's youth that smoking is a desirable mark of maturity.

- See Annex 7

5. Some facts concerning the Appellants

16. The Appellants produce and sell tobacco products. They are participants in an oligopolistic market in which three companies control 99% of the Canadian market. In 1988, the Appellant RJR controlled 17% of the market, ITL 54% and Rothmans, Benson and Hedges Inc. 27%. The Appellants also control part of the remaining 1% of the market occupied by the few brands of foreign tobacco sold in Canada;

- See Annex 8

17. Sales of tobacco products generate considerable profits. For instance, in 1992, earnings from operations for ITL reached $432,000,000;

- See Annex 9

18. In the last decades, the Appellants have spent hundreds of millions of dollars to promote their products (for instance, $76,195,027 for both in 1987);

- See Annex 10

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19. While the Appellants do not challenge the legislative objective of the TPCA, they have always refused to admit that their products are in any way harmful to health;

- See Annex 11

6. Advertising of tobacco products

20. Large scale advertising seeks to convince potential buyers either to purchase goods or services, or to adopt an idea or a specific behaviour. Social psychology techniques are used to modify or influence consumers' attitudes. Repeated messages in various media seek to induce reminders of a product:

> Advertising is salesmanship, and it is paid by a firm, a person or a group with a particular point of view. The message advocates that point of view, and its goal is to create awareness, attitude, or behaviour that is favourable to that advocacy position. The message attempts to inform and to persuade, it is intentionally biased, and there is no intent to present a balanced point of view.

- M.L. Rothschild, *Advertising: from Fundamentals to Strategies* (Toronto: D.C. Heath, 1987) at 8 (cited in AG-224, Annex 12 a)
- See annex 12

21. The Appellants have not demonstrated that they ever have engaged in what Brossard J.A. referred to as "informative advertising". As for "brand advertising", evidence shows that packaging design and colour are chosen to convey the idea that tobacco products have certain attributes, which, in fact, they do not possess. They create an "image", despite the fact that it is virtually impossible to differentiate one product from another;

- See Annex 13

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22. The Appellants' marketing activities are not only aimed at promoting a product by hiding its true characteristics, but also at comforting consumers preoccupied with their health. This is done by portraying tobacco products as being less harmful to health than they actually are;

- See Annex 14

23. The Appellants submit that tobacco products advertising does not promote consumption, but that its only effect is to encourage users to chose one particular brand over another. In other words, the Appellants suggest that commercial promotion of tobacco products has no impact on general consumption rates;

- See Annex 15

24. The Appellants' definition of smokers is extremely wide-ranging. It encompasses anyone who smokes at least one cigarette per day, regardless of how recently that person started to smoke. In the Appellants' opinion, as soon as someone over 17 starts to experiment with tobacco, he or she is "fair game" for tobacco advertisers;

- See Annex 16

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;

- See Annex 17

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26. No one can remain insensitive to tobacco products advertising. This would be the case, **even if** the objective actually were to target users exclusively. In the words of Professor Cohen:

> Nonsmokers, and particularly adolescents, cannot be made immune to advertising effects -- **even if the primary goal of such advertising were to attract smokers of other brands** (...). No convincing theoretical argument or empirical evidence has yet been introduced by the cigarette industry to demonstrate that otherwise effective advertising is mysteriously ineffective for adolescents who have yet to become smokers.

- See Annex 18

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. The Respondent introduced into evidence numerous documents emanating from the Appellants, which clearly expose their attempts to promote the social acceptability of tobacco consumption and thereby convince Canadians to purchase tobacco products;

- See Annex 19

28. Tobacco advertising seeks to create positive attitudes about tobacco use, to present tobacco consumption as the norm and to counter fears that consumers may have about the health problems caused by the use of tobacco products. 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;

- See Annex 20

29. Advertising techniques seek to reassure persons concerned with their health by suggesting that they may continue to smoke if they choose products that are less harmful. The problem is twofold. First, no such product exists.

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Secondly, smoker satisfaction requires a certain level of nicotine. The Appellants' solution is to introduce the image of a "mild" product, while the product is not really less harmful. Unfortunately, some smokers chose a product which only appears less harmful, rather than attempt to quit smoking;

- See Annex 21

30. The Appellants argue, against all logic, that their advertising efforts are irrelevant to a youngster's decision to start using tobacco products. No expert testified on their behalf to support such a thesis. In fact, demographic and psychographic studies conducted for the Appellants dealt with teenagers as young as 15;

- See Annex 22

31. Measuring with precision an advertising campaign's effectiveness is virtually impossible. Sales are not only influenced by advertising. Other relevant factors include sex, age, psychological development, home environment, peer pressure, urban or rural setting. The exact interaction between all those factors and advertising is impossible to assess;

- See Annex 23

32. Despite this difficulty in quantifying precisely the relationship between advertising and consumption, the World Health Organization (WHO), the U.S. Surgeon General, a number of experts, as well as Parliament, all consider that advertising influences consumption;

- See Annex 24

33. The Department of National Health and Welfare (NHW) admitted that there was "no compelling" quantitative evidence that an advertising ban influences

consumption. However, Mr. Collishaw, NHW's adviser on tobacco policy prior to the enactment of the TPCA, did testify that there was "suggestive evidence" and "certainly a compelling logic" that this was so;

- See Annex 25

34. Furthermore, one eloquent fact remains: the Appellants spend huge amounts of money to advertise and market their products. The ultimate purpose of all this activity is to convince people to buy and consume tobacco products. The Appellants must, therefore, consider advertising an effective means of attaining that goal;

7. Measures recommended by international organizations and measures adopted by other countries to fight tobacco consumption

35. The Respondent introduced into evidence all of the U.S. Surgeon General Reports published up to the date of trial, several studies written for the WHO, and recommendations and resolutions of the Assembly of the WHO. Three experts in public health also testified. One of the purposes of leading this evidence was to demonstrate that the principles underlying the TPCA were widely accepted;

- See Annex 26

36. Several organizations active in the field of public health have conducted studies aimed at fighting the problem of tobacco consumption. Since 1970, the WHO has regularly recommended that its 187 member States adopt measures to deal with the problems caused by tobacco consumption such as premature deaths and diseases. For instance, in May 1986, the WHO Assembly adopted a resolution urging member States to fight tobacco consumption through various

measures (WHA39.14). Those recommendations were reiterated in 1990 (WHA43.16) and they include:

- the establishment of public education programs on tobacco and health issues, including smoking cessation programs;
- the promotion of abstention from the use of tobacco so as to protect children and young people from becoming addicted;
- **the progressive elimination of socio-economic and behavioral incentives to consume tobacco;**
- **the imposition of prominent health warnings, including the statement that tobacco is addictive, on all tobacco products packaging;**
- the elimination of smoking in health establishments;
- the protection of non-smokers from secondary smoke;
- the promotion of viable alternatives to tobacco production, sale of tobacco products and taxation of the products;
- the monitoring of tobacco consumption rates, tobacco related diseases and the effectiveness of national smoking control action;
- the establishment of national centres to stimulate and coordinate those activities.
- See Annex 27

37. In fact, in that 1990 resolution the WHO issued an even more urgent call for legislation to eliminate secondary smoke in public places and workplaces, to discourage the use of tobacco through progressive financial measures and to ban direct and indirect advertising of tobacco (WHA43.16). In 1991, the WHO urged member States to adopt appropriate measures for effective protection against involuntary smoke in all forms of public transport (WHA44.26);

- See Annex 28

38. In July 1993, the Economic and Social Council of the United Nations adopted a resolution expressly urging governments to maximize their efforts to reduce tobacco consumption (Res. 1993/79). It recommended the adoption of

multifaceted approaches. It also noted the importance of cooperation between international organizations in the development of global strategies to deal with the problem of tobacco consumption;

- See also Draft resolution E/1994/L.47, July 28, 1994 (Adopted July 29, 1994)
- See Annex 29

39. The European Union has also been active in this area. Already in 1982, the European Parliament approved an anti-smoking campain launched by the European Council (O.J. No. C87, 5.4.82, p. 118). In 1986, the European Council adopted a resolution declaring the fight against tobacco consumption to be a priority (86/C 184/05). In July 1989, the Council and the Ministers for Health adopted a resolution inviting member States to ban smoking in places open to the public and on all forms of public transport (89/C 189/01). In October 1989, the European Council adopted a directive banning broadcast advertising of tobacco products (89\552\EEC). A second directive, adopted one month later, listed the health warnings which must appear on tobacco products packaging (89\622\EEC; amended May 1992: 92/41/EEC). That last amending directive also prohibits tobacco for oral use. Finally, from 1990 to 1992, the European Commission submitted proposals for Council directives which would ban all direct and indirect advertising of tobacco products (90/C116/05; 91/C167/03; 92/C129/04);

