

SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC)

BETWEEN:

ATTORNEY GENERAL OF CANADA

APPELLANT
CROSS-RESPONDENT
(Respondent)

- and -

JTI-MACDONALD CORP.

RESPONDENT
CROSS-APPELLANT
(Appellant)

- and -

CANADIAN CANCER SOCIETY

INTERVENER

- and -

ATTORNEY GENERAL OF ONTARIO
ATTORNEY GENERAL OF QUEBEC
ATTORNEY GENERAL OF NEW BRUNSWICK
ATTORNEY GENERAL OF MANITOBA
ATTORNEY GENERAL OF SASKATCHEWAN
ATTORNEY GENERAL OF BRITISH COLUMBIA

INTERVENERS

FACTUM OF THE RESPONDENT
THE ATTORNEY GENERAL OF CANADA
ON CROSS-APPEAL
(English Translation)

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

**APPELLANT
CROSS-RESPONDENT
(Respondent)**

- and -

ROTHMANS, BENSON & HEDGES INC.

**RESPONDENT
CROSS-APPELLANT
(Appellant)**

- and -

CANADIAN CANCER SOCIETY

INTERVENER

- and -

**ATTORNEY GENERAL OF ONTARIO
ATTORNEY GENERAL OF QUEBEC
ATTORNEY GENERAL OF NEW BRUNSWICK
ATTORNEY GENERAL OF MANITOBA
ATTORNEY GENERAL OF SASKATCHEWAN
ATTORNEY GENERAL OF BRITISH COLUMBIA**

INTERVENERS

AND BETWEEN:

ATTORNEY GENERAL OF CANADA

**APPELLANT
CROSS-RESPONDENT
(Respondent)**

- and -

IMPERIAL TOBACCO CANADA LTD.

**RESPONDENT
CROSS-APPELLANT
(Appellant)**

- and -

CANADIAN CANCER SOCIETY

INTERVENER

- and -

**ATTORNEY GENERAL OF ONTARIO
ATTORNEY GENERAL OF QUEBEC
ATTORNEY GENERAL OF NEW BRUNSWICK
ATTORNEY GENERAL OF MANITOBA
ATTORNEY GENERAL OF SASKATCHEWAN
ATTORNEY GENERAL OF BRITISH COLUMBIA**

INTERVENERS

John Sims, Q.C.
Deputy Attorney General of Canada
Mtre. Claude Joyal
Justice-Canada
200 René-Lévesque Blvd. West
East Tower, 5th Floor
Montreal, Quebec H2Z 1X4

Tel.: (514) 283-8768
Fax: (514) 283-3856
Email: claud.joyal@justice.gc.ca

Attorneys for the Cross-Respondent
Attorney General of Canada

Mtre. Douglas C. Mitchell
Mtre. Catherine McKenzie
Irving Mitchell Kalichman LLP
4119 Sherbrooke Street West
Suite 200
Westmount, Quebec H3Z 1A7

Tel.: (514) 935-4460
Fax: (514) 935-2999
Email : dmitchell@irvingmitchell.com

-and-

Mtre. Georges Thibaudeau
Borden Ladner Gervais LLP
1000 de la Gauchetière Street West
Montreal, Quebec
H3B 45H

Tel.: (514) 954-2560
Fax: (514) 954-1905
Email : gthibaudeau@blgcanada.com

Attorneys for the Cross-Appellant
JTI-Macdonald Corp.

Mtre. Christopher M. Rupar
Justice-Canada
234 Wellington Street
Room 1212
Ottawa, Ontario
K1A 0H8

Tel.: (613) 941-2351
Fax: (613) 957-1920
Email: christopher.rupar@justice.gc.ca

Agent for the Cross-Respondent
Attorney General of Canada

Mr. Ed Van Bommel
Legal Assistant
Gowling Lafleur Henderson
160 Elgin Street
Suite 2600
Ottawa, Ontario K1P 1C3

Tel.: (613) 786-0107
Fax: (613) 788-3500
Email : ed.vanbommel@gowlings.com

Agent for the Cross-Appellant
JTI-Macdonald Corp.

Mtre. Chantal Masse
Mtre. Rachel Ravary
McCarthy Tétrault LLP
1000 de la Gauchetière Street West,
Suite 2500
Montreal, Quebec H3B 4S8

Tel.: (514) 397-4100
Fax: (514) 875-6246
Email : cmasse@mccarthy.ca

Attorneys for the Cross-Appellant
Rothmans, Benson & Hedges Inc.

Mtre. Gregory Bordan
Mtre. Sophie Perreault
Ogilvy, Renault LLP
1981 McGill College Ave.
Suite 1100
Montreal, Quebec H3A 3C1

Tel.: (514) 847-4747
Fax: (514) 286-5474
Email: gbordan@ogilvyrenault.com

-and-

Mtre. Simon Potter
McCarthy Tétrault LLP
1000 de la Gauchetière Street West,
Suite 2500
Montreal, Quebec H3B 4S8

Tel.: (514) 397-4100
Fax: (514) 875-6246
Email : spotter@mccarthy.ca

Attorneys for the Cross-Appellant
Imperial Tobacco Canada Ltd.

Mtre. Colin S. Baxter
McCarthy Tétrault LLP
40 Elgin Street
Suite 1400
Ottawa, Ontario K1P 5K6

Tel.: (613) 238-2000
Fax: (613) 563-9386
Email: cbaxter@mccarthy.ca

Agent for the Cross-Appellant
Rothmans, Benson & Hedges Inc

Mtre. Martha A. Healey
Ogilvy, Renault LLP
45 O'Connor Street
Suite 1500
Ottawa, Ontario K1P 1A4

Tel.: (613) 780-8661
Fax: (613) 230-5459
Email: mhealey@ogilvyrenault.com

Agent for the Cross-Appellant
Imperial Tobacco Canada Ltd.

Mtre. Julie Desrosiers
Fasken Martineau Dumoulin LLP
800 Place Victoria
Suite 3400
Montreal, Quebec H4Z 1E9

Tel.: (514) 397-7400
Fax: (514) 397-7600
Email: jdesrosiers@mtl.fasken.com

Attorneys for the Intervener
Canadian Cancer Society

Mtre. Robert K. Basu
Mtre. Mark Crow
Ministry of the Attorney General of Ontario
720 Bay Street, 4th Floor
Toronto, Ontario M5G 2K1

Tel: (416) 326-4470
Fax: (416) 326-4015
Email: mark.crow@jus.gov.on.ca

Attorneys for the Intervener
Attorney General of Ontario

Mtre. Dominique A. Jobin
Mtre. Caroline Renaud
Ministère de la Justice du Québec
1200, route de l'Église, 2nd Floor
Sainte-Foy, Quebec G1V 4M1

Tel.: (418) 643-1477, local 20788
Fax: (418) 644-7030
Emails: djobin@justice.gouv.qc.ca
carolinerenaud@justice.gouv.qc.ca

Attorneys for the Intervener
Attorney General of Ontario

Mtre. Jeffrey W. Beedell
Lang Michener
50 O'Connor Street
Suite 300
Ottawa (Ontario) K1P 6L2

Tel: (613) 232-7171
Fax: (613) 231-3191
Email: jbeedell@langmichener.ca

Agent for the Intervener
Canadian Cancer Society

Robert E. Houston, Q.C.
Burke-Robertson
70 Gloucester Street
Ottawa, Ontario
K2P 0A2

Tel.: (613) 236-9665
Fax: (613) 235-4430
Email: rhouston@burkerobertson.com

Agent for the Intervener
Attorney General of Ontario

Mtre. Sylvie Roussel
Noël & Associés
111 Champlain Street
Hull, Quebec J8X 3R1

Tel.: (819) 771-7393
Fax: (819) 771-5397
Email: s.roussel@noelassociés.com

Agent for the Intervener
Attorney General of Quebec

Mtre. Gaétan Migneault
Office of the Attorney General of New Brunswick
Centennial Building, Room 447
P.O. Box 6000
Fredericton, New Brunswick E3B 5H1

Tel.: (506) 453-2222
Fax: (506) 453-3275

Attorney for the Intervener
Attorney General of New-Brunswick

Mtre. Cynthia Devine
Attorney General of Manitoba
1205 – 405, Broadway
Winnipeg, Manitoba R3C 3L6

