

COMMENT

On Smokes and Oakes: A Comment on *RJR-MacDonald Inc. v. Canada (A.G.)*

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In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not 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.¹

—Chief Justice of Canada Brian Dickson

I. INTRODUCTION

AS DICKSON C.J.C. WARNED, the Canadian *Charter of Rights and Freedoms*² could—if inappropriately applied—be used to inflict the very harm which it was intended to prevent. The guarantee of the freedom of expression as defined by s.2(b) of the *Charter*³ has become, to some extent, a tool for the dismantling of the regulatory state by parties whose interests run counter to limits imposed by government. While the former Chief Justice's caution to the courts about potential abuse was a common symptom of early *Charter* anxiety, this perceived threat to the *Charter's* integrity has manifested in the recent Supreme Court of Canada decision *RJR-MacDonald Inc. v. Canada (A.G.)*.⁴

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¹ *Edwards Books and Art Ltd. v. The Queen*, [1986] 2 S.C.R. 713 at 779 [hereinafter *Edwards Books*].

² Part I of the *Constitution Act, 1982*, being schedule B of the *Canada Act 1982 (U.K.)*, 1982, c. 11 [hereinafter *Charter*].

³ *Ibid.*, *Fundamental Freedoms*. 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.

⁴ [1995] 3 S.C.R. 199 [hereinafter *RJR-MacDonald*].

In *RJR-MacDonald*, a narrow five-to-four majority of the Supreme Court struck down the federal government's *Tobacco Products Control Act*.⁵ The legislation comprehensively prohibited advertising of tobacco products in an attempt to reduce tobacco consumption in Canada.⁶ The tobacco companies challenged the law as *ultra vires* the Parliament of Canada⁷ and a violation of their constitutionally guaranteed right to freedom of expression under s.2(b) of the *Charter*. While the numerical difference between verdict and dissent was slim, the separation between rationales was vast.

On the division of powers issue, the majority (Sopinka and Major JJ. dissenting) ruled that the *TPCA* was in pith and substance criminal law and therefore validly enacted under s.91(27), the criminal law power of the federal government.⁸ The majority felt it unnecessary to discuss whether the *TPCA* could be upheld under the Peace, Order, and Good Government (POGG) clause, as the Quebec Court of Appeal had found.⁹ The dissent held that only s.9 of the *TPCA*, which required unattributed health warnings, was within the federal government's criminal law power.

The Supreme Court ruled *en banc* that the impugned sections of the *TPCA* did in fact infringe s.2(b) of the *Charter*. The ultimate question of whether such a violation of the *Charter* was justifiable under the s.1 *Oakes* test¹⁰ was where members of the Court differed. The decision was complex; seven of nine justices wrote opinions with only L'Heureux-Dube and Gonthier JJ. abstaining. Justice McLachlin, writing for the majority (Lamer C.J.C., Sopinka, Iacobucci, and Major JJ., concur-

⁵ S.C. 1988, c. 20 [hereinafter *TPCA*]. Including the *Tobacco Products Control Regulations*, SOR/89-21, s.11.

⁶ For a detailed description of the *TPCA*, see Section II of this comment, *infra*.

⁷ As proscribed by the *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3 [hereinafter *Constitution Act, 1867*].

⁸ *Ibid.*

⁹ [1993] R.J.Q. 375, 102 D.L.R. (4th) 289 (C.A.).

¹⁰ From *The Queen v. Oakes*, [1986] 1 S.C.R. 103 [hereinafter *Oakes*]. In *Oakes*, the SCC outlined a structured analysis for applying s.1 of the *Charter*. The objective sought by the legislation must be "pressing and substantial in a free and democratic society" (*Oakes* at 138) and must be of "sufficient importance to warrant overriding a constitutionally protected right of freedom." (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 352 [hereinafter *Big M Drug Mart*].) When the court has determined that a sufficiently important objective exists, the government must then demonstrate that the means are proportional to the objective sought. "The proportionality requirement, in turn, has three aspects; the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights." (*Edwards Books*, *supra* note 1 at 768.) The onus is at all times upon the government to justify the proportionality of the challenged legislation.

ring), held that the offending portion of the TPCA could not be justified under the *Oakes* tripartite proportionality test because the law did not minimally impair the right to free speech. Sopinka, McLachlin, and Major JJ. added that s.8 of the TPCA, which prohibited the use of tobacco trademarks on non-tobacco products, was not rationally connected to its objective of decreasing tobacco consumption. In reference to the third part of the *Oakes* test, the majority simply stated that the fact the infringed expression was motivated by profit was irrelevant to the s.1 analysis.

Justice La Forest, writing for the dissent (L'Heureux-Dube, Gonthier, and Cory JJ., concurring), held that the TPCA's encroachment of s.2(b) was justifiable under s.1. The objective of protecting Canadians from the harms of tobacco use, exacerbated by advertising, was of sufficient import to justify a legislative *Charter* limit. La Forest J. held that the legislation satisfied the proportionality requirements enunciated in *Oakes*.

The split in the decision was not one in which the Justices applied the same analytical mechanism to an agreed set of facts and simply came to a different conclusion. The Supreme Court's split in *RJR-MacDonald* was of a far more profound nature. The dissent and the majority diverged on almost every stage of the *Oakes* test, adapted in *Irwin Toy Ltd. v. Quebec (A.G.)*¹¹ to analyse cases involving violations of freedom of expression under s.2(b) of the *Charter*.

In *RJR-MacDonald*, the majority appears to have departed from one of the fundamental principles of *Charter* jurisprudence: parliamentary deference. This doctrine, cultivated throughout the *Charter's* formative decade, is now under threat of being supplanted by judicial paternalism. In light of the majority judgment, it appears that Court has abandoned the approach of giving a broad and generous interpretation to social science evidence in favour of a strict objective analysis.

¹¹ [1989] 1 S.C.R. 927 [hereinafter *Irwin Toy*]. In *Irwin Toy*, the SCC elaborated on the two step process required to find whether a breach of s.2(b) of the *Charter* had occurred. The first step is "to determine whether the plaintiff's activity falls within the sphere of conduct protected by the guarantee." The second step is to examine whether freedom of expression has in fact been restricted. Once the plaintiff has met this burden the onus then shifts to the defendant to prove that the infringement is justifiable under s.1. In respect to the issue raised in *Irwin Toy*, the SCC deferred to the Quebec government's law prohibiting advertising directed at children under 13 years of age, despite the fact that the evidence supporting its rationality and proportionality was equivocal.

II. THE TOBACCO PRODUCTS CONTROL ACT

THE TPCA WAS INTRODUCED by the federal government to replace the impotent voluntary code of the Canadian Tobacco Manufacturers' Council.¹² Established in 1964, the Code was an attempt by the tobacco companies to prevent parliamentary action. The Code was designed to demonstrate that manufacturers were capable of regulating themselves.¹³

The Code has been little more than a paper tiger, unenforceable and frequently transgressed. Violations have been reported by the Non-Smokers Rights Association in its 1986 *Catalogue of Deception*,¹⁴ detailing breaches of practically all substantial rules in the Code. Violations include advertising on television, advertising next to schools, and failure to display warnings prominently and legibly.¹⁵

The essential thrust of the legislation is to prohibit commercial advertising and promotion of tobacco products in Canada. The law's rationale is that smoking is so harmful to Canadian society that government should endeavour to prevent its encouragement, with advertising being considered tantamount to encouragement. To attempt to control tobacco consumption through a restriction on marketing is more effective than attempting to regulate personal tobacco use directly. The intense physiological and psychological addictions suffered by smokers makes the direct control of tobacco by law a far more daunting task.¹⁶

The objectives of the TPCA, as described in Section 3:

3. The purpose of this Act is to provide a legislative response to the 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;

¹² The Canadian Tobacco Manufacturers' Council [hereinafter CTMC] is comprised primarily of representatives of Canada's three major tobacco companies: RJR-MacDonald Inc., Imperial Tobacco Ltd., and Rothmans, Bensons & Hedges Ltd. Its purpose is to forward the tobacco industry's "non-commercial" interests such as government lobbying, consumer information, research, and corporate sponsorship.

¹³ R. Cunningham, "Cigarette Advertising and Freedom of Expression: The Case for the *Tobacco Products Control Act*" (1990) 48 U.T. Fac. L. Rev. 305.

¹⁴ Non-Smokers Rights Association, *Catalogue of Deception* (Toronto: Non-Smokers Rights Association, 1986).

¹⁵ See *Hansard: House of Commons, Minutes of Proceedings and Evidence of the Legislative Committee on Bills C-204 and C-51* (21 January 1988) at 22:36-37.

¹⁶ For a comprehensive and well documented summary of the existing medical evidence on the addictive nature of tobacco products, see M. Grossman & P. Price, *Tobacco Smoking and the Law In Canada* (Toronto: Butterworths, 1992) at 1-41-1-44.

- (b) to protect young persons and others, to the extent that it 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.

The impugned sections of the TPCA may be paraphrased as follows:

- s.4(1) Prohibits the advertisement of "any tobacco product offered for sale in Canada."
- s.4(2-4) Provides exception to the advertising ban to the importation of foreign publications or re- broadcast of foreign radio or television emissions.
- s.5(1) Provides exception to the advertising ban so retailers may expose tobacco products for sale.
- s.5(2) Provides exception to the advertising ban to vending machines.
- s.6(1) Provides exception to the advertising ban for the promotion or support of cultural or sporting events or activities which have been entered into contractual terms before January 1987.
- s.6(2) Freezes the financing of such promotion or support excepted under s.6(1) at 1987 levels.
- s.7(1-2) Prohibits the free distribution of tobacco products as well as rewards and contests.
- s.8(1-4) Prohibits the use of any tobacco trade mark or any recognisable variation thereof, regardless of their status under the *Trade Marks Act*,¹⁷ on anything other than a tobacco product. Exception is permitted for goods manufactured before 30 April 1987 and "Dunhill" trademark.
- s.9(1) Requires that tobacco packages must give unattributed health warnings and information messages and contain a health warning leaflet.
- s.9(2) Requires that the package may not give any extraneous information, the only information permissible being: name, brand name, trademark, the health warning information, the label, and the excise stamp.