- See Annex 30

40. Canada is not alone in its legislative attempts to deal with the problem of tobacco consumption. By 1990, over 55 countries had adopted various measures to restrict tobacco consumption and\or tobacco advertising. Singapore, Iceland, Norway, Finland and Portugal were the first to prohibit tobacco advertising. They were followed by Canada, New Zealand, France,

Thailand and Australia. It is worth noting that in 1991, the French *Conseil constitutionnel* declared valid the *Loi no. 91-32 relative à la lutte contre le tabagisme et l'alcoolisme*, which prohibits all direct and indirect tobacco advertising, as it is founded on the constitutional principle of public health protection;

- See Annex 31
- See also WHO, *Legislative Actions to Combat the World Tobacco Epidemic*, 2e ed. (Geneva: WHO, 1993)
- *International Digest of Health Legislation*, vol. 41 to 44 (1990-94)

8. The fight against tobacco consumption in Canada

41. The evolution of measures taken in Canada has followed the evolution of medical science. In 1969, a Parliamentary committee studied the question of tobacco advertising. Its recommendations to Parliament are remarkably similar to those adopted by the Assembly of the WHO in 1986. Over the years, several bills aimed at prohibiting tobacco advertising were introduced. In response to such a Bill introduced in 1971, the tobacco industry restricted its promotional activities, thereby implicitly admitting that advertising influences consumption rates. The Department of National Health and Welfare introduced several education programs. It also supported research and health promotion organizations. In 1987, the committee responsible for elaborating a comprehensive program to fight tobacco consumption recommended several measures to protect the health and rights of non-smokers, to prevent people from starting to smoke and to encourage smokers to quit. One of those measures was the introduction of very strict limitations on tobacco advertising. Again, all those measures closely follow those recommended by the WHO;

- See Annex 32

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9. Enactment of the TPCA

42. The legislative committee responsible for studying Bill C-51 (the *Tobacco Products Control Act*) heard from 104 organizations representing a variety of interests: medicine, transport, advertising, smokers rights, non-smokers rights, and tobacco production. Parliament adopted Bill C-51, which received Royal Assent on June 28, 1988;

- See Annex 33

43. The TPCA is part of the comprehensive programme designed to curb tobacco consumption. Regulations pursuant to the TPCA were adopted in 1988, and modified twice in 1993. In addition, the *Non-Smokers' Health Act* bans smoking in federal buildings and on common carriers under federal jurisdiction. In 1993, the *Tobacco Sales to Young Persons Act* which prohibits businesses from selling or giving tobacco to persons under the age of 18, replaced the *Tobacco Restraint Act*;

- *Non-Smokers' Health Act*, R.S.C. 1985, c.15 (4th supp.)
- *Tobacco Sales to Young Persons Act*, S.C. 1993, c.5
- *Tobacco Restraint Act* (R.S.C., c. T-12)
- SOR/89-21; SOR/93-389; SOR/94-5

10. Conclusions as to the facts

44. The Quebec Court of Appeal properly concluded that tobacco consumption is a complex and multifaceted problem. Any analysis of the TPCA must take into account the following factors:

a) The world's medical community unanimously agrees that tobacco products are toxic and have serious deleterious effects on health;

b) Over 30,000 premature deaths per year in Canada are attributable to tobacco use;

c) All tobacco products presently on the market represent a health hazard;

d) Tobacco products contain an addictive drug: nicotine. Smoking is simply a means of self-administering that drug;

e) The onset of smoking occurs almost exclusively during the teenage years.

f) Over 6,700,000 Canadians use tobacco products on a regular basis;

g) The Appellants spend considerable sums on the promotion of those products;

h) Every form of tobacco products advertising constitutes an inducement to consume these products;

i) An increasing number of international organizations call for restrictions on tobacco products advertising. Several countries have already complied;

45. No single measure can, on its own, reduce tobacco consumption and thereby the number of premature deaths and illnesses attributable to tobacco use. As the WHO repeatedly noted, any viable and effective solution must be comprehensive and multifaceted. The TPCA is an important component of Parliament's comprehensive programme to fight tobacco consumption and protect the health of Canadians;

PART II - POINTS IN ISSUE

46. 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?"

47. The Attorney General of Canada submits 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 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

1. Characterization of the *Tobacco Products Control Act*

48. It is submitted that the Court of Appeal took the correct approach in rejecting the learned trial judge's narrow characterization of the legislation as merely the regulation of the advertising of tobacco products. Basing itself on both the extrinsic evidence and s. 3 of the TPCA, it correctly identified the "leading feature or true character" of the Act as dealing with a problem of public health;

> En réalité, pour la répartition des compétences constitutionnelles, cette loi vise un problème de santé publique. Pour le régler, au moins partiellement, sans doute pour s'y attaquer, elle vise au contrôle de certaines formes de la publicité des produits du tabac...

- Judgment *a quo* at 381 (Lebel J.A.)

> ... j'en viens à la conclusion que le sens véritable de cette loi, que son idée maîtresse ou caractère véritable, que sa caractéristique la plus importante réside dans la recherche d'une diminution de la consommation des produits du tabac et, en conséquence, dans la protection de la santé publique contre les effets nocifs du tabagisme.

- Judgment *a quo* at 408 (Brossard J.A.)
- See, as to characterization for division of powers purposes, *R.* v. *Morgentaler* #3, [1993] 3 S.C.R. 463 at 481-88 (Sopinka J.)

49. The proper characterization of the legislation is that it is directed at the suppression of inducements to use tobacco products coupled with requirements that information about the hazards of the use of tobacco products be furnished to consumers, the whole with the aim of reducing consumption of, and

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dependence upon, a dangerous product. The legislation is thus a response to a major public health problem and, it is submitted, is *intra vires* Parliament both as a matter of criminal law and as a matter of peace, order and good government;

2. The *Tobacco Products Control Act* is valid as criminal law

50. Case law has established the following principles as key elements in examining the federal criminal law power:

a) The criminal law power under s. 91(27) of the *Constitution Act, 1867* means "criminal law in its widest sense". It is not confined to what was criminal in 1867 nor is the application of criminal law confined to any fixed domain of activity;

- *Attorney General for Ontario* v. *Hamilton Street Railway*, [1903] A.C. 524 at 529-30
- *Proprietary Articles Trade Association* v. *The Attorney General of Canada*, [1931] A.C. 311 at 324-5
- *The Queen* v. *Zelensky et al.*, [1978] 2 S.C.R. 940 at 950-1 (Laskin C.J.C.)
- *Scowbie* v. *Glendinning*, [1986] 2 S.C.R. 226 (Estey J.)

b) The criminal law must not, however, invade the proper sphere of the provincial legislatures. It must be directed to a public purpose such as public peace, order, security, **health** or morality;

- *Reference as to the validity of section 5(A) of the Dairy Industry Act, R.S.C. 1927, c. 45*, [1949] 1 S.C.R. 1 ("*The Margarine Reference*") at 49-50 (Rand J.)
- *Johnson* v. *Attorney General of Alberta*, [1954] S.C.R. 127 at 154-55 (Locke J.)
- *Boggs* v. *The Queen*, [1981] 1 S.C.R. 49 at 60 (Estey J.)

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c) While most aspects of health fall within provincial jurisdiction, many aspects, particularly those related to products causing a risk to health, such as the problem of tobacco consumption, may be dealt with by Parliament;

- *Schneider* v. *The Queen*, [1982] 2 S.C.R. 112 at 134 and 136 (Dickson J.) and at 142 (Estey J.)

d) Legislation, particularly in the area of health, may contain detailed regulatory provisions without thereby losing its characterization as criminal law;

- *R.* v. *Wetmore and Attorney General of Ontario*, [1983] 2 S.C.R. 284 at 285-9 (Laskin C.J.C.)
- *C.E. Jamieson and Co. (Dominion) Ltd.* v. *Attorney General of Canada*, [1988] 1 F.C. 590 (T.D.; Muldoon J.)

e) Criminal law may provide exemptions for certain conduct;

- *Lord's Day Alliance of Canada* v. *Attorney General of British Columbia*, [1959] S.C.R. 497
- *Morgentaler* v. *The Queen* #1, [1976] 1 S.C.R. 616 at 626-627 (Laskin C.J.C.)
- *Furtney* v. *The Queen*, [1991] 3 S.C.R. 89 at 102-3 and 105 (Stevenson J.)

f) In dealing with conduct under the criminal law power, Parliament may deal with the problem indirectly, provided that it does not trespass on provincial powers. Thus, while not prohibiting prostitution directly, Parliament may prohibit the operation of bawdy houses or the solicitation of clients in the streets. While not making suicide or attempted suicide

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a crime, it may make the act of assisting someone to commit suicide a crime;

- *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at 1190-95 (Lamer J.)
- *Rodriguez* v. *British Columbia (A.G.)*, [1993] 3 S.C.R. 519 at 596-8 (Sopinka J.)