Tel.: (204) 945-0679
Fax: (204) 945-0053
Email: cdevine@gov.mb.ca

Attorney for the Intervener
Attorney General of Manitoba

Mtre. Thomson Irvine
Attorney General of Saskatchewan
1874 Scarth Street, 8th Floor
Regina, Saskatchewan
S4P 3V7

Tel.: (306) 787-6307
Fax: (306) 787-9111
Email: tirvine@justice.gov.sk.ca

Attorney for the Intervener
Attorney General of Saskatchewan

Brian A. Crane, Q.C.
Gowling Lafleur Henderson
160 Elgin Street
Suite 2600
Ottawa, Ontario
K1P 1C3

Tel.: (613) 786-0107
Fax: (613) 788-3500
Email : Brian.Crane@gowlings.com

Agent for the Intervener
Attorney General of New Brunswick

Henry S. Brown, Q.C.
Gowling Lafleur Henderson
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3

Tel.: (613) 233-1781
Fax: (613) 563-9869
Email: henry.brown@gowlings.com

Agent for the Intervener
Attorney General of Manitoba

Brian A. Crane, Q.C.
Gowling Lafleur Henderson
160 Elgin Street
Suite 2600
Ottawa, Ontario K1P 1C3

Tel.: (613) 786-0107
Fax: (613) 788-3500
Email : Brian.Crane@gowlings.com

Agent for the Intervener
Attorney General of Saskatchewan

Mtre. Craig Jones
Attorney General of British Columbia
1001 Douglas Street
Victoria, British Columbia V8W 9J7

Tel.: (250) 387-3129
Fax: (250) 356-9154
Email: craig.jones@gov.bc.ca

Attorney for the Intervener
Attorney General of British Columbia

Robert E. Houston, Q.C.
Burke-Robertson
70 Gloucester Street
Ottawa, Ontario K2P 0A2

Tel.: (613) 236-9665
Fax: (613) 235-4430
Email: rhouston@burkerobertson.com

Agent for Intervener
Attorney General of British Columbia

TABLE OF CONTENTS

FACTUM OF THE RESPONDENT ON CROSS-APPEAL	Page
OVERVIEW	1
PART I – THE FACTS	3
PART II – CONSTITUTIONAL QUESTIONS	7
PART III – ARGUMENT	9
1. The decision in <i>R.J.R. MacDonald</i> , [1995] 3 S.C.R. 199	9
2. Tobacco products promotion restrictions	10
3. The <i>Tobacco Act</i> and minimal impairment	12
4. Contextual factors	15
5. The structure of section 22	16
6. Subsection 22(3) – Advertising appealing to young persons	20
7. Subsection 22(3) – Lifestyle advertising	25
8. The <i>WHO Framework Convention on Tobacco Control</i>	29
9. Conclusions	30
10. The warnings and freedom of expression	31
10.1 Forced expression	32
10.2 Size of health messages and freedom of expression	34
10.3 The Information Regulations and section 1 of the Charter	35
11. Conclusions	40
12. Answers of the Attorney General of Canada to the constitutional questions	40
13. Remedies	41

TABLE OF CONTENTS

FACTUM OF THE RESPONDENT ON CROSS-APPEAL	Page
PART IV – COSTS	.....42
PART V – ORDER SOUGHT	.....42
PART VI – ALPHABETICAL TABLE OF AUTHORITIES	.....43
PART VII – EXTRACTS FROM STATUTES	

Please refer to the French version of the Factum of the Respondent on Cross-Appeal for this section.



FACTUM OF THE RESPONDENT ON CROSS-APPEAL

OVERVIEW

1. In 1994, the manufacturers argued before this Court that a total prohibition on all advertising of tobacco products was not justified under section 1 of the *Charter* since it was necessary to distinguish between informative or brand-preference advertising, lifestyle advertising or advertising aimed at young persons.
10
2. In answer to these arguments, the Attorney General maintained that any form of advertising constituted an incitement to smoking.
3. This Court rejected the Attorney General's thesis and suggested that Parliament allow information or brand-preference advertising, and prohibit lifestyle advertising or advertising aimed at young persons.
4. Parliament thoroughly examined the problem posed by tobacco and the manufacturers' marketing. It responded to the judgment of this Court by enacting section 22 of the *Tobacco Act*, which in subsection 22(2) allows information or brand-preference advertising in publications with an adult readership of not less than 85%, or in signs in places where young persons are not permitted by law.
20
5. Moreover, Parliament wanted to ensure that the authorization under subsection 22(2) would not open the way to aggressive marketing practices encouraging young persons in particular to start smoking and becoming addicted to tobacco.
6. That is why Parliament was careful, in subsections 22(3) and (4), to exclude lifestyle advertising and advertising that could be construed to be appealing to young persons from information or brand-preference advertising.
30

7. Subsections 22(1), (2), (3) and (4) must be read in their entire context, following the modern rule of interpretation and taking into account the fact that they are addressed to a sophisticated industry with great expertise in marketing.

8. In this context, and bearing in mind the applicable rules of interpretation, subsections 22(3) and 22(4) of the Act, dealing with advertising appealing to young persons and lifestyle advertising, are intelligible standards the scope of which is not overly broad. These subsections are justified under section 1 of the *Charter*.

10 9. The obligation to place warnings attributed to Health Canada occupying 50% of the packaging is not a form of “forced” expression that infringes paragraph 2(b) of the *Charter*, since it does not associate the manufacturers with a point of view that is not their own.

10. Insofar as the manufacturers claim that this obligation limits their ability to communicate, the onus is on them to demonstrate this, while taking into account the principles and values underlying freedom of expression. The manufacturers have not made this demonstration.

11. Eleven years have elapsed since the judgment of this Court in 1995. More than 168 countries have condemned the marketing practices of the worldwide tobacco industry. By ratifying the
20 *WHO Framework Convention on Tobacco Control*, 140 countries have undertaken, in accordance with their respective constitutions, to prohibit or restrict advertising, promotion and sponsorship that contributes to promote tobacco products. The *Tobacco Act* does not prohibit all promotion of tobacco. It responds to the guidelines of this Court as well as to the international objectives of the fight against tobacco, while respecting the limits imposed by the Constitution of Canada.

PART I – THE FACTS

12. The manufacturers present an incorrect version of the facts, of the legislative history of the *Tobacco Act*, and of the proceedings, evidence and judgment of first instance.¹³⁴ The Attorney General urges this Court to refer instead to the statement of the facts mentioned in his factum on the main appeal¹³⁵ and to the findings of fact of the trial judge, which the manufacturers do not question in their cross-appeal.

13. The manufacturers argue that Parliament has sought to impair freedom of expression as much as possible¹³⁶ and rely on the document “Tobacco Control: A Blueprint to Protect the Health of Canadians”.¹³⁷ This document was used to consult the public¹³⁸ and does not have the significance attributed to it by the manufacturers. As Denis J. noted, referring to the testimony of Ms. Judy Ferguson, Health Canada examined all aspects of tobacco use and identified the legislative options enumerated in the document “Analysis of Options for Tobacco Product Promotional Activity Restrictions”.¹³⁹

14. The promotion of tobacco products is only one of the aspects that was examined by the team led by Ms. Judy Ferguson. It is inappropriate to suggest that Health Canada, the drafters of the Act and Parliament sought to impair freedom of expression to the maximum possible extent. The work of Health Canada began after this Court’s decision in *RJR-Macdonald* and was compiled on a continuous basis throughout the parliamentary process (since the Act was amended during

¹³⁴ Factum of Appellants on Cross-Appeal, par. 9 to 27.

¹³⁵ Factum of the Attorney General of Canada on Appeal, par. 8 to 33.

¹³⁶ Factum of Appellants on Cross-Appeal, par. 15, 16, 39, 41, 46, 47 and 107.

¹³⁷ **D-274:** Tobacco Control: A Blueprint to Protect the Health of Canadians [CAQ, Vol. 69, p. 26693] **A.R., Vol. XVIII, pp. 3475 et seq.**

¹³⁸ Judgment of Denis J., A.R., Vol. 1, par. 171 to 176, p. 41, par. 265 to 268, p. 51.