The tobacco lobby asserted that the industry was engaged in the manufacture and sale of a legal product and the *Charter* should therefore protect the advertising of that product. Such a contention is based on the dubious argument that if the product is as harmful as claimed, then the government should prohibit it outright, as it had done with cocaine, for example. The government maintained that it was *intra vires* its constitutional jurisdiction to make the manufacture, distribution, and use of tobacco illegal but the government equally understood that a complete prohibition of tobacco was unrealistic and, in fact, impossible.¹⁸ To criminalise an activity in which almost one third of Canadians regularly indulge would surely lead to the underground "bootlegging" of the product, the development of a criminal

¹⁷ R.S.C. 1985, c. T-13.

¹⁸ La Forest J. recognised this reality in his judgment. *Supra* note 4 at 278.

marketplace, and a massive disregard for the law.¹⁹ Prohibition of alcohol in the United States exemplifies this phenomenon. Consequently, the government was forced to take a *prima facie* less restrictive approach to controlling tobacco consumption than permitted by the Constitution. When government can legally but not practically prohibit a product like tobacco, it is logical that it would be justified in taking all alternative steps to reduce consumption.²⁰

III. CASE HISTORY

THE TOBACCO COMPANIES quickly countered the federal government's campaign to ban cigarette advertising in 1987.²¹ They hired able and influential lobbyists. They made grave predictions to the media about severe job loss in the industry if the government succeeded in prohibiting tobacco advertising. Yet as the federal government came closer to passing the legislation it became clear that the war in Canada over tobacco advertising would be won or lost on *Charter* grounds.²²

The tobacco industry's strategy in challenging Bill C-51 concentrated on its restriction of freedom of expression. This attempted use of the *Charter* to cut down progressive legislation gave the tobacco companies something they formerly lacked: principle and legitimacy. Chief tobacco lobbyist William Neville quickly raised the standard of the *Charter* and waved it for the press, stating that the proposed law would set a "dangerous precedent" for denial of freedom of expression and deny Canadians their "most important" rights.²³ Although this position was soundly lampooned in editorial cartoons,²⁴ Neville and the tobacco industry were by no

¹⁹ This type of scenario had already developed in eastern Canada in response to high tobacco prices. A burgeoning black market for American and exported Canadian cigarettes smuggled back into Canada forced the government to reduce taxes in order to be competitive with black market prices. Although high taxes were the government's preferred approach to reducing tobacco consumption, the underground economy defeated this objective while simultaneously depriving the government of tobacco tax revenues.

²⁰ Cunningham, *supra* note 13 at 316. The reason for tobacco's modern legal status can be described as an "accident of history"; that is, the product was sufficiently entrenched in society before the harmful nature of tobacco was discovered. If tobacco was introduced into the market today, it would certainly be statutorily prohibited like other harmful drugs. See also Grossman & Price, *supra* note 16 at 1-1-1-19 for a historical survey of tobacco consumption.

²¹ The Hon. Jake Epp, Minister of National Health and Welfare, introduced Bill C-51 into the House of Commons on 30 April 1987.

²² M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Carswell, 1994) at 327.

²³ *Ibid.* at 327.

²⁴ "Rejecting Tobacco's Pitch" *The Globe and Mail* (2 June 1988) A6.

means alone in their opposition to Bill C-51. The Canadian Civil Liberties Association wrote to the House of Commons Legislative Committee arguing that the Bill “unwarrantedly infringe[d] freedom of expression.”²⁵ Other prominent members of the Canadian legal community²⁶ joined the fray fought primarily on the editorial pages of Canada’s newspapers.²⁷ The legislation was given Royal Assent on 28 June 1988.

However, before the end of the summer, Canada’s triumvirate of tobacco companies²⁸ had filed their statements of claim against the Crown. RJR-MacDonald Inc. maintained that the TPCA was first wholly *ultra vires* Parliament and, secondly, invalid as an unjustifiable violation of freedom of expression guaranteed by s.2(b) of the *Charter*. Imperial Tobacco Ltd. asserted the same declaration, but only in respect to ss. 4 and 5 (advertisement of tobacco products), and ss. 6 and 8 (promotion of tobacco products).²⁹

The actions were heard together in Quebec Superior Court.³⁰ Judge Chabot consequently rejected the Attorney General of Canada’s assertion that the legislation was valid as either criminal law or under the Peace, Order, and Good Government power in s.91 of the *Constitution Act, 1867*. At the end of this lengthy trial³¹ it was declared that the TPCA in its entirety was *ultra vires* Parliament. In addition,

²⁵ Mandel, *supra* note 22 at 328. The American Civil Liberties Union had successfully prevented the US Congress from restricting tobacco advertising.

²⁶ *Ibid.* at 328. A former president of the Canadian Bar Association, the Calgary Civil Liberties Union, a law professor, and a philosophy professor petitioned the Senate after Bill C-51 passed the House of Commons.

²⁷ For example see G. Fraser, “Senate Fine Tuning Delays Tobacco Bills” *The Globe and Mail* (22 June 1988) A4; G. Fraser, “Tobacco Bill Called Breach of Charter” *The Globe and Mail* (23 June 1988) A7.

²⁸ In addition to RJR-MacDonald Inc. and Imperial Tobacco Ltd., Rothmans, Bensons & Hedges Inc. challenged the TPCA in the Federal Court of Canada. *Rothmans, Bensons & 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.)]. Rothmans, Bensons & Hedges Inc. holds the second largest share of the Canadian tobacco market. Rothmans is 60 percent owned by Rothmans Inc. and 40 percent by Philip Morris Companies Inc., the makers of Marlboro cigarettes. Rothmans Inc. is a unit of Rothmans International Plc., which is in turn owned by Swiss luxury goods holding company Cie Financiere Richmond AG.

²⁹ *Supra* note 4 at 200.

³⁰ *RJR-MacDonald Inc. 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.) rev’d *supra* note 9.

³¹ The marathon trial was 13 months in duration, with 28 witnesses called and 560 exhibits entered. The final trial transcript was over 10,000 pages long. For a detailed description of both trial and appeal decisions, see R. Cunningham, “RJR-MacDonald v. Canada (A.G.): Reflections from the Perspective of Health” (1995) 40 McGill L. J. 299.

Chabot J. held the TPCA to be of no force and effect as an unjustified violation of s.2(b) of the *Charter*.

The Quebec Court of Appeal unanimously overruled the trial court judgment (Rothman, Lebel, and Brossard JJ.A.).³² While agreeing with the trial judge that the TPCA was not within Parliament's criminal law jurisdiction, the Quebec Court of Appeal held that the TPCA was within Parliament's POGG power and therefore *intra vires*. The majority further held that the infringement of s.2(b) of the *Charter* was justified under the triune *Oakes* test. Brossard J.A., dissenting in part, held that ss.4, 5, 6, and 8 were invalid under s.2(b) of the *Charter*. RJR and Imperial were granted leave to appeal to the Supreme Court of Canada.³³

In the year and a half between the trial and the appeal, it was business as usual for the tobacco industry. The tobacco companies continued to profit from cigarette sales.³⁴ The Mulroney government decided to delay operation of the TPCA until a decision was handed down by the Quebec Court of Appeal. The fact that the tobacco industry's chief lobbyist was a Mulroney speech-writer led some to speculate that the Tory government's procrastination was not unintentional.³⁵ So legislation which received Royal Assent 28 June 1988 and scheduled to come into effect on 1 January 1989, did not actually come into force and effect until January 1993. This fact by itself constituted a substantial victory for the tobacco industry.

In 1994 the new Liberal government acted quickly to placate an uprising of businesspersons protesting the loss of revenue to the burgeoning black-market in cigarettes.³⁶ Not surprisingly, the tobacco industry supported this movement. By cutting high tobacco taxes—then stated to be the most effective method of reducing smoking—the Liberals attempted to eliminate cigarette smugglers from the economic picture and re-channel some of the profits and corresponding tax revenues back to their respective coffers.³⁷ Yet this was not enough; the TPCA was law

³² *Supra* note 9. Additionally, the Quebec Court of Appeal allowed a stay of execution on the tobacco advertising prohibition in retail stores. The phase-in provision was supposed to come into effect on 1 January 1993 and was postponed until the Court released its judgment.

³³ *Supra* note 4 at 222. Leave to appeal to the SCC was granted 14 October 1993.

³⁴ Imasco Ltd., *Annual Report* 1992 (Montreal: Imasco Ltd., 1992) at 52–53. Imperial Tobacco Ltd., which holds approximately 65 percent of the Canadian tobacco market, earned \$432,000,000 in operational revenue in 1992. Imperial Tobacco Ltd. located in Montreal, Quebec, is a unit of Imasco Ltd., which is in turn 40 percent owned by B.A.T. Industries of Britain.

³⁵ See "Tougher Warnings About a Deadly Habit" *The Globe and Mail* (16 March 1992) A10; G. York, "Ottawa Toughens Cigarette Labels" *The Globe and Mail* (20 March 1993) A2; and G. York, "Cigarette Warning Labels May be Delayed" *The Globe and Mail* (4 June 1993) A8.

³⁶ *Supra* note 19. See also R. Mackie & B. McKenna, "Ottawa Proposes to Slash Tobacco Tax" *The Globe and Mail* (29 January 1994) A1.

