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## R.J.R.-MacDonald Inc. v. Canada (A.G.): *Reflections from the Perspective of Health*

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The *Tobacco Products Control Act* came into force in January 1989, prohibiting virtually all direct and indirect advertising of tobacco products in Canada. The *Act* was vigorously opposed by the tobacco industry, which ultimately requested that courts find the statute unconstitutional. The Quebec Superior Court in *R.J.R.-MacDonald Inc. v. Canada (A.G.)*, held that the *Act* was indeed *ultra vires* Parliament, and that it unjustifiably infringed upon freedom of expression as guaranteed in subsection 2(b) of the *Charter*. The decision was overturned by the Quebec Court of Appeal, and the matter is now on appeal to the Supreme Court of Canada.

The author contrasts the Quebec decisions and critically analyzes the Superior Court judgment. He maintains that the *Act* meets the section 1 test under the *Charter*. The author reaches this conclusion by examining existing jurisprudence on commercial free speech and by evaluating the government's objectives in light of the risks associated with tobacco consumption. He argues that the rational connection between the prohibition of advertising and decreased consumption is evident from industry marketing strategies and from independent health research. He further contends that any less intrusive control would defeat the purpose of the legislation. Finally, the author urges the Supreme Court of Canada to uphold the *Act's* restriction on free speech in the interests of health.

La *Loi sur le contrôle des produits du tabac*, entrée en vigueur en janvier 1989, interdit pratiquement toute forme de publicité directe ou indirecte portant sur les produits du tabac au Canada. L'industrie canadienne du tabac s'est opposée farouchement à cette loi et a demandé aux tribunaux de la déclarer inconstitutionnelle. Or dans l'affaire *R.J.R.-MacDonald Inc. c. Canada (P.G.)*, la Cour supérieure du Québec jugea que cette loi outrepassait les pouvoirs du Parlement et portait atteinte de façon injustifiée à la liberté d'expression garantie au paragraphe 2(b) de la *Charte*. Ce jugement fut renversé par la Cour d'appel du Québec et l'affaire a finalement été portée devant la Cour suprême du Canada.

L'auteur met en contraste les décisions des tribunaux du Québec et procède plus particulièrement à l'analyse critique du jugement de la Cour supérieure. Il considère que la *Loi* rencontre les exigences du test de l'article premier de la *Charte*. Il arrive à cette conclusion après avoir procédé à l'étude de la jurisprudence existante portant sur la question de la libre expression commerciale ainsi qu'à l'évaluation des objectifs poursuivis par le gouvernement eu égard aux risques associés à l'utilisation du tabac. Selon lui, les stratégies de marketing de l'industrie ainsi que les recherches indépendantes sur la santé démontrent clairement qu'il existe un lien rationnel entre l'interdiction de faire de la publicité et la réduction de la consommation de tabac. Il ajoute qu'un assouplissement du contrôle anéantirait les objectifs poursuivis par cette législation. Finalement, l'auteur presse la Cour suprême du Canada de confirmer, dans l'intérêt de la santé, la validité de la restriction imposée par cette loi à la liberté d'expression.

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## Introduction

The *Tobacco Products Control Act*<sup>1</sup> was adopted by Parliament in 1988 and came into force January 1, 1989. The *Act* prohibits all direct and indirect advertising of tobacco products, with certain exceptions. In addition to the advertising ban, the *Act* prohibits the free distribution of tobacco, the use of tobacco trademarks on non-tobacco goods (*e.g.* T-shirts, lighters), and the use of cash rebates, gifts, contests, games or lotteries as promotional incentives. The *Act* also provides the government with regulatory authority to prescribe health messages on or in tobacco packaging. Further, the *Act* requires manufacturers to report sales data, product contents, and certain other information to the government.

The *Act's* objectives are significant. Section 3 describes the *Act's* purpose:

3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
  - (a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
  - (b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
  - (c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.<sup>2</sup>

The passage of the *Act* was vigorously opposed by the tobacco industry and was just as ardently supported by health organizations.<sup>3</sup> Despite the support of all parties in Parliament, passage of the *Act* was delayed until fourteen months after introduction, almost entirely as a result of the industry's lobbying. After their defeat in Parliament, tobacco companies quickly sought to overturn the legislation in the courts.

This article comments on the decisions of the Quebec Superior Court and

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<sup>1</sup> R.S.C. 1985 (4th Supp.), c. 14 [hereinafter T.P.C.A.].

<sup>2</sup> *Ibid.*, s. 3.

<sup>3</sup> For a discussion of the lobbying battle, see K. Kyle, "Canada's Tobacco Legislation: A Victory for the Health Lobby" (1990) 28:4 Health Promotion 8; M. Mintz, "No Ifs, Ands, or Butts" (1990) 22:6 The Washington Monthly 30.

the Quebec Court of Appeal as they relate to freedom of expression.<sup>4</sup> Aspects of those judgments relating to division of powers issues are, for the most part, not covered.

## I. Proceedings to Date

On July 20, 1988, shortly after the T.P.C.A.'s royal assent on June 28, 1988, Rothmans, Benson & Hedges Inc. ("R.B.H.") filed a statement of claim in the Federal Court of Canada. The company pleaded that the T.P.C.A. was *ultra vires* Parliament's authority as set out in the *Constitution Act, 1867*,<sup>5</sup> and that certain sections of the *Act* infringed the protection of freedom of expression in the *Canadian Charter of Rights and Freedoms*.<sup>6</sup> An amended statement of claim later alleged that the *Act* also infringed the equality rights protected by section 15 of the *Charter*.

For the R.B.H. claim, the Canadian Cancer Society was granted intervenor status notwithstanding the plaintiff's objections.<sup>7</sup> The Institute of Canadian Advertising was also granted intervenor status.<sup>8</sup> Because of proceedings in the Quebec courts regarding the T.P.C.A.'s constitutionality, R.B.H. has not sought to have its claim tried.<sup>9</sup>

On September 1, 1988, shortly after the R.B.H. claim was filed, Imperial Tobacco Ltd. and R.J.R.-MacDonald Inc. each filed applications in the Quebec Superior Court. Both companies pleaded that the T.P.C.A. was *ultra vires* Parliament and that the *Act* (or, more specifically sections 4, 5, 6, and 8 of the

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<sup>4</sup> *R.J.R.-MacDonald v. Canada (A.G.)*, [1991] R.J.Q. 2260, (*sub nom. Imperial Tobacco Ltd. v. Canada (A.G.)*) 82 D.L.R. (4th) 449 (Sup. Ct.) [hereinafter *R.J.R.-MacDonald* cited to D.L.R.], *rev'd* [1993] R.J.Q. 375, 102 D.L.R. (4th) 289 (C.A.) [hereinafter *R.J.R.-MacDonald (C.A.)* cited to D.L.R.]. Leave to appeal granted 14 October 1993, [1993] 3 S.C.R. vii (Imperial Tobacco Ltd.), viii (R.J.R.-MacDonald Inc.) [hereinafter *R.J.R.-MacDonald (S.C.C.)*]. The D.L.R. contain unofficial translations of the Quebec decisions.

<sup>5</sup> (U.K.), 30 & 31 Vict., c. 3 [hereinafter *Constitution Act, 1867*].

<sup>6</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 2(b).

<sup>7</sup> *Rothmans, Benson & Hedges Inc. v. Canada (A.G.) (No. 1)* (1989), [1990] 1 F.C. 74, 29 F.T.R. 267 (T.D.) [hereinafter *Rothmans (F.C.T.D.)*], *rev'd in part* (1989), [1990] 1 F.C. 90, 45 C.R.R. 382 (C.A.) [hereinafter *Rothmans (F.C.A.)*].

<sup>8</sup> *Rothmans (F.C.A.)*, *ibid.*

<sup>9</sup> An attempt by the Attorney General to stay the Federal Court case pending the outcome of the Quebec case was held to be premature: *Rothmans, Benson & Hedges Inc. v. Canada (A.G.) (No. 3)* (1989), 29 F.T.R. 275, 27 C.P.R. (3d) 125 (T.D.).

*Act* in the case of Imperial Tobacco) infringed the *Charter's* protection of freedom of expression.

Before trial in Quebec, a number of preliminary disputes were resolved in court.<sup>10</sup> Further, the Canadian Cancer Society was denied intervenor status.<sup>11</sup> Before the Superior Court decision was rendered, the T.P.C.A. was the subject of academic articles which contested the industry's freedom of expression arguments.<sup>12</sup>

The applications of R.J.R.-MacDonald and Imperial Tobacco were heard together, but were not formally joined. The trial itself, before Chabot J. of the Quebec Superior Court, lasted thirteen months. There were 28 witnesses (mostly experts), some 560 exhibits, and more than 10,000 pages of transcribed proceedings.

The decision of Chabot J., released July 26, 1991, declared the T.P.C.A. unconstitutional. He held that the pith and substance of the *Act* was the control of advertising, and that the *Act* could not be upheld as *intra vires* Parliament under either the criminal law power,<sup>13</sup> or the power to make laws for the peace, order and good government of Canada.<sup>14</sup> He further held that the advertising ban infringed subsection 2(b) of the *Charter* and was not saved by section 1. While Chabot J. accepted the *Act's* objectives as pressing and substantial, he found that the limitation on freedom of expression was not proportional to its objectives. Chabot J. strongly criticized the advertising ban. He also held that the required health warnings infringed the tobacco companies' freedom of

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<sup>10</sup> *R.J.R.-MacDonald Inc. v. Canada (A.G.)*, [1988] R.J.Q. 2779 (Sup. Ct.) (re application procedure); *Imperial Tobacco Ltd. v. Canada (A.G.)* (1990), 25 Q.A.C. 338, rev'g (18 October 1988), Montreal 500-05-009760-883, J.E. 89-1027 (Sup. Ct.) (re trial date); *R.J.R.-MacDonald Ltd. v. Canada (A.G.)* (1988), 25 Q.A.C. 339, rev'g (18 October 1988), Montreal 500-05-009755-883, J.E. 89-1136 (Sup. Ct.) (re trial date); *Canada (A.G.) v. Imperial Tobacco Ltd.*, [1989] R.D.J. 209 (C.A.), aff'g (15 December 1988), Montreal 500-05-009760-883, J.E. 89-1027 (Sup. Ct.) (re production of documents).

<sup>11</sup> *Imperial Tobacco Ltd. v. Canada (A.G.)* (1988), [1989] R.J.Q. 367, 55 D.L.R. (4th) 555 (Sup. Ct.), aff'd (*sub nom. Société Canadienne du Cancer v. Impérial Tobacco Ltée.*), [1989] R.J.Q. 820, 59 D.L.R. (4th) 743 (C.A.). Leave to appeal to S.C.C. refused [1989] 1 S.C.R. xv.

<sup>12</sup> E.g. R. Cunningham, "Cigarette Advertising and Freedom of Expression: The Case for the Tobacco Products Control Act" (1990) 48 U.T. Fac. L. Rev. 304; K. Kowal, "The First Amendment and Section 2(b) of the *Charter*: Predicting the Outcome of the Tobacco Products Advertising Ban in Canada" (1991) 1 Media & Communications L. Rev. 237; R. Moon, "Lifestyle Advertising and Classical Freedom of Expression Doctrine" (1991) 36 McGill L.J. 76.

<sup>13</sup> *Constitution Act, 1867*, *supra* note 5, s. 91(27).

<sup>14</sup> *Ibid.*, s. 91.

expression because that freedom includes the right to remain silent. Because the warnings could not be attributed to the government as author, they could not be saved by section 1.

The Superior Court decision was the subject of substantial media commentary.<sup>15</sup> While tobacco companies were pleased with the victory, health groups quickly urged an appeal. Internationally, many health organizations outside Canada also wrote to the Prime Minister, calling for an appeal.<sup>16</sup>

An appeal was argued before the Quebec Court of Appeal in May, 1992. In a decision released January 15, 1993, the Court of Appeal reversed the trial judgment.<sup>17</sup> A unanimous Court (Rothman, LeBel and Brossard J.J.A.) held that while the T.P.C.A. could not be upheld under the criminal law power, it was *intra vires* Parliament by virtue of the power to make laws for the peace, order and good government of Canada.<sup>18</sup> Regarding freedom of expression, the Attorney General admitted that subsection 2(b) was infringed. A majority of the Court held that the T.P.C.A. was saved by section 1 (LeBel J.A., Rothman J.A. concurring). Brossard J.A. dissented in part, holding that the advertising restrictions were not saved by section 1. He was of the view, however, that unattributed health warnings and the prohibition of the free distribution of

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<sup>15</sup> E.g. A.C. Hutchinson, "Tobacco Ruling No Triumph for Free Speech" *The Toronto Star* (29 July 1991) A13; Editorial, "Tobacco Ad Ruling: Blow to Democratic Tradition" *The Ottawa Citizen* (30 July 1991) A6; Editorial, "The Advertising of Cigarettes" *The [Toronto] Globe and Mail* (30 July 1991) A10; J. Simpson, "The Charter Intrudes Upon Yet Another Essentially Political Question" *The [Toronto] Globe and Mail* (7 August 1991) A10; R. Martin, "A Judicious Use of Words? Assessing the Rhetorical Technique in the Superior Court Ruling on Tobacco Advertising" *The Ottawa Citizen* (12 August 1991) A7; T. Corcoran, "Tobacco Ruling Strikes Blow for Freedom" *The Ottawa Citizen* (30 July 1991) B2; W. Johnson, "Ban on Tobacco Advertising is Censorship" *The [Montreal] Gazette* (2 August 1991) B3.

<sup>16</sup> E.g. Letter of National Forum for Coronary Heart Disease Prevention (U.K.) to Prime Minister B. Mulroney (5 August 1991); Letter of European Bureau for Action on Smoking Prevention to Prime Minister B. Mulroney (1 August 1991); Letter of the American Medical Association to Prime Minister B. Mulroney (31 July 1991).