51. The Court of Appeal held that the TPCA could not be justified under the criminal law power. For Brossard J.A., with whom Lebel and Rothman J.J.A. concurred, the TPCA seeks to control activities which are accessory or secondary to the consumption of tobacco products. While he concedes that "indirect" legislation is possible in some cases, he is of the view that this is only possible where the activity has affinity with "some traditional criminal law concern";

- Judgment *a quo* at 410 (Brossard J.A.)

52. Such analysis, however, neglects the well-established principle that, in determining what is criminal law and what criminal sanctions are to be, Parliament is not restricted by what may have existed at the time of Confederation. New crimes and new legislative techniques to deal with crimes may be introduced under the criminal law power;

- *Zelensky et al.*, *supra*, at 950-1 (Laskin C.J.C.)
- *R.* v. *Sheldon S.*, [1990] 2 S.C.R. 254

53. Further, the approach of the Court of Appeal is unduly narrow. It fails to appreciate the particular characteristics of tobacco consumption. The evidence clearly shows that tobacco consumption is injurious to health, that consumption begins at an early age, that long term consumption is particularly harmful and that the product is highly addictive. But, evidence also shows that consumption is still widespread. Nearly seven million Canadians consume tobacco regularly.

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That is a quarter of the Canadian population. In these circumstances, it was not possible, in Parliament's judgment, to simply prohibit the product. Parliament's choice, however, to establish a lesser prohibition did not have the effect of changing the characterization of the legislation away from its criminal law basis. It is a prohibition enacted, not with the view to regulate the tobacco industry and its relationship with consumers, but rather as criminal legislation aimed at the protection of public health. The purpose of the legislation is the protection of health, as opposed to the establishment of industry standards or the protection of economic interests;

- Compare: - *Labatt Breweries* v. *Canada (A.G.)*, [1980] 1 S.C.R. 914
  - *Margarine Reference*, *supra*
- See par. 5 to 15, *supra*

54. To distinguish between "direct" and "indirect" attempts to regulate undesirable conduct on the basis of some connection with a "traditional criminal law concern" is, with respect, a return to the outdated notion of a "domain" of criminal law. Such an approach would stifle the evolution of criminal law as a tool to protect public health by proscribing inducements to consume tobacco products. Rather, the TPCA represents a modern approach to deal with a difficult and complex problem and, in the absence of a clear invasion of provincial authority, should not be unduly restricted;

55. The crucial question is not whether the subject of the legislation is traditionally criminal, but rather whether the legislation can ***in fact*** be characterized as criminal law;

56. Just as the criminal law power is not confined to what was criminal in 1867, there is no reason why the exercise of Parliament's criminal law power should not extend to the prohibition of "secondary" activities, when prohibiting

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the "central" one is not feasible. While care must be exercised not to invade provincial jurisdiction, the scope of criminal law, encompassing the protection of public peace, order, security, health and morality, must be allowed to evolve and adapt to new problems and circumstances. The criminal law power permits Parliament to do more than simply prohibiting the sale and consumption of tobacco products, which is unrealistic;

Compare:
- *Goodyear Tire and Rubber of Canada Ltd.* v. *The Queen*, [1956] S.C.R. 303 (Rand J.)
- *Zelensky et al, supra*

57. It is further submitted that the legislation does not fail the criminal law test simply because it contains certain exemptions. Legislation containing exemptions and forbearance provisions has, provided it meets the criminal law test, consistently been upheld under the criminal law power;

- *Lord's Day Alliance of Canada, supra*
- *Morgentaler #1, supra* at 626-627 (Laskin C.J.C.)
- *Furtney, supra*

58. In any event, the exemptions provided in the TPCA are clearly marginal and do not have the scope attributed to them by the Appellants. S. 4(1) of the TPCA contains a broad prohibition on advertising any tobacco product for sale in Canada. S. 4(2) extends this prohibition to the media disseminating tobacco advertising. S. 4(3) operates as an exception to 4(2), exempting publications imported into Canada or the retransmissions of broadcasts originating outside of Canada. It applies to the media, not to the advertiser. S. 4(3) contemplates *foreign* (mainly U.S.) publications advertising *foreign* cigarettes. The provision is clearly designed to preclude the extraterritorial application of Canadian legislation. It avoids criminalizing an advertisement by a U.S. manufacturer in a U.S. publication, of a tobacco product which may be sold in Canada, and therefore prevents the page-by-page censoring of foreign publications of interest

to Canadians. The Appellants, in any event, have put forward no evidence to show that any product so advertised has any significant share of the Canadian tobacco market;

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59. It is submitted that the TPCA represents a carefully targeted attempt to proscribe conduct, the inducement to consume tobacco products, which leads to disease and death. It is not a mere attempt to regulate a specific industry, but is rather directed at a major public health concern. It is carefully limited both as to its scope and to its impact on the industry. As such, it is submitted, it is valid

20 as legislation in relation to the criminal law;

3. The *TPCA* is justifiable under the peace, order and good government power

60. It is submitted that the Court of Appeal was correct in its finding that it was open to Parliament to adopt the impugned Act, since it addressed a problem

30 of national concern i.e. the death and illnesses caused by tobacco consumption under the peace, order and good government power (hereinafter "POGG");

- Judgment *a quo* at 382-89 (Lebel J.A.), and at 410-17 (Brossard J.A.)

61. The TPCA is a focused attempt to deal with inducements to consume tobacco products with a view to reducing and ultimately eliminating consumption. It also requires the presentation of information as to the contents

40 and the health risks associated with the product. As the evidence summarized *supra* clearly shows, tobacco consumption causes many deaths and illnesses. Further, tobacco is an addictive product consumed by a large segment of the population. The pervasiveness of tobacco use in the twentieth century, together with the increasing scientific knowledge of the health risks associated with tobacco use, have made tobacco consumption a problem of national concern.

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The TPCA, properly characterized, is not merely health legislation writ large or the control of a single industry, but rather a carefully tailored attempt to deal with that national problem;

- See par. 5 to 15, *supra*

62. The legislation is carefully targeted. It is limited in its scope to the severe restriction of the advertising of tobacco products and the requirement for health information on packaging. It does not deal with such matters as licensing, hours of sale, pricing, and regulation of methods of production of the tobacco industry. Thus, the "scale of impact" on provincial jurisdiction is limited;

Compare:
- *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 272 at 458 (Beetz J.)
- *R.* v. *Crown Zellerbach*, [1988] 1 S.C.R. 401 at 432-4 (Le Dain J.)

63. Tobacco consumption is hazardous to health when used as intended. With its extensive pattern of use, its attendant health risks, and the dependence which its consumption engenders, tobacco consumption is qualitatively different from the consumption of other legal products. Recognizing this, the legislation is not merely directed to regulating advertising, but is directed to a larger end: the elimination of smoking by Canadians to protect their health. This, it is submitted, is a public health problem, like the alcohol trade or drug trafficking, which goes beyond provincial concern. If, as the courts have consistently held, the prevention of a resurgence of drunkenness was a POGG matter in 1946, what of smoking now, whose harmful effects on Canadians are clearly in evidence?