³⁷ *Ibid.*

again and with 35, 000 smoking related deaths and an additional 100, 000 persons quitting each year, the tobacco companies were scrambling to secure future business.³⁸

IV. THE SUPREME COURT OF CANADA

A. The Interrelation Between s.1 and s.2(b) of the Charter

McLachlin J. began her decision by agreeing with La Forest J. that Parliament has the jurisdiction to restrict tobacco advertising and require health warnings under its criminal law power. She continued by stating that the TPCA constituted a violation of the guaranteed right to free speech under s.2(b) of the Charter. The Attorney General of Canada did not dispute this point. However, McLachlin J. quickly departed from La Forest J.'s opinion, holding that the imposition of unattributed health warnings (s.9 of the TPCA) was an infringement of free expression. She cited Lamer J.'s judgment in *Slaight Communications Inc. v. Davidson*,³⁹ where he stated that "freedom of expression necessarily entails the right to say nothing or the right not to say certain things."⁴⁰

While the principle espoused in *Slaight Communications* regarding the constitutional right to silence is sound, its use in *RJR-MacDonald* was inappropriate. The health warnings required by the government need not be qualified. They are not opinion or conjecture. They do not carry any political, social, or religious meaning. They are simple statements of fact: "smoking can cause cancer"; "smoking during pregnancy can harm the baby"; "smoking can kill you."⁴¹ La Forest J. likened health warnings as the textual equivalents of symbols required to be placed on other dangerous or hazardous products such as poisons, cleaning products, and inflammables.⁴² By forcing the government to attribute these warnings, consumers of

³⁸ The Hon. Jake Epp, Minister of National Health and Welfare, *Minutes of Proceedings and Evidence of Legislative Committee on Bills C-204 and C-51* (10 December 1989) at 16:59. See also N.E. Collishaw, W. Tostowaryk & D. Wiggle, "Mortality Attributable to Tobacco Use" (1988) 79 Can. J. Pub. Health 166.

³⁹ [1989] 1 S.C.R. 1038 [hereinafter *Slaight Communications*].

⁴⁰ *Ibid.* at 1080.

⁴¹ U.S. Department of Health and Human Services, *Reducing the Health Consequences of Smoking: 25 Years of Progress. A Report of the Surgeon General 1989* (Rockville, Maryland: US Department of Health and Human Services, 1989). The Surgeon General's Report is globally regarded as the leading authority on the state of medical knowledge about tobacco and related health issues. The 1989 report summarises all that is currently known about tobacco consumption and health from the first Surgeon General's report in 1964 to the present. This 679 page report was compiled from a knowledge base of more than 50, 000 documents on tobacco from around the world.

⁴² See Regulations SOR/88-556.

tobacco products are given the impression that it is only the government's opinion that smoking is harmful. This is exactly the sentiment that the tobacco companies wish to instill in the minds of smokers.

By consistently denying the adverse effects of tobacco⁴³ and simultaneously countering all such scientific data with "empirical data"⁴⁴ of its own impugning the credibility of scientific findings, the tobacco industry was able to foster doubt about the harmful effects of smoking. La Forest J. opined that this is especially so in the case of adolescents, who constitute the largest single entry market for consumers of tobacco products.⁴⁵ Young people are more likely to dismiss the warnings of authority figures such as the government and will then feel justified in smoking as they search for their own perceived truth. The end result of attributed health warnings is a diluted message that is no longer seen as fact but as merely the government's opinion. Nonetheless, McLachlin J. held that it was permissible under the *Charter* for the tobacco companies to "express their own views" of the truth regarding the harmful nature of tobacco.⁴⁶

McLachlin J. proceeded to observe the *TPCA* under the microscope of the *Oakes* analysis. The dissent rejected Chabot J.A.'s "rigorous application" at trial that the standard of proof under s.1 was equal to the civil standard of proof, the balance of probabilities. La Forest J. asserted that the proportionality requirements established in *Oakes* are simply jurisprudential guidelines for the application of the s.1 analysis and should in no way be misconstrued as equal or superior to the actual language in s.1.:

It is implicit in the wording of s.1 that the courts must, in every application of that provision, strike a delicate balance between individual rights and community needs. Such a balance

⁴³ In the past, tobacco companies have consistently denied that smoking is dangerous to health. For example, at a Legislative Committee hearing MP Lynn MacDonald asked the Chairman of Imperial Tobacco Ltd., Jean-Louis Mercier: "Mr. Mercier, do you believe that any Canadians die of smoking related diseases?" Answer, "No, I do not." *Hansard: House of Commons, Minutes and Proceedings and Evidence of the Legislative Committee on Bill C-204* (24 Nov 1987) at 13:29.

However, the tobacco lobby has now rejected this approach. When appearing before the Senate Justice and Constitutional Affairs Committee, Robert Parker, Chairman and CEO of the CMTC, conceded that, "[t]here are health risks associated with smoking this product, a list of diseases as long as your arm. The risk of contracting them rises as you smoke; everyone in Canada knows it. T. Wills, "Senators Blast Tobacco Lobbyists" *The Montreal Gazette* (2 April 1997) A1.

⁴⁴ Tobacco companies routinely declare that the causal link between smoking and its many harmful side-effects is inconclusive. See *Hansard: 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).

⁴⁵ Grossman & Price, *supra* note 16 at 1-44.

⁴⁶ *Supra* note 4 at 326.

cannot be achieved in the abstract, with reference solely to a formalistic “test” uniformly applicable in all circumstances. The s.1 inquiry is an unavoidably normative inquiry, requiring the courts to take into account both the nature of the infringed right and the specific values and principles upon which the state seeks to justify the principle.⁴⁷

In arguing for a flexible approach to the s.1 analysis, La Forest J. repeated the cautionary words of Dickson C.J.C. in *Edwards Books*,

The court stated that the very nature of the proportionality test would vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards.⁴⁸

The majority’s acceptance of Chabot J.A.’s imposition of a strict civil standard of proof upon the Crown constituted a significant deviation from the fundamental principles of the *Oakes* test previously articulated by the Supreme Court. The precedent espoused by McLachlin J. forces the Court to isolate itself from all external circumstances surrounding an issue, creating a hermetically sealed courtroom protected from the influence of the democratic process and popular public opinion. The Court’s refusal to consider the greater social and political context of an issue now places an increased burden on the party wishing to justify an infringement of the *Charter*. This approach is troublesome because the process of demonstrating whether a law is reasonably justified, in the absence of absolute factual proof, inherently depends upon the larger social and political situation beyond the “actual objective” of the impugned legislation.

B. The Relevance of the *Tobacco Products Control Act*

McLachlin J. continually referred to actualities in her determination of whether the objective of the law is of sufficient import to supercede a guaranteed right,

[T]he court must examine the *actual objective* of the law. ...[I]t must determine the *actual connection* between the objective and what the law will in fact achieve; the *actual degree* to which it impairs the right; and whether the *actual benefit* which the law is calculated to achieve outweighs the *actual seriousness* of the limitation of the right.⁴⁹ [emphasis added]

While one is forced to surmise as to what McLachlin J. *actually meant* in this description, she assists the reader by concluding that the application of s.1 is “an exercise based on the facts of the law at issue and the proof offered of its justifica-

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⁴⁸ *Supra* note 1 at 768–69.

⁴⁹ *Supra* note 4 at 330.

tion, not on abstractions." It appears, that to the majority, logical and common-sense deductions based upon existing evidence are "abstractions" which lead to problematic interpretations.

While ultimately holding that the TPCA was relevant to its proposed objective, McLachlin J. declared that the Supreme Court's adjudication of the federal government's attempt to curb the smoking crisis in Canada "cannot be carried to the extreme of treating the challenged law as a unique socio-economic phenomenon." This argument is very disturbing because smoking is indeed "a unique socio-economic phenomenon"—the exact definition McLachlin declined to acknowledge.

Tobacco is alone among all legal products in that it is harmful when used exactly as prescribed by the manufacturer.⁵⁰ There is no safe way to consume tobacco.⁵¹ While over six million Canadians regularly smoke cigarettes,⁵² 90 percent wish to quit.⁵³ They are for the most part unable to do so because of tobacco's strongly addictive nature.⁵⁴ Tobacco is the leading cause of disease, disability, and death in Canada. Over 35,000 fatalities a year are attributed to smoking—one of every five deaths in Canada.⁵⁵ The mortality rate from tobacco is greater than the combined total of deaths caused by all forms of car accidents (including impaired driving), alcohol, murder, suicide, drugs, and AIDS.⁵⁶ Tobacco also causes massive economic loss in society from fires, health care, disability, insurance, property damage, absenteeism, lost productivity, and lost income due to mortality. The entire cost to Canada from tobacco use was estimated in 1982 at more than \$7 billion.⁵⁷ In light of these alarming facts, the Supreme Court's refusal to treat smoking as "a unique socio-economic phenomenon" is questionable.

⁵⁰ With the possible exception of alcohol—and perhaps handguns.

⁵¹ One cigarette will commence the highly addictive process. "Of teenagers who smoke more than one or two casual cigarettes a day, 85 percent will escalate to a lifestyle of regular smoking." See Addiction Research Foundation, et al., "Position Paper on the Prevention of Smoking in Children" (Toronto, 1986) [unpublished] quoted in Toronto, Board of Health, *Report No. 6* (1988) at 66.

⁵² See "36% Smoke ... Gallup Finds," *The Toronto Star* (18 Sept. 1989) A3; and "To All 6,400,000 Smokers," advertisement in *The Toronto Star* (23 May 1991) A26.

⁵³ Nine of ten smokers desire to quit. United States Department of Health, Education, and Welfare, *Healthy People: The Surgeon General's Report on Health Promotion and Disease Prevention* (1979) at 10-8 [hereinafter *Health Promotion*].

⁵⁴ See Grossman & Price, *supra* note 16 at 1-41-44, for an extensive discussion on the effects of nicotine. See also Cunningham, *supra* note 13 at 305-07.

⁵⁵ Collinshaw, Tostoworyk & Wiggle, *supra* note 38.

⁵⁶ *Ibid.*

⁵⁷ N.E. Collinshaw & B. Rogers, "Tobacco in Canada" (1984) 117 *Can. Pharm. J.* 147 at 149.