¹³⁹ a) **D-271:** Analysis of Options for Tobacco Product Promotional Activity [CAQ, Vol. 67, p. 25641] A.R., Vol. 17, pp. 3337 et seq.

b) Judgment of Denis J., A.R., Vol. 1, par. 269 to 280, pp. 149-150.

the proceedings), hence the numerous versions of the document “Analysis of Options for Tobacco Product Promotional Activity”.¹⁴⁰

15. The manufacturers allege that the Attorney General would have substituted evidence of legislative facts *in lieu of* testimonial evidence.¹⁴¹ This proposition is incorrect. The Attorney General sent the manufacturers the list and the documents he intended to file as legislative facts.¹⁴² Furthermore, as the judgment of Denis J. states,¹⁴³ the manufacturers consented to the production of these documents and themselves filed documents as legislative facts.¹⁴⁴ The Attorney General also filed numerous internal documents of the manufacturers and called eight (8) witnesses whose testimony is summarized by Denis J.¹⁴⁵

¹⁴⁰ **D-273 A)** Policy Analysis of Tobacco Product Promotional Activity Restrictions - 26 April 1996 [CAQ, Vol. 67, pp. 25897 et seq.]; **D-273 B)** Policy Analysis of Tobacco Product Promotional Activity Restrictions - September 1996 [CAQ, Vol. 67, pp. 25942 et seq.]; **D-273 C)** Policy Analysis of Tobacco Product Promotional Activity Restrictions - November 1996 [CAQ, Vol. 68, pp. 26022 et seq.]; **D-273 D)** Policy Analysis of Tobacco Product Promotional Activity Restrictions - February 1997 [CAQ, Vol. 68, pp. 26129 et seq.]; **D-273 E)** Policy Analysis of Tobacco Product Promotional Activity Restrictions - March 1997 [CAQ, Vol. 68, pp. 26524 et seq.]; **D-273 F)** Policy Analysis of Tobacco Product Promotional Activity Restrictions - March 1997 (French translation) [CAQ, Vol. 69, pp. 26239 et seq.]; **D-273 G)** Policy Analysis of Tobacco Product Promotional Activity Restrictions - undated (French translation) [CAQ, Vol. 69, pp. 26529 et seq.].

¹⁴¹ a) Factum of Appellants on Cross-Appeal, par. 26, 27.

b) *Pub. Sch. Bds. Ass. v. Alberta (A.G.)*, [2000] 1 S.C.R. 44. [Book of Authorities of Respondents, tab 14] is inapplicable because it concerns an application to file fresh evidence in this Court. This applies as well to *R. v. Malmö-Levine*, [2003] 3 S.C.R. 571 [Book of Authorities of Respondents, tab 18] which concerns a decision of the trial court denying leave to file proof of legislative facts.

¹⁴² List of extrinsic evidence of Attorney General, with explanations, April 2002 [CAQ, Vol. 6, pp. 2122 to 2179] **A.R., Vol. XVIII, pp. 3562 et seq.**

¹⁴³ Judgment of Denis J., par. 72. A.R., Vol. 1, p. 190.

¹⁴⁴ Plaintiff’s List of Extrinsic Evidence, 23 April 2002 [CAQ, Vol. 6, pp. 2195-2196].

¹⁴⁵ a) Judgment of Denis J., par. 112 to 215. A.R., Vol. 1, pp. 35 to 45.

b) Judgment of Denis J., Appendix 1, par. 125 to 435. A.R., Vol. 1, pp. 117 to 171.

c) Table of references to evidence prepared by the Attorney General for the Quebec Court of Appeal. **A.R., Vol. 4 and 5.**

16. The Attorney General submits that the fact that certain witnesses were not called to testify is of no relevance since what matters is the evidence on the record. The manufacturers themselves likewise withdrew three of their experts who were to testify.¹⁴⁶

17. The manufacturers allege that they were deprived of the necessary information to review the Act by reason of the fact that the Clerk of the Privy Council refused to disclose certain documents under s. 39 of the *Canada Evidence Act*. However, the manufacturers obtained all versions of the document “Analysis of Options for Tobacco Product Promotional Activity Restrictions” setting out the legislative options considered by Health Canada for regulating the promotion of tobacco products, as this Court suggested.¹⁴⁷

18. Moreover, they obtained, in the course of the proceedings before the Quebec Court of Appeal, following the judgment of the Federal Court of Appeal in *Canada v. Canada*,¹⁴⁸ all the discussion papers (par. 39(4)(b)) contained in cabinet documents over the last 25 years, including the discussion papers concerning Bill C-71 which led to the enactment of the *Tobacco Act*.

¹⁴⁶ Lucy Henke:

“She will deal with theoretical and actual purpose and effect of advertising and, in particular, the key question in this case: Does advertising affect overall consumption as the Attorney-General of Canada contends or brand choice as the Plaintiffs contend. Dr. Henke has special expertise with respect to the impact of advertising on children and she will touch on this issue. Her evidence will also cover ‘lifestyle advertising’ and the impact of sponsorship.”

Plaintiff’s Pre-Trial Conference Memorandum, 1st June 2001 [CAQ, Vol. 4, p. 1447]

Gerald Wilde: “Warnings on packages” ITL – Declaration of inscription on the roll for hearing – 1st December 2000

Zalman Amit: “The effects of advertising” ITL – Declaration of inscription on the roll for hearing – 1st December 2000

¹⁴⁷ *R.J.R. MacDonald Inc. v. A.G. (Canada)*, [1995] 3 S.C.R. 199, McLachlin J., par. 166, p. 345; Iacobucci J., par. 186, p. 352. **Book of Authorities, Vol. 2, tab 22.**

¹⁴⁸ *Canada (Minister of the Environment) v. Canada (Information Commissioner)*, 2003 FCA 68. **Book of Authorities, Vol. III, tab 31.**

19. The Attorney General also took the initiative to ask the Court of Appeal to file these discussion papers in the record, but this request was denied.¹⁴⁹

20. The only questions raised by the manufacturers' cross-appeal concern the interpretation of subsections 22(3) and 22(4), the definition of lifestyle and the size of the warnings. No inference need be drawn from the fact that the Clerk filed certifications under section 39 of the *Canada Evidence Act*, as Beauregard J.A. noted.¹⁵⁰

21. The manufacturers maintain that this case has been argued on the premise that a total prohibition of any advertising would not be justified under section 1 of the *Charter*.¹⁵¹ This statement is incorrect. The question of whether a total prohibition of all advertising would now be justified was not debated in Superior Court, since the issue before it was rather to determine whether the restrictions imposed on the manufacturers' marketing by the *Tobacco Act* are reasonable measures in a free and democratic society.¹⁵²

¹⁴⁹ Judgment of this Court refusing leave to appeal to the Attorney General, docket 30611, 27 January 2005, Bastarache, LeBel and Deschamps JJ.

¹⁵⁰ Judgment of Beauregard J.A., A.R., Vol. 2, par. 227, p. 340.

¹⁵¹ Factum of Appellants on Cross-Appeal, par. 3.

¹⁵² Judgment of Denis J., A.R., Vol. 1, page 55, par. 285.

PART II – CONSTITUTIONAL QUESTIONS

22. The manufacturers have chosen to reformulate the constitutional questions posed by the Chief Justice in her order dated May 24, 2006. The debate on the cross-appeal now only concerns subsections 22(3) and 22(4) of the Act and the increase in the size of the warnings. The Attorney General does not accept the formulation of the questions proposed by the manufacturers, which has for effect to sidetrack the analysis to which the Court must proceed.

23. Questions 1 and 2:

- (1) Do subsections 22(3) and 22(4) of the *Tobacco Act* infringe s. 2(b) of the *Canadian Charter of Rights and Freedoms*?

The Attorney General concedes that subsection 22(3) combined with the definition of “lifestyle advertising” in subsection 22(4) infringes s. 2(b) of the *Charter*.

- (2) If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

The Attorney General maintains that subsections 22(1) and 22(2) allow information and brand-preference advertising, without appealing elements for young persons and without lifestyle, and that subsection 22(3) combined with the definition of “lifestyle advertising” in subsection 22(4) is justified under section 1 of the *Charter*.

24. Questions 3 and 4:

- (3) Do the provisions of the *Tobacco Products Information Regulations*, SOR/2000-272, governing the size of the mandatory messages, infringe s. 2(b) of the *Canadian Charter of Rights and Freedoms*?