64. In determining whether a matter is of "national concern", one must consider what Le Dain J. described as the "provincial inability" test in *Crown*

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Zellerbach. In other words, would a provincial failure to adopt legislation similar to that under examination have an effect on the national importance of the matter? The Appellants seem to interpret this test as meaning that POGG cannot be invoked unless provincial legislation dealing with any part of the problem would be ineffective. With respect, this is not the test for determining whether a matter can fall under the "national concern" test. In *Canada Temperance Federation*, Lord Simon made clear that the validity of federal legislation was not affected by the fact that provinces could deal with many aspects of the same subject which particularly affect the province;

- *Crown Zellerbach*, *supra*, at 432 (Le Dain J.)
- *Attorney General for Ontario* v. *Canada Temperance Federation*, [1946] A.C. 193 at 205-6 (Lord Simon)

65. In the same vein, in *Crown Zellerbach*, Le Dain J. underlined that the "provincial inability" test is simply designed to verify whether a matter has the requisite "singleness or indivisibility" to bring it within that national concern doctrine;

> As expressed by Professor Hogg in the first and second editions of his *Constitutional law of Canada*, the «provincial inability» test would appear to be adopted simply as a reason for finding that a particular matter is one of national concern falling within the peace, order and good government power: that provincial failure to deal effectively with the intra-provincial aspects of the matter could have an adverse effect on extra-provincial interests. In this sense, the «provincial inability» test is one of the indicia for determining whether a matter has that character of singleness or indivisibility required to bring it within the national concern doctrine. It is because of the interrelatedness of the intra-provincial and extra-provincial aspects of the matter that it requires a single or uniform legislative treatment. The «provincial inability» test must not, however, go so far as to provide a rationale for the general notion, hitherto rejected in the cases, that there must be a plenary jurisdiction in one order of government or the other to deal with any legislative problem. In the context of the national concern doctrine of the peace, order and good government power, its utility lies, in my opinion, in assisting in the determination whether a matter has

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> the requisite singleness or indivisibility from a functional as well as conceptual point of view.
>
> - *Crown Zellerbach*, *supra*, at 433-434 (emphasis added)

66. Le Dain J. notes that one should examine whether provincial "failure" to deal with local aspects of the matter could adversely affect extra-provincial interests. In the present case, it is clear that, were one or more provinces not to adopt legislation like the TPCA, the aim of reducing advertising with a view to cutting the number of smokers would not be met on a national basis. An exclusive reliance on provincial legislation in this field would not meet the national objective - one with a singleness, distinctiveness and indivisibility - of choking demand for tobacco products through severe restrictions on advertising. At best, one would have a checkerboard of legislation which could only address the provincial aspects of the problem and would thereby prejudice a uniform national solution to the pressing national problem caused by tobacco consumption;

67. It is submitted that the Court of Appeal correctly held that the matters addressed in the TPCA have the requisite "degree of singleness, distinctiveness and indivisibility" to be distinguished from provincial matters:

> Par ailleurs, si nous en revenons aux critères de l'arrêt *Crown Zellerbach,* il me paraît que les problèmes de santé reliés au tabagisme comportent ce degré d'unicité, de particularité et d'indivisibilité qui les distingue clairement des matières d'intérêt strictement provincial. La preuve extrinsèque, en effet, tel que déjà mentionné d'ailleurs, démontre clairement que, quelle que soit la juridiction, le problème est identique et uniforme. Sa dimension, tant dans ses effets que dans son importance, ne varie pas d'une province à l'autre ni même d'un pays à l'autre. Il n'existe aucune preuve permettant de croire que les effets de la publicité sur la consommation, positive ou négative, sont susceptibles de varier d'une juridiction à l'autre. Cet aspect de la preuve, susceptible d'être très important plus loin, dans l'appréciation de la justification

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> de la loi en litige en vertu de l'article 1 de la charte des droits et libertés, paraît m'autoriser, à ce stade-ci, à conclure à l'indivisibilité du problème dans sa dimension nationale.
>
> - Judgment *a quo* at 415 (Brossard J.A., Lebel J.A. concurring)

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68. Further, it is submitted that Brossard J.A. was correct when he noted that communications today know no boundaries. This is particularly true in the case of provincial legislation which cannot have any territorial application beyond the boundaries of a province. While the Appellants complain that the TPCA's exemption over foreign advertising makes a patchwork of the legislation, this
20 situation would only be aggravated were Parliament denied authority to effectively deal with the problem of tobacco consumption;

- Judgment *a quo* at 415 (Brossard J.A., Lebel J.A. concurring)

69. Early on, the Judicial Committee recognized federal authority to deal with matters which, in ordinary circumstances, would be provincial. In those cases, analogous to the case at bar, their Lordships considered legislation designed to
30 deal with a national problem engendered by the consumption of a particular product. They upheld federal legislation, the *Canada Temperance Act*, which provided for the prohibition of the sale of liquor in any county or city where the electors so decided. Lord Watson observed:

> Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body
40 politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local or provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada.
>
> - *Attorney General for Ontario* v. *Attorney General for the Dominion*, [1896] A.C. 348 (*Local Prohibition case*) at 361

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70. Similar temperance legislation was upheld in 1946 on the same basis. Lord Simon asserted that there was a federal power under POGG to deal with matters which go beyond a local concern to become the concern of the nation as a whole. Nor was there any reason to disallow federal legislation, on the basis that a province could deal with the matter, or an aspect thereof, so far as it affected the province. He stated:

> In their Lordships' opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (as, for example, in the Aeronautics case and the Radio case), then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances; so, too, may be the drink or drug traffic, or the carrying of arms. In *Russell* v. *The Queen*, Sir Montague Smith gave as an instance of valid Dominion legislation a law which prohibited or restricted the sale or exposure of cattle having a contagious disease. Nor is the validity of the legislation, when due to its inherent nature, affected because there may still be room for enactments by a provincial legislature dealing with an aspect of the same subject in so far as it specially affects that province.
>
> - *Canada Temperance Federation*, *supra*, at 205-6

71. In that case, Lord Simon further observed that legislating for prevention as well as for cure, was a valid exercise of federal authority under POGG:

> To legislate for prevention appears to be on the same basis as legislation for cure. A pestilence has been given an example of a subject so affecting, or which might so affect, the whole Dominion that it would justify legislation by the Parliament of Canada as a matter concerning the order and good government of the Dominion. It would seem to follow that if the Parliament could legislate when there was an actual epidemic it could do so to prevent one occurring and also to prevent it happening again.
>
> - *ibid.*, at 208 (emphasis added)

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72. It is submitted that this reasoning is particularly apposite here, given that one of the major aims of the legislation is to prevent inducements to consume tobacco products, such consumption being a serious health concern;

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73. Parliament, it is submitted, has dealt with the unique problem of tobacco consumption in a limited and focused way which takes into account the particular nature of that problem. The TPCA has a minimal impact on provincial jurisdiction, that impact being limited to the national dimension of the problem. Provinces can deal with many local aspects of the tobacco trade. The problem of tobacco consumption has gone beyond local concerns and the legislation deals with national concerns. Thus, it is submitted, the TPCA falls within the legislative authority of Parliament under POGG;

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B. FREEDOM OF EXPRESSION

74. The Respondent does not question the fact that freedom of expression is a fundamental value in a free and democratic society. This Court has underlined the principles and values which lie at the heart of freedom of expression. They relate to the search for truth, participation in the political process and individual self-fulfilment;

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- *Irwin Toy Ltd* v. *Québec (A.G.)*, [1989] 1 S.C.R. 927 at 976 (Dickson C.J.C.)
- *R.* v. *Butler*, [1992] 1 S.C.R. 452 at 499 (Sopinka J.)
- *R.* v. *Keegstra*, [1990] 3 S.C.R. 697 at 762 (Dickson C.J.C.)

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75. This Court has held that, since commercial expression conveys meaning and fosters informed economic choices, it is protected under s. 2(b) of the *Canadian Charter of Rights and Freedoms*;

- *Ford* v. *Québec (A.G.)*, [1988] 2 S.C.R. 712 at 767
- *Irwin Toy, supra*, at 971
- *Rocket* v. *Royal College of Dental Surgeons*, [1990] 2 S.C.R. 232 at 241-42 (McLachlin J.)