McLachlin J. then turned her attention to the issue of what degree of deference Parliament was to be afforded. La Forest J. had written in his dissent that social legislation should be accorded a greater degree of deference than legislation in the criminal realm. This view is grounded largely on the ideal that Parliament, not the courts, is the optimal institution to determine policy. It is Parliament which has the democratic support of Canadians. It is Parliament which can allocate the requisite financial means and institutional resources to best assess social science evidence, to balance competing social interests, and to protect "particularly vulnerable groups." La Forest J. further recognised that the TPCA was the culmination of over 20 years of legislative efforts by Parliament; the legislative committee which prepared Bill C-51 heard from an astounding 104 interest groups during the law's preparation.⁵⁸ In citing *Ford v. Quebec (A.G.)*⁵⁹ and *Irwin Toy*, La Forest J. attempted to continue the Supreme Court's established practice of affording the government "a wide margin of appreciation to form legitimate objectives based on somewhat inconclusive social science evidence."⁶⁰

In rejecting the Supreme Court's past convention, McLachlin J. again retreated into her theoretical fortress, declaring that:

The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.⁶¹

This commentary cannot be faulted in theory, but the implication that the ability of tobacco companies to advertise is imperative to the continued existence of rights in this country is of little comfort to the families and loved ones of Canada's 35,000 annual smoking fatalities.

C. Pressing and Substantial Objective

This was one area where the majority and minority agreed. While reiterating the point that it is important to focus on the exact purpose of the legislation in ques-

⁵⁸ These organisations included the medical establishment, advertising, civil libertarians, smoker's rights, non-smoker's rights, and all stages of the tobacco production and manufacturing industry.

⁵⁹ [1988] 2 S.C.R. 712 [hereinafter *Ford*]. Note: the first case in which the validity of restriction on commercial speech was confronted was *Re Law Society of Manitoba and Savino* (1984), 1 D.L.R. (4th) 285 (Man. C.A.), where the Manitoba Court of Appeal assumed that commercial speech came within the scope of s.2(b) of the *Charter*, but declined to expound further.

⁶⁰ *Supra* note 1 at 777-79.

⁶¹ *Supra* note 4 at 332.

tion, McLachlin J. concurred with La Forest J. that the government's objective of prohibiting tobacco advertising in an attempt to prevent persons in Canada from being persuaded to use tobacco products was of sufficient importance to infringe the guaranteed right of free expression. Nonetheless, McLachlin J. was troubled by La Forest J.'s view that the overall social context of the tobacco problem could not be excised from the problem at hand. By stating that "[t]he critical question is not the evil that tobacco works generally in our society, but the evil which the legislation addresses," she appears to have failed to appreciate that tobacco's pervasive nature makes it impossible to delineate where one aspect of the harm tobacco causes stops and another begins. The Supreme Court's decisions in *R. v. Keegstra*⁶² and *R. v. Butler*⁶³ illustrates prior acceptance of this approach. In both cases, the overall harmful nature of an activity was relevant in determining whether legislation dealing with a more specific aspect of the problem was reasonably justified. It must be noted that McLachlin J.'s reluctance to recognise the overall import of the TPCA's objectives became significant during her analysis of the tripartite proportionality test, where the level of importance attributed to a law's objective clearly affected the standard of proof demanded by the Court.

D. The Oakes Three Part Proportionality Test

1. Rational Connection

In the first stage of the proportionality test the government must demonstrate that the violations of the right to free expression created by the legislation are rationally connected to the law's objective. The Court was divided over the issue of what test was to be used in determining reasonableness. McLachlin J. held that the test should be based upon whether it was reasonable or not for the government to act. In contrast, La Forest J. asked whether on the basis of the overall evidence, was the legislation itself reasonable. He consequently held that it was "sufficient for the government to demonstrate that it had a reasonable basis for believing such a rational connection existed."⁶⁴ La Forest J. justified his support for this approach in citing *Irwin Toy*,⁶⁵ *Butler*,⁶⁶ and *McKinney v. University of Guelph*.⁶⁷

⁶² [1990] 3 S.C.R. 697 [hereinafter *Keegstra*].

⁶³ [1992] 1 S.C.R. 452 [hereinafter *Butler*].

⁶⁴ *Supra* note 4 at 290.

⁶⁵ *Supra* note 11 at 994.

⁶⁶ *Supra* note 63 at 502.

⁶⁷ [1990] 3 S.C.R. 229 at 282–85 [hereinafter *McKinney*].

In her dealing with what she described as difficult and inconclusive social science evidence, McLachlin J. was conspicuously silent as to what precedent she had relied upon in her departure from the Court's traditionally flexible position towards examining such evidence. Her adherence to such a strict standard of probabilities is therefore disquieting. The Supreme Court has consistently held that the standard of proof required to determine whether a rational connection between means and ends exists may depend on the context of the case.⁶⁸ As Dickson C.J.C. stated in *Oakes*, "[w]ithin the broad category of the civil standard, there exists different degrees of probability depending on the nature of the case." The significance of the protected expression is correlated to the standard of proof required to justify its infringement. The greater the significance of the expression, the greater the degree of proof demanded by the court. Inversely, the greater the value of the legislative objective, the lower the standard of proof.

Even more puzzling was McLachlin J.'s rejection of the Crown's scientific evidence,⁶⁹ which concluded that a correlation existed between the degree of restriction on tobacco advertising and the decrease in tobacco consumption. At trial, Chabot J.A. summarily dismissed the evidence put forth by the government as containing "serious methodological errors" which rendered it "for all intents and purposes devoid of any probative value."⁷⁰ Though McLachlin J. apparently had difficulty in according deference to the cumulative efforts of the federal government, she did not seem to encounter such difficulty when dealing with the findings of a sole arbiter who possessed, in her opinion, "the trial judge's traditional and accepted expertise."⁷¹

The Court then looked at the question of whether a rational connection could be found by adducing indirect evidence through reason, logic, and common sense. After a thorough argument by La Forest J., the Court was unanimous in its belief that there was a reasonable and logical connection between advertising, health warnings, and tobacco consumption. In summary, La Forest J. refused to accept the tobacco companies' argument that their advertising was targeted solely at existing smokers in an attempt to encourage brand loyalty and to distribute product information. La Forest J. found it hard to believe that Canada's three major tobacco

⁶⁸ See, for example, *Oakes* *supra* note 10; *Irwin Toy*, *supra* note 11; *Rocket v. Royal College of Dental Surgeons*, [1990] 1 S.C.R. 232 [hereinafter *Rocket*]; *Reference re ss. 193 and 195.1(1) of the Criminal Code* [1990] 1 S.C.R. 1123 [hereinafter *Prostitution Reference*].

⁶⁹ The evidence of the link between advertising bans and smoking reduction was contained in a report of the New Zealand Toxic Substances Board titled, "Health or Tobacco: An End to Advertising and Promotion" (1989). Dr. Jeffery Harris, expert witness for the federal government, affirmed the accuracy of this report at trial.

⁷⁰ *Supra* note 4 at 340.

⁷¹ *Ibid.*

companies would spend \$75 million annually to preserve brand loyalty among a group of consumers who are remarkably static in terms of brand preference.⁷² Following the Supreme Court's reasoning in *Butler* regarding the utilisation of inconclusive social science evidence, La Forest J. applied the common sense connection between advertising and the quantum of consumption to determine that the rational connection requirement of *Oakes* was satisfied.

Section 8 of the TPCA, which banned the use of tobacco trademarks on non-tobacco products, was held by the majority not to satisfy the causal connection test. McLachlin J. stated that she could not imagine how a tobacco trademark on a lighter could possibly encourage consumption. While her reasoning may appear sound at first blush, a more vigorous investigation of the rationale behind s.8 of the TPCA will strengthen the government's position.

What the government is clearly trying to prevent with s.8 of the TPCA is the development of sophisticated tobacco lifestyle advertising schemes⁷³ conducted through the camouflaged medium of non-tobacco related products. In the United States, the country's two largest brands of cigarettes, Camel and Marlboro, have been engaged in an aggressive advertising campaign waged through the use of non-tobacco products.⁷⁴ Each tobacco company markets products that are representative of the lifestyle image that the company wishes to have associated with its product. Camel, in line with its "Joe Camel" advertising scheme, offers products such as leather jackets, sunglasses, bar and billiards paraphernalia, and various other accoutrements commonly viewed as "cool" by the targeted demographic group.⁷⁵ The rival "Marlboro Adventure Team" has introduced a line of rugged clothing and outdoor equipment transmitting the lifestyle message Marlboro wishes to send to its customers—strong, adventuresome, and rugged Americans smoke Marlboro

⁷² "[O]nly 10 percent of smokers change brands each year. Additionally, many competing brands are manufactured by the same parent companies that are buying the advertising." See "The Civil Libertarians are Blowing Smoke" *The Washington Post* (24 July 1986) A24.

⁷³ Lifestyle advertising differentiates the product from similar products in the market by attaching values or attributes, through visual imagery and symbolism, that the manufacturer wishes to have associated with the product. An example would be Marlboro cigarettes and the cowboy mystique. See R. Moon, "Lifestyle Advertising and Classical Freedom of Expression Doctrine" (1988) 36 McGill L.J. 76 at 108.

⁷⁴ Camel is the flagship brand of the American tobacco giant RJR-Nabisco Ltd., which in turn wholly owns subsidiary RJR-MacDonald Inc; Marlboro is owned by Philip Morris Inc. For a critical investigation into this particular battle of the American tobacco war see, "Tobacco Under Fire" *Mother Jones* (May/June 1996) 62 at 63.