The Attorney General maintains that the obligation to place warnings attributed to Health Canada does not infringe freedom of expression. The warnings so attributed are intended to inform Canadians of the detrimental effects of tobacco and respect the manufacturers' right to say nothing.

- (4) If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

The Attorney General maintains that the increase in the size of the warnings is justified under s. 1 of the *Charter*.

PART III – ARGUMENT

1. The decision in *R.J.R. MacDonald*, [1995] 3 S.C.R. 199

25. In 1995, this Court declared of no force or effect the prohibition of all advertising of tobacco products (s. 4 of the *Tobacco Products Control Act*) and indicated to Parliament that it had to examine other less intrusive measures including, *inter alia*, a partial prohibition that would have allowed informative and brand-preference advertising, a prohibition on lifestyle advertising or advertising aimed at young persons, and allow the attribution of health messages to Health Canada.¹⁵³

26. Parliament responded to this judgment by enacting the *Tobacco Act*. On the one hand, it allows informative or brand-preference advertising (subsection 22(2)) and on the other, prohibits advertising that could be construed to be appealing to young persons, as well as lifestyle advertising.

27. The manufacturers maintain that Parliament did not participate in the dialogue with the Court since the *Tobacco Act* would have been drafted so as to impair freedom of expression as much as possible.¹⁵⁴

28. This reasoning does not rest on any foundation. If Parliament had intended to re-enact legislation prohibiting any form of advertising, it would not have gone to the trouble of drafting Part IV of the Act to provide for prohibitions and permissions. Professor Hogg writes in this regard:¹⁵⁵

¹⁵³ *R.J.R. MacDonald Inc. v. A.G. (Canada)*, [1995] 3 S.C.R. 199, McLachlin J., p. 344, par. 164; Iacobucci J., p. 355, par. 191. **Book of Authorities, Vol. 2, tab 22.**

¹⁵⁴ Factum of Appellants on Cross-Appeal, par. 16, 39, 41, 46, 47 and 107.

¹⁵⁵ HOGG, Peter, et al. “*The Charter Dialogue Between Courts and Legislatures*” (1997) 35 Osgoode Hall Law Journal 75, pp. 85-86. **Book of Authorities, Vol. 2, tab 28.**

“Even if the court has **a weak grasp of the practicalities of the particular field of regulation, so that the court’s alternative is not really workable**, it will usually be **possible** for the policymakers to devise a less restrictive alternative that is practicable. With appropriate recitals in the legislation, and with appropriate evidence available if necessary to support the legislative choice, one can usually be confident that a carefully drafted “second attempt” will be upheld against any future *Charter* challenges.” ... “In *RJR-MacDonald Inc. v. Canada (A.G.)* (1995), the Supreme Court of Canada struck down a federal law that prohibited the advertising of tobacco products. In its discussion of the least restrictive means standard, the Court made clear that it would have upheld restrictions that were limited to “lifestyle advertising” or advertising directed at children. Within two years of the decision, Parliament enacted a comprehensive new *Tobacco Act*. The new Act prohibits lifestyle advertising and restricts advertising to media which is targeted at adults, but allows tobacco manufacturers to use informational and brand-preference advertising in order to promote their products to adult smokers.”

2. Tobacco products promotion restrictions

29. The *Tobacco Act* regulates the marketing of tobacco products.¹⁵⁶ Part IV of the Act sets guidelines for the promotion of these products.

30. The Attorney General’s factum on the main appeal analyzes the whole of sections 18 to 33 of the Act. However, it is useful to clarify the following.

31. Contrary to what the manufacturers say, the definition of the term “promotion” in section 18 covers only the commercial promotion of tobacco products.¹⁵⁷

32. The manufacturers allege that section 21, which prohibits testimonials and endorsements, is sufficient to prohibit lifestyle advertising. According to them, lifestyle advertising is limited to the representation of a person. However, lifestyle advertising is not restricted to the representation of a person, as admitted by Mr. Ed Ricard, director of the Marketing and Development Strategy Group at ITL.¹⁵⁸

¹⁵⁶ Factum of the Attorney General of Canada on Appeal, par. 48 to 53.

¹⁵⁷ a) Factum of Appellants on Cross-Appeal, par. 52, p. 15.

b) Judgment of Denis J., A.R., Vol. 1, pp. 63-64, par. 336 to 342.

¹⁵⁸ a) Testimony of Ed Ricard, 29 January 2002 [CAQ, Vol. 143, p. 56831] **A.R., Vol. XVIII, p. 3620.**

33. Section 21 deals with a marketing technique different from the concept of lifestyle advertising.

34. The manufacturers allege, moreover, that section 53¹⁵⁹ would imply a reversal of the burden of proof in the event of a prosecution for infringement of s. 22 and that they will have to bear the onus of demonstrating that they benefit from one of the exceptions to the prohibitions set out in the Act. This proposition is mistaken not only because it is based on an incorrect reading of the Act as to what is allowed and what is prohibited, but also because it gives s. 53 a scope that it does not have.

35. This provision is not unique in Canadian law. Other laws, both federal and provincial, have identical provisions that have been interpreted and declared valid by the courts. Section 794 of the *Criminal Code* (which applies to any summary conviction offence under subsection 34(2) of the *Interpretation Act*¹⁶⁰) essentially states the same thing. The entire body of case law in relation to this kind of provision establishes that: the burden imposed by such a provision applies only in limited cases that essentially have to do with (1) exemptions related to obtaining authorization, generally in the form of a licence, to do something that otherwise would constitute an offence, or (2) refraining from carrying out a statutory obligation.¹⁶¹ Section 53 must be interpreted in the

b) Exhibit I-9: Benson & Hedges King Size – Black and Gold advertisement [CAQ, Vol. 71, pp. 27391] **A.R., Vol. XVIII, p. 3621.**

c) Extracts – Lifestyle Advertising. A.R., Vol. XIII, pp. 2462 to 2531.

¹⁵⁹ Factum of Appellants on Cross-Appeal, par. 70.

¹⁶⁰ R.S.C. 1985, ch. I-21, **Factum of the Cross-Respondent (french version)**, « F.V. », p. 54.

¹⁶¹ *R. v. Lee's Poultry Ltd.*, (1985) 17 C.C.C. (3d) 539 (Ont. C.A.). **Book of Authorities, Vol. IV, tab 48**; *R. v. Schwartz*, [1988] 2 S.C.R. 443. **Book of Authorities, Vol. IV, tab 50**; *R. v. H.(P.)*, (2000) 143 C.C.C. (3d) 223 (Ont. C.A.). **Book of Authorities, Vol. III, tab 46**; *R. v. Daniels* (1990), 60 C.C.C. (3d) 392 (BCCA). **Book of Authorities, Vol. III, tab 43**; *R. v. Perka*, [1984] 2 S.C.R. 232. **Book of Authorities, Vol. IV, tab 49**; *R. v. Fisher* (1994), 17 O.R. (3d) 295 (Ont. C.A.), p. 304: “In my view, the Crown correctly suggests that the authority of Schwartz is limited to cases where a licensing scheme is in place, such that the existence of a licence, permit or certificate can be said to be neither an element of the offence, nor a defence in true sense.” **Book of Authorities, Vol. III, tab 45.** In *Proulx v. Krukowski*, (1993), 109 D.L.R. (4th) 606 (Ont. C.A.) p. 607: “The exemption does not relate in any way to any essential averment, and does not impose a burden on the respondent to disprove an essential averment of the offence. Furthermore, s. 47(3) has nothing to do with reasonable doubt.” **Book of Authorities, Vol. III, tab 39.**

same way and certainly does not have for effect to bring about a general reversal of the burden of proof in regard to what promotion is prohibited or allowed by the Act.

36. For example, the *Tobacco Reporting Regulations*¹⁶² impose an obligation on the manufacturers to file an annual report containing an analysis of the chemical emissions of each of their cigarette brands. Subsection 14(11) of the Regulations provides, however, a mechanism whereby a manufacturer may be exempted from certain tests. To obtain this exemption, the manufacturer must send a letter to the Minister, who may grant the exemption in writing, where applicable. It is precisely in such a situation that s. 53 applies. Indeed, where a manufacturer having obtained an exemption from the Minister would subsequently be charged with having failed to file a toxic emissions report, it will be up to the manufacturer to demonstrate that it obtained the Minister's exemption by producing the appropriate document.