76. In view of this Court's decisions on commercial expression, the Respondent recognizes that the impugned legislation constitutes an infringement on the Appellants' freedom of expression;

77. The Respondent submits, however, that the impugned legislation ensures that consumers receive all relevant information concerning health problems caused by the use of tobacco products, as well as preserving point of sale information on the products;

1. The values promoted by section 1 of the Charter

78. Section 1 guarantees Canada's fundamental values and aspirations. However, the *Charter* is not exhaustive. The rights and freedoms enshrined in the *Charter* are not the only values protected in a free and democratic society. Some other important underlying values and principles, "are the ultimate standard under which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified";

- *R.* v. *Oakes*, [1986] 1 R.C.S. 103 at 136 (Dickson C.J.C.)
- See also *Keegstra, supra*, at 736-37 and *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038 at 1056

79. Public health is one such value. Health underlies the liberty and security of the person as well as other fundamental rights protected by the *Charter* and

various international instruments. Hence, s. 10 of the *European Convention on Human Rights* recognizes that, in some circumstances, freedom of expression may be subject to restrictions in the interest of health protection;

- See Annex 34
- See also s. 12 of the *International Covenant of Economic, Social and Cultural Rights*, both found in A. Morel, ed., *Code des droits et libertés*, 5th ed. (Montréal: Les Éditions Thémis, 1993)

80. The corollary of the fundamental value of public health is the responsibility undertaken by democratic societies, including Canada, to adopt measures which maintain, protect and improve their population's health;

- See preamble to *Canada Health Act*, R.S.C. 1985, c. C-6
- Resolution of the Economic and Social Council of the UN, 1993/79, July 30, 1993 (Annex 29 a)
- See WHO documents cited at par. 32 (Annex 24 a to 24 u) and par. 79 (Annex 34)

81. By virtue of the TPCA, Parliament has discharged its responsibility to protect all Canadians from inducements to use tobacco products and satisfied their need to be properly informed of the serious health problems caused by those products;

- *143471 Canada Inc.* v. *Québec (Q.G.)* (1994), 167 N.R. 321 at 327-328 (Cory J.)

82. Section 1 makes reference to a democratic society. Fundamental in a representative democracy, such as Canada, is the responsibility of the elected members of a legislature to adopt legislation for the public good. Legislating often requires a difficult balancing of interests. While legislation is certainly the proper focus of *Charter* review, it is important to underline that the protection of democratic values also implies an appreciation of the workings of democratic governments and the role of legislative bodies;

- See *Irwin Toy*, *supra*, at 993

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83. As La Forest J. recently stated:

> One must be mindful of the fact that governments - though capable of interfering with the rights the *Charter* was created to protect - are fundamentally democratic organizations whose function is to advance the welfare of the individual and society [...] The courts must, consistent with their duty to oversee government activities to ensure reasonable compliance with our fundamental freedoms, allow these democratic bodies room to accomplish their own tasks of balancing interests in our society, and not to fetter them unduly with unworkable rules.
>
> - G.V. La Forest, "The Balancing of Interests under the *Charter*" (1993), 2 *N.J.C.L.* 133 at 136

2. The contextual approach: the type of expression at stake in the case at bar

84. This Court has repeatedly endorsed a contextual approach to the protection of *Charter* rights and freedoms. S. 1 analyses require that the contradictory values at stake be examined in their specific factual and social context. The *Charter* precludes an assessment of rights and freedoms in the abstract;

- La Forest J., *ibid.*, at 134
- *Keegstra*, *supra*, at 737 (Dickson C.J.C.)

85. Through its use of the contextual approach, this Court seeks to assess the extent to which expression in a particular context accords with the principles underlying s. 2(b), in order to determine the importance of that expression in the balancing test under s. 1;

- *Edmonton Journal* v. *Alberta (A.G.)*, [1989] 2 S.C.R. 1326 at 1355 (Wilson J.); applied in *Keegstra*, *supra*, at 737 (Dickson C.J.C.) and in *Rocket* at 246-7

86. While freedom of expression is fundamental, this Court has held that some forms of expression may be limited by governmental action more easily than

others. The farther a particular conduct is from the "central core of the spirit" of s. 2(b), the more easily a restriction on this conduct can be justified under s. 1;

- *Re ss. 193 and 195.1(1) of the Criminal Code*, [1990] 1 S.C.R. 1123 at 1136 (Lamer C.J.C.)
- *Keegstra*, *supra*, at 766
- *Rocket*, *supra*, at 247
- *Butler*, *supra*, at 499
- *Peterborough (City)* v. *Ramsden*, [1993] 2 S.C.R. 1084 at 1107 (Iacobucci J.)

87. Although commercial expression is protected under s. 2(b) of the *Charter*, it is imperative to recall that the present case deals with the advertising of tobacco, a product harmful to health, even when used as intended. Advertising tobacco does not further individual self-development or the search for truth, nor does it play a role in the democratic or political process, any more than communication for purposes of prostitution, or the sale of obscene material do;

- *Re art. 193, 195 Criminal Code*, *supra*
- *Butler*, *supra*

88. The Appellants' expressive activities have only one purpose: profit. It is this value which must be examined alongside the other values at stake in the present case, these being health protection and the right of consumers to be informed of the harmful effects of certain products offered for sale;

89. The Respondent does not suggest that commercial advertising is "inherently less worthy than other forms of expression" (RJR, par. 65). The Respondent, instead, submits that, in the context of this case, Parliament was

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justified in severely restricting the commercial promotion of a harmful product, when such promotion is designed for ***no other purpose*** than to make a profit;

- Judgment *a quo* at 400 (Lebel J.A.)
- *Rocket, supra*, at 247

90. The control of advertising and commercial promotion of other dangerous products is common in democratic societies;

See for example:
- *Hazardous Products Act*, R.S.C. 1985, c. H-3, ss. 2, 4, 5
- *Food and Drugs Act*, R.S.C. 1985, c. F-27, ss. 2, 3, 5, 6.1, 10, 17, 20, 21, 30

91. It is worth noting that while commercial speech and publicity are constitutionally protected in the United States, they receive a lesser degree of protection than other forms of expression;

- *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council Inc.*, 96 S.Ct. 1817; 425 U.S. 748 (1976)
- *Central Hudson Gas & Electric Corp.* v. *Public Service Commission of New York*, 100 S.Ct. 2343; 447 U.S. 557 (1980)
- *Board of Trustees of the State University of New York et al.* v. *Fox*, 109 S.Ct. 3028; 492 U.S. 480 (1989)
- *Metromedia Inc.* v. *City of San Diego*, 101 S.Ct. 2882; 453 U.S. 490 (1981)

92. In 1968, the U.S. Court of Appeals already confirmed the constitutional validity of regulations which imposed stringent rules on broadcasters who advertised tobacco products;

- In *Banzhaf* v. *Federal Communications Commission*, 405 F.2d 1082 (C.A., D.C.Cir. 1968), cert. denied sub. nom. *Tobacco Institute Inc.* v. *F.C.C.*, 396 U.S. 842 (1969)

93. The Respondent therefore submits that Parliament was justified in limiting the Appellants' freedom of commercial expression;

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3. Justification under s. 1 of the *Charter*

94. In *Oakes*, Dickson C.J.C. elaborated criteria for determining when a limit on a guaranteed right or freedom may be justified in a free and democratic society. Those criteria require that:

1. the objective of the limitation relate to concerns which are pressing and substantial;

2. the means chosen be reasonably and demonstrably justified:
   - the measures should be rationally connected with the objective;
   - they should impair the guaranteed right or freedom as little as possible; and
   - their deleterious effects should not be disproportionate relative to the legislative objective;

95. The complex application of these criteria in *Charter* case law must not detract from the basic question which section 1 poses to the Court: Is the limit imposed by a democratic law-maker **reasonable** and demonstrably justified in a free and democratic society? Again, as La Forest J. concisely put it:

> *Oakes* does not prescribe rules. It simply provides a checklist, guidelines for the performance of our duty under the Constitution to consider whether limits to guaranteed rights have been shown to be reasonable by those who rely on those limits.
>
> - "The Balancing of Interests under the *Charter*", *supra*, at 146
> - See also *Committee for the Commonwealth of Canada* c. *Canada*, [1991] 1 S.C.R. 139 at 221-222 (L'Heureux-Dubé J.)

3.1 The legislative objective relates to pressing and substantial concerns

96. Both Appellants admit that the objective of the TPCA is sufficiently important to warrant overriding the freedom of expression guaranteed by s. 2(b). The Quebec Court of Appeal unanimously recognized that tobacco consumption

was a "*fléau mondial*" and a "*problème majeur de santé publique*" and that the legislative objectives to curb, and even eliminate it, were very important;

- ITL, par. 22 and 88
- RJR, par. 7
- Judgment *a quo* at 405 (Brossard J.A.) and at 382 (Lebel J.A.)