<sup>17</sup> *R.J.R.-MacDonald* (C.A.), *supra* note 4. A few months prior to the decision, the Court of Appeal ordered a stay of execution on enforcement of the ban on tobacco advertising in retail stores, a phase-in provision effective January 1, 1993 (*R.J.R.-MacDonald Inc. v. Canada (A.G.)* (1992), 11 R.D.J. 237 (C.A.)). The stay was effective until release of the Court's decision on the merits.

<sup>18</sup> For a comment on this aspect of the decision, see J. Leclair, "Droit constitutionnel — Partage des compétences — Loi réglementant les produits du tabac, S.C. 1988, c. 20 — La théorie des dimensions nationales: une boîte à phantasmes: *Canada (Procureur Général) c. R.J.R.-MacDonald Inc.*" (1993) 53 R. du B. 524. See also W.J. Kiely, "*Benson & Hedges (Canada) Ltd. v. Attorney-General of British Columbia* (1972), 27 D.L.R. (3d) 257 (B.C.S.C.): A Case Comment" (1973) 2 Queen's L.J. 59; R. Cunningham, "The Difficulties Provinces Have in Implementing a Complete Ban on Tobacco Advertising" (1995) Health L. Can. (forthcoming).

tobacco products were saved by section 1. Had the advertising ban been restricted to lifestyle advertising, Brossard J.A. would have upheld the ban under section 1.

The two companies were given leave to appeal to the Supreme Court of Canada on October 14, 1993.<sup>19</sup> Oral argument in the case was heard by the Court November 29 and 30, 1994 and judgment was reserved. Although four provincial governments, those of Ontario, Quebec, Saskatchewan, and British Columbia, had filed notices of intention to intervene, only Ontario and Quebec participated in the proceedings. The Canadian Cancer Society, the Canadian Council on Smoking and Health, the Canadian Lung Association, the Canadian Medical Association, and the Heart and Stroke Foundation of Canada were collectively granted status as intervenors, over industry objections.<sup>20</sup>

Following the Court of Appeal decision, the federal Cabinet significantly strengthened the requirements with respect to health warnings. An application by the industry to delay implementation of the new requirements until one year after the Supreme Court ruling on the T.P.C.A.'s constitutionality was unanimously dismissed by a nine-member Supreme Court bench.<sup>21</sup>

## II. The Tobacco Industry

The tobacco industry is dominated by an oligopoly of three companies which together control 99 per cent of the cigarette and roll-your-own tobacco market in Canada. The largest company, Imperial Tobacco Ltd., controlled about 60 per cent of the cigarette market at the time of the *Act's* passage. Imperial's market share has since increased to 67 per cent.<sup>22</sup> The company is wholly owned by Imasco Ltd., which in turn is affiliated with British-American Tobacco of the United Kingdom. Rothmans, Benson & Hedges Inc., which currently has about a 20 per cent market share, is affiliated with both U.S.-based Philip Morris and British-based Rothmans International. R.J.R.-MacDonald, which has about a 12 per cent market share, is a wholly-owned

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<sup>19</sup> *R.J.R.-MacDonald* (S.C.C.), *supra* note 4.

<sup>20</sup> The motion for status as an intervenor was approved by Major J. on 15 February 1994.

<sup>21</sup> *R.J.R.-MacDonald Inc. v. Canada* (A.G.), [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 [hereinafter *R.J.R.-MacDonald* (S.C.C. II) cited to S.C.R.]. The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada were intervenors in this application.

<sup>22</sup> Current market share data comes from J.C. Maxwell, "The Maxwell Report: International, Part I" *Tobacco Reporter* (May 1994) at 12.

affiliate of U.S.-based R.J. Reynolds Tobacco. The remaining market share of less than 1 per cent includes a small firm, Bastos du Canada Ltée., and a small number of imports.

The Canadian industry is highly profitable. Pre-tax profit in 1993 for the two largest companies stood at a record-high 609 million dollars.<sup>23</sup> Profits have been increasing annually since 1986. The total retail value of tobacco sales in 1992 was 9.8 billion dollars.<sup>24</sup>

Historically, increased calls for the regulation of the tobacco industry followed a statement by then Health Minister Judy LaMarsh in 1963 about the health consequences of tobacco use,<sup>25</sup> and the landmark 1964 Report of the Advisory Committee to the U.S. Surgeon General. In 1969, the House of Commons Standing Committee on Health, Welfare and Social Affairs held lengthy public hearings on tobacco and issued a report recommending a ban on tobacco advertising.<sup>26</sup> Former Health Minister John Munro introduced a bill to do just that, but the bill never went beyond first reading because of pressure from the tobacco lobby. The passage of the T.P.C.A. in 1988 marked the first federal legislation regulating tobacco manufacturers.<sup>27</sup> Tobacco is not regulated by the *Hazardous Products Act*,<sup>28</sup> the *Food and Drugs Act*<sup>29</sup> or the *Narcotic Control Act*.<sup>30</sup> Rather, since 1964, the Canadian tobacco industry has restricted its marketing through a voluntary code<sup>31</sup> which has been strengthened several times to date. However, tobacco companies do not acknowledge that smoking is a cause of lung cancer, that anyone has ever died from smoking, that

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<sup>23</sup> Imasco Ltd., *Annual Report 1993*; Rothmans Inc., *Annual Report 1993*. Rothmans figures are for the year ending 31 March 1993.

<sup>24</sup> Canadian Tobacco Manufacturers' Council, "Tobacco in Canada 1992" (1 June 1993) at 2.

<sup>25</sup> *House of Commons Debates* (17 June 1963) at 1213-14.

<sup>26</sup> Canada, House of Commons, *Report of the Standing Committee on Health, Welfare and Social Affairs on Tobacco and Cigarette Smoking* (Ottawa: Queen's Printer, 1969).

<sup>27</sup> Prior to this, the industry had some voluntary restrictions on its marketing and was subject to excise tax laws. A federal law passed in 1908 (*Tobacco Restraint Act*, S.C. 1908, c. 73) and a number of provincial laws prohibited the sale of tobacco to young persons. In 1971, British Columbia banned tobacco advertising (*Tobacco Advertising Restraint Act*, S.B.C. 1971, c. 65.). This ban was substantially repealed following (and notwithstanding) an unsuccessful challenge by the industry to the law's constitutionality. (*Benson & Hedges (Canada) Ltd. v. British Columbia (A.G.)*, [1972] 5 W.W.R. 32, 27 D.L.R. (3d) 257 (B.C.S.C.)).

<sup>28</sup> R.S.C. 1985, c. H-3.

<sup>29</sup> R.S.C. 1985, c. F-27.

<sup>30</sup> R.S.C. 1985, c. N-1.

<sup>31</sup> Canadian Tobacco Manufacturers' Council, "Cigarette & Cigarette Tobacco Advertising and Promotion Code of the Canadian Tobacco Manufacturers' Council" (1 January 1976) [hereinafter *C.T.M.C. Code*].



cigarettes are addictive, or that second-hand smoke is harmful.<sup>32</sup>

### III. Subsection 2(b)

In *Irwin Toy Ltd. v. Quebec (A.G.)*,<sup>33</sup> the Supreme Court of Canada held that commercial expression was covered by the protection of freedom of expression in subsection 2(b) of the *Charter*, which states:

2. Everyone has the following fundamental freedoms: ...
  - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

Given *Irwin Toy*, and given that the Attorney General admitted before the Court of Appeal in the present case that the T.P.C.A. infringed subsection 2(b), this article concentrates on the section 1 analysis. Nevertheless, commentators have argued that cigarette lifestyle advertising should be exempt from subsection 2(b) protection,<sup>34</sup> and that exceptions to the protection of commercial advertising should apply in the case of tobacco advertising.<sup>35</sup> Further, it is doubtful that the ban on the free distribution of tobacco products, found in subsection 7(1) of the T.P.C.A., conveys or attempts to convey a meaning, and thus infringes the protection of commercial expression. This question was not discussed in either Quebec decision. Similar doubt might be cast on subsection 7(2), which prohibits the use of gifts, cash rebates and other promotional incentives. Finally, the issue remains open as to whether the mandatory health warnings infringe subsection 2(b). This question will be examined later.

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<sup>32</sup> The industry's position was articulated in detail before the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Health and the Environment (14 April 1994). See also Canada, House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-204* (24 November 1987) at 13:29. See also the comments of R. Parker, President, Canadian Tobacco Manufacturers' Council, on "Centrepoint", CBC Radio (10 April 1994). On the question of addiction, see testimony of R. Parker in Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Health* (12 May 1994) at 10:64-65.

<sup>33</sup> [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577 [hereinafter *Irwin Toy* cited to S.C.R.].

<sup>34</sup> Moon, *supra* note 12.

<sup>35</sup> Cunningham, *supra* note 12.

#### IV. Section 1

Laws which infringe a *Charter*-protected right or freedom may nevertheless be found constitutionally valid if they can be saved by section 1 of the *Charter*:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The test to determine whether a limit is reasonable was initially set out in *R. v. Oakes*.<sup>36</sup> In *Oakes*, the Supreme Court of Canada stated that first, a law's objective must "relate to concerns which are pressing and substantial in a free and democratic society."<sup>37</sup> Second, the means chosen to achieve the objective must be reasonable, demonstrably justified and survive a three-part proportionality test: the measures must be rationally connected to achieving the objective; they should impair the right or freedom as little as possible; and the effects of the measures must be proportional to the identified objective.<sup>38</sup> Each of these steps will be considered in turn.

#### V. Pressing and Substantial Objective

The government had no difficulty establishing the pressing and substantial nature of the objective of the T.P.C.A. Although Chabot J. made no finding as to whether tobacco use caused disease or death, let alone the extent of such harm, he did find that there was a sufficiently important objective:

Uncontradicted evidence adduced by the A.G.C. clearly and undeniably indicates that tobacco use has been *perceived* in Canada and in the international community as a scourge for many years. The mass of information, studies and research gathered in Canada and throughout the world, particularly during the past 25 years, makes it abundantly clear that tobacco use constitutes a substantial and pressing concern in Canada, in free and democratic societies and, more generally, in the world community as a whole. In the opinion of the court, the *struggle against tobacco use* constitutes a sufficiently important objective in a free and democratic society such as ours to justify a restriction on a freedom guaranteed by the Charter.<sup>39</sup>

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<sup>36</sup> [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [hereinafter *Oakes* cited to S.C.R.].

<sup>37</sup> *Ibid.* at 138-39.

<sup>38</sup> *Ibid.* at 139.

<sup>39</sup> *R.J.R.-MacDonald*, *supra* note 4 at 492 [emphasis added]. It is interesting to note that for the purposes of the *Charter*, Chabot J. accepted the "struggle against tobacco use" as a sufficiently

Before the Court of Appeal, the companies acknowledged that “legislative measures the purpose of which is to check, diminish and/or control the scourge of tobacco use might, within reasonable limits, be justified in a free and democratic society.”<sup>40</sup> While this admission benefitted the government’s case, it also hindered it in two ways.

First, perhaps as a result of the admission, the Court of Appeal failed to consider the magnitude of the objective. Indeed, in our view, the objective of preventing the serious harm caused by tobacco use outweighs any other objective yet considered by courts under section 1. Tobacco use is the leading preventable cause of addiction, disease, disability and death in Canada today. The 38,000 annual premature deaths in Canada attributable to tobacco<sup>41</sup> approach the 42,000 Canadian war fatalities in all the years of World War II. Adolescents continue to take up smoking at an alarming rate notwithstanding three decades of educational efforts to discourage tobacco use. Among smokers, the annual number of premature deaths from tobacco use far exceeds the number of deaths from motor vehicle accidents, suicide, murder, AIDS and illicit drug abuse combined.<sup>42</sup>

Voluminous evidence was presented at trial about the impact of tobacco use on cancer, lung disease, heart disease, the health of the fetus, the health of non-smokers (due to second-hand smoke), and other health consequences. Chabot J. considered this evidence irrelevant and he “[had] no intention of deciding”<sup>43</sup> on the health consequences of tobacco use:

[M]uch of the expert scientific evidence relating to the effects of tobacco on health, however voluminous and instructive, was nevertheless, with respect, irrelevant to the case and, in the humble view of the court, served merely to colour the debate unnecessarily. ...

For the purposes of this constitutional challenge, the question is not whether tobacco causes lung cancer or whether in fact, on a preponderance of probabilities, it accounts for the deaths of 35,000, 20,000, 5,000 or one

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important objective. But when examining the T.P.C.A. on the division of powers question, he found that the *Acr*’s pith and substance did not deal with health or tobacco use, but rather with the control of advertising of a particular class of products (*ibid.* at 467).

<sup>40</sup> *R.J.R.-MacDonald (C.A.)*, *supra* note 4 at 328-29.

<sup>41</sup> N.E. Collishaw & K. Leahy, “Mortality Attributable to Tobacco Use in Canada, 1989” (1991) 12:4 *Chronic Diseases in Canada* 46.

<sup>42</sup> Y. Mao *et al.*, “The Health Consequences of Smoking Among Smokers in Canada” (1988) 79:5 *Canadian Journal of Public Health* 390.

<sup>43</sup> *R.J.R.-MacDonald*, *supra* note 4 at 491.

person per year.<sup>44</sup>

With respect, the questions Chabot J. declined to decide are highly relevant. When balancing under section 1, it is not only relevant whether the threshold of “pressing and substantial objective” has been met, but it is also relevant how far the threshold has been exceeded. The more significant the objective, the more likely a law will survive the proportionality test. The objective can affect the degree of proof required. The evidence required is commensurate with the occasion, and should be inversely related to the importance of the objective. The magnitude of the problem may contribute to a judicial conclusion that an element of the section 1 analysis is “obvious or self-evident”.<sup>45</sup> Further, the importance of the objective is directly germane in the third part of the proportionality test which balances the objective with the effects of restricting a constitutionally protected right.

Second, the admission hindered the government by dealing with only one “pressing and substantial objective”. Section 3 of the *Act*, as noted above, lists three objectives. Neither the trial court nor the appeal court considered whether these other objectives were valid for the purpose of section 1 analysis.