⁷⁵ One American study found that "Joe Camel," the cartoon mascot of Camel cigarettes, was recognised by six year old children on a level equal to that of Mickey Mouse. P.M. Fischer *et al.*, "Brand Logo Recognition by Children Aged Six to Eight Years: Mickey Mouse and Joe the Camel" (1991) 226:22 J. Am. Med. Assoc. 3145.

cigarettes.⁷⁶ Through this transfer the cigarette comes to represent the feelings of strength and adventure. The ultimate implication is that buying or using of the product will transfer these values to the consumer.⁷⁷ By understanding the psychology behind cross-product advertising it becomes evident that the medium does have an effect on smoking habits. Consequently, the federal government was justified including s.8 of the TPCA.

2. Minimal Impairment

The second part of the proportionality test requires the government to demonstrate that the challenged legislation impairs the guaranteed right as little as reasonably possible in order to meet its objective. Whether or not the TPCA satisfied the minimal impairment test was another contentious point of division for the Supreme Court. The tobacco companies claimed that Parliament could have implemented a partial ban on lifestyle advertising or advertising directed at children without prohibiting brand preference advertising or informational advertising.⁷⁸ They centred their argument on the point that it was unnecessary to prohibit brand or informational advertising since both types were directed solely at smokers. This approach theoretically fulfilled the beneficial function of disseminating information to consumers as espoused by the Court in *Ford*.⁷⁹

The Court then asked whether it was permissible for the government to attempt to decrease demand for a product which is legally offered to the consumer. The prohibition of tobacco advertising would in effect discourage the flow of information regarding the price and availability of a product. It was recognised by the Supreme

⁷⁶ During this advertising campaign a fleet of Marlboro vans, driven by young, enthusiastic workers, travelled from coast to coast distributing free Marlboro gear in attempt to attract new smokers. At a cost of approximately \$300 million U.S., this promotion is one of the most expensive in the history of the tobacco industry. See *supra* note 74 at 64. In comparison, the Canadian tobacco industry has an estimated promotion budget of \$75–80 million per annum, of which \$60 million is direct sponsorship.

⁷⁷ Moon, *supra* note 73 at 110.

⁷⁸ *Ibid.* at 108. These two types of advertising are often synonymous. In its Amended Statement of Claim, filed October 1988 in the Ontario Supreme Court, Rothmans, Bensons, and Hedges Inc. declared: Brand preference advertising provides tobacco consumers with information to which they are entitled under s.2(b) of the *Charter*. It enables them to identify the brand with the combination of characteristics that best satisfies their preferences and tastes, and thus allows them to make a more informed purchasing decision.

⁷⁹ *Supra* note 57. In *Ford*, the SCC defined what constituted expression using three questions: Is it essential to intelligent and democratic self-government?; Does it protect an open exchange of views, creating a market-place of ideas?; And does it have value of expression for its own sake? The Court ruled that commercial expression "plays a significant role in enabling individuals to make informed choices, an important aspect of individual self-fulfilment and personal autonomy.

Court in *Rocket*⁸⁰ that the guarantee of free expression extends not only to the speaker but also to the listener. Commercial expression provides the consumer with valuable information about the merits and attributes of various goods and services which then assists the consumer in making his or her choice of what goods or services to utilise. While the “marketplace of ideas” is a founding principle of free expression, the Supreme Court made it clear in *Irwin Toy* that it is permissible for the government to restrict commercial speech in an attempt to protect “particularly vulnerable groups.”

The Supreme Court was further divided on the very nature of the *Oakes* analysis. La Forest J. continued with his flexible interpretation of s.1 and *Oakes* in relation to s.2(b) by citing Dickson C.J.C in the *Prostitution Reference*:

When a *Charter* freedom has been infringed by state action that takes the form of criminalisation, the Crown bears the heavy burden of justifying that infringement. Yet, the expressive activity, as with any infringed *Charter* right, should be analyzed in the particular context of the case.⁸¹

La Forest J. opined that the government is only required to demonstrate that the means by which the law operates were the least intrusive, in respect to both the legislative objective and the infringed right. He paid special attention to the nature of the expression being infringed, reiterating one of the Supreme Court’s earlier ideals⁸²—that not all expression deserved equal protection under the *Charter*. La Forest J. proceeded by stating that when the expressive form being violated was far from the “centre core of the spirit” of expression, there was a less onerous burden on the government to justify its infringement. Citing Dickson C.J.C. in *Keegstra*:

In my opinion, however, the s.1 analysis of a limit upon s.2(b) cannot ignore the nature of the expressive activity which the state seeks to restrict. While we must guard carefully against judging expression according to its popularity, it is equally destructive to free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s.2(b).⁸³

⁸⁰ *Rocket*, *supra* note 68. In *Rocket*, McLachlin J. for the majority argued that the restricted expression in question, dental advertising, enabled patients to make informed health choices and that selecting a dentist was a critical consumer decision.

⁸¹ *Prostitution Reference*, *supra* note 68 at 1136.

⁸² *Edmonton Journal v. Alberta (A.G.)*, [1989] 2 S.C.R. 1326 at 1355–56 [hereinafter *Edmonton Journal*].

⁸³ *Supra* note 62 at 760.

La Forest J. asserted that the harm inflicted upon Canadian society by tobacco and the primary motive of profit behind its promotion placed tobacco advertising is,

[A]s far from the core of freedom of expression values as prostitution, hate mongering, or pornography, thus entitling it to a very low degree of protection under s.1. It must be kept in mind that tobacco advertising serves no political, scientific, or artistic ends; nor does it promote participation on the political process. Rather, its sole purpose is to inform consumers about, and promote the use of a product that is harmful, and often fatal, to the consumers who use it.⁸⁴

In the opinion of the minority, because it was *intra vires* Parliament's criminal law power to prohibit the sale and manufacture of tobacco products, the TPCA was *prima facie* a reasonably less restrictive means to achieve the desired objective of reducing tobacco consumption. It is a paradox that the government could have the constitutional ability to prohibit a product outright but could not validly enact lesser legislation prohibiting the advertising of such a product.⁸⁵

La Forest J. discussed in detail the harms of tobacco advertising. He recognised that the TPCA prevented the tobacco companies from "employing sophisticated marketing and social psychology techniques" to influence persons to buy their products. He deferred to Parliament's deliberated conclusion that all advertising stimulates consumption and therefore it was necessary to implement a total ban on tobacco advertising to best achieve the objective of reducing tobacco consumption. He traced the history of tobacco legislation in Canada from 1969 to the present and pointed out that all lesser forms of tobacco advertising restrictions had failed to create a substantial decrease in the number of Canadian smokers. He advanced his argument by referring to the mass of international legislation prohibiting tobacco advertising. While La Forest J. ultimately concluded that the government had satisfied the minimal impairment requirement of the *Oakes* test, he was obviously troubled by the Crown's refusal to introduce into evidence existing studies it had conducted regarding the potential effects of partial advertising bans.

In the opinion of the majority, it was upon these questionable evidentiary rocks that the government's legislative ship was wrecked. McLachlin J. was not as accepting as her dissenting colleague towards the Crown's unwillingness to introduce, *inter alia*, its study of alternatives to the total advertising ban. At trial, the

⁸⁴ *Supra* note 4 at 282.

⁸⁵ The United States Supreme Court expressed the same sentiment in *Posadas de Puerto Rico Associates et al. v. Tourism Company of Puerto Rico*, 106 S. Ct. 2968 at 2979-80 (1986) *per* Rehnquist C.J.: "It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny the legislature the authority to forbid the stimulation of demand for the product or activity through advertising..."

government had invoked the evidentiary privilege of s.39 of the *Canada Evidence Act*,⁸⁶ depriving the court of over 500 documents concerning the TPCA.

This use of s.39 to deny the production of evidence did not sit well with McLachlin J. She was openly unsatisfied with the Attorney General's explanation for the government's use of s.39, describing the Attorney General's reasoning as a "bland statement ... [which] ... presented no argument."⁸⁷ McLachlin J. continued by pointing out that the onus was on the government to satisfy the minimal impairment test and that the government's lack of disclosure did not help their cause. The Court made the negative inference that the Crown had evidence demonstrating that a partial ban on tobacco advertising would also achieve the desired objective of reducing tobacco consumption—therefore constituting a superior balance between parliamentary goals and the guarantee of rights than the TPCA.

This somewhat unforgiving approach conflicts with Dickson C.J.C.'s words in *Irwin Toy*:

While evidence exists that other less intrusive options reflecting more modest objectives were available to the government, there is evidence establishing the necessity of a ban to meet the objectives the government had reasonably set. This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups.⁸⁸

Whether or not the government's refusal to introduce certain evidence in its possession was fatal to its case is speculative. Nonetheless, it seemed to be a very strong factor influencing McLachlin J.'s conclusion that ss. 4 and 9 of the TPCA did not satisfy the minimal impairment test. From the tenor of her judgment, it was clear that McLachlin J. did not accept the validity of the evidence which proposed that all forms of tobacco advertising stimulated consumption.

Regardless of the ultimate consequence of the government's use of s.39, McLachlin J. questionably compared the present case to her decision in *Rocket*. In that case, where dentists were totally prohibited from advertising their services, McLachlin J. articulated that such information would logically lead to a reduction in the health risk posed to consumers because they would ultimately choose the healthiest product advertised. In *RJR-MacDonald*, however, she stated that tobacco

⁸⁶ R.S.C., 1985, c. C-5. Section 39 of the *Canada Evidence Act* provides Ministers of the Crown, Cabinet, and Cabinet Committees, *inter alia*, absolute immunity from disclosure of certain documents. The rationale behind the privilege is to encourage candour in government communications and to protect the government's decision and policy making process. For a further discussion of the public interest immunity doctrine see J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada* (Toronto: Butterworths, 1992) 773–89.

⁸⁷ *Supra* note 4 at 345.

⁸⁸ *Supra* note 11 at 999.

advertising was beneficial avenue of information to the consumer regarding product availability and brand content.