97. This Court has recognized that governments must be afforded a "margin of appreciation to form legitimate objectives", even when the social science evidence is "somewhat inconclusive";

- *Irwin Toy*, *supra*, at 990 (Dickson C.J.C.)
- *Ford*, *supra*, at 777-79

98. Tobacco consumption is a multifaceted problem which requires the intervention of various public authorities, including legislative bodies. All the measures adopted by those actors are directed at the same important objective: reducing tobacco consumption. The WHO and recently the Economic and Social Council of the UN have reiterated the necessity that governments adopt global strategies to deal with this major problem;

- See par. 36 to 38, *supra*

99. The impugned legislation is part and parcel of a comprehensive program which seeks to eliminate tobacco use in our society. It is coupled with legislation restricting smoking in federal buildings and common carriers, as well as the prohibition of the sale of tobacco to persons under the age of 18;

- See par. 43, *supra*

100. While such an important objective might appear to require the banning of the sale and use of tobacco, this would be a totally unrealistic method of attaining it. Nearly 7 million Canadians use tobacco products. Due notably to their addictive nature, banning tobacco products would be ineffectual and might

provoke a large movement of civil disobedience. In its wisdom, the legislator has concluded that a better approach would be a multi-pronged attack on the problem of tobacco use. The TPCA is one aspect of this response. As the Respondent noted in the section on the division of powers, Parliament may ban "peripheral activities", without prohibiting the precise conduct that is the real problem, when such a prohibition would be ineffectual or impossible to enforce;

101. The Canadian Parliament's initiative is not unique. The EEC has adopted several directives dealing with the problem of tobacco use and promotion. Many countries, such as France, Portugal, Australia, New-Zealand and Thailand have banned tobacco advertising;

- See par. 39-40, *supra*

3.2 The means are proportional to the legislative objective

102. In *Edwards Books*, Dickson C.J.C., reflecting on *Charter* cases including *Oakes*, declared the following:

> The Court has stated that the nature of the proportionality test would vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards.

- *Edwards Books* v. *R.*, [1986] 2 S.C.R. 713 at 768-69; see also at 794-95 (La Forest J.)

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103. This need for a flexible approach has been reinforced in subsequent decisions in which the Court has repeatedly rejected any formalistic and mechanistic analysis of s. 1;

See for example:

- *Keegstra*, *supra*, at 735-38 (Dickson C.J.C.)
- *United States* v. *Cotroni*, [1989] 1 S.C.R. 1469 at 1489 (La Forest J.)

104. Furthermore, in the context of social policy, this Court has recognized the need to allow governments and legislators a certain "room to manoeuvre" to respond to conflicting interests;

- *Edwards Books*, *supra*, at 794-95; adopted by the majority in *R.* v. *Schwartz*, [1988] 2 S.C.R. 443 at 488 and in Cotroni, *supra*, at 1495

105. In other words:

> The term "reasonable limit" is used in section 1 and must be given meaning. Inherent in the word "reasonable" is the notion of flexibility. Section 1 does not advocate perfection.

- *Black* v. *Law Society of Alberta*, [1989] 1 S.C.R. 591 at 627-8 (La Forest J.)

106. The impugned legislation is not justified simply because it was supported by a certain "body of opinion". In the case at bar, the body of opinion was substantial, coherent, consistent. It clearly provided a reasonable foundation for legislative action aimed at dealing with a serious health problem;

107. The analysis of the proportionality segment of s. 1 requires that three distinct aspects of the TPCA be examined:

a) the ban on the distribution of free samples of tobacco products and on incentives for purchasing them: s. 7 of the TPCA
b) the compulsory health warnings: ss. 9 and 17
c) the severe restrictions on advertising: ss. 4 and 17(a)

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The Respondent will deal with those, in turn, in the first two sections of the analysis of the proportionality test;

3.2.1 The means chosen are rationally connected to the legislative objective

108. The first component of the proportionality test requires that there be

> a link or a nexus based on and in accordance with reason, between the measures enacted and the legislative objective
>
> - *Re art. 193 and 195 Criminal code, supra*, at 1195 (Lamer J.)

109. Wilson J. has formulated the test of the rational connection as follows:

> The *Oakes* inquiry into "rational connection" between objectives and means to attain them requires nothing more than a showing that the legitimate and important goals of the legislature are logically furthered by the means government has chosen to adopt.
>
> - *Lavigne* v. *Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211 at 291

a) The ban on the distribution of free samples of tobacco products and on incentives for purchasing them

110. Even assuming that the distribution of free samples and of incentives for purchasing a product constitute a form of expression, the prohibition against such distribution is clearly a rational way of protecting Canadians from inducement to use tobacco products. Even the dissenting judge below found this to be the case. Only the Appellant RJR calls into question this aspect of the legislation;

- Judgment *a quo a* at 436 (Brossard J.A.)

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b) The compulsory health warnings

111. Again, as the Court below unanimously found, there clearly is a rational connection between the imposition of compulsory health message and the objective of informing Canadians of the health problems caused by tobacco use. (The question of the attribution of those messages to the Department of National Health and Welfare is more fully addressed in the section on minimal impairment: see *infra*, par. 143-150);

- Judgment *a quo* at 436-37 (Brossard J.A.)

c) The severe restrictions on advertising

112. Restrictions on advertising activities of tobacco products are, by definition, rationally connected to the objective of reducing inducements to buy and use those products;

113. The Respondent admits that economic and social science evidence **cannot conclusively prove** the existence of a **causal link** between the promotion of tobacco products and overall consumption. Human behaviour is simply not amenable to such proof;

114. It is not possible to demonstrate with exactitude that advertising causes smoking, or that banning advertising will automatically result in a lowering of tobacco use. With respect, Brossard J.A. erred in holding that marketing and publicity are precise sciences. Those disciplines use deductions and inferences as much as other social sciences;

- Judgment *a quo* at 439 (Brossard J.A.)
- See par. 31, *supra*

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

- See par. 20 to 33, *supra*, especially par. 32

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116. As Dickson C.J.C. stated in *Edwards Books*, this Court has been careful to avoid rigid and inflexible rules with regards to the standard of proof required in the application of the proportionality test;

- *Edwards Books*, *supra*, at 768-69

117. This Court did not require that the government prove, according to a strict
20 balance of probabilities, that advertising for toys actually manipulated children (*Irwin Toy*), that hate propaganda actually fomented hate against identifiable groups (*Keegstra*) or that pornography actually induced violence towards women (*Butler*). Hence, in *Butler*, Sopinka J. wrote:

> While a **direct link** between obscenity and harm to society may be **difficult, if not impossible, to establish,** it is **reasonable to presume** that exposure to
30 images bear a **causal relationship** to changes in attitudes and beliefs.
>
> - *Butler*, *supra*, at 502

118. While governments are always required to meet a civil standard of proof under s. 1, with regards to legislation of socio-economic character, for which social science is inconclusive, what must be demonstrated is the existence of a "reasonable basis" for action. This was the conclusion reached by the majority
40 below;

- Judgment *a quo* at 396-7 (Lebel J.A.)
- *Irwin Toy*, *supra*, at 994

119. For his part, Brossard J.A. concluded that the banning of "lifestyle" advertising was rationally connected to the legislative objective. With respect,

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

- Judgment *a quo* at 437-38 (Brossard J.A.)

10

120. The task facing this Court is to establish whether Parliament acted in a reasonable manner to further its legitimate public health objective;

121. The Appellants spend over 75 million dollars a year in promotional activities. It is logical to conclude that prohibiting those activities would, in the medium and long-term, result in a reduction in the number of users of tobacco products, and thereby a reduction in the number of victims of disease and early deaths caused by tobacco products;

20

- See par. 18, *supra*

122. The Appellants claim that tobacco advertising is not designed to influence people to smoke. Yet in Overview 1988, an internal document prepared by ITL, it was clearly asserted that one of the "philosophies" governing its marketing activities is to:

30

> [s]upport the continued social acceptability of smoking through industry and/or corporate action (e.g. product quality, positive lifestyle advertising, selective field activities and marketing public relations programs).

- See Annex 19 c

40

123. Moreover, evidence clearly shows that a magic curtain cannot be drawn around the young to prevent them for receiving the messages transmitted by tobacco advertising;

- See par. 26, *supra*

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124. With respect, there is a contradiction between ITL's contention that people smoke regardless of the health-related information at their disposal (par. 96), and its desire to advertise lower-tar cigarettes to attract smokers who are concerned about their health. This surely indicates that the Appellant ITL believes that tobacco advertising influences people's smoking habits, above and beyond the brand of tobacco they buy. This is confirmed by their internal documents which underline the importance of "reassuring" smokers concerned with their health, lest they quit smoking;

- See par. 22 and 28, *supra*

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;

- On the rationality of presuming that advertising has an effect, see: *Dunagin* v. *City of Oxford*, 718 F.2d 738 (C.A., 5th Cir. 1983) at 749
- See also: *Oklahoma Telecasters Ass'n* v. *Crisp*, 699 F.2d 490 (C.A., 10th Cir. 1983), at 501

126. The majority below endorsed a conclusion by the U.S. Surgeon General to this effect:

> There is no scientifically rigorous study available to the public that provides a definitive answer to the basic question of whether advertising and promotion increase the level of tobacco consumption. Given the complexity of the issue, none is likely to be forthcoming in the foreseeable future. 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

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> (Warner 1986b). This influence relative to other influences on tobacco use, such as peer pressure and role models, is uncertain. Although its effects are not wholly predictable, regulation of advertising and promotion is likely to be a prominent arena for tobacco policy debate in the 1990s. In part this reflects the high visibility of advertising and promotion; in part it reflects the perception that these activities constitute an influence on tobacco consumption that is amenable to government action.