The stated purpose in paragraph 3(b) is “to protect young persons and others ... from inducements to use tobacco products and consequent dependence on them.” If this objective were accepted as valid, and, in our view, it should be, then the government’s section 1 burden would be discharged simply. Prohibiting tobacco advertising is rationally connected to protecting young persons from inducements to use tobacco because the advertising ban eliminates the inducements. In terms of minimal impairment, there is no other way to prevent young people from being exposed to tobacco advertisements than by eliminating the ads altogether.

The Supreme Court’s decision in *Irwin Toy* may suggest that the objective in paragraph 3(b) would be accepted as valid. In that case, a majority of the Court upheld the Quebec ban on commercial advertising directed at children under thirteen years of age, stating that “[t]here can be no doubt that a ban on advertising directed to children is rationally connected to the objective of protecting children from advertising.”<sup>46</sup> The majority held that the concern which prompted the legislation was pressing and substantial, noting that the “concern is for the protection of a group which is particularly vulnerable to the

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<sup>44</sup> *Ibid.*

<sup>45</sup> *Oakes*, *supra* note 36 at 138.

<sup>46</sup> *Irwin Toy*, *supra* note 33 at 991.

techniques of seduction and manipulation abundant in advertising.”<sup>47</sup> While in *Irwin Toy* the Court was not faced with a general advertising ban on children’s products (which would not have survived section 1 analysis), neither was the Court faced with the advertising of a product which is addictive, carcinogenic, and lethal when used exactly as intended. The potential acceptability of the objective in paragraph 3(b) is enhanced by two factors: the early onset of smoking, and the impact of tobacco advertising on children.

Evidence before Chabot J. from Imperial Tobacco data indicated that the median age of onset of regular smoking was 15.2 years for males and 14.7 years for females. Further, 20 per cent of male smokers and 22 per cent of female smokers begin regular smoking by age 13.<sup>48</sup> A research report for Imperial Tobacco made these comments about the age at which smoking behaviour is initiated:

Serious efforts to smoke occur between ages 12 and 13 in most case [*sic*]. Playful experimentations, especially by children from smoking homes, can take place as early as 5 years of age, but most often around 7 or 8. ... However intriguing smoking was at 11, 12 or 13, by the age of 16 or 17 many regretted their use of cigarettes for health reasons and because they feel [*sic*] unable to stop smoking when they want to.<sup>49</sup>

There are numerous studies providing evidence of the impact of advertising on children. In one American study, “Joe Camel” (the cartoon character that promotes Camel-brand cigarettes) was equally as recognizable among six-year-olds as was the Disney Channel logo which bears a silhouette of Mickey Mouse.<sup>50</sup>

## VI. Rational Connection

Rigorously applying a balance of probabilities test, Chabot J. examined whether a ban on tobacco advertising would reduce tobacco consumption. He concluded that, “[i]n the face of all the documentation available prior to the adoption of the *Act*, this possibility [that advertising may affect overall

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<sup>47</sup> *Ibid.* at 987.

<sup>48</sup> Exhibit AG-197, Dr. J.E. Harris, “Supplementary Report” at 14, 15. The figures are based on data from Imperial Tobacco’s “Monthly Monitor”. Neither this aspect of Harris’ evidence, nor any other referred to below in this article, was discussed by Chabot J.

<sup>49</sup> Exhibit AG-216, Kwechansky Marketing Research Inc., “Project 16” (report prepared for Imperial Tobacco Ltd.) (18 October 1977) at ii, vi [hereinafter “Project 16”].

<sup>50</sup> P.M. Fischer *et al.*, “Brand Logo Recognition by Children Aged 3 to 6 Years. Mickey Mouse and Old Joe the Camel” (1991) 266:22 *J. of the American Medical Association* 3145.

consumption] goes no further than speculation and certainly does not rise to the level of a probability.”<sup>51</sup> He also stated that “the evidence of a rational connection between the restrictions and the objective sought is deficient, if not non-existent.”<sup>52</sup>

The majority of the Court of Appeal rejected the civil balance of probabilities standard used by Chabot J., stating that “what was necessary was to identify the existence of a reasonable basis for governmental action.”<sup>53</sup> The majority adopted the remarks of Sopinka J. in *Dickason v. University of Alberta*:

The rationale for this approach in the latter case is that in dealing with governmental actors, it is often difficult, if not impossible, to prove in the ordinary way whether a particular measure will in fact achieve its objective. Accordingly, if Parliament, a legislature or other governmental body had a reasonable basis for concluding that the measure would achieve its objective, that is ordinarily a basis for concluding that there is a rational connection between the measure and the governmental objective. Accordingly, although the government could not prove that advertising toys on television had a manipulative effect on children, nor that hate propaganda actually promoted hatred against an identifiable group, nor that pornography caused harm to women, the fact that there was sufficient evidence to provide a reasonable basis for the legislature to adopt the impugned legislation in aid of its objective was sufficient to save it.<sup>54</sup>

Lebel J.A., for the majority of the Court, also stated:

In matters of social policy choices, an examination of the Supreme Court jurisprudence reveals a flexible approach with respect to the nature of the evidence required. ... The jurisprudence suggests rather that one should determine whether, in its defence of the limitation of a constitutionally guaranteed right, particularly in matters of socio-economic policy and the balancing of opposed social interests, the state has offered evidence which indicates the existence of a reasonable foundation for the measure chosen. What must be demonstrated is that the choice adopted by the legislator falls within the realm of possibilities. The question is not whether there is a real probability.<sup>55</sup>

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<sup>51</sup> *R.J.R.-MacDonald*, *supra* note 4 at 514. This passage raises the question as to the value of the evidence available after the adoption of the *Act*. An extensive amount of such evidence, including corporate documents, was presented to the court.

<sup>52</sup> *Ibid.* at 515.

<sup>53</sup> *R.J.R.-MacDonald* (C.A.), *supra* note 4 at 321.

<sup>54</sup> [1992] 2 S.C.R. 1103 at 1195-96, 95 D.L.R. (4th) 439.

<sup>55</sup> *R.J.R.-MacDonald* (C.A.), *supra* note 4 at 319.

The majority concluded that “the Attorney-General of Canada has presented sufficient evidence to establish a reasonable basis for the legislative action and to justify the rational connection between the objective sought and the means utilized.”<sup>56</sup> In doing so, the majority cited expert witness testimony, resolutions of the World Health Organization, the 1989 U.S. Surgeon General’s Report, and the companies’ internal marketing documents that referred to expanding the overall market and dissuading smokers from quitting.<sup>57</sup>

In dissent, Brossard J.A. held that a rational connection will be established “if it is shown on a balance of probabilities that it is *at least possible* that the goal sought will be achieved through the means chosen.”<sup>58</sup> He was of the view that requiring unattributed health messages<sup>59</sup> and prohibiting free distribution<sup>60</sup> met this test, and that a ban on lifestyle advertising would have met this test.<sup>61</sup> He held, however, that the test had not been met for other types of advertising, despite the low threshold articulated:

I therefore find that the Attorney-General did not discharge her burden of demonstrating, based on a preponderance of evidence or balance of probabilities, that it is either probable or possible that the law at issue ... will have any effect on the consumption of tobacco products.<sup>62</sup>

Brossard J.A.’s view was equally applicable to brand advertising (other than lifestyle)<sup>63</sup> and to informational advertising.<sup>64</sup> He placed heavy reliance on the trial judge’s conclusion about the absence of probative evidence.<sup>65</sup>

### A. *Standard of Proof*

Numerous Supreme Court cases have held that the required standard of proof may vary with the context.<sup>66</sup> The greater the objective, the lower the

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<sup>56</sup> *Ibid.* at 326.

<sup>57</sup> *Ibid.* at 323-25.

<sup>58</sup> *Ibid.* at 382.

<sup>59</sup> *Ibid.* at 383.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.* at 385-86.

<sup>62</sup> *Ibid.* at 392.

<sup>63</sup> *Ibid.* at 384, 385, 388.

<sup>64</sup> *Ibid.* at 387.

<sup>65</sup> *Ibid.* at 384.

<sup>66</sup> See e.g. *Reference Re Sections 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, 56 C.C.C. (3d) 65 [hereinafter *Prostitution Reference* cited to S.C.R.]; *Oakes*, *supra* note 36; *Irwin Toy*, *supra* note 33; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, 71 D.L.R. (4th) 68 [hereinafter *Rocket* cited to S.C.R.]; *Peterborough (City of) v.*

standard. Further, the lesser the significance of the protected expression, the lower the standard. As stated by Dickson C.J. in the *Prostitution Reference*:

[E]xpressive activity ... should ... be analysed in the particular context of the case. Here, the activity to which the impugned legislation is directed is expression with an economic purpose. It can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression.<sup>67</sup>

In this passage, “tobacco” could easily be substituted for “sex”. In *Oakes*, the Court stated:

Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case ... Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups.<sup>68</sup>

In *Irwin Toy*, the majority showed deference to the democratically elected legislature in evaluating social science evidence and in mediating between competing interests.<sup>69</sup> In *Rocket*, the Court again recognized that infringements of commercial expression would be easier to justify than infringements of other forms of expression.<sup>70</sup> It is worth noting that tobacco advertising does not deal with an underlying artistic activity, as was the case in *Ramsden*.<sup>71</sup>

Given the jurisprudence, the Supreme Court will likely apply a reasonable basis test, and perhaps a deferential one at that, when considering, for the T.P.C.A., the rational connection under section 1.

In the United States, where the analysis used to justify restrictions on commercial speech is similar to the section 1 analysis in Canada, the Supreme Court has displayed deference to the legislature when adjudicating on commercial speech, as demonstrated in this leading case:

The Puerto Rico Legislature obviously believed, when it enacted the ad-

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*Ramsden*, [1993] 2 S.C.R. 1084, 106 D.L.R. (4th) 233 [hereinafter *Ramsden*].

<sup>67</sup> *Prostitution Reference*, *ibid.* at 1136.

<sup>68</sup> *Oakes*, *supra* note 36 at 137, 139.

<sup>69</sup> *Irwin Toy*, *supra* note 33 at 990.

<sup>70</sup> *Rocket*, *supra* note 66 at 242, 247.

<sup>71</sup> *Supra* note 66. In that case, a municipal by-law prohibiting the affixing of posters to public property was found unconstitutional because it did not restrict expression as minimally as was possible. The accused, who was challenging the validity of the by-law, had affixed to hydro poles posters advertising upcoming performances of his band.



vertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. *We think the legislature's belief is a reasonable one*, and the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view.<sup>72</sup>

In both Canadian and American constitutional cases, a distinction could be made between adjudicative facts and legislative facts.<sup>73</sup> David Lepofsky describes the distinction in three ways.<sup>74</sup> First, adjudicative facts arise in the courts (*e.g.* the terms of a contract or an accused's blood-alcohol level) while legislative facts arise in the law-making process. Second, adjudicative facts are often more amenable to proof. Third,

legislative facts tend to be amorphous, dealing with such things as the nature of society or of human nature. They involve the social sciences, such as economics, sociology, psychology and criminology. In contrast, adjudicative facts tend to be more in the nature of "hard facts".<sup>75</sup>

In this light, the standard of proof necessary for legislative facts should be less onerous than that for adjudicative facts. This is partly because much of the evidence available to legislators may be found inadmissible in courts because of hearsay. Such evidence could include published research and commentary, opinions expressed by media editorials, or representations made by the public. For example, during the trial, Chabot J. ruled inadmissible an examination of the impact of tobacco advertising on consumption, the conclusions of which were favourable to the government's position.<sup>76</sup>

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<sup>72</sup> *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico*, 478 U.S. 328 at 341-42, 92 L.Ed. (2d) 266 (1986) [emphasis added, hereinafter *Posadas de Puerto Rico* cited to U.S.].

<sup>73</sup> For further discussion on this distinction, see D. Pinard, "La rationalité législative, une question de possibilités ou de probabilités? Commentaire à l'occasion de l'affaire du tabac" (1994) 39 McGill L.J. 401.

<sup>74</sup> M.D. Lepofsky, "Litigating Charter Claims — Legal, Factual and Evidentiary Ammunition" in *Public Law Reference Materials, 35th Bar Admission Course Materials* (Toronto: Law Society of Upper Canada, 1993) at 10:17. See also P.W. Hogg, "Proof of Facts in Constitutional Cases" (1976) 26 U.T.L.J. 386 at 394-95.

<sup>75</sup> Lepofsky, *ibid.* at 10:17.

<sup>76</sup> K.E. Warner, *Selling Smoke: Cigarette Advertising and Public Health* (Washington: American Public Health Association, 1986).

### *B. Standard of Judicial Review*

A separate issue concerns the appropriate standard for judicial review of the Superior Court's decision. In this case, the trial court was not a trier of fact in the same way that it is in a civil or criminal case. In these latter cases, the trial court is the trier of fact of first instance. Concerning the T.P.C.A., the same critical issues were previously considered by the House of Commons and by the Senate, including detailed hearings by committees of both legislative chambers. Parliament concluded that dependence on tobacco products was a consequence of tobacco advertising and this conclusion was subsequently written into the T.P.C.A.<sup>77</sup> As well, a detailed study on tobacco issues by the House of Commons Standing Committee on Health, Welfare and Social Affairs led to a report which included a recommendation to ban tobacco advertising.<sup>78</sup>

Chabot J. reviewed Parliament's conclusion on a correctness basis, seemingly without any deference to the legislature. The majority of the Court of Appeal, in reversing the trial court, showed more deference to Parliament than did the trial court, and the majority came to a different conclusion on the evidence than did Chabot J. In contrast, Brossard J.A. cited civil cases in support of his position that the rule of non-interference should guide appeal courts with respect to the findings of fact of trial courts. "Only a manifest and determinative error in the findings of fact by the trial judge can justify intervention," wrote Brossard J.A., provided the error influenced the "final conclusion or overall appreciation of the evidence."<sup>79</sup> On the question of the impact of advertising on consumption, Brossard J.A. saw no error requiring his intervention.

For the standard of judicial review, Brossard J.A. did not consider the implications of the constitutional nature of the case at hand. It would be a serious blow to democracy if a single trial judge could reverse the findings of Parliament on complex social issues, and that trial judge's decision could then be insulated from judicial review.