3. The *Tobacco Act* and minimal impairment

37. The commercial promotion of tobacco is dominated by the three large manufacturers who control virtually the entire Canadian market. Sections 18 to 33 of the Act regulate promotion by putting in place a statutory regime of strict liability. This is legislation that does not target a large number of companies, but rather is directed primarily to the three large Canadian manufacturers.

38. The manufacturers admit that their tobacco promotion activities must be subject to a statutory framework.¹⁶³

39. They also admit that the definitions of information or brand-preference advertising do not raise any difficulty.¹⁶⁴

¹⁶² Factum of the Attorney General of Canada on Appeal, p. 116.

¹⁶³ Judgment of Denis J., par. 84, A.R., Vol. 1, p. 30.

¹⁶⁴ Factum of Appellants on Cross-Appeal, par. 60.

40. Once the manufacturers add lifestyle elements to their advertising beyond what is allowed by the definitions of information or brand-preference advertising, they are laying themselves open to sanctions, without being deprived of the usual legal guarantees in criminal matters.

41. The manufacturers claim that because of the sentences that may be imposed on them (s. 47), the Act has a chilling effect.¹⁶⁵

42. The rules of conduct governing the three large manufacturers, including the sentences that may be imposed on them, must be assessed taking into account their marketing expertise and their significant financial resources.¹⁶⁶

43. The manufacturers' claims of a chilling effect must be assessed taking into account their previous conduct and that of their parent corporations, which show that they have attempted to take advantage of each regulatory and statutory loophole to circumvent the prohibitions on advertising imposed on them in Canada or abroad.¹⁶⁷

¹⁶⁵ Factum of Appellants on Cross-Appeal, par. 68, 69, 123 to 126.

¹⁶⁶ *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, Cory J., p. 250: "The ultimate question is whether the imposition of imprisonment on the basis of strict liability comports with the principles of fundamental justice. For the reasons set out earlier concerning the underlying rationale of regulatory offences, I am of the opinion that it does.

Regulatory schemes can only be effective if they provide for significant penalties in the event of their breach. Indeed, although it may be rare that imprisonment is sought, it must be available as a sanction if there is to be effective enforcement of the regulatory measure. Nor is the imposition of imprisonment unreasonable in light of the danger that can accrue to the public from breaches of regulatory statutes.... The potential for serious harm flowing from the breach of regulatory measures is too great for it to be said that imprisonment can never be imposed as a sanction." **Book of Authorities, Vol. 1, tab 19.**

¹⁶⁷ a) Factum of the Attorney General of Canada on Appeal, par. 92, 107 to 127.

b) Judgment of Denis J., A.R., Vol. 1, pp. 56 and 57, par. 292 to 299.

c) *République Française v. KROONDIJK Onno, NIEUWOUDT Daniel, La Société British American Tobacco Europe BV, La Société British American Tobacco Export BV, La Société British American Tobacco Manufacturing BV*, 3 May 2006, Cour de cassation, chambre criminelle. **Book of Authorities, Vol. IV, tab 54.**

d) *Comité national contre le tabagisme (CNCT) v. Société nationale d'exploitation industrielle des tabacs et allumettes – SEITA, Société Altadis Financial Service (A.F.S.)*, 28 July 2006, Tribunal de grande instance de Paris. **Book of Authorities, Vol. III, tab 33.**

44. The manufacturers maintain that it would have been possible to reduce the chilling effect by putting in place a pre-clearance mechanism of allowed advertising¹⁶⁸ and they refer to the testimony of lawyer Rafe Engle whom they presented as an expert on advertising codes and regulation. However, Mr. Justice Denis dismissed his testimony, which he characterized as not credible.¹⁶⁹

45. In reality, a pre-clearance system like the one provided in the manufacturers' *Voluntary Code* was considered as a legislative option and was rejected.¹⁷⁰

“There are very good reasons for the traditional reticence of English, American, and Canadian courts to impose prior restraints on speech.”

46. Moreover, the putting in place of a statutory pre-clearance system would have for effect to exempt the manufacturers of any obligation, whereas the purpose of regulatory legislation such as the *Tobacco Act* is to see to it that the manufacturers take reasonable steps not to contravene the Act.¹⁷¹

“The concept of diligence is based on the acceptance of a citizen's civic duty to take action to find out what his or her obligations are. Passive ignorance is not a valid defence in criminal law.”

¹⁶⁸ Factum of Appellants on Cross-Appeal, par. 13, 39(c) and 124.

¹⁶⁹ a) Judgment of Denis J., A.R., Vol. 2, p. 229, par. 112, A.R., Vol. 1, pp. 103 and 104, par. 1 to 16:

“[112] As the Court does not find the witness credible, the expert testimony of Mr. Engle shall be disregarded. It has been demonstrated that the *Tobacco Industry Voluntary Packaging and Advertising Code* was created primarily to serve the industry's purposes, with consumer protection trailing far behind this first objective.”

b) Since February 1, 1997, the CRTC no longer gives prior approval for advertisements for alcoholic beverages. P-15: “Public Notice CRTC 1996-108” [CAQ., Vol. 12, pp. 4543, 4544]; P-16: “Public Notice CRTC 1997-12” [CAQ, Vol. 12, p. 4565].

¹⁷⁰ a) **D-271**: Analysis of Options for Tobacco Product Promotional Activity Restrictions [CAQ, Vol. 67, p. 25740]. **A.R., Vol. 17, p. 3337.**

b) *Little Sisters Book & Art Emporium v. Canada*, [2000] 2 S.C.R. 1120, Iacobucci J., par. 231 to 236, pp. 1239 to 1242. **Book of Authorities, Vol. III, tab 35.**

¹⁷¹ *Lévis (City) v. Tétreault*, [2006] 1 S.C.R. 420, Lebel J., par. 30. **Book of Authorities, Vol. IV, tab 56.**

4. Contextual factors

47. The manufacturers maintain that subsection 22(3), combined with the definition of “lifestyle advertising” in subsection 22(4), is overly broad and vague, thereby nullifying for all practical purposes the authorization to engage in information or brand-preference advertising.¹⁷²

48. It is accepted fact that the manufacturers are bodies corporate that cannot avail themselves of the legal guarantees set out in section 7 of the *Charter* in a civil action for a declaratory judgment, as is the case in this instance.¹⁷³

49. In the context of the section 1 *Charter* review of subsections 22(3) and 22(4) of the *Tobacco Act*, it is necessary to consider the contextual factors in order to identify that which the Act addresses. The Attorney General’s factum on the main appeal sets out some of these factors.¹⁷⁴

50. The Attorney General adds that, in the context where the cross-appeal maintains that subsections 22(3) and 22(4) are overly broad and vague, the Court should take the following factors into account:

- The prohibition of advertising appealing to young persons or lifestyle advertising in order to reduce the appeal of tobacco and tobacco consumption constitutes a legitimate exercise of social policy.
- More than 168 countries have signed the *WHO Framework Convention on Tobacco Control*, which provides for measures limiting the promotion of tobacco products. 140 countries have ratified it and undertaken, in accordance with their constitutions, to prohibit or limit advertising, promotion and sponsorship.

¹⁷² Factum of Appellants on Cross-Appeal, par. 38, 73, 74, 75, 93, 110 and 123.

¹⁷³ *Irwin Toy Ltd v. Québec (A.G.)*, [1989] 1 S.C.R. 927, pp. 1002-1004. **Book of Authorities, Vol. 1, tab 8**; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, Lamer J. (in the majority on this point), p. 180. **Book of Authorities, Vol. 1, tab 19**.

¹⁷⁴ Factum of the Attorney General of Canada on Appeal, p. 54, par. 152.

- Advertising appealing to young persons or lifestyle advertising does not lend itself to strict codification.
- The manufacturers are aware that the presence of lifestyle elements or elements appealing to young persons in advertising constitutes an incentive to tobacco consumption.
- The manufacturers know the physical properties of their products and the characteristics of their brands.
- Society no longer tolerates that tobacco products advertising be associated with images appealing to young persons or with lifestyle images.
- The *Charter* must not be used to reduce the protection provided by the *Tobacco Act* to young persons and smokers, a majority of whom come from the most vulnerable segments of society.

51. The prohibition on inserting lifestyle elements or elements appealing to young persons in information or brand-preference advertising is essential in order to achieve the objectives sought by the Act.