- 1989 Report by the U.S. Surgeon General, cited in judgment *a quo* at 399, Lebel J.A., emphasis added (see Annex 24 x)

127. Requiring strict proof that legislative tools will actually accomplish their stated purpose, in order for social policy legislation to be justified, would preclude elected officials from governing in the interests of the citizenry. As the majority below emphasized:

> "[s]i l'on applique rigoureusement le critère de la preuve civile, selon la balance des probabilités, on ne gouvernera pas. L'on ne saura faire les choix législatifs difficiles, mais parfois nécessaires. L'on confiera à la magistrature la surveillance d'un état essentiellement passif"

- Judgment *a quo* at 391 (Lebel J.A.)

128. In fact, this Court has recognized that the precise impact of a legislative scheme remains, to a certain extent, unknown, until they are put into practice;

- *R.* v. *Chaulk*, [1990] 3 S.C.R. 1303 at 1342-43 (Lamer J.)
- See also *Keegstra*, *supra*, at 763 (Dickson C.J.C.)

129. The exclusion of advertising for foreign tobacco in foreign magazines sold in Canada does not detract from the main objective and means of the legislation. In fact, in the case of countries that also ban such publicity, there is no problem. For instance, French magazines sold in Canada are free from tobacco advertising. The main difficulty lies with American magazines. In weighing the pros and cons

of the restriction of tobacco products advertising, Parliament chose to make the ban as wide as possible, but agreed to certain exceptions;

- S. 4(2) TPCA

130. Just as this incapacity to prohibit **all** advertising does not deprive the legislation of its criminal law character, it does not deprive it of rational connection with the legislative ends pursued. Flexibility and a balancing of competing interests do not render the legislation irrational. It may be less comprehensive, but Parliament, in its judgment, concluded that this was a desirable compromise;

131. In *Posadas*, the U.S. Supreme Court rejected the argument that the legalization of casinos precluded a state legislature from restricting their promotion to local residents in order to limit the demand for gambling. It further held that legislation aimed at curbing the social problems caused by gambling did not violate the First Amendment. This was so even though the impugned legislation prohibited casino advertising to the Puerto Rican population, while allowing it in magazines designed to reach foreigners, even on the Island. While this Court has rejected the American approach to freedom of expression, that case is nevertheless helpful because it illustrates how a particular measure, adapted to particular circumstances, passed constitutional muster;

- *Posadas de Puerto Rico Associates* v. *Tourism Company of Puerto Rico*, 106 S.Ct. 2968; 478 U.S. 328 (1986)
- For similar use of American case law, see *Rocket*, *supra*, at 242-44

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3.2.2 The means chosen impair the Appellants' freedom of expression as little as possible

132. This part of the *Oakes* test requires that the means should minimally impair the right or freedom in question. The Respondent agrees that means should be carefully tailored to meet legislative objectives;

133. Parliament is not required to always chose the absolutely least intrusive alternative. A legislative scheme need not be the "perfect" one that a Court could design. Rather, it is sufficient that it be appropriately and carefully tailored in the context of the infringed right;

- *Irwin Toy*, *supra*, at 999
- *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, *supra*, at 1138 (Dickson C.J.C.) and 1196-97 (Lamer J.)
- *Ramsden*, *supra*, at 1105-06
- *Chaulk*, *supra*, at 1343 (Lamer J.)
- *R.* v. *Downey*, [1992] 2 S.C.R. 10 at 37 (Cory J.)

134. When legislative measures seek to strike a balance between competing values, governments must be accorded some flexibility to choose between alternatives. In such cases, the test is whether the government had a reasonable basis for concluding that it impaired the right as little as possible given the government's pressing and substantial objectives;

- *Irwin Toy*, *supra*, at 993-94
- *Tétrault-Gadoury* v. *Canada (A.G.)*, [1991] 2 S.C.R. 22 at 43-44 (La Forest J.)
- *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229 at 286 and 305 (La Forest J.)
- *Rodriguez*, *supra*, at 614 (Sopinka J.)

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135. In the words of McLachlin J.:

> As this Court pointed out in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, some deference must be paid to the legislators and the difficulties inherent in the process of drafting rules of general application. A limit prescribed by law should not be struck out merely because the court can conceive of an alternative which seems to it to be less restrictive. What is required by s. 1 is that the limit be reasonable and justifiable in a free and democratic society. If the limit represents a reasonable legislative choice tailored so as to limit the right in question as little as possible the minimum impairment requirement is met. What must be guarded against are the evils of vagueness, and overbreadth, the broad sweep that catches more conduct than is justified by the government's objective.

- *Committee for the Commonwealth of Canada, supra*, at 248 (emphasis in the original)
- See also *Edwards Books, supra*, at 781-82 (Dickson C.J.C.)

136. Even though alternatives exist, which may infringe rights guaranteed by the *Charter* to a lesser degree, the means selected by Parliament are acceptable if the less offensive measures would also be less effective. In *Irwin Toy* for instance, this Court held that the legislature was justified in preferring a legislated prohibition of publicity directed at children to the self-regulation mechanism designed by broadcasters. In the words of Dickson C.J.C.:

> Based on narrower objectives than those pursued in Quebec, some governments might reasonably conclude that self-regulation is an adequate mechanism for addressing the problem of children's advertising. But having identified advertising aimed at persons under thirteen as **per se** manipulative, the legislature of Quebec could conclude, just as reasonably, that the only effective statutory response was to ban such advertising.

- *Irwin Toy, supra*, at 999

137. Parliament seeks to protect the health of Canadians. Tobacco companies want to promote and sell their products. Consumers need to receive relevant

information that could affect their economic behaviour. In view of the difficulty in assessing the most appropriate, and least intrusive, way to address the problems of tobacco use, this Court should defer to the legislator's conclusion that nothing less than a severe restriction on advertising would lower the demand for the product;

138. The TPCA is part of a comprehensive program which the WHO and the Economic and Social Council of the UN repeatedly asked member States to adopt;

- See par. 32 and 36-38 , *supra*

139. In *Keegstra*, Dickson C.J.C. emphasized that different means of addressing the same problem need not be exclusive alternatives, but that they could be complementary:

> As for the argument that other modes of combatting hate propaganda eclipse the need for a criminal provision, it is eminently reasonable to utilize more than one type of legislative tool in working to prevent the spread of racist expression and its resultant harm.
>
> - *Keegstra*, *supra*, at 786

140. Sopinka J. came to a similar conclusion in *Butler*:

> Serious social problems such as violence against women require multi-pronged approaches by government. Education and legislation are not alternatives but complements in addressing such problems. There is nothing in the *Charter* which requires Parliament to choose between such complementary measures.
>
> - *Butler*, *supra*, at 509

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141. Parliament has never stated that the banning of tobacco advertising would, in and of itself, suffice to eliminate smoking. However, it has concluded that it is a necessary and useful component of its non-smoking policy;

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a) The ban on the distribution of free samples of tobacco products and on incentives for purchasing them

142. No half-ban, or prohibition to distribute free samples or incentives for purchasing tobacco products except to certain identified segments of society, would meet the TPCA's objectives. All free distribution of tobacco products and

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rebates constitute inducements to use them. Parliament was justified in banning such distribution and incentives. This was the unanimous position of the Court below. Again, only the Appellant RJR challenges this aspect of the legislation;

b) The compulsory health warnings

143. The health warnings imposed by the regulations adopted pursuant to s. 17

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express **facts**. The messages contain **factual** information about tobacco products. For instance, it is clearly established that tobacco consumption causes lung cancer. The health messages are thus not a matter of **opinion** attributable to either the Department of National Health and Welfare or the Appellants;

- *Slaight Communications*, *supra*, at 1055 (Dickson C.J.C.)
- *Tobacco Products Control Regulations*, SOR/89-21, as am. by SOR/93-389 and SOR/94-5, ss. 11-16

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144. Evidence shows that teenagers are more likely to disregard warnings attributed to a particular public actor on the basis that such warnings carry a particular point of view and are less objective;

- See par. 15, *supra*

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145. The warnings imposed by the regulations adopted under s. 17 are similar to those which must be affixed to products covered by the *Hazardous Products Act*, and to those imposed by regulations concerning chemical products sold to consumers;

- *Hazardous Products Act*, *supra*, ss. 11, 13, 14, 16-18, 27
- *Consumer Chemicals and Containers Regulations*, adopted pursuant to the HPA

146. Moreover, it has been established that producers of dangerous products are civilly responsible for properly informing consumers of the risks associated with the use of their products;

- *Buchan* v. *Ortho Pharmaceuticals (Canada) Ltd* (1986), 54 O.R. (2d) 92 (C.A.)