### *C. Evidence of a Rational Connection*

With respect for the contrary views of Chabot J. and Brossard J.A., there is sufficient evidence to provide a reasonable basis for Parliament's conclusion that a ban on tobacco advertising would reduce tobacco use. Some of this

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<sup>77</sup> *Supra* note 1, par. 3(b).

<sup>78</sup> *Supra* note 26. This report was filed as Exhibit AG-94.

<sup>79</sup> *R.J.R.-MacDonald (C.A.)*, *supra* note 4 at 362.

evidence was referred to by the Court of Appeal. Much of it was not, however, including the lengthy oral testimony and written submissions presented to the House of Commons and Senate Committees which considered the T.P.C.A.

The very fact that large, respected national and international health organizations are strong supporters of the T.P.C.A. is meaningful. The World Health Organization, the Canadian Medical Association, the Canadian Cancer Society, and many other organizations are at the front lines of tobacco control. If the T.P.C.A. will have no impact on reducing consumption, then why would health and medical bodies and their policy experts commit so much energy to supporting the *Act*?

Tobacco companies argue that tobacco advertising can only affect market share through brand choice. But non-smoking is a choice smokers can make; indeed the market share for this option is increasing. Further, cigarettes must now compete for market share with partial substitutes, namely nicotine gum and the nicotine patch. As well, Wrigley's positions its spearmint gum as an alternative to smoking.

#### ***D. Tobacco Industry Marketing Documents***

Some of the best evidence of a rational connection between advertising and tobacco use comes from tobacco industry documents.<sup>80</sup> These documents provide unprecedented information about tobacco industry marketing practices. The industry targeted women, researched teenage smoking behaviour, advertised to teenagers, sought to position low tar and nicotine cigarettes as safer for health, fostered positive images about a carcinogenic product, provided reassurances about the social acceptability of smoking through lifestyle advertising, and tried to stem the decline in tobacco consumption through marketing.<sup>81</sup> The industry's practices contrast with those of other companies that recall products from the market (*e.g.* Perrier water or Tylenol) when the risk of harm is relatively minimal.

It makes little sense that profit-driven tobacco companies would advertise only to gain or defend market share, and would not advertise to prevent smokers from quitting altogether. Why would companies not want to do so,

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<sup>80</sup> The Quebec courts did not have before them the marketing documents from Rothmans, Benson & Hedges Inc., a company which chose to make its challenge before the Federal Court of Canada. These documents might have provided further evidence.

<sup>81</sup> Documents evidencing these practices will be cited *infra*.

especially since, in their view, no one has ever been harmed from smoking? In 1988, for example, only 11.7 per cent of smokers switched brands, yet 43 per cent attempted to quit.<sup>82</sup> Potential quitters represented a threat to tobacco companies four times greater than did brand switchers. This is especially true since a significant proportion of switching inevitably occurs among brands of the same company. From a profit perspective, ignoring the threat posed by quitting would be a large commercial mistake uncharacteristic of the tobacco industry.

A section of one study done for Imperial Tobacco begins with the introductory comment that “[t]he ability to reassure smokers, to keep them in the franchise for as long as possible, is the focal point here.”<sup>83</sup> In that study, smokers are segmented into five groups: “Smokers with a Disease Concern”; “Leave Me Alone”; “Pressured”; “Seriously Like to Quit”; and “Not Enjoying Smoking/Smoking Less Now”. The following comment appears under the category “Pressured”:

The final group of smokers does deserve particular attention as it is most vulnerable to quitting and is in urgent need of reassurance and stroking. It involves a similar proportion to the previous group [Leave Me Alone], one-quarter of smokers and 10 percent of the adult population.<sup>84</sup>

A related study contained this passage under the heading “Unsuccessful Quitters”:

Probably this is the most important group to examine. It is comprised of people in turmoil in the final stages of smoking. The extent to which they can be reassured and satisfied ... has a major impact on the extension of a viable tobacco industry.<sup>85</sup>

Cigarette marketing involves the marketing of images and the promotion of the general social acceptability of smoking:

Without price differentials and without easily perceptible product differentiation (except for extremes, e.g. *Matinée* versus *Player's*) consumer

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<sup>82</sup> Exhibit AG-31, Imperial Tobacco Ltd., “The Canadian Tobacco Market at a Glance” (1989) at 2.

<sup>83</sup> Exhibit AG-21B, Creative Research Group Ltd., “Project Viking, Volume II, An Attitudinal Model of Smoking, February-March 1986” (prepared for Imperial Tobacco) at 31.

<sup>84</sup> *Ibid.* at 33-34.

<sup>85</sup> Exhibit AG-21A, Creative Research Group Ltd., “Project Viking, Volume I: A Behavioural Model of Smoking, February-March 1986” (prepared for Imperial Tobacco) at 60.

choice is influenced almost entirely by imagery factors.<sup>86</sup>

All lifestyle images in *Player's* ads will promote the social acceptability of smoking where appropriate. Scenarios and settings for the lifestyle imagery will be selected to invite the reader to associate a *Player's* brand with a pleasant peer group situation where product usage can be seen to be appropriate, acceptable and enjoyable.<sup>87</sup>

[The role of lifestyle images is to] [p]romote and reinforce social acceptability among the peer group to smoking as a relaxing, enjoyable self-indulgence.<sup>88</sup>

duMAURIER (red) F'81 ADVERTISING STRATEGIES

1. To continue to develop advertising that reflects a contemporary quality image, by ensuring that all advertising reflects a contemporary, perhaps even avant-garde, lifestyle and materialism to which the target market would aspire to [*sic*].<sup>89</sup>

Clearly, marketing has been used to slow the decline in smoking. In the mid-1980s, after overall industry sales had declined for several years, R.J.R.-MacDonald decided to respond, as this passage indicates:

Key Issue #1 - Decline in Industry Volume ...  
Objectives

a) Achieve stability of industry volume by directing all business efforts, including both our marketing and sales programs as well as our external corporate relations, towards this end.<sup>90</sup>

To continue to prosper, the tobacco industry needs new smokers to replace those who quit or die. Since relatively few adults begin to smoke, the industry needs teenagers to do so. Imperial Tobacco's media plans for 1980 outline the target groups for each of the company's brands. A weight was assigned to each target group to determine, by means of a computer, in which magazines advertisements would be placed. This method maximized the advertising exposure for the desired target groups. The following table lists the

<sup>86</sup> Exhibit AG-204, Imperial Tobacco, "1971 Matinée Marketing Plans" at 7.

<sup>87</sup> Exhibit AG-29, Imperial Tobacco, (the apparent title is "Creative Guidelines") at 3. Page numbers indicated for this exhibit conform to those designated by the court.

<sup>88</sup> *Ibid.* at 13. This passage falls under the phrase "Role of lifestyle is to". The list includes a number of "roles", only one of which is to cause brand switching and brand loyalty.

<sup>89</sup> Exhibit AG-35, Imperial Tobacco Internal Documents, Jacques Woods, "duMAURIER (red) F'81 ADVERTISING OBJECTIVES" at 14 [F'81 denotes the 1981 fiscal year].

<sup>90</sup> Exhibit RJR-14, R.J.R.-MacDonald Inc., "R.J.R.-MacDonald Inc. Area II — Canada 1985-1987 Strategic Plan" at 25.

demographic characteristics (including age, sex, and education).<sup>91</sup> For some brands, not only do target groups include adolescents as young as twelve years old, but youths aged twelve to seventeen are weighted more heavily than are older age groups.<sup>92</sup> The marketing document contains the following information:

*Brand and advertising language Target Group and Weight*

Player's Filter - English	Men	Weight	Women	Weight
	12-17	1.0		
	18-24	1.0		
	25-34	0.7		
	35+	0.0		
Player's Filter - French	12-17	1.0		
	18-24	0.9		
	25-34	0.7		
Player's Light - English	12-24	1.0	12-24	1.0
	25-34	0.7	25-34	0.7
	35+	0.0	35+	0.0
Player's Light - French	12-17	0.8	12-17	0.7
	18-24	1.0	18-24	0.9
	25-34	0.6	25-34	0.5
duMaurier - English	Men & Women 12-34			
duMaurier - French	Men & Women 12-34			
Matinée - English	Smokers, Men & Women 18-49, Some H.S.+			
Matinée - French	Smokers, Men & Women 18-49			
Matinée Extra Mild - English	Smokers	Weight		
	18-24	0.7		
	25-49	1.0		
	50-64	0.3		

<sup>91</sup> Exhibit ITL-13, Imperial Tobacco, "Fiscal '80 Media Plans". It is believed that "H.S." is an abbreviation for "high school".

<sup>92</sup> In 1980, the minimum age to be sold tobacco was 18 in Ontario and New Brunswick and 16 in the rest of the country (*Minors' Protection Act*, R.S.O. 1980, c. 293; *Act Respecting the Use of Tobacco by Minors*, R.S.N.B. 1927, c. 64; *Tobacco Restraint Act*, R.S.C. 1970, c. T-9). As well, the industry's voluntary code provided that advertising would not be directed to persons under 18 (*C.T.M.C. Code*, *supra* note 31, Rule 7).

Matinée Extra Mild - French	Smokers	Weight		
	18-24	0.7		
	25-49	1.0		
	50-64	0.3		
Cameo Family	Smokers, Women 18-49			
Peter Jackson Extra Light - English and French	Smokers			
	Men	Weight	Women	Weight
	18-24	0.8	18-24	0.6
	24-64	1.0	25-34	0.8
	35-64	0.9		
	(Also <Some H.S. Weight 0.0; Some H.S. Weight 0.7; Grad. H.S. Weight 1.0)			
Medallion English and French	Men & Women	Weight	Also	Weight
	25-49	1.0		
	50-64	0.9		
			Grad. H.S.+	1.0

An Imperial Tobacco document for the following year revealed a comparable target market strategy. For some brands, teenagers aged twelve to seventeen continued to be the most heavily weighted target group.<sup>93</sup>

In 1981, Imperial Tobacco's overall market share was about forty-five per cent, but for people under the age of twenty, its market share was closer to seventy per cent.<sup>94</sup> The attractiveness of Imperial products to young people has contributed to the continual growth of Imperial's market share as those young people age. Imperial's 1993 cigarette market share stood at sixty-seven per cent. The advertising strategy has obviously worked.

Imperial Tobacco maintained regular data on the percentage of fifteen to nineteen year-olds who were smokers: in this age group in 1989, 22.9 per cent of males and 26.9 per cent of females were smokers.<sup>95</sup>

Behavioural research with teenage subjects examining why teenagers begin to smoke was done for Imperial Tobacco: Project 16 (1977)<sup>96</sup> and Project Plus/Minus (1982).<sup>97</sup> Project Plus/Minus also looked at quitting behaviour

<sup>93</sup> Exhibit AG-223, Imperial Tobacco, "Fiscal '81 National Media Plans".

<sup>94</sup> Exhibit AG-196, Dr. J.E. Harris, "Cigarette Advertising and Promotion in Canada: Effects on Cigarette Smoking and Public Health" (August 1989) at 55, 59. The figures originate from Imperial Tobacco computer tracking data.

<sup>95</sup> Exhibit AG-197, *supra* note 48 at 14.

<sup>96</sup> *Supra* note 49.

<sup>97</sup> See Exhibit AG-217, Kwecbansky Marketing Research Inc., "Project Plus/Minus May 7, 1982 Report for Imperial Tobacco Ltd."

among both smokers and former smokers. Project Huron examined a cigarette targeted primarily at males aged fifteen to twenty-five.<sup>98</sup> Youth '87, done for R.J.R.-MacDonald, provided a detailed and sophisticated examination of smoking among the young. The study covered 1,022 subjects aged fifteen to twenty-four.<sup>99</sup>

Creative guidelines in 1981 for Player's Light stated that its strategy to reach the target market in English Canada would emphasize somewhat "the under-20-year-old group in its imagery reflection of lifestyle (activities) tastes" but would be "cautious in terms of alienating the older end of the total group."<sup>100</sup> For Player's Filter, activities "should not require undue physical exertion. They should not be representative of an elitist's sport nor should they be seen as a physical conditioner ... The activity shown should be one which is practiced by young people 16 to 20 years old or one that these people can reasonably aspire to in the near future."<sup>101</sup>

The following marketing document excerpts further illustrate the importance of the youth market to the tobacco industry:

Young smokers represent the major opportunity group for the cigarette industry, we should therefore determine their attitude to smoking and health and how this might change over time.<sup>102</sup>

If the last ten years have taught us anything, it is *that the industry is dominated by the companies who respond most effectively to the needs of younger smokers*. Our efforts on these brands will remain *on maintaining their relevance to smokers in these younger groups* in spite of the share performance they may develop among older smokers.<sup>103</sup>

#### FISCAL '88, OVERALL MARKETING OBJECTIVES

1. *RE-ESTABLISH clear distinct images* for ITL brands with particular emphasis on relevance to younger smokers. Shift resources substantially in favour of avenues that allow for the expression and reinforcement of these

<sup>98</sup> Exhibit AG-224, R.W. Pollay, "The Functions and Management of Cigarette Advertising" at 13.

<sup>99</sup> Exhibit RJR-6, The Creative Research Group Ltd., "Youth '87" (prepared for R.J.R.-MacDonald). Exhibit RJR-5 is a letter from I.A. Walker, Director of Market Research for R.J.R.-MacDonald, to Creative Research Group, stating that R.J.R. only wants analysis for those aged 18-24. The report, however, looks at those under 18, including specific reference to the 15-17 age group (*ibid.* at 47-48).

<sup>100</sup> Exhibit AG-35, "Player's Filter '81 Creative Guidelines" at 42.

<sup>101</sup> *Ibid.* at 1.

<sup>102</sup> Exhibit AG-204, *supra* note 86 at 11.

<sup>103</sup> Exhibit AG-214, Imperial Tobacco, "Overall Market Conditions - F88" at 6.



image characteristics.<sup>104</sup>

#### Rationale

1. By younger modern smokers, we mean people ranging from starters of the smoking habit up to and through the seeking and setting of their independent adult lifestyle. Relevant lifestyle is the key to the brand's positioning, and the youthful emphasis is a psychological not chronological one.