5. The structure of section 22

52. Subsection 22(1) prohibits “Subject to this section” the promotion of tobacco by means of an advertisement. It does not prohibit all tobacco advertising and instead refers the reader to the other subsections of that section.

53. Subsection 22(2) provides that “Subject to the regulations, a person may advertise a tobacco product by means of information advertising or brand-preference advertising” (subsection 22(4)) in publications addressed to adults or in signs in places where only adults have access:

22 (4) The definitions in this subsection apply in this section.

22 (4) Les définitions qui suivent s’appliquent au présent article.

“information advertising” means advertising that provides factual

« publicité informative » Publicité qui donne au consommateur des renseignements factuels et qui porte :

information to the consumer about	sur un produit ou ses caractéristiques;
(a) a product and its characteristics; or	sur la possibilité de se procurer un produit ou une marque d'un produit ou sur le prix du produit ou de la marque.
(b) the availability or price of a product or brand of product.	
“brand-preference advertising” means advertising that promotes a tobacco product by means of its brand characteristics.	« publicité préférentielle » Publicité qui fait la promotion d'un produit du tabac en se fondant sur les caractéristiques de sa marque.

54. The manufacturers do not raise any difficulty in the interpretation or application of information and brand-preference advertising.¹⁷⁵

55. However, they maintain that the lack of any statutory or regulatory obligation to include warnings in information or brand-preference advertising shows that Parliament itself believed that the Act would have for effect to prevent this type of advertising.¹⁷⁶ This is an inference of intention that does not resist to scrutiny.

56. It should be pointed out, moreover, that the lack of a statutory or regulatory obligation to place warnings on advertising does not release the manufacturers from their common law or civil law obligations to warn the consumer of the health hazards of their product (*Tobacco Act*, s. 16).¹⁷⁷

57. Parliament does not speak for no reason, and it must be concluded that the manufacturers are authorized to engage in information or brand-preference advertising, such as, for example:

¹⁷⁵ Factum of Appellants on Cross-Appeal, par. 59.

¹⁷⁶ Factum of Appellants on Cross-Appeal, par. 126.

¹⁷⁷ *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, McLachlin J., par. 20, 22 and 25. **Book of Authorities, Vol. III, tab 34.**

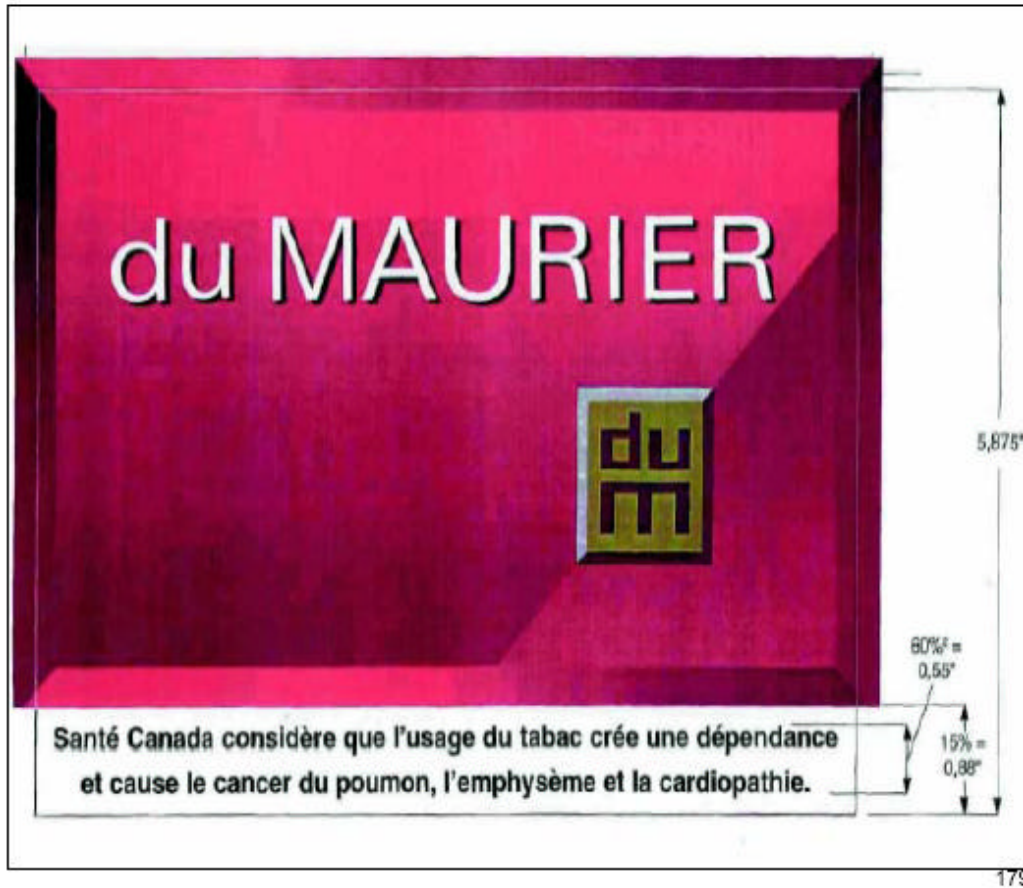
MONTREAL TOBACCO
Canadian Cigarettes
Accessories – Pipes – Lighters –
Cigarette Holders – Cigar Clips – Matches
Peel StreetTel : 999-9999
Open from 8 a.m. to 11 p.m.

178



¹⁷⁸ D-167: Player's Advertising, 1988 to 1997 [CAQ., Vol. 45, p. 17660]

179



¹⁷⁹ D-218: Du Maurier Advertising 1988-1997 [CAQ., Vol. 58, p. 22484]

6. Subsection 22(3) – Advertising appealing to young persons

58. The manufacturers propose an incorrect interpretation of s. 22, both in terms of its components and in terms of the onus on the Crown in the context of a criminal prosecution.

59. Subsection 22(1), combined with subsection 22(3), creates a strict liability offence, the *actus reus* of which is to engage in advertising “*that could be construed on reasonable grounds to be appealing to young persons*”.

60. The use of the expression “reasonable grounds” does not constitute a lesser burden in criminal matters; rather, this concept is a component of the prohibited act in regard to which the usual standard (beyond a reasonable doubt) applies.

61. Contrary to their contentions, the manufacturers cannot be convicted even if there were a reasonable doubt as to the commission of an offence. The Crown will have to prove the *actus reus* of the offence: in other words, prove beyond a reasonable doubt¹⁸⁰ that a manufacturer has engaged in advertising “*that could be construed on reasonable grounds to be appealing to young persons*”.

62. Section 11(a) of the *Charter* provides that any person charged with an offence has the right to be informed of the specific offence. Consequently, any charge laid under subsection 22(1) will have to contain the relevant particulars as to the description of the alleged prohibited act (*lifestyle or that could be construed on reasonable grounds to be appealing to young persons*). The requirements of sections 581 and 583 of the *Criminal Code* fall specifically within that perspective.¹⁸¹

¹⁸⁰ *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, pp. 218 and 248. **Book of Authorities, Vol. 1, tab 19.**

¹⁸¹ EWASCHUK, E. G., *Criminal Pleadings and Practice in Canada*, 2nd ed., Canada Law Book, 2006, par. 9 : 6030). **Book of Authorities, Vol. IV, tab 57.** See also *R. v. Tremblay*, [1993] 2 S.C.R. 932 (Cory J., p. 955). **Book of Authorities, Vol. IV, tab 52.** *R. v. B. (G.)*, [1990] 2 S.C.R. 30 (Wilson J. at pp. 44-45). **Book of Authorities, Vol. III, tab 40.**

63. By prohibiting, in subsection 22(3), advertising “appealing to young persons”, Parliament has opted for an objective standard that helps ensure the protection of young persons.

64. The Crown’s burden is analogous with the one that exists, for example, in regard to misleading advertising: it is not necessary to demonstrate who, among the public, has in fact been misled. It is the characteristics inherent to the message that matter, and which must be analyzed. It is not necessary to demonstrate that the advertising was in fact appealing to all young persons or to some of them; it must be so in the eyes of a reasonable observer viewing the matter objectively.