With respect, this contention that all commercial speech should be granted equal protection under the *Charter* cannot be maintained. It is difficult to see how benefits derived from increased information of an important and necessary health service, as was the case in *Rocket*, could possibly be equated with the dissemination of information about a product that is deadly when used as prescribed. McLachlin J. invalidated the impugned law in *Rocket* for the very reason that the government passed the *TPCA*—so the consumer could make informed health choices. Unfortunately, the very nature of the information that the tobacco companies wish to purvey to consumers prevents such information from fostering educated and informed health choices.

By declaring that there was no indication that purely informational or brand preference advertising would increase consumption,⁸⁹ McLachlin J. contradicted her earlier analysis of the *TPCA*'s rational connection where she acknowledged that there was a link between tobacco advertising and consumption.⁹⁰ La Forest J. pointed out another of his colleague's inconsistencies in regard to the issue of minimal impairment by citing her observation in *Committee for the Commonwealth of Canada v. Canada*,

[S]ome deference must be paid to the legislatures and the difficulties inherent in the process of drafting rules of general application. A limit prescribed by law should not be struck out merely because the Court can conceive of an alternative which seems to it to be less restrictive.⁹¹

The ruling is further troublesome when one takes a closer examination of the social science evidence that McLachlin J. declined to accept. Tobacco advertising is inherently misleading in that its primary purpose is to induce people to buy a product which is both harmful and addictive.⁹² The quality of the information that the tobacco companies wish to disperse is dubious because tobacco advertising implicitly promotes tobacco consumption as a desirable and socially acceptable habit. Additionally, tobacco advertising is distinguishable from ordinary advertising "puffery" of products since it deceives the consumer, by way of omission, about the potential harms of a uniquely dangerous product. "Truth" in advertising must be defined both by what is included and what is omitted—advertising must be accurate

⁸⁹ *Supra* note 4 at 344.

⁹⁰ *Ibid.* at 341.

⁹¹ [1991] 1 S.C.R. 139 at 248 [hereinafter *Committee for the Commonwealth of Canada*].

⁹² In *Irwin Toy*, the SCC recognised that "the techniques of seduction and manipulation [are] abundant in advertising." *Supra* note 11 at 987.

and must not omit material which may mislead the consumer.⁹³ An advertiser's omission to disclose relevant factual information about a product is tantamount to deception.⁹⁴

McLachlin J. spoke about the consumer making informed health choices from information contained in advertisements or on packages as per her rationale in *Rocket*. What can be inferred from her statements is that information about tar and nicotine contents of a particular brand will enable the tobacco consumer to choose a "safer" brand. This conclusion is problematic because there is no "safer" brand—all tobacco products are harmful. No evidence exists demonstrating that lower tar or nicotine cigarettes, commonly marketed as "mild" or "light" are less harmful than normal cigarettes.⁹⁵ Such cigarettes may even be more dangerous because persons who smoke "light" cigarettes may unconsciously smoke more cigarettes, take more frequent puffs, and inhale deeper in order to compensate for lower nicotine levels.⁹⁶ Additionally, smokers who might otherwise quit do not because they believe that it is "safe" to smoke light brands.⁹⁷

3. *Proportionality Between the Effects of the Legislation and the Objective*

Since she had determined that ss.4 and 9 of the TPCA did not satisfy the minimal impairment requirement of the *Oakes* test, McLachlin J. declined to advance to the proportionality analysis of s.1 which balances the deleterious effects of the legislation against the law's objective. In dissent, La Forest J. briefly stated,

[I]t is my view that the deleterious effects of this limitation, a restriction on the rights of tobacco companies to advertise products for profit that are inherently dangerous and harmful, do not outweigh the legislative objective of reducing the number of direct inducements for Canadians to consume these products.⁹⁸

⁹³ It is important to note that tobacco advertising is untouched by major federal and provincial consumer protection legislation. The *Hazardous Products Act*, R.S.C. 1985, c.24; the *Food and Drugs Act*, R.S.C. 1985, c. F-27; and the *Narcotic Control Act*, R.S.C. 1985, c. N-1, all fail to mention tobacco. For a further analysis of tobacco products liability, see R. Cunningham, "Tobacco Products Liability in Common Law Canada" (1990) 11 *Health L. Can.* 43.

⁹⁴ K. L. Polin, "Argument for the Ban of Tobacco Advertising: A First Amendment Analysis" (1988-89) 17 *Hofstra L. Rev.* 99 at 114-18.

⁹⁵ *Supra* note 37 at 315-17.

⁹⁶ Cunningham, *supra* note 13 at 313.

⁹⁷ *Ibid.*

⁹⁸ *Supra* note 4 at 319.

What can be extracted from this comment is that the more pressing and substantial the legislative objective is originally viewed, the greater the probability that the legislation will ultimately pass the proportionality test.

E. Remedy

The majority found sections 4, 8, and 9 of the TPCA to be unjustifiable violations of s.2(b) of the *Charter*. The Supreme Court held that the invalid provisions could not be severed from the interconnected sections 5 and 6. Consequently, the Court declared that sections 4, 5, 6, 8, and 9 contradicted the guaranteed right of freedom of expression under the *Charter* and were therefore of no force and effect by virtue of s.52 of the *Constitution Act, 1982*. The remaining provisions of the TPCA were deemed constitutional and were permitted to stand. Costs of the appeals were granted to both appellant tobacco companies.⁹⁹

V. CONCLUSION

AS STATED BY Robert Cunningham of the Canadian Cancer Society, tobacco advertising can have six possible effects: (i) it can encourage non-smokers to commence smoking; (ii) it can encourage present smokers to smoke more; (iii) it can deter smokers who wish to quit from doing so; (iv) it can induce former smokers who have quit to recommence the habit; (v) it can encourage brand loyalty; and (vi) it can influence brand preference.¹⁰⁰ All collective empirical, experimental, and logical evidence leads to the conclusion that it is more likely than not that tobacco advertising and promotion stimulates tobacco consumption.¹⁰¹

The groups most affected by the harms of tobacco advertising are the young and the uneducated.¹⁰² In 1986, 60 percent of Canadians without a high school education smoked habitually, while only 8 percent of university graduates did so.¹⁰³ Furthermore, 80 percent of all smokers become regular smokers before the age of 21 and 75 percent of these smokers began smoking before 18 years of age.¹⁰⁴ These

⁹⁹ *Ibid.* at 350.

¹⁰⁰ Cunningham, *supra* note 13 at 318.

¹⁰¹ K.E. Warner, *Selling Smoke: Cigarette Advertising and Public Health* (Washington: American Public Health Association, 1986).

¹⁰² *Supra* note 4 at 291. From the report of Dr. Robert G. Florence, "Project Plus/Minus" (Imperial Tobacco, 1988) 32.

¹⁰³ *Ibid.*

¹⁰⁴ G.L. Mangan & J.F. Golding, *The Psychopharmacology of Smoking* (Cambridge: Cambridge University Press, 1984) at 9.

figures lead to the conclusion that young persons develop a dependence on tobacco in the early to middle adolescent years, and adult patterns of tobacco consumption are normally set between the ages of 15 and 18 years. If an individual has not started smoking by his or her 21st birthday, it is unlikely that he or she will ever do so.

The young and uneducated are the least able in our society to inform themselves of the potential harms of tobacco and to take precaution against such harms. The Supreme Court has described these segments of society as "particularly vulnerable groups,"¹⁰⁵ and has stated that legislation enacted to protect such groups is to be analysed under "an attenuated level of s.1 justification."¹⁰⁶ It is vital that Parliament implement policies to discourage and prevent the young and uninformed from starting to smoke before they are fully aware of the harmful consequences. In turn, the courts must support and uphold such policies for they have as their ultimate objective the most important value recognised—that of life itself.

A. Jurisprudential Ramifications

The Supreme Court's verdict in *RJR-MacDonald v. Canada* is disappointing on several levels. It is an unfortunate setback for the federal government, whose comprehensive and meticulous preparation behind the *Tobacco Products Control Act* should become an example for all legislators. It is also a great letdown for health advocates in Canada who wish to see the harms that tobacco consumption creates in our society eliminated.

The victory by the Canadian tobacco industry will also have an impact on the tobacco legislation of foreign countries. The Quebec Court of Appeal decision did not go unnoticed in the American legal and political communities.¹⁰⁷ It is evident that both sides in the U.S. tobacco advertising war are looking to the Canadian courts for jurisprudential support.¹⁰⁸ It is lamentable that the Supreme Court's

¹⁰⁵ *Supra* note 11 at 993.

¹⁰⁶ *Supra* note 4 at 284.

¹⁰⁷ See, for example, M. Mintz, "No Ifs, Ands, or Butts" (1990) 22:6 *The Washington Monthly* 30; H.S. Fairly & B.R. Fraser, "Tobacco Advertising, Public Welfare, and Commercial Free Speech: Some Insights from the Canadian Experience" (1992) 16 *Am. J. Trial Advoc.* 497.

¹⁰⁸ A comprehensive discussion on the present state of the U.S. tobacco war is beyond the scope of this paper, much due to the size, complexity, and rapidly evolving nature of the issue in America. This is much due to the bombshell announcement by American tobacco company Liggett Group Inc. that it had reached an out-of-court settlement with the Attorney Generals from 22 states who had filed suit against the tobacco manufacturer in order to recoup medical costs associated with treating tobacco related illnesses. Under the terms of the agreement, Liggett will acknowledge that smoking is addictive and causes cancer and that tobacco marketing was targeted toward teenagers. Additionally, Liggett, whose brands include Chesterfield, L&M, and Lark, will pay up to one quarter

decision in *RJR-MacDonald* may be used by the powerful American tobacco lobby in their fight against tobacco advertising restrictions.¹⁰⁹

From a jurisprudential vantage, the ruling generates some very troubling questions about the present state of freedom of expression adjudication in Canada. It appears that some members of the Supreme Court are attempting to push the ever-evolving *Oakes* test in a more objective and formalistic direction—despite the Court's assurances that it is not. As a result of this shift, the Court diverged greatly in *RJR-MacDonald* on the application of the *Oakes* rational connection and minimal impairment tests.