147. The same principles and rules apply in the U.S., where the Court of Appeal held that the Federal Trade Commission could require that a manufacturer "make **affirmative** disclosure" of unfavourable facts in order to prevent the public from being misled;

- *Warner-Lambert Co.* v. *F.T.C.*, 562 F.2d 749 (C.A., D.C. Cir. 1977) at 760

148. The present case is not different. The impugned legislation simply requires that tobacco producers inform consumers about the inherent dangers of their products;

149. It is worth noting that the United Kingdom has recently adopted legislative measures requiring tobacco producers to affix non-attributed health warnings on packaging;

- See Annex 35

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150. The Respondent therefore submits that the legislative obligation to affix non-attributed health messages on tobacco products packaging is carefully tailored and impairs the Appellants' freedom of expression as little as possible;

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c) The severe restrictions on advertising

151. Tobacco advertising is not only harmful for what it contains and portrays, but even more so for what it omits to communicate: the risks of serious illnesses and addiction. Even with health warnings, the message projected by tobacco advertising is that smoking is a harmless, innocuous, pleasant and socially acceptable activity. The legislation seeks to reverse this image concocted by the tobacco producers, including the Appellants;

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152. In *Rocket*, this Court recognized the importance of the right of consumers to information affecting their decision-making. However, it also noted that this information may be threatened by the distortion of facts resulting from certain forms of publicity;

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- *Rocket, supra*, at 249-51

153. In order to deal with the serious public health problem caused by the consumption of tobacco products, Parliament has had to balance competing interests. Not all of those are addressed in the TPCA, but all are considered in the comprehensive program in which the TPCA plays a crucial role;

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154. On the one hand, Parliament took into account the interests of the medical profession, the WHO, and anti-smoking organizations, all of whom consistently call for measures aimed at eliminating tobacco consumption. It also considered

the interests of non-smokers who want to be protected against secondary smoke;

155. On the other hand, Parliament considered the interests of those who benefit from the production and sale of tobacco products: companies producing tobacco products, advertising agencies, retailers who sell tobacco products. Parliament also considered the interests of smokers who want to buy tobacco products, and need to obtain relevant point of sale information, such as prices;

156. Contrary to the Appellants' contention, the TPCA does not prohibit the dissemination of **information** concerning tobacco products by persons other than State officials. It prohibits **advertising**, the sole purpose of which is to promote a product. 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. Evidence shows that this is exactly where consumers get their information. Moreover, the TPCA ensures that consumers receive all relevant health warnings concerning the dangers inherent in the use of the products;

- Ss. 5 and 9 TPCA; *Tobacco Products Control Regulations*, SOR/89-21, as mod. by SOR/93-389 and SOR/94-5, supra, ss. 6 and 11-16
- See Annex 36

157. In the event that less dangerous tobacco products were developed, s. 17(a) would authorize the adoption of regulations permitting them to be advertised;

158. ITL argues, and, respectfully, Brossard J.A. erroneously found, that Parliament could have chosen a less intrusive means in the form of

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> a ban short of a total ban of Canadian advertising, such as the prohibition of all advertising save those types explicitly permitted
>
> - ITL, par. 112

159. With respect, this is exactly what the TPCA does: see s. 17(a);

160. Parliament concluded that the nature of tobacco advertising is such that a curtain cannot be drawn around young people, non-smokers, ex-smokers fighting the temptation to start again, and smokers who want to quit. All of these people must be protected from inducements to use tobacco products;

161. Furthermore, **all** Canadians must be alerted to the health hazards caused by tobacco products. Again, it was certainly open to Parliament to conclude that nothing short of compulsory non-attributed health messages would be effective;

162. Public authorities attempt to increase public awareness of the health problems caused by tobacco use, by a variety of means, including legislation which prohibts the sale of tobacco to minors, the legislation which creates non-smoking zones and the legislation at issue here. All those measures are aimed at underlining the inherent dangers of tobacco consumption and at reducing illnesses and mortality caused by that consumption;

163. For decades, tobacco was commonly used in all public places, including hospitals. Simply regulating tobacco advertising as is done with alcohol advertising would not work. Alcohol has been a highly regulated product for a long time. 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. It must be consistent, intensive, prevalent, and

non-contradictory. Banning tobacco advertising and the free distribution of tobacco products is part and parcel of such an endeavour;

164. Furthermore, tobacco, unlike alcohol, is harmful even when used moderately and as intended. Tobacco contains nicotine, an addictive drug which rapidly prevents people from freely choosing to use or not to use the product. The product is thus intrinsically and qualitatively different from alcohol, and the regulation of advertising of alcoholic beverages cannot be simply transposed to tobacco products. A 1989 directive by the Council of the European Community, in fact, draws a similar distinction: all broadcast advertising for tobacco products is prohibited, while broadcast advertising of alcoholic beverages is simply subject to strict regulations;

- 89/552/EEC, O.J. No. L298, 17.10.89, ss. 13-15 (See Annex 30 f)

165. It is not unusual for public authorities to protect citizens, including those clearly capable of discernment, from various risks by means such as occupational safety regulations, speed limits and the obligation to use seat belts or helmets;

- *143471 Canada Inc.*, *supra*, at 327-28
- D. Beauchamp, "Life-Style, Public Health and Paternalism" in D. Spyros, ed., *Ethical Dilemmas in Health Promotion* (New York: John Wiley and Sons, 1987) 69-81

166. Again, Parliament was certainly entitled to conclude that nothing short of the means it designed would meet the public health objectives set out in s. 3 of the TPCA. The Act is a justified preventative health measure. Parliament has the ability to set the exact limits of this measure;

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3.2.3 The effects of the limitation do not impair the Appellants' freedom of expression so as to outweigh the legislative objective

167. This last aspect of the s. 1 analysis requires the Court to balance the effects of the infringement of a *Charter* right or freedom on the beneficiaries of that right or freedom with the legislative objectives in question;

168. On the one hand, this legislation seeks to reduce inducements to consume tobacco for all Canadians, and particularly for young people. It seeks to reduce the social acceptability of a harmful product, as well as the actual use of the product. It requires manufacturers of tobacco products to provide warnings concerning the risks inherent in the use of their products. If a product proven to be less harmful to health were developed, regulations adopted pursuant to s. 17(a) would permit its promotion. Any potential changes in nicotine and tar levels can still be communicated to consumers on packages. Consumers still have access to information relevant to the exercise of their economic choices: where to find the product, and at what price;

169. On the other hand, the effect of the legislation is to impose very strict restrictions on the ways in which the Appellants may promote a dangerous product. The TPCA also compels the Appellants to include health messages on packages to warn consumers of the proven health hazards caused by the product, just as other laws and regulations require that warnings be given to consumers of hazardous products. Finally, the Appellants are prohibited from distributing free samples of a dangerous product and from providing incentives for its purchase;

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170. The economic interests of tobacco companies must not prevail over public health interests, particularly those of young persons. As Dickson C.J.C. warned in *Edwards Books*, courts

> must be cautious to ensure that [the *Charter*] does not simply become an instrument of better suited individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.
>
> - *Edwards Books, supra*, at 779

171. The protection of public health lies at the very heart of a free and democratic society. The Respondent submits that to the extent that the TPCA infringes upon the Appellants' freedom of commercial expression, it is justified under s. 1 of the *Canadian Charter of Rights and Freedoms*.

*

* *

PART IV - THE ORDER SOUGHT

172. The appeal should be dismissed with costs in all courts and the constitutional questions should 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*.

SIGNED AT Montreal, this 14th day of September, 1994.

James Mabbutt, Q.C.

Claude Joyal

Paul Evraire, Q.C.

FOR THE RESPONDENT, THE ATTORNEY GENERAL OF CANADA

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