2. At a younger age, taste requirements and satisfaction in a cigarette are thought to play a secondary role to the social requirements. Therefore, taste, until a certain nicotine dependence has been developed, is somewhat less important than other things.<sup>105</sup>

The tobacco industry acknowledged that certain brands and "slims" cigarettes are targeted at women.<sup>106</sup> For example, *Matinée Special Mild* is a brand directed towards "modern young women".<sup>107</sup> The brand was positioned "to be more modern, more up-to-date, certainly clearly for women, that was for women who today, in their busy life, increasingly felt that they would like a moment of relaxation and self indulgence."<sup>108</sup>

#### E. U.S. Imports

If tobacco advertising has no impact on consumption, then why are tobacco companies contesting an advertising ban, especially since tens of millions of dollars of marketing expenses would be saved by the ban? The industry opposes the T.P.C.A., claiming that spillover advertising from U.S. magazines would result in increased imports of cigarettes.<sup>109</sup> This argument, essential to the tobacco industry's case, is significantly undermined by a number of facts.

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<sup>104</sup> *Ibid.* at 11.

<sup>105</sup> Exhibit AG-33, Spitzer, Mills & Bates, "The Player's Family: A Working Paper" (prepared for Imperial Tobacco) (25 March 1979) at 14.

<sup>106</sup> Testimony of D. Brown, Imperial Tobacco Ltd. Vice-President of Marketing (28 September 1989) at 661-62.

<sup>107</sup> Testimony of D. Brown (2 October 1989) at 711.

<sup>108</sup> *Ibid.* Brown is referring to the launch of *Matinée Special Mild* cigarettes and to an advertisement for *Matinée Special Mild* depicting a woman smoking while in a bathtub (Exhibits AG-1 and ITL-9).

<sup>109</sup> Canada, House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-204 and Bill C-51* (20 January 1988) at 21:7-8.

First, cigarette imports from the U.S. have declined, not risen, since the T.P.C.A. came into force in 1989, as this table indicates:<sup>110</sup>

Year	Total Cigarette Imports (million)	Cigarette Imports from U.S. (million)
1988	661.2	567.3
1989	445.4	392.8
1990	296.7	229.6
1991	381.2	345.9
1992	314.6	283.6
1993	271.4	240.8

The share for imports remains a fraction of one per cent of the Canadian market. The major reason for the immediate decline in 1989 was that Philip Morris stopped exporting to Canada so that it would not have to place Canadian warnings on packages or report product contents to the Canadian government.<sup>111</sup>

Second, the three major Canadian companies are affiliated with American corporations.<sup>112</sup> If the companies really wanted to stop exports from the U.S. to Canada, a simple decision could be implemented quickly.

Third, Canadian smokers are accustomed to smoking Virginia flue-cured tobacco, instead of the different tasting tobacco blends used in American cigarettes.

Fourth, while prior to the T.P.C.A. two-thirds of tobacco ads in magazines seen in Canada originated in the U.S., magazines represented only a small proportion of the total tobacco promotion seen by Canadians (*e.g.* newspapers, flyers, direct mail, sponsorships, displays and advertisements at point of sale, packaging, outdoor advertising such as billboards and signs on transit vehicles, *etc.*). Further, some Canadians, especially francophones, seldom read English-language American magazines.<sup>113</sup>

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<sup>110</sup> Statistics Canada, *Imports by Commodities*, Catalogue 65-007. The statistics are from the December 1988, December 1989, December 1990, December 1991, December 1992 and December 1993 volumes respectively.

<sup>111</sup> M. Strauss, "Philip Morris to Withdraw Seven Cigaret [*sic*] Brands" *The Globe and Mail* (4 April 1989) B3.

<sup>112</sup> Both Canada's Imperial Tobacco and Brown and Williamson of the U.S. are affiliated with British-American Tobacco.

<sup>113</sup> Because tobacco advertising is prohibited in France, magazines from France distributed in Canada do not contain cigarette advertisements.

Fifth, many cigarettes advertised in the U.S. are not exported to Canada. Chabot J. referred to twenty-seven advertisements included in eight American magazines filed as exhibits at trial, yet only four advertisements promoted products made by U.S. manufacturers and exported by the companies to Canada.<sup>114</sup>

Sixth, if the T.P.C.A. really would increase market share for American companies, then R.J. Reynolds should be pleased. The company's cigarette market share in the U.S. is 30.6 per cent,<sup>115</sup> but the market share in Canada of its Canadian subsidiary is much lower at 12 per cent.<sup>116</sup> An increase in exports to Canada would likely increase the multinational's overall share in the Canadian market.

Seventh, and perhaps most importantly, the Canadian tobacco advertising ban does the opposite of what the companies allege. The T.P.C.A. protects Canadian companies from foreign competition by serving as a barrier to entry and making it difficult for foreign brands to break into the Canadian market. This is a major benefit for Canadian companies which enjoy an unusually high dominance, with more than ninety-nine per cent of the domestic market.

Advertising bans elsewhere in the world have been considered protectionist. The U.S. government opposed advertising restrictions in Thailand and Taiwan on the grounds that American companies were hampered in efforts to increase market share. The U.S. even challenged Thailand's complete ban under GATT, albeit unsuccessfully.<sup>117</sup> More recently, Philip Morris argued that Canadian promotional restrictions through plain packaging would make it "virtually impossible" for the company to penetrate the Canadian market.<sup>118</sup> The written submission to the House of Commons Standing Committee on Health from British-based British-American Tobacco contained a similar

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<sup>114</sup> The only brands advertised which are exported to Canada are Salem (3 advertisements) and Camel (1 advertisement). D. Brown testified that many of the brands advertised in U.S. magazines were not or were no longer exported to Canada. Other U.S. brands were made by a separate company in Canada. Philip Morris, the manufacturer of Marlboro and Virginia Slims, no longer exports products to Canada.

<sup>115</sup> J.C. Maxwell, "Maxwell Report Part II, USA" *Tobacco Reporter* (April 1994) at 14.

<sup>116</sup> Maxwell, *supra* note 22 at 12.

<sup>117</sup> GATT, *Thailand. Restrictions on Importation of and Internal Taxes on Cigarettes. Report of the Panel adopted on 7 November 1990*, GATT Doc. DS10/R, 46th sess., 37th supp. B.I.S.D. (1991) 200.

<sup>118</sup> Letter of W.H. Webb, President and Chief Executive Officer of Philip Morris International Inc., to the House of Commons Standing Committee on Health (5 May 1994) at 2.

argument stating that plain packaging would constitute a “disguised restriction on international trade”.<sup>119</sup>

#### *F. Low Tar and Nicotine Cigarettes*

Some opponents of tobacco advertising bans have argued that a ban would deprive consumers of information regarding low tar and nicotine cigarettes. In fact, this information will continue to be available through more prominent display on cigarette packages. While low tar brands are perceived by many individuals to be safe, this is not the case.<sup>120</sup> There is no such thing as a safe cigarette. Indeed, tobacco company executives denied in testimony that low tar and nicotine cigarettes are safer for health.<sup>121</sup>

When cigarettes have less tar and nicotine, some smokers are more likely to smoke closer to the butt, smoke more deeply, take more puffs, cover ventilation holes in the filter with fingers or lips, and smoke more cigarettes. Many “light” cigarettes are not light in tar at all: Player’s Light has fourteen milligrams of tar compared to Medallion Ultra Mild cigarettes with one milligram of tar. Light cigarettes induce many smokers away from the alternative of quitting smoking altogether:

We have evidence of virtually no quitting among smokers of those brands, and there are indications that the advent of ultra low tar cigarettes has actually retained some potential quitters in the cigarette market by offering them a viable alternative.<sup>122</sup>

The third objective [of Project Plus/Minus] was to explore brand selection patterns and the perceptions of light brands. The latter was approached in

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<sup>119</sup> The written submission of B.-A.T. was a legal opinion from Lovell White Durrant (London, England) to both British-American Tobacco Company Limited and Rothmans International (29 April 1994). See at 2-3.

<sup>120</sup> J.R. Palmer *et al.*, “Low Yield’ Cigarettes and the Risk of Non-Fatal Myocardial Infarction in Women” (1989) 320:24 *New England J. of Medicine* 1569 (Exhibit AG-71); L.T. Kozlowski *et al.*, “Prevalence of the Misuse of Ultra-Low-Tar Cigarettes by Blocking Filter Vents” (1988) 78:6 *American J. of Public Health* 694 at 695; U.S. Department of Health and Human Services, *Reducing the Health Consequences of Smoking: 25 Years of Progress. A Report of the Surgeon General* (Maryland: U.S. Department of Health & Human Services, 1989) at 315-16, 665 (Exhibit AG-146V).

<sup>121</sup> Testimony of D. Brown, Imperial Tobacco Vice-President of Marketing, 3 October 1989 at 911-13; testimony of P. Hoult, former R.J.R.-MacDonald President, 27 September 1989 at 503-507.

<sup>122</sup> Exhibit AG-41, Imperial Tobacco, “Response of the Market and of Imperial Tobacco to the Smoking and Health Environment” at 2.

particular as regards the view of light brands as potential substitutes for quitting.<sup>123</sup>

#### Perceptions of Low-Tar Brands

LTN's [low tar/nicotine] allow consumers to continue to smoke under social duress. As a category, low-tar brands are seen *as a means* to yield to health considerations, social pressures and personal guilt feelings.<sup>124</sup>

Hence, Quitters may be discouraged from quitting, or at least kept in the market longer, by either of the two product opportunities noted before. A less irritating cigarette is one route. (Indeed, the practice of switching to lower tar cigarettes and sometimes menthol in the quitting process tacitly recognizes this.) The safe cigarette would have wide appeal, limited mainly by the social pressures to quit. ... Strategically, it would seem that reducing quitting is the most viable approach. But it would also seem that a product solution may not be sufficient on its own. An advocacy thrust may be necessary; disaffected smokers do need some reassurance that they are not social pariahs.<sup>125</sup>

If a particular tobacco product is less harmful to health than are other tobacco products, the government has the regulatory authority to exempt the product from the application of the T.P.C.A.<sup>126</sup> In addition, the *Act* does not prevent the government from publicizing less dangerous tobacco products,<sup>127</sup> nor does it prevent physicians from providing advice to patients about tobacco products.

Tobacco marketing seeks to rebut smoking and health concerns by promoting certain brands as healthy choices:

#### *OVERALL POSITIONING OBJECTIVE*

The objective for Medallion is to associate the brand with the lowest recognized level of mildness (Ultra-Mildness) and "safety", with as little sacrifice or trade-off on image elements. ...

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<sup>123</sup> Exhibit AG-217, *supra* note 97 at 2.

<sup>124</sup> Exhibit AG-40, Market Systems Inc., "Project Eli Focus Groups Final Report" (prepared for Imperial Tobacco) (July 1982) at 21.

<sup>125</sup> Exhibit AG-21C, The Creative Research Group Limited, "Project Viking, Volume III: Product Issues" (prepared for Imperial Tobacco) (February-March 1986) at 8.

<sup>126</sup> *Supra* note 1, par. 17(a).

<sup>127</sup> The T.P.C.A. does not bind the Crown.

## STRATEGIES

### Positioning

Reinforce Medallion's lowest tar, "safest" perception.<sup>128</sup>

Player's Extra Light continues to be positioned as a milder, therefore healthier, version of Player's Light. It remains a health oriented alternative for interested Player's smokers. Its role will continue to be as such.<sup>129</sup>

### Opportunities

a) ... Due to continuing anti-smoking publicity, the public continues to be aware of and concerned with the suggested hazards of cigarette smoking. Matinee [*sic*] is then in an ideal position to take advantage of this situation with its low T&N [tar and nicotine] and "safer for health" propositions.<sup>130</sup>

## VIII. Advertising Plan

### 2. Copy Strategy

G. *Rationale*. As consumers shift from full-flavour cigarettes to brands with lower "tar" and nicotine levels, they will desire as much flavour and satisfaction as possible while *easing their concerns about smoking/health controversy*. Because there are many new and established brands competing in this segment, it will be necessary to aggressively communicate that Export "A" Lights is the *only* brand that has successfully combined full flavour *and* lightness in one cigarette.<sup>131</sup>

A proposed advertisement for Vantage cigarettes featured the following copy under the heading "TO SMOKE OR NOT TO SMOKE":

There's a good chance that you've been giving some serious thought to smoking ... Vantage is the cigarette for people who may have had second thoughts about smoking and are looking for a way to do something about it. Vantage cuts down substantially on what you may not want, without cutting out that satisfying tobacco flavour you've come to appreciate.<sup>132</sup>

The advertisement was modified because many people related the phrase "you may not want" directly to cancer, in addition to tar and nicotine. This generated "defensiveness towards smoking in general, and a feeling of

<sup>128</sup> Exhibit AG-24, Imperial Tobacco, "Medallion" at 3.

<sup>129</sup> Exhibit AG-210, Imperial Tobacco, "Player's 1988" at 4.

<sup>130</sup> Exhibit AG-204, *supra* note 86 at 50.

<sup>131</sup> Exhibit AG-14, "Canada — R.J. Reynolds Tobacco International — 1978 Annual Business Plan — Marketing Plans: Export 'A' Lights" at 2126 [emphasis added].