65. This Court has adopted a similar interpretation in juvenile pornography matters under subparagraph 163.1(1)(a)(i) of the *Criminal Code*.¹⁸²

“Section 163.1(1)(a)(i) brings within the definition of child pornography a visual representation of a person “who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity” (emphasis added). Does “depicted” mean: (a) intended by the maker to depict; (b) perceived by the possessor as depicting; or (c) seen as being depicted by a reasonable observer?”

The first and second interpretations are inconsistent with Parliament’s objective of preventing harm to children through sexual abuse. The danger associated with the representation does not depend on what was in the mind of the maker or the possessor, but in the capacity of the representation to be used for purposes like seduction. **It is the meaning which is conveyed by the material which is critical, not necessarily the meaning that the author intended to convey. Moreover, it would be virtually impossible to prove what was in the mind of the producer or possessor.** On the second alternative, the same material could be child pornography in the possession of one person and innocent material in the hands of another. Yet the statute makes it an offence for anyone to possess such material, not just those who see it as depicting children. **The only workable approach is to read “depicted” in the sense of what would be conveyed to a reasonable observer. The test must be objective, based on the depiction rather than what was in the mind of the author or possessor.** The question is this: would a reasonable observer perceive the person in the representation as being under 18 and engaged in explicit sexual activity?”

¹⁸² *R. v. Sharpe*, [2001] 1 S.C.R. 45, par. 42, 43, pp. 78-79 and par. 51, p. 82. **Book of Authorities, Vol. 1, tab 18.**

66. The advertising prohibited in subsection 22(3) is defined according to an objective standard: reasonable grounds.¹⁸³ The expression “could” in subsection 22(3) is thus calibrated objectively so that the necessary analysis rules out any form of subjectivity.

67. The offence is not defined in terms of a mere possibility, as the manufacturers suggest. It is not unknown in Canadian law to have a component of an offence defined according to an objective standard. Some serious crimes, such as manslaughter¹⁸⁴ and unlawfully causing bodily harm,¹⁸⁵ are subject to a similar standard: objective foreseeability. Likewise, the crime of dangerous driving is a function of certain circumstances that must be assessed according to what *might reasonably be expected* (s. 249(1)(a) *Criminal Code*) or according to the use that *is or might reasonably be expected to be made* of the place in question (s. 249(1)(b) *Criminal Code*).

68. The use of such a standard is necessary in a regulatory context intended to protect young persons from the detrimental effects of tobacco. There is nothing vague or imprecise about the obligation imposed on the manufacturers.

69. The standard incorporated in subsection 22(3) is justified by the need to impose the obligation on the manufacturers to take reasonable steps to prevent their information or brand-preference advertising from being appealing to young persons.

70. The manufacturers maintain that subsection 22(3), which prohibits advertising appealing to young persons, is overly broad. According to them, young persons and adults are attracted by all

¹⁸³ *R. v. Sharpe*, [2001] 1 S.C.R. 45, para. 50, on p. 82: “The question is whether a reasonable viewer, looking at the depiction objectively and in context, would see its “dominant characteristic” as the depiction of the child’s sexual organ or anal region. The same applies to the phrase “for a sexual purpose”, which I would interpret in the sense of reasonably perceived as intended to cause sexual stimulation to some viewers.” **Book of Authorities, Vol. 1, tab 18.**

¹⁸⁴ *R. v. Creighton*, [1993] 3 S.C.R. 3. **Book of Authorities, Vol. III, tab 42.**

¹⁸⁵ *R. v. DeSousa*, [1992] 2 S.C.R. 944. **Book of Authorities, Vol. III, tab 44.**

sorts of things that vary according to their personalities, tastes or personal characteristics. However, this statement is not based on any evidence.¹⁸⁶

71. It should be remembered that in 1995, the Attorney General maintained that all advertising was an incentive to tobacco consumption. The manufacturers had then denied this proposition and argued that it was necessary to distinguish different types of advertising, such as informative advertising, brand-preference advertising, lifestyle advertising and advertising aimed at young persons.

72. The manufacturers now contend that the s. 22(3) prohibition of advertising appealing to young persons or lifestyle advertising effectively nullifies the permission to engage in information or brand-preference advertising.¹⁸⁷ In other words, Parliament would have taken with one hand what it gave with the other.

73. According to the modern rule of statutory interpretation stated in many decisions,¹⁸⁸ the words “advertising that could be construed on reasonable grounds to be appealing to young persons” must be interpreted as a whole with subsections 22(1) and (2), and not in a segmented way. It is also necessary to bear in mind the judgment of this Court in 1995, the intention of the legislator, the detrimental effects to which the Act is addressed, the necessity to protect Canadians from tobacco consumption and, finally, the purpose of the Act, which regulates the promotion of tobacco products.

74. To avoid reaching the absurd interpretation¹⁸⁹ proposed by the manufacturers, subsection 22(3) must be read not in isolation but rather in combination with subsections 22(1) and 22(2)

¹⁸⁶ Factum of Appellants on Cross-Appeal, par. 92.

¹⁸⁷ Factum of Appellants on Cross-Appeal, par. 93.

¹⁸⁸ *R. v. Sharpe*, [2001] 1 S.C.R. 45, McLachlin C.J., pp. 74-75, par. 33. **Book of Authorities, Vol. 1, tab 18**; *Imperial Oil Ltd. v. Canada*, 2006 SCC 46, Lebel J., par. 25. **Book of Authorities, Vol. III, tab 32**; *R. v. Shoker*, 2006 SCC 44, Lebel J., par. 29. **Book of Authorities, Vol. IV, tab 51.**

¹⁸⁹ SULLIVAN, Ruth, *Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002), pp. 251 and 252:

and the definitions of information and brand-preference advertising, since Parliament does not speak for no reason.¹⁹⁰

75. The word “appealing” in subsection 22(3) should accordingly be interpreted as was the word “depicted” in the expression “depicted as engaged in explicit sexual activity” in *Sharpe*, that is, “in the sense of what would be conveyed to a reasonable observer”. This is an objective criteria based on the content of the advertising and not on what its author intended to express.¹⁹¹ It is not overly broad, as the manufacturers maintain.

76. This Court has had the opportunity to rule on a similar provision in the *Irwin Toy* case, in which it recognized the validity of a general prohibition on commercial advertising directed to young persons under the age of thirteen.¹⁹² The issue of whether advertising was directed to children had to be determined in light of criteria connected (1) to the nature of the goods advertised, (2) to the advertisement content, and (3) to the time and place it was shown. The Court concluded that the legislation stated an intelligible standard.

“The court’s jurisdiction to avoid absurd results parallels and complements its jurisdiction to promote legislative purpose. Whereas purposive analysis justifies the preference for interpretations that lead to good consequences, which are presumed to be intended, avoiding absurdity justifies the rejection of interpretations that lead to undesirable consequences, which are presumed to be unintended. Like purposive analysis, consequential analysis should be part of every effort to apply legislation to particular facts. It may be relied on to help resolve any type of problem, from ambiguity or vagueness, to overlapping provisions, to the temporal operation of legislation.” **Book of Authorities, Vol. IV, tab 59.**

Medovarski v. Canada (Minister of Citizenship and Immigration), [2005] 2 S.C.R. 539, McLachlin C.J., par. 8, 31 and 34. **Book of Authorities, Vol. III, tab 36.**

¹⁹⁰ SULLIVAN, Ruth, *Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002), p. 119: “It makes sense to assume that when legislation initially is drafted it is meant to apply to something; the legislature would not engage in a futile exercise.” **Book of Authorities, Vol. IV, tab 59.**

¹⁹¹ *R. v. Sharpe*, [2001] 1 S.C.R. 45, McLachlin J., par. 42-43, pp. 78-79, and par. 51, p. 82. **Book of Authorities, Vol. 1, tab 18.**

¹⁹² *Irwin Toy v. Québec (A.G.)*, [1989] 1 S.C.R. 927, Dickson C.J., p. 982. **Book of Authorities, Vol. 1, tab 8.**

77. With regard to the *Tobacco Act*, subsections 22(1), 22(2) and 22(3) include similar criteria. Considering, first, the good advertised (tobacco) and second, the places where the advertising may lawfully be conducted, the question remaining is to determine whether the content of the advertising may reasonably be appealing to young persons.

78. Correctly construed, subsection 22(3) is not overly broad, as the manufacturers maintain.

7. Subsection 22(3) – Lifestyle advertising

79. The manufacturers’ thesis that the definition of lifestyle advertising is overly broad or vague flows from a theoretical and hypothetical approach that is contrary to the modern rule of statutory interpretation.