The Supreme Court's position toward parliamentary deference has also moved toward a stricter standard of judicial scrutiny. This demanding approach prevented the majority from examining the targeted problem of smoking in a greater social and economic context. Economic and social science evidence presented by the federal government to support its position was viewed with scepticism instead of deference. Consequently, the majority was not prepared to accept the government's assertion that there was a sufficient causal connection between informational and brand-name tobacco advertising and an increase in consumption to justify the legislation. As a result of this difficulty with the causal relationship, the government was ultimately unable to meet the stringent burden of proportionality imposed by the Court.

In reference to s.39 of the *Canada Evidence Act*, the majority's decision demonstrated that application of the public interest immunity doctrine may not be appropriate in some situations where the government must satisfy the *Oakes* test burden of proportionality. It appears that when adjudicating freedom of expression cases, the Court may now demand a high level of disclosure from the government.

The Supreme Court of Canada has returned to the *RJR-MacDonald* decision several times in subsequent cases. In *Ross v. New Brunswick School District No. 15*,¹¹⁰ La Forest J., writing for the Court, referred to *RJR-MacDonald* and stated that "an approach involving a 'formalistic test uniformly applicable in all circumstances' must be eschewed," and that "the *Oakes* test should be applied flexibly, so as to

of pre-tax profits, plus another \$25 million U.S. in damages to the states *annually* for the next 25 years. See "Cigarette Maker Concedes Smoking Can Cause Cancer" *The New York Times* (20 March 1997) A1.

¹⁰⁹ In 1995, the United States Congress spent \$1 million U.S. on anti-smoking messages. Comparatively, tobacco companies spent \$4 billion U.S. on promotion. See *supra* note 74 at 64. For a comprehensive behind-the-scenes look at the American tobacco industry see, R. Kluger, *Ashes to Ashes: America's Hundred-Year War, the Public Health, and the Unabashed Triumph of Philip Morris* (New York: Alfred A. Knopf, 1996).

¹¹⁰ [1996] 1 S.C.R. 825 [hereinafter *Ross*].

achieve a proper balance between individual rights and community needs.”¹¹¹ Interestingly, the words La Forest J. quoted from *RJR-MacDonald* were not his own but rather those of McLachlin J.

More confusing is the Court’s insistence that it is becoming less formalistic simply by not adhering to previous methods of s.1 analysis. It is important to note that rationally following well-conceived past practices is not “formalistic” behaviour in itself—such methodology is the cornerstone of the concept of precedent—and that merely diverging from such practices does not automatically demarcate a lack of formalism. What the Court seems to be saying is that *Oakes* is not the last word on s.1 analysis and that it will not become a slave to the *Oakes* precedent, as perhaps has occurred in the past. Consequently, the Court seems determined to evolve the *Oakes* analysis to match the present state of the Court’s jurisprudence. However, growing pains do exist, as demonstrated by the unreconcilable conflict of language and thought which appears in decisions such as *Ross*.

La Forest J. again referred to *RJR-MacDonald* in *Harvey v. New Brunswick (A.G.)*,¹¹² where he reiterated his views regarding minimal impairment. He stated that the government need not utilise the least intrusive means available but only “demonstrate that the measures employed were the least intrusive in light of both the legislative objective and the infringed right.”¹¹³ It should be noted that this was the sentiment of both the majority and minority opinions in *RJR-MacDonald*.

In *CBC v. New Brunswick (A.G.)*,¹¹⁴ La Forest J. conceded to the majority in *RJR-MacDonald* that in cases where the relationship between the infringement of the right and the benefit sought may not be “scientifically measurable,” the Court will find a causal connection based upon reason and logic rather than La Forest’s less formalistic “common-sense” approach. Whether there is any real difference between the tests is questionable given that neither requires direct proof of a relationship between the infringing measure and the legislative objective. At minimum, the tests should intersect at some point as one would assume that reason

¹¹¹ *Ibid.* at 871–72.

¹¹² [1996] 2 S.C.R. 876 [hereinafter *Harvey*].

¹¹³ *Ibid.* at 904.

¹¹⁴ [1996] 3 S.C.R. 481 [hereinafter *CBC*]. See also the dissent of L’Heureux-Dube J. in *Adler v. Ontario (A.G.)*, [1996] 3 S.C.R. 666 where she reiterated her dissent in *RJR-MacDonald*, stating that when determining deference to Parliament, the court must “take a contextual approach to the legislation in question, to evaluate both the nature of the right infringement and that of the social interest or value meant to be promoted by the legislation.”

Additionally, see the Federal Court of Canada decision *Archibald v. Canada (A.G.)*, [1997] F.C.J. No. 394 (QL) where Muldoon J. of the Trial Division acknowledged that, “a split seems to have occurred in how the principle [of deference] specifically tempers the orthodox proportionality branch stated in *Oakes*.”

and logic are not mutual exclusive of common-sense and vice versa. Perhaps it is just a question of semantics.

If anything can be gleaned from the Supreme Court's subsequent reflections on the *RJR-MacDonald* decision, it is perhaps the simple point that they have in fact returned to it. By doing so, the Court has demonstrated that the decision will not become a judicial orphan. Instead, commentary such as La Forest J.'s in *Ross* seems to indicate that the *RJR-MacDonald* decision may become the Supreme Court's major restatement of the *Oakes* s.1 analysis.

B. Legislative Ramifications

Despite the conflicts in jurisprudence, the Supreme Court clearly expressed its support for restrictions on tobacco advertising. Seven justices held that tobacco could be prohibited under the criminal law power. But while supporting the government's objective, the Court could not accept the means used to achieve it; certain aspects of the *TPCA* were simply not justifiable under the *Charter*. The law's broad limitation on tobacco advertising was not proportional to its objective of reducing tobacco consumption. It did not minimally impair the right to free expression. In the Court's opinion, a less-inclusive law would have sufficed to achieve the government's goal.

However, due to the nebulous and inconclusive nature of the causal relation between tobacco and advertising, less-inclusive may ultimately mean under-inclusive. The government will not risk having another tobacco law struck down in an attempt to implement perfectly proportional legislation. Consequently, they have passed a law that attempts to come within the freedom of expression parameters set out by the Supreme Court in *RJR-MacDonald*.

If this was the message the Supreme Court was sending to the government then they have succeeded. The federal government introduced Bill C-71 into Parliament in January 1997 to replace the ostensibly defunct *TPCA*. The thrust of Bill C-71—now the *Tobacco Act*¹¹⁵—is fourfold: to further limit youth access to tobacco products; to restrict the promotion of tobacco products; to increase health information on tobacco packages; and to establish powers to regulate tobacco products.

The key sections of the *Tobacco Act* may be paraphrased as follows:

- s.11 Prohibits self-service displays of tobacco products, ie., all sales are required to be "over-the-counter."
- s.12 Prohibits vending machine sales of tobacco products.
- s.13 Prohibits mail-order distribution of tobacco products.
- s.14(a) Allows for the creation of regulations requiring photo-identification to confirm legal age before tobacco can be purchased.

¹¹⁵ S.C. 1997, c. C-13.

- s.15(1) Requires manufacturers to include prominent health warnings on cigarette packaging.
- s.15(2) Requires manufacturers to provide increased information about the effects of toxic substances in tobacco products as such information becomes known.
- s.20 Prohibits false, deceptive, or misleading claims about tobacco products.
- s.21 Prohibits endorsements by humans, animals, and fictional characters.
- s.22(1) Prohibits advertising depicting tobacco products, packaging, or brand elements.
- s.22(2) Permits informational and brand-preference advertising in direct mailings, publications with not less than 85 percent adult readership, and in places where minors are not permitted by law.
- s.22(3) Prohibits all "lifestyle" advertising and advertising which may be deemed to be appealing to young persons.
- s.24(1) Prohibits specific locales and methods of tobacco product advertising such as broadcast advertising, billboards, advertising on street kiosks and bus panels, and displays at point-of-sale, eg. counter-top displays in retail outlets.
- s.24(2) Restricts the display of brand name and brand elements to the bottom 10 percent of the display surface.
- s.27 Prohibits brand name or brand element advertising on non-tobacco products that are youth oriented or have lifestyle connotations.
- s.29 Prohibits free distribution of tobacco products and the use of gifts, cash rebates, contest, and lotteries in tobacco promotion.
- s.31(2) Permits continued broadcasting of tobacco sponsored events.
- s.33 Establishes powers to regulate tobacco product and tobacco smoke constituents and to require tobacco companies to provide detailed information regarding: tobacco products and sales; toxic substances present in tobacco products and smoke; manufacturing and distribution practices; and promotional activities.
- ss.43-59 Establishes comprehensive and stringent enforcement powers and penalties.
- s.64 Repeals the *Tobacco Products Control Act*.

In essence, the *Tobacco Act* is a diluted *TPCA*. The new law is less restrictive toward informational and brand-name advertising. It is more lenient toward corporate sponsorship of cultural and sporting events, as it does not restrict sponsorship *per se* but only the public advertising of such sponsorship. Owing to its less restrictive nature, the new law may ultimately be less effective than its predecessor. Indeed, in attempt to meet the proportionality guidelines suggested by the Supreme Court in *RJR-MacDonald*, the new legislation is vaguer and less focussed than the *TPCA*. By targeting lifestyle, informational, and brand-name tobacco advertising, the *TPCA* attempted to remove tobacco advertising's presence from Canadian society. The *Tobacco Act* only prohibits lifestyle advertising and advertising directed expressly at youth. Much of the law is confusing and ambiguous—an invitation for avoidance and challenge by the tobacco companies. The end result is that despite all the restrictive measures of the *Tobacco Act* there will be a continued societal presence of tobacco through advertising.