<sup>132</sup> Exhibit AG-205A, "To Smoke or Not to Smoke" [unpublished advertisement, 1981]. See also Exhibit AG-205B, "Smoking. What are you going to do about it?" [unpublished advertisement, 1981].

discomfort.”<sup>133</sup> The phrase was dropped in the final advertisement. Emphasis was instead placed on “Contemporary Taste” and “Contemporary Choice”.<sup>134</sup>

### G. *New Evidence*

Since the T.P.C.A. came into force, total per capita consumption (age fifteen and above) has declined at significant rates, even when contraband sales are factored in.<sup>135</sup> In terms of prevalence (*i.e.* the percentage of population that smokes), Imperial Tobacco data show a declining rate of increase. The following table provides data for the time periods 1971 to 1982 (no regulation or significant tax increases), 1983 to 1988 (significant tax increases), and 1989 to 1993 (regulation and significant tax increases):<sup>136</sup>

	1971-82	1983-88	1989-93
Average Annual Decline in Prevalence	0.67%	0.78%	1.16%
Average Annual % Decline Based on Start of Period <sup>137</sup>	1.43%	1.98%	3.33%

A British government study, referring to statistical studies examining advertising expenditure, concluded that “[t]he balance of evidence supports the conclusion that advertising does have a positive effect on consumption.”<sup>138</sup> Further, the study examined the effects of banning tobacco advertising in Canada, Norway, Finland and New Zealand, and concluded that “the banning of advertising was followed by a fall in smoking ... which cannot reasonably be

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<sup>133</sup> Exhibit AG-208, Research Dimensions, untitled (prepared for R.J.R.-MacDonald Inc.) (June 1980) at 80029 6883.

<sup>134</sup> Exhibits 206A-C (various Vantage advertisements). Exhibit 206A contained the text: “Vantage mildness is an expression of contemporary taste.”

<sup>135</sup> Non-Smokers’ Rights Association and Smoking and Health Action Foundation, “The Smuggling of Tobacco Products: Lessons from Canada” (July 1994) at 2.

<sup>136</sup> Exhibit AG-31, *supra* note 82 at 2; Imasco Ltd., *Annual Report 1993* at 18.

<sup>137</sup> For example, prevalence declined from 34.8% in 1988 to 29% in 1993, a decrease of 5.8%. Divided by the five years in the period, the average annual decline was 1.16%. The total percentage decline over the period was 16.7% (taken by dividing 5.8 by 34.8, the prevalence in 1988 at the start of the period). The average annual percentage decline based on the start of the period is 3.33% (16.7 divided by 5). As the percentage of smokers decreases, each 1% decline becomes more significant. (A prevalence decrease from 2% to 1% is more significant and harder to achieve than from 99% to 98%).

<sup>138</sup> U.K., Department of Health, Economics & Operational Research Division, *Effect of Tobacco Advertising on Tobacco Consumption: A Discussion Document Reviewing the Evidence* (London: H.M.S.O., 1992) at 22.

attributed to other factors.”<sup>139</sup>

A recent study found that in “girls younger than 18 years, smoking initiation increased abruptly around 1967, when tobacco advertising aimed at selling specific brands to women was introduced. This increase was particularly marked in those females who never attended college.”<sup>140</sup>

The 1994 U.S. Surgeon General’s report provides an excellent examination of the role and history of tobacco advertising.<sup>141</sup> The report noted how in the U.S., almost 4 billion dollars were spent by the industry on cigarette advertising and promotional expenditures in 1990. The report described: tobacco advertising targeted at women and youth; promotions in high schools and colleges; the use of sports sponsorships; endorsements by entertainment celebrities; the use of explicit reassuring health claims in the early 1950s followed by frequent use of health themes in advertising; and the use of psychological satisfactions and imagery (*e.g.* masculinity, femininity, independence, and female emancipation). There was also reference to advertising executives who refused to work for the industry, and to admissions and analyses about the impact of advertising on consumption. The following are a few examples cited in the *Report*:

The effectiveness of current advertising by tobacco products manufacturers has been demonstrated repeatedly by the upward trend in sales volume that results there from [*sic*].<sup>142</sup>

I don’t think cigarettes ought to be advertised ... [W]hen all the garbage is stripped away, successful cigarette advertising involves showing the kind of people most people would like to be, doing the things most people would like to do, and smoking up a storm. I don’t know any way of doing this that doesn’t tempt young people to smoke, and, in view of my present knowledge, this is something I prefer not to do.<sup>143</sup>

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<sup>139</sup> *Ibid.* The conclusions for Canada and New Zealand were qualified because of the short time period involved.

<sup>140</sup> J.P. Pierce *et al.*, “Smoking Initiation by Adolescent Girls, 1944 through 1988. An Association With Targeted Advertising” (1994) 271:8 *J. of the American Medical Association* 608.

<sup>141</sup> U.S. Department of Health and Human Services, *Preventing Tobacco Use Among Young People: A Report of the Surgeon General* (Atlanta: U.S. Department of Health and Human Services, 1994) [hereinafter *Report of the Surgeon General 1994*].

<sup>142</sup> Editorial, “More advertising” (1956) 166:10 *United States Tobacco J.* 4, quoted in *Report of the Surgeon General 1994*, *ibid.* at 173.

<sup>143</sup> Quotation from an advertising agency executive who worked on the Marlboro account. Quoted in D. Daniels, *Giants, Pigmies and Other Advertising People* (Chicago: Crain Communications, 1974) at 245, reproduced in *Report of the Surgeon General 1994*, *ibid.*



We try to tap the emerging independence and self-fulfillment of women, to make smoking a badge to express that.<sup>144</sup>

The *Report* referred to considerable academic research and other information on the impact of tobacco advertising. Of the references cited in the chapter on advertising and promotion, sixty-four became available after the T.P.C.A. came into force. The evidence supporting the government's defence of the T.P.C.A. is clearly increasing. The following points were among the *Report's* conclusions:

- Young people continue to be a strategically important market for the tobacco industry.
- Cigarette advertising uses images rather than information to portray the attractiveness and function of smoking. Human models and cartoon characters in cigarette advertising convey independence, healthfulness, adventure-seeking, and youthful activities — themes correlated with psychosocial factors that appeal to young people.
- Cigarette advertisements capitalize on the disparity between an ideal and actual self-image and imply that smoking may close the gap.
- Cigarette advertising appears to affect young people's perceptions of the pervasiveness, image, and function of smoking. Since misperceptions in these areas constitute psychosocial risk factors for the initiation of smoking, cigarette advertising appears to increase young people's risk of smoking.<sup>145</sup>

Tobacco advertising can affect consumption in an indirect way. Since some media want to avoid offending advertisers for fear of losing revenue, they may be discouraged from carrying stories containing negative information about smoking. With less information available about the harmful effects of smoking, it is reasonable to expect that smokers will have less motivation to quit. A recent American study examined ninety-nine U.S. magazines' editions from 1959 to 1969 and 1973 to 1986.<sup>146</sup> The study found that magazines which did not carry tobacco advertising were forty per cent more likely to cover the health consequences of smoking than magazines which carried tobacco advertising. For women's magazines, the likelihood increased to 230 per cent. There are

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<sup>144</sup> P. Waldman, "Tobacco Firms Try Soft, Feminine Sell" *The Wall Street Journal* (19 December 1989) B1, quoted in *Report of the Surgeon General 1994*, *ibid.* at 178. The quotation is from an advertising executive heading the account for a leading brand of cigarettes targeted at women. He requested anonymity.

<sup>145</sup> *Report of the Surgeon General 1994*, *ibid.* at 195.

<sup>146</sup> K.E. Warner, L.M. Goldenhar & C.G. McLaughlin, "Cigarette Advertising and Magazine Coverage of the Hazards of Smoking — A Statistical Analysis" (1992) 32b:5 *New England J. of Medicine* 305.

numerous reports of the suppression of tobacco and health articles by media in consideration of tobacco advertisers.<sup>147</sup> In this light, it can also be said that tobacco advertising hampers the reader's interest in freedom of expression. Neither lower court decision considered this aspect of the effects of tobacco advertising. The potential influence of tobacco advertising on press coverage is not limited to the United States, as indicated by this excerpt from the *Ottawa Citizen*:

Imperial Tobacco Ltd. has pulled the balance of its June and July advertising from the Citizen in the wake of an intensive stop-smoking campaign launched by the newspaper. ...

Imperial marketing vice-president Anthony Kalkok, in a telephone interview Tuesday from Montreal, said he was "surprised" The Citizen's sales department hadn't called his department to "let us know you were running this type of campaign and ask us in advance if we wanted to run our ads during that time."

"Some papers do that and I'm just surprised that someone didn't tell us in advance that you were planning to run a series of articles."

Kalkok refused to explain the reasoning behind the company's decision.

"We don't ask you to explain or justify your editorial content, so I don't see why we have to answer any questions. We don't have a contract that says we have to run an ad simultaneously in all newspapers in one city, or in all cities across Canada at the same time."<sup>148</sup>

Since Canada banned tobacco advertising, a number of other countries have followed suit, namely New Zealand, Australia, France, Thailand and Lithuania.<sup>149</sup> In Great Britain, the House of Commons Health Committee held public hearings on tobacco advertising, and concluded that "in the face of the evidence that has now been accumulated, the Government can no longer maintain its position that a further tightening of tobacco advertising controls is unlikely to contribute to a reduction of the prevalence of smoking in the UK."<sup>150</sup>

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<sup>147</sup> See e.g. E.M. Whelan, *A Smoking Gun: How the Tobacco Industry Gets Away With Murder* (Philadelphia: George F. Stickley, 1984).

<sup>148</sup> K. Moser, "Tobacco Firm Pulls Ads" *The Ottawa Citizen* (27 June 1979) 12.

<sup>149</sup> R. Roemer, *Legislative Action to Combat the World Tobacco Epidemic*, 2d ed. (Geneva: World Health Organization, 1993) at 32; *The Order of Import of Tobacco Products and Alcoholic Drinks*, Government of the Republic of Lithuania, Resolution No. 443 (16 June 1993); *Tobacco Advertising Prohibition Act 1992*, No. 218 (1992) (Australia). According to a news report, the Australian tobacco industry is challenging the law because it breaches the "Australian Constitution's implied guarantee of freedom of communication, breaches the guarantee of freedom of trade between the states and is beyond the powers of the federal government" ("Philip Morris Fights Ad Ban" *The [Toronto] Globe and Mail* (7 June 1994) B7).

<sup>150</sup> U.K., House of Commons Health Committee, *Second Report: The European Commission's*

The Committee recommended that the government support banning tobacco advertising other than at point-of-sale and that the government support a proposed European Commission directive prohibiting tobacco advertising (with some exceptions at point-of-sale). Subsequently, a private member's bill banning tobacco advertising except at point-of-sale received approval at second reading, but procedural rules prevented it from coming to a third reading vote.

The complete bans on tobacco advertising implemented by other jurisdictions support the reasonableness of the measure in a free and democratic society. Other countries with tobacco advertising bans include Finland, Iceland, Italy, Norway, Portugal, Singapore, French Polynesia, and Papua New Guinea.<sup>151</sup> Several dozen other countries have some legislated restrictions short of a total ban.<sup>152</sup>

## VII. Minimal Impairment

A legislative measure which infringes a protected freedom must do so as little as possible. However, the measure selected by Parliament need not be the best possible limitation or the least intrusive one imaginable.<sup>153</sup> A number of less restrictive controls on advertising will be considered in turn.

### A. Lifestyle Advertising

Chabot J. noted that the ban was not limited to lifestyle advertising.<sup>154</sup> In his dissent, Brossard J.A. wrote that he would have upheld the T.P.C.A. if only lifestyle advertising had been banned,<sup>155</sup> noting that tobacco industry counsel acknowledged that this type of advertising could have an impact on consumption.<sup>156</sup> However, with respect for the above views, the lifestyle advertising ban is an impractical alternative.

First, the tobacco industry's voluntary code addressed lifestyle advertising:

Rule 8 — No advertising will state or imply that smoking the brand advertised ... is essential to romance, prominence, success or personal advance-

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*Proposed Directive on the Advertising of Tobacco Products* (London: H.M.S.O., 1992) at xvii.

<sup>151</sup> Roemer, *supra* note 149 at 181.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Edmonton Journal v. Alberta (A.G.)*, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577.

<sup>154</sup> *R.J.R.-MacDonald*, *supra* note 4 at 516.

<sup>155</sup> *R.J.R.-MacDonald (C.A.)*, *supra* note 4 at 385-86.

<sup>156</sup> *Ibid.* at 355.

ment.<sup>157</sup>

This provision was not effective at curbing lifestyle advertising. Moreover, there were problems with the rule's wording.

Second, it is difficult to define lifestyle advertising. A restriction on the depiction of people does not prevent the use of animal cartoon characters, such as "Joe Camel" promoting Camel-brand cigarettes. Lifestyle advertising could include the depiction of race cars, mountain scenery, a palm-tree lined beach, opera tickets, or a red rose with a bottle of wine. A trademark (*e.g.* a heraldic crest) can in itself convey imagery. Packaging alone can send messages: "After extensive consumer research, packaging designs for all Matinée products were updated in 1991 to project a more international and contemporary image."<sup>158</sup> Even certain colours can evoke images, such as gold or silver suggesting status and wealth.

Third, the industry's ingenuity can elude content restrictions. A former French law restricting advertising to product information, trademarks and package presentation was avoided in a number of ways. The package of one brand carried pictures, all of which were reproduced when advertisements showed the package. For another brand, full page ads were taken out but product information was only placed in the top quarter. The remaining three-quarters of the page were subcontracted to Club Med, whose advertisements contributed to a lifestyle association for the brand. For other brands, lifestyle advertisements identical to those permitted prior to the enactment of the law were published, except that these ads were for boots or lighters instead of for cigarettes.<sup>159</sup>

Fourth, the industry can avoid a lifestyle advertising ban by using creative names for its products that suggest a particular lifestyle. "Virginia Slims" (no longer sold in Canada), "Matinée Slims", "Craven 'A' Superslims" and "Contessa Slims" suggest that smokers of those cigarettes are slim or will become slim. "Sportsman" and "Player's" cigarettes are suggestive of active athletes. "Kool" (no longer sold in Canada) evokes images of social acceptability. "Light" or "mild" suggests that these cigarettes are healthier than other cigarettes. "Player's Smooth Light" and "Export 'A' Smooth" suggest that

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<sup>157</sup> *C.T.M.C. Code*, *supra* note 31.

<sup>158</sup> Imasco Ltd., *Annual Report 1991* at 7.

<sup>159</sup> L. Joosens, "Strategy of the Tobacco Industry Concerning Legislation on Tobacco Advertising in Some Western European Countries" in *Proceedings of the 5th World Conference on Smoking and Health*, vol. 1 (Ottawa: Canadian Council on Smoking and Health, 1983) at 552-53.

these cigarettes produce a smoother, more pleasing smoke. "Deluxe" suggests an upscale product.

Outside Canada, brand names are associated with various lifestyles and other images: Hollywood (Brazil), Prince (Denmark), Long Life (Taiwan), Sport (Mexico), Ambassade (Zaire), Parisiennes (Argentina).<sup>160</sup>

### **B. Informational Advertising**

Brossard J.A. noted that there was no attempt to exclude informational advertising from the ban.<sup>161</sup> Informational advertising, however, can have an impact on consumption. For example, an advertisement with information about a new low tar cigarette could induce a smoker with health concerns away from the alternative of quitting altogether.

Advertising containing price information can induce price competition. Lower prices in turn result in increased consumption.<sup>162</sup> Using gasoline as an example, the roadside advertising of the price of gasoline helps to maintain low prices.<sup>163</sup> For tobacco, an advertising ban prevents the use of price advertising. Retailers no longer promote tobacco through notices of sale prices in weekly circulars, and price advertisements at retail locations are restricted.<sup>164</sup> Price competition is thereby reduced, and the potential effectiveness of putting tobacco on sale or using the product as a loss leader is diminished.

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<sup>160</sup> "How the Brands Ranked" *World Tobacco* (September 1991) 60; G.N. Connolly, "Freedom From Aggression: A Guide to Resisting Transnational Tobacco Companies' Entry Into Developing Countries" in American Cancer Society, *Selected Papers From the 8th World Conference on Tobacco or Health: Building a Tobacco-Free World/Part 3* (American Cancer Society, 1992) 128 at 143.

<sup>161</sup> *R.J.R.-MacDonald (C.A.)*, *supra* note 4 at 387.

<sup>162</sup> Many studies documenting the relationship between the price of tobacco and consumption were cited in U.S. Department of Health and Human Services, *Smoking and Health in the Americas: A 1992 Report of the Surgeon General, in collaboration with the Pan American Health Organization* (Atlanta: U.S. Department of Health & Human Services, 1992) at 130.

<sup>163</sup> Another example comes from the legal profession, where many have criticized advertising restrictions on legal services because price competition is inhibited and high incomes of lawyers are protected. See *Re Klein and Law Society of Upper Canada* (1985), 50 O.R. (2d) 118, 16 D.L.R. (4th) 489 (Div. Ct.) [hereinafter *Re Klein*].

<sup>164</sup> Retailers may display between two and four signs (depending on the store) indicating the tobacco products available for sale and their prices including all taxes, but not by brand. The signs must be inside the store and be one square metre or less in size. (*Tobacco Products Control Regulations*, SOR/89-21, s. 6). The outdoor use of cigarette price advertisements by gas stations may be stopped once the constitutionality of the T.P.C.A. has been decided.

Informational advertising can inform consumers about lower-priced alternatives to cigarettes, such as roll-your-own tobacco, cigarette sticks, or raw leaf tobacco. Increased market share for these cheaper substitutes could increase overall consumption since more product can be obtained for the same price. Smokers who would otherwise quit because they could no longer afford cigarettes may choose substitutes to continue or to restart tobacco use. Informational advertising can increase overall tobacco consumption by encouraging the use of tobacco-based alternatives in places where smoking is prohibited. American advertisements for smokeless tobacco remark that the product is convenient “in places where you can’t light up.” Informational advertising can increase an individual’s consumption, for example, through various promotions such as: “Two for one”; “Buy a carton, get a T-shirt”; “Chance to win Hawaii trip in every pack”.

Informational advertising can also inform consumers about lower-priced sources of supply. For example, an interprovincial mail-order cigarette market was created in early 1994 when Ontario and Quebec lowered their tobacco taxes but western provinces did not. Entrepreneurs based in central Canada used classified ads (pure informational advertising) to solicit orders from Western Canadian customers. Advertisements sent by fax and computer bulletin board were also used. The resulting mail order market undermined the high tax policies of the Western provinces by increasing the availability of low-tax cigarettes. Since this advertising violated the T.P.C.A., enforcement officials were able to curb growth in interprovincial shipments by preventing many ads from reappearing.

It is worth noting that tobacco companies have a poor record of providing information to consumers. The companies have failed to meet their common law obligations to warn.<sup>165</sup> They lobbied hard to block enhanced health messages and the industry continues to refuse to disclose which additives are contained in which brands. When regulations required the disclosure of carbon monoxide levels on packages, companies used an abbreviation (“CO”) not understood by many consumers.<sup>166</sup>

The T.P.C.A. now guarantees that more information is available to consumers. Cigarette packages must now display carbon monoxide levels (an initiative once opposed by the industry) and all brands sold in Canada,

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<sup>165</sup> See *infra* note 200 and accompanying text.

<sup>166</sup> Revised regulations require “carbon monoxide” to be spelled out in full (*Tobacco Products Control Regulations, amendment*, SOR/93-389, s. 7, creating para. 15(6)(b) of the regulations).

including foreign products, are required to display tar and nicotine levels. Health information has been significantly increased through enhanced warnings. Information once available — price, cigarette length, type of tobacco(s) used, and tar and nicotine levels — remains available to be disseminated either at retail locations (through a sign or a clerk) or on the package, depending on the type of information. This view was supported by the majority of the Court of Appeal:

The citizen who wishes to smoke or the smoker who intends to continue to do so may still obtain necessary information with respect to the nature and content of the purchased product.<sup>167</sup>

### C. *Prohibiting Advertising to Specified Target Consumers*

Brossard J.A. suggested that it would have been feasible merely to ban tobacco advertising aimed at a particular group.<sup>168</sup> In support, he cited the Quebec law prohibiting advertising directed at children under thirteen.<sup>169</sup>

Tremendous difficulties would accompany a law which banned tobacco advertising aimed at minors below a certain age. Firstly, the minimum age at which one can purchase tobacco varies by province and is presently either eighteen or nineteen. (At the time of the passage of the T.P.C.A., the minimum applicable age was sixteen except in New Brunswick and Ontario where it was eighteen.) Secondly, it is very difficult to know whether tobacco companies are aiming their advertising at teenagers. For years, the companies argued that they did not advertise to non-adults and they even had a provision in their voluntary *Code* which stated “[c]igarette or cigarette tobacco advertising will be addressed to adults 18 years of age or over and will be directed solely to the increase of cigarette brand shares.”<sup>170</sup> Notwithstanding the *Code*, and as discussed above, the industry did target minors.<sup>171</sup> The ineffectiveness of the self-restriction thus necessitated a complete ban.

Irrespective of the advertiser’s intent, the *Act* aims to deal with the effect of advertising on young people. It is impossible to design an advertisement which has an impact on youths only after their eighteenth or nineteenth birthdays. As already noted, the only way to prevent tobacco advertising from reaching

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<sup>167</sup> *R.J.R.-MacDonald (C.A.)*, *supra* note 4 at 327.

<sup>168</sup> *Ibid.* at 389.

<sup>169</sup> *Consumer Protection Act*, R.S.Q. c. P-40.1, ss. 248, 249.

<sup>170</sup> *C.T.M.C. Code*, *supra* note 31.

<sup>171</sup> See *supra* note 91 and accompanying text.

adolescents is to prevent tobacco advertising altogether.

#### *D. Prohibiting Advertising in Certain Media Only*

One alternative is to prohibit advertising in certain media and to allow it in others. However, anything less than a full ban will likely shift advertising expenses into permitted channels. For example, when tobacco manufacturers stopped direct broadcast advertising in 1972, they merely increased advertising elsewhere.

#### *E. Voluntary Self-Regulation*

Prior to the T.P.C.A., a voluntary industry code restricting tobacco advertising was in place. As previously discussed, the *Code* proved ineffective at curbing tobacco industry marketing. Violations or evasions of almost every rule in the *Code* were numerous and well-documented, including the placement of billboards near elementary and secondary schools.<sup>172</sup> The *Code* may thus be seen as a mere public relations effort designed to prevent legislation. A 1971 Imperial Tobacco document stated: “[W]e have ... an industry here who are [*sic*] prepared to anticipate government action by further self-legislation (*e.g.* incentives).”<sup>173</sup>

#### *F. Other Less Intrusive Alternatives*

Parliament is addressing comprehensively the pandemic caused by tobacco with the goal of minimizing tobacco use. Limiting tobacco control efforts to only one measure would therefore hinder realization of that goal. Instead of choosing one measure to reduce smoking, the government should be able to pursue all available means. The comprehensive approach is illustrated by other measures introduced by Parliament that complement the T.P.C.A.

An updated law preventing the sale of tobacco to young persons has been adopted.<sup>174</sup> Restrictions on smoking in workplaces and public places have been adopted.<sup>175</sup> Parliament has sought to reduce smoking through increases in tobacco taxes. Major increases were introduced in 1985, 1989 and 1991, but

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<sup>172</sup> Exhibit AG-74, Non-Smokers' Rights Association, *A Catalogue of Deception: The Use and Abuse of Voluntary Regulation of Tobacco Advertising in Canada* (January 1986) at 27.

<sup>173</sup> Exhibit AG-204, *supra* note 87 at 18. Amendments to the industry's voluntary code in 1971 preceded the federal government's abandonment of its bill to ban tobacco advertising.

<sup>174</sup> *Tobacco Sales to Young Persons Act*, S.C. 1993, c. 5.

<sup>175</sup> *Non-smokers' Health Act*, R.S.C. 1985 (4th Supp.), c. 15 [hereinafter N.s.H.A.].



taxes were partially rolled back in 1994 to address a large contraband problem.

Through the imposition of compulsory health warnings, the government has launched a world precedent-setting education campaign against tobacco use. These warnings supplement the government's other public education programmes. Current warnings appear in black and white, at the top of the front and back of the package, in French and English, and in an area covering at least twenty-five per cent of the surface, not including a border. The English text of the eight rotating messages is:

Cigarettes are addictive  
Tobacco smoke can harm your children  
Cigarettes cause fatal lung disease  
Cigarettes cause cancer  
Cigarettes cause strokes and heart disease  
Smoking during pregnancy can harm your baby  
Smoking can kill you  
Tobacco smoke causes fatal lung disease in non-smokers<sup>176</sup>

Many who argue against tobacco advertising bans have no objection to public education. No explanation is offered by those groups, however, as to why it is possible for anti-smoking public education to reduce smoking, but impossible for sophisticated multi-million dollar pro-smoking advertisements to increase smoking. It is contradictory to support one measure but not the other. Supporting anti-smoking public education reveals a belief in the effect of advertising on consumption levels, whereas objecting to tobacco advertising bans ignores this effect.

Both Chabot J.<sup>177</sup> and Brossard J.A.<sup>178</sup> took issue with the government's invocation of the confidentiality of Privy Council documents as a justification for the government's failure to disclose a third option. This criticism is curious because whatever the option was, nothing prevents the companies from presenting any less intrusive alternative to the Court during argument on section 1 of the *Charter*.

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<sup>176</sup> *Tobacco Products Control Regulations, amendment*, SOR/93-389, s. 4.

<sup>177</sup> *R.J.R.-MacDonald*, *supra* note 4 at 516.

<sup>178</sup> *R.J.R.-MacDonald (C.A.)*, *supra* note 4 at 390.

### VIII. Means Proportional to Objective

Given the magnitude of the harm caused by tobacco use, and the importance of the objective of reducing that harm, coupled with the purely economic nature of the expression, one would think that the means chosen in the T.P.C.A. would be proportional to the *Act's* objective. Nevertheless, Chabot J. and Brossard J.A. disagreed.

While considering whether the means of the legislation are proportional to its objective, it is relevant to note that Parliament, through its enactment of the T.P.C.A., was advancing another right protected under the *Charter*, namely the right to life, liberty and security of the person guaranteed by section 7. Tobacco use shortens life, restricts liberty through addiction, and infringes security of the person through debilitating diseases in both smokers and those exposed to second-hand smoke. Tobacco addiction impairs personal autonomy and decision-making.

Tobacco is inherently harmful. It does not have the socially redeeming qualities of other products which are potentially harmful, such as cars, prescription drugs, or rat poison.

In considering the industry's application to delay the implementation of the new health warnings, the Supreme Court of Canada used a "balance of inconvenience" test. The Court weighed the financial cost to the companies, which could be passed on to consumers, against the public interest. The balancing under section 1 in the case now before the Court will be similar. In the application to delay warnings, the Court stated:

The only possible public interest [in maintaining existing warnings] is that of smokers' not having the price of a package of cigarettes increase. Such an increase is not likely to be excessive and is purely economic in nature. Therefore, any public interest in maintaining the current price of tobacco products cannot carry much weight. This is particularly so when it is balanced against the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.<sup>179</sup>

The T.P.C.A. could be criticized as overly paternalistic. It could be seen as unacceptable in a democratic society where citizens should be free to make their own choices. This argument, however, overlooks the highly addictive

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<sup>179</sup> *R.J.R.-MacDonald* (S.C.C. II), *supra* note 21 at 353-54.

nature of nicotine, as well as the fact that most smokers begin smoking before the age of majority. Nothing prevents adult smokers from making the same decisions as before, only now the decisions will be made in the absence of advertising.

The consequences of tobacco use go beyond the individual smoker. Second-hand smoke can harm otherwise healthy non-smokers. The effects are particularly acute on the fetus, infants, and persons with prolonged exposure to second-hand smoke, such as bar employees and spouses of smokers.

Choices made by smokers affect the financial health of non-smokers. Society contributes billions of dollars annually to pay for health costs resulting from tobacco-caused illness. In addition, smoking causes harm to non-smokers through fires, worker absenteeism, and the death of family members.

Tobacco use also harms the environment. The Canadian environment must deal with some two billion discarded packages (plus assorted foil and plastic wrappings) and more than forty-five billion cigarette butts annually. Further, the curing process used to transform raw leaf tobacco uses a large quantity of energy.