The *Tobacco Act* experienced fierce opposition in both the House of Commons¹¹⁶ and in the media.¹¹⁷ However, this time the tobacco industry shifted the focus of the fight against tobacco laws from constitutional to economic grounds. This is not to say that the tobacco industry held Bill C-71 to be constitutionally valid—for it clearly did not—but rather that the tobacco lobby realised that the *Charter* is an ineffective preemptive weapon against proposed legislation. The tobacco industry recognised that the federal government would not be dissuaded from introducing Bill C-71 by threat of an impending *Charter* challenge. The federal government's initial refusal to negotiate with the tobacco industry over Bill C-71 was based upon the government's adamant stance regarding tobacco advertising and its relative confidence that the proposed legislation was within the constitutional parameters set out by the Supreme Court in *RJR-MacDonald*.

The tobacco lobby's economic attack was to threaten to remove all direct sponsorship from cultural and sporting events in Canada, a not insubstantial sum of \$60 million annually. This move demonstrated that the motivations behind tobacco's support of arts and sports were less than philanthropic. Quite simply, direct sponsorship of prestigious events such as the Montréal International Jazz Festival, the Canadian Grand Prix, and professional golf and tennis tournaments, for example, creates the perception that tobacco use is desirable, attractive, and more prevalent in Canadian society than it actually is. In short, the primary goal of direct sponsorship is legitimacy, not charity. And, when the forum for legitimacy is removed or restricted, as occurs under the *Tobacco Act*, the impetus for sponsorship disappears.

The cultural and sports communities' reaction to the threatened withdrawal of tobacco sponsorship highlighted another aspect of the Canadian tobacco war: that, in the words of singer Andrew Cash, "[t]obacco sponsorship itself is as addictive as the product."¹¹⁸ The organisers of the major tobacco sponsored events

¹¹⁶ See *Hansard: House of Commons, Oral Question Period* (5 February 1997) at 14:30, *Hansard: House of Commons, Government Orders* (21 February 1997) at 10:00, *Hansard: House of Commons, Government Orders* (4 March 1997) at 10:15, *Hansard: House of Commons, Oral Question Period* (4 March 1997) at 14:15, *Hansard: House of Commons, Government Orders* (6 March 1997) at 10:25, and *Hansard: House of Commons, Oral Question Period* (6 March 1997) at 14:20.

¹¹⁷ See, for example, T. Harper, "Lies, Smears, and Rumours: All's Fair in Tobacco War" *The Toronto Star* (2 March 1997) A1; T. Harper, "Tobacco Firms Put on the Ritz Trying to Stop the Bill" *The Toronto Star* (5 March 1997) A4; T. Harper, "Commons to Pass Tough Bill on Tobacco" *The Toronto Star* (6 March 1997) A14; S. Feschuck & T. Thanh Ha, "Ottawa Forcing Tobacco Bill Vote" *The Globe and Mail* (4 March 1997) A1; A. McIlroy & K. Unland, "Liberals Try to Limit Bill's Fallout" *The Globe and Mail* (5 March 1997) A4; and S. Delacourt, "Liberal Senators, MPs Feud Over Bill" *The Globe and Mail* (6 March 1997) A1.

¹¹⁸ J. Tibbetts, "Artists Want Replacement for Tobacco Funding" *The Edmonton Journal* (2 April 1997) A15.

apocalyptically predicted that without the direct funding and advertisement by tobacco companies, the events would not be able to continue. For example, Phil Heard, General Manager of the Vancouver Indy stated flatly that the race would depart Canada as soon as tobacco sponsorship ended.¹¹⁹ The organisers of the Montreal International Jazz Festival also made similar dire predictions despite that fact that Imperial Tobacco Inc.'s direct sponsorship of \$1.2 million a year is only 10 percent of the festival's total operating budget.¹²⁰

Nonetheless, these types of reactions from the organisers of tobacco sponsorship dependent events across Canada in turn created a political domino effect. Owing to the fact that Quebec holds a disproportionate amount of tobacco sponsored events in comparison to the other provinces,¹²¹ the Bloc Québécois criticised Bill C-71, saying that it would have grave economic consequences in Quebec. The Bloc argued that Quebec would lose massive tourist and tourist spin-off revenue if such events were forced to fold or scale down because of the withdrawal of tobacco sponsorship. In Montreal, merchants and taxi drivers demonstrated their opposition to the proposed legislation by staging a 15 minute business shutdown and taxi gridlock. It was clear that in the minds of Quebec politicians and persons economically connected to tobacco sponsored events, the financial benefits of such sponsorships far outweighed any detrimental health effects. This seems to be a honest case of economic prioritizing; it is hard to be concerned about health and societal harms when one's livelihood is at stake. The question of whether the economic benefit of some should be sacrificed for the potential health protection of others is far more difficult to answer. Such a problem illustrates well the greater societal and economic complexities of the issue.

The intense pressure from the tobacco lobby, the Bloc Québécois, cultural and sporting event organisers, and businesspersons dependent on such events was not enough to force the federal government to make widespread amendments to Bill C-71. However, the federal government did make two significant concessions. The Minister of Health, the Hon. David Dingwall, assured the organisers of Canada's major motor sport races¹²² that an amendment permitting all sponsor identification on cars, drivers, pit crews, and transportation equipment would be made to the

¹¹⁹ See the "Hi-Tech Bulletin/Molson Indy Vancouver 'Save Our Track'" home page at <http://vfv.com/hi_tech/save-our-race/contact.htm> (17 April 1997).

¹²⁰ T. Wills, "Ottawa Delays Tobacco Bill" *The Montreal Gazette* (4 March 1997) A1.

¹²¹ Such events include the Montreal International Jazz Festival, the Canadian Grand Prix, the Trois-Rivieres Indy Light, the Just For Laughs Comedy Festival, the Canadian Open Tennis Tournament, and the Montreal International Fireworks Competition.

¹²² Consisting of the Molson Indy Vancouver, the Molson Indy Toronto, the Trois-Rivieres Indy-Light, and the Canadian Grand Prix.

Tobacco Act before the end of 1997. This alteration, known as the “Molstar Amendment,” insures the continuing existence of the popular Players Racing Team and stabilises the short term viability of tobacco sponsored motor sport races in Canada.¹²³ Additionally, the federal government announced that the *Tobacco Act*’s restrictions on cigarette advertising at cultural and sporting events will not take effect until 1 October 1998. The purpose behind this move is to help such events wean themselves from tobacco sponsorship and to give their organisers time to seek out new sponsors.¹²⁴

Yet despite all the controversy and external opposition, on 6 March 1997 the *Tobacco Act* easily passed the House of Commons with a vote of 139–37. The overall political support for the law, regardless of party, was even more evident in the Senate where it passed on 16 April 1997 by a virtually unanimous vote of 75–1. The suggested amendments to the law were not well received in the Senate, being soundly defeated.¹²⁵ The *Tobacco Act* received Royal Assent on 25 April 1997.

However, on 21 April 1997, days before Bill C-71 received Royal Assent, Imperial Tobacco Ltd., RJR-MacDonald Inc., and Rothmans, Bensons, and Hedges Inc. filed in a Quebec Superior Court their request for both a temporary and permanent stay for the *Tobacco Act*.¹²⁶ The request for a legislative stay, based on the grounds that the law was unconstitutional, was adopted from American anti-legislative tactics.

In her 16-page decision denying the stay, Grenier J. held that while the *Tobacco Act* lacks clarity and contains a “certain confusion of ideas,” the law is not identical to the TPCA and could not therefore be automatically deemed to be unconstitutional. Grenier J. mused,

How can we reproach a government for having tried to legislate again when, by its commentary, the Supreme Court invited the government to do so, indicating that a partial restriction

¹²³ *Supra* note 119.

¹²⁴ The Minister of Health, the Hon. David Dingwall stated that, “[f]inancial institutions, I think should play their part with arts and cultural groups. See T. Harper, “You Fund the Arts, Ottawa Tells Bankers” *The Toronto Star* (4 March 1997) A2; and T. Wills, “Shell Out in Sponsorships, MPs Tell Big Banks” *The Montreal Gazette* (4 March 1997) A4.

¹²⁵ When the CMTC appeared before the Senate Justice and Constitutional Affairs Committee, Liberal Senator Colin Kennedy attacked Robert Parker, Chairman and CEO. of the CMTC, saying, “You bob and you weave and you duck and you bring high-priced lawyers with you and you find ways to con the Canadian public into buying your product.” In a statement afterwards, Parker declared that the new law “will be challenged with some speed.” See L. Eggerton, “Ottawa Tobacco Bill May Face Court Challenge” *The Globe and Mail* (2 April 1997) A4.

¹²⁶ *Rothmans et al. v. Canada* (A.G.), [1997] A.Q. no. 1261 (Que. Sup. Ct.).

on freedom of expression that respected certain parameters would not be judged unconstitutional?¹²⁷

In response to the setback, the tobacco companies seemed unsurprised. Marie-Josée Lapointe, spokesperson for the CMTTC, remarked that the industry, “[w]ill proceed in a few weeks to argue the merits of the case.” She continued by saying that the tobacco companies and retailers would move as quickly as possible to comply with the new law by taking down billboards and advertising.¹²⁸ Nonetheless, despite such posturing, it is clear that the federal government and its new *Tobacco Act* will again come under *Charter* attack.¹²⁹ It will be interesting to see if federal legislators have crafted a law that sufficiently follows the Supreme Court of Canada’s less than precise constitutional instructions.

¹²⁷ *Ibid.* at para. 23.

¹²⁸ L. Fitterman, “Cigarette Billboards Coming Down” *The Montreal Gazette* (30 April 1997) A1.

¹²⁹ When questioned about the *Tobacco Act*, Brian Levitt, C.E.O. of Imasco Ltd., owner of Imperial Tobacco Ltd., remarked, “[w]e feel very strongly that the law doesn’t meet the standards enunciated by the Supreme Court in its ruling in 1995.” “Imasco Confident to Defeat New Law” *The Ottawa Citizen* (1 May 1997) A7.