It is worth noting that the *Charter* itself has paternalistic content, notably in the right to counsel. As Marshall J.A. stated: "The principal purpose of s. 10(b), indeed its very essence, is to protect a detained person against himself or herself."<sup>180</sup>

If individual adults are to be protected from the power of police and the government, how can we justify not protecting adolescents from the power of multinational conglomerates? The companies challenging the T.P.C.A. have combined annual global revenues exceeding 175 billion dollars.<sup>181</sup> This exceeds the revenues of any federal, provincial or municipal government in Canada. And unlike deficit-ridden governments, these companies are profitable.

In a modern society, large corporations (which are not subject to the *Charter*) have as much or more influence than does government on the lives of

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<sup>180</sup> *R. v. Hawkins* (1992), 102 Nfld. & P.E.I.R. 91 at 97, 14 C.R. (4th) 286 (Nfld. S.C.A.D.).

<sup>181</sup> B.-A.T Industries p.l.c., *Annual Review and Summary Financial Statement, 1993* (£25.1 billion); Rothmans International p.l.c., *Annual Report and Accounts 1993* (£6.9 billion); Philip Morris Companies Inc., *1993 Annual Report* (60.9 billion USD); R.J.R.-Nabisco, *1992 Annual Report to Shareholders* (15.7 billion USD). One British pound was converted at \$2.15 CAD. One American dollar was converted at \$1.39 CAD.

individuals. While the *Charter* is available to scrutinize government action, government should not be unduly constrained in restricting harmful corporate activity. Government should be able to stop the social engineering practised by the tobacco industry. The industry's marketing practices are incompatible with a responsible, modern society concerned with public health.

Although not specifically regarding this part of the section 1 analysis, Chabot J. made repeated reference to the facts that tobacco is a legal product and that the T.P.C.A. only addressed advertising, not the sale or use of tobacco itself. What has to be recognized, however, is that Parliament has restricted the sale and use of tobacco through a number of statutes, instead of consolidating all the legislation into one act. The *Non-smokers' Health Act* (N.s.H.A.)<sup>182</sup> places significant restrictions on the use of tobacco in federally-regulated public places and workplaces. This act wound its way through Parliament contemporaneously with the T.P.C.A. Both were considered together by the same House of Commons committee, received third reading in the House of Commons on the same day, were considered by the same Senate committee, received third reading in the Senate on the same day, and received Royal Assent on the same day. The *Tobacco Sales to Young Persons Act*<sup>183</sup> restricts the sale or furnishing of tobacco to persons under eighteen, and places limits on its sale through vending machines. The T.P.C.A. itself prohibits the sale of tobacco by manufacturers and importers unless the package carries the required health warning, and prohibits the free distribution of tobacco. The sale of "kiddie packs" (packages containing fewer than twenty cigarettes) has been prohibited.<sup>184</sup> Through the *Excise Act*<sup>185</sup> and the *Excise Tax Act*,<sup>186</sup> taxes increase the retail price of tobacco.

Had the N.s.H.A. passed Parliament alone without the T.P.C.A., the restrictions on tobacco could have been noticeably stricter than under the T.P.C.A. The N.s.H.A. listed tobacco as a restricted product under the *Hazardous Products Act*<sup>187</sup> and consequently the advertising, sale and importation of tobacco would have been completely prohibited except in compliance with regulations. However, as a result of the adoption of the T.P.C.A., a provision in the N.s.H.A. operates to exclude the application of the

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<sup>182</sup> *Supra* note 175.

<sup>183</sup> *Supra* note 174.

<sup>184</sup> *An Act to amend the Excise Act, the Customs Act and the Tobacco Sales to Young Persons Act*, S.C. 1994, c. 37, s. 11

<sup>185</sup> R.S.C. 1985, c. E-14.

<sup>186</sup> R.S.C. 1985, c. E-15.

<sup>187</sup> *Supra* note 28.

*Hazardous Products Act* listing to tobacco.<sup>188</sup>

It is only by historical accident that tobacco is legally available on the market. If it were a new product today, it would not be allowed. Prohibiting the product altogether is not feasible because a large contraband market, with all its associated problems, would quickly undermine a blanket prohibition. This is partly because millions of Canadians are addicted to nicotine and because the companies in Canada also operate in the United States.

Although it appears impractical to prohibit tobacco altogether, Parliament should not be prevented from introducing less intrusive measures to reduce tobacco use. Blocking measures such as the T.P.C.A. on the above basis is tantamount to the assertion, for example, that the legalization of marijuana would necessarily spawn a constitutional right to promote the product.

There are numerous legal and quasi-legal products and activities for which advertising is restricted. While prostitution and attempted suicide are legal and cannot feasibly be prohibited, soliciting prostitution<sup>189</sup> and counselling suicide<sup>190</sup> are illegal.

In the United States, a majority of the Supreme Court in *obiter dicta* cited cigarettes, alcohol and prostitution as examples of where governmental power to prohibit completely an activity included the lesser power to prohibit advertising of the activity.<sup>191</sup>

## IX. Health Messages

Chabot J. held that freedom of expression includes the right to remain silent. In support, he cited *National Bank of Canada v. R.C.I.U.*<sup>192</sup> and Lamer J.'s dissenting judgment in *Slaight Communications Inc. v. Davidson*.<sup>193</sup> He also held that legislated health messages unattributed to the government as author infringed subsection 2(b) (examples of attribution include "Health and Welfare Canada advises that" and "Surgeon General's Warning").<sup>194</sup> The lack of

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<sup>188</sup> N.s.H.A., *supra* note 175, s. 9.

<sup>189</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 213.

<sup>190</sup> *Ibid.*, par. 241(a).

<sup>191</sup> *Posadas de Puerto Rico*, *supra* note 72 at 346.

<sup>192</sup> [1984] 1 S.C.R. 269, 9 D.L.R. (4th) 10.

<sup>193</sup> [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416.

<sup>194</sup> *R.J.R.-MacDonald*, *supra* note 4 at 486-87.

attribution was not saved by section 1.

The Court of Appeal unanimously held that unattributed health messages were saved by section 1. Brossard J.A. stated:

[I]t seems to me to leap to the eye that an "attributed" message can quickly become meaningless, or even ridiculous. ...

As an example, the message that is supposed to come from the Surgeon-General remains a message imputed to an abstract entity or a political body which obviously cannot by simple decree make something hazardous that otherwise would not be. This, it seems to me, rationally weakens and attenuates the message.<sup>195</sup>

Still at issue is whether unattributed messages infringe subsection 2(b). While the messages appear on packages sold by manufacturers, the companies are not required to endorse the messages, and the company's name does not appear anywhere in the area in which the message is displayed (*i.e.* the message does not state "Imperial Tobacco Ltd. advises that cigarettes cause cancer").<sup>196</sup> The two cases cited by Chabot J. are arguably distinguishable because they required individual companies to write particular letters rather than messages on packages of a class of products, regardless of manufacturer.

Many provisions in consumer protection statutes require unattributed statements. Should all government-mandated labelling be attributed? If so, possible results may include: "The government says that this bag contains 200g"; "The government says that there are the following ingredients in this product ..."; and "The government says that this product is poisonous and flammable." Numerous unattributed labelling provisions are required by virtue of regulations under the *Hazardous Products Act* and the *Consumer Packaging and Labelling Act*.<sup>197</sup>

As Brossard J.A. indicates, attribution would detract from the effectiveness of the health message. The added words would distract the reader from the heart of the message and message simplicity would be reduced. The greater the number of words in a message, the smaller the print has to be if the message is to fit in a given space. As well, readers might ask themselves, "the government says this, but should I believe the government?" Research for Imperial Tobacco involving teenage subjects reported that "[t]he health warning clause is

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<sup>195</sup> *R.J.R.-MacDonald (C.A.)*, *supra* note 4 at 383.

<sup>196</sup> Imperial Tobacco's statement of claim did not assert that section 9, which deals with warnings, infringed subsection 2(b) of the *Charter*. Only *R.J.R.-MacDonald* made this claim.

<sup>197</sup> R.S.C. 1985, c. C-38.

perceived as an intrusion by government on individual rights, and a sham since governments make vast sums on tobacco tax".<sup>198</sup> The unattributed policy has been strongly recommended by domestic and international health organizations. Moreover, in New Brunswick, detailed health warnings required at point-of-sale are unattributed.<sup>199</sup>

Manufacturers have a common law duty to warn consumers of the hazards of their products. This duty belongs to manufacturers, not to the government. Given that tobacco product manufacturers failed to fully carry out their common law obligation on their own initiative, legislation was necessary.<sup>200</sup>

## X. Importance of the Case

There is no doubt that the decision of the Supreme Court will be significant. Internationally, the decision will be influential because of the respect accorded to Canada around the world. A tobacco industry victory will be used in other countries to prevent tobacco advertising restrictions whereas a government victory will be used by health groups abroad to respond to tobacco industry arguments and to support legislated advertising bans. In the United States, a Canadian decision might be cited in any future litigation challenging advertising restrictions.

In Canada, the decision will be examined closely as governments seek to impose further regulations on the tobacco industry, including the plain packaging of tobacco products. The industry has already said that an immediate implementation of plain packaging "would inevitably lead to further litigation."<sup>201</sup>

Regardless of whether the government succeeds in its defence of the T.P.C.A., the industry will have won in a number of areas. First, the uncertainty brought about by the constitutional challenge to the T.P.C.A. significantly delayed the implementation of new health warnings. Originally announced in January 1990, the new warnings were not required to appear on tobacco

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<sup>198</sup> "Project 16", *supra* note 49 at vii.

<sup>199</sup> N.B. Reg. 94-57. The required content of the warnings is set out in section 4 and in Schedules A and C. No attribution is required.

<sup>200</sup> For a discussion of tobacco products liability and the duty to warn see R. Cunningham, "Tobacco Products Liability in Common Law Canada" (1990) 11 Health L. Can. 43.

<sup>201</sup> Canadian Tobacco Manufacturers' Council, "Plain Tobacco Packaging: A Brief to the House of Commons Standing Committee on Health" (12 May 1994) at 16.

packages sold to wholesalers until September 12, 1994. Second, constitutional uncertainty has delayed enforcement of the T.P.C.A. Notwithstanding that the *Act* has been in force for more than five years, no conviction under the *Act* has yet been registered. Violations by tobacco companies and retailers, as reported in lengthy listings of complaints to the government, have gone unprosecuted.

The Supreme Court's decision in *R.J.R.-MacDonald* will have an impact on other cases involving commercial expression. There are perhaps thousands of federal, provincial and municipal statutes, regulations and by-laws restricting commercial expression. Examples of underlying products and activities include liquor,<sup>202</sup> firearms,<sup>203</sup> ammunition,<sup>204</sup> prescription drugs,<sup>205</sup> radiation-emitting devices,<sup>206</sup> methods or products which cause a miscarriage,<sup>207</sup> tourist facilities,<sup>208</sup> commodity futures,<sup>209</sup> corporate names,<sup>210</sup> and securities.<sup>211</sup>

If a high standard of proof is required of the party asserting the constitutionality of legislation that infringes freedom of expression, private interests will be accorded another weapon in their arsenal to prevent laws that enhance individual welfare. This should not be the *Charter's* effect. In *R. v. Edwards Books & Art Ltd.*, Dickson C.J.C. stated that courts "must be cautious to ensure that [the *Charter*] does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons."<sup>212</sup> Already, courts have considered commercial expression cases presented on behalf of such advantaged groups as lawyers,<sup>213</sup> a dentistry chain,<sup>214</sup> optometrists,<sup>215</sup> a toy manufacturer,<sup>216</sup> and margarine companies.<sup>217</sup> In public policy debates, powerful

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<sup>202</sup> *Liquor Licence Act*, R.S.O. 1990, c. L.19, s. 38.

<sup>203</sup> *Criminal Code*, *supra* note 189, pars. 105(6)(a), 116(1)(a).

<sup>204</sup> *Ibid.*

<sup>205</sup> *Food and Drugs Act*, R.S.C. 1985, c. F-27.

<sup>206</sup> *Radiation Emitting Devices Act*, R.S.C. 1985, c. R-1, s. 5(3).

<sup>207</sup> *Criminal Code*, *supra* note 189, par. 163(2)(c).

<sup>208</sup> *Tourism Act*, R.S.O. 1990, c. T.16, s. 12.

<sup>209</sup> *Commodity Futures Act*, R.S.O. 1990, c. C.20, s. 54.

<sup>210</sup> *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, s. 12(1).

<sup>211</sup> *Securities Act*, R.S.O. 1990, c. S.5, s. 50.

<sup>212</sup> [1986] 2 S.C.R. 713 at 779, 35 D.L.R. (4th) 1.

<sup>213</sup> *Re Klein*, *supra* note 163.

<sup>214</sup> *Rocket*, *supra* note 66.

<sup>215</sup> *Re Grier and Alberta Optometric Association* (1987), 79 A.R. 36, 42 D.L.R. (4th) 327 (C.A.).

<sup>216</sup> *Irwin Toy*, *supra* note 33.

<sup>217</sup> *Institute of Edible Oil Foods v. Ontario* (1989), 71 O.R. (2d) 158, 64 D.L.R. (4th) 380 (C.A.).



industry lobby groups may cite a high standard in an attempt to prevent proposed legislation, as was the case with the T.P.C.A. This type of tactic can have a chilling effect on good government.

## Conclusion

While most of the relevant provisions of the T.P.C.A. infringe subsection 2(b), the Act should be upheld as a justifiable limit under section 1. There is a "reasonable basis" upon which to conclude that a ban on tobacco advertising would reduce tobacco use. This view is supported by a substantial body of opinion, tobacco industry marketing documents, and evidence which has arisen since the T.P.C.A. was adopted. As well, an advertising ban is by definition rationally connected to the separate objective of protecting young persons from inducements to use tobacco. Alternatives to a total ban on tobacco advertising would be less effective at achieving the goal of minimizing tobacco use. If unattributed health messages infringe subsection 2(b), then this lack of attribution is justifiable because message effectiveness is improved. The Supreme Court's decision will have significant implications, both in terms of the scope of constitutional protection for commercial expression in Canada, and in terms of tobacco industry regulation in Canada and around the world.

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