80. Lifestyle advertising is a technical term that is used by marketing experts to describe the content of an advertising concept:¹⁹³

“3. **Motivation with psychological appeals.** This type of ad uses **emotional appeals**. It tries to enhance the appeal of the product by attaching pleasant **emotional** connotation to it. The ad creates a mood. Selling points are then both explicit and implicit. Cosmetic, cigarette, and beer and liquor products are heavy users of this approach.

...

6. **Symbolic association.** This type of ad is a more subtle form of the repeat assertion ad. The intent is to get across one piece of information about the product. Here, the product is likened to an object, a person or people, a tune or a situation or activity that has particularly pleasant connotations. The product and the symbol then become highly interrelated. Examples: The Rock of Gibraltar and Prudential. The Bull and Merrill-Lynch. This type of appeal is obviously similar to **emotional appeals**. For example, beer is often associated with “good times with friends”, a very emotional appeal. Both the **emotion** and the symbolic association are there.”¹⁹⁴

¹⁹³ Factum of the Attorney General of Canada on Appeal, pp. 33 to 37, par. 94 to 99.

¹⁹⁴ a) Factum of the Attorney General of Canada on Appeal, par. 94.

b) Exhibit ED-180: Marketing of Tobacco Products [CAQ, Vol. 181, pp. 72574 and 72575] D.A., Vol. XII, p. 2416-2417.

81. The definition of lifestyle advertising must be interpreted according to the way it is used in marketing.¹⁹⁵

82. The manufacturers, notwithstanding their statements that it is impossible for them to know whether or not an advertisement evokes an emotion, know very well how to evoke emotions in their advertising. They can even quantify and describe those emotions.¹⁹⁶

83. There are four key words in the definition of lifestyle advertising that can be used to circumscribe the sphere of risk when a manufacturer chooses to insert other elements in information or brand-preference advertising. Those words are: “advertisement”, to “associate”, to “evoke” and “emotion”.

84. First, the word “advertisement”, which means:

¹⁹⁵ *Driedger on the Construction of Statutes*, 4th ed. by Ruth Sullivan (Toronto: Butterworths, 2002),

p. 40:

Technical terms. Technical or scientific terms are words or expressions that have no common or popular meaning; their only meaning derives from their specialized use by a distinct portion of the community. When technical or scientific terms are used in legislation, there is no possibility of confusion; such terms automatically receive their technical or scientific meaning”. *Perka v. R.*, [1984] 2 S.C.R. 232, p. 264, Dickson J.: “It is well established that technical and scientific terms which appear in statutes should be given their technical or scientific meaning.”

p. 42:

Qualification. The presumption in favour of the ordinary, non-technical meaning of words is subject to an important qualification. This is explained by Lord Esher in *Unwin v. Hanson*: “If the Act is directed to dealing with matters affecting everybody generally, the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business, or transaction, and words are used which everybody conversant with that trade, business, or transaction, knows and understands to have a particular meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words. **Book of Authorities, Vol. IV, tab 59.**

¹⁹⁶ Factum of the Attorney General of Canada on Appeal, par. 98, and the extracts quoted under note 86. Extracts – Emotion in lifestyle advertising. A.R., Vol. 12, pp. 2425 to 2461.

« Publicité - *II Le fait d'exercer une action sur le public à des fins commerciales; le fait de faire connaître (un produit, un type de produits) et d'inciter à l'acquérir; ensemble des moyens qui concourent à cette action. »¹⁹⁷

“Advertisement – esp. one advertising goods or services in newspapers etc. on posters, or in broadcasts. 2. the act or process of advertising. 3. notice to readers in a book etc.”¹⁹⁸

85. Secondly, the verb “associate”:

« Associer – Mettre ensemble des choses »¹⁹⁹

“Associate – 1. connect in the mind – 2. join or combine - 4. combine for a common purpose.”²⁰⁰

86. The verb “associate” plays a particular role in the definition since it identifies the visual elements that are targeted by the association of a tobacco product with “a way of life”, including prestige, leisure, enthusiasm, vitality, risk and audacity.²⁰¹

87. In the case of advertising that “associates” a product with a way of life, the association appears upon viewing the advertisement.

¹⁹⁷ Le Nouveau Petit Robert de la langue française – 40th ed. (Paris: 2007). **Book of Authorities, Vol. IV, tab 58.**

¹⁹⁸ The Canadian Oxford Dictionary (Toronto, Oxford, New York: Oxford University Press, 1998). **Book of Authorities, Vol. IV, tab 60.**

¹⁹⁹ Le Nouveau Petit Robert de la langue française – 40th ed. (Paris: 2007). **Book of Authorities, Vol. IV, tab 58.**

²⁰⁰ The Canadian Oxford Dictionary, (Toronto, Oxford, New York: Oxford University Press, 1998). **Book of Authorities, Vol. IV, tab 60.**

²⁰¹ Since 1989, this Court has used the expression “lifestyle” 66 times to describe all sorts of situations, e.g. *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, Lamer J., p. 1194:

“In this regard the impugned section aims at minimizing the public exposure of this degradation especially to young runaways who seek refuge in the streets of major urban centres, and to those who are exposed to prostitution as a result of the location of their homes and schools in areas frequented by prostitutes and who may be initially attracted to the “glamorous” lifestyle as it is described to them by the pimps.” **Book of Authorities, Vol. IV, tab 53.**

88. Thirdly, the verb “evoke” means:

« Évoquer – Appeler, faire apparaître par la magie – 3. Rappeler à la mémoire. »²⁰²

“Evoke – 1. inspire or draw forth (memories, an image, feelings...).”²⁰³

89. Finally, the word “emotion” means:

« Émotion – 1. Mouvement, agitation d’un corps collectif pouvant dégénérer en troubles – par ext. Sensation (agréable ou désagréable), considérée du point de vue affectif. »²⁰⁴

“Emotion – 1. a strong mental or instinctive feeling... 2. emotional intensity or sensibility.”²⁰⁵

90. The words “evoke” and “emotion” cover advertisements the content of which recalls pleasant or unpleasant sensations. For example, the image of the coffee cup accompanied by a pack of cigarettes recalls, as Mr. Justice Brossard noted, enjoyable moments for a smoker or a former smoker and is an incentive to smoke or to begin smoking again.²⁰⁶

91. The definition of lifestyle advertising is not overly broad, as the manufacturers maintain. On the contrary, it is open to judicial interpretation.

²⁰² Le Nouveau Petit Robert de la langue française – 40th ed. (Paris: 2007). **Book of Authorities, Vol. IV, tab 58.**

²⁰³ The Canadian Oxford Dictionary, (Toronto, Oxford, New York: Oxford University Press, 1998). **Book of Authorities, Vol. IV, tab 60.**

²⁰⁴ Le Nouveau Petit Robert de la langue française – 40th ed. (Paris: 2007). **Book of Authorities, Vol. IV, tab 58.**

²⁰⁵ The Canadian Oxford Dictionary, (Toronto, Oxford, New York: Oxford University Press, 1998). **Book of Authorities, Vol. IV, tab 60.**

²⁰⁶ Judgment of the Court of Appeal, Brossard J.A., A.R., Vol. 2, pp. 349 and 353, par. 283 and 287.

8. The *WHO Framework Convention on Tobacco Control*

92. The *WHO Framework Convention*, of which Canada is one of the 168 signatory states, calls for the enactment of a set of legislative measures, in accordance with the constitution of each signatory, prohibiting or limiting the promotion of tobacco.²⁰⁷

93. Even if the Convention is subsequent to the Act, the methods adopted by the Convention's signatory states show that the legislative measures adopted by Parliament are in line with a universal and irreversible trend in favour of controlling tobacco promotion activities and are reasonable in a free and democratic society.²⁰⁸

94. Eleven years have elapsed since the 1995 judgment of this Court. More than 168 countries have condemned the marketing practices of the worldwide tobacco industry. By ratifying the *WHO Framework Convention on Tobacco Control*, 140 countries have undertaken, in accordance with their respective constitutions, to prohibit or limit the advertising, promotion and sponsorship activities that help promote tobacco products. The *Tobacco Act* is not a total prohibition on all promotion of tobacco. It is a response to the international objectives of the tobacco control effort that is consistent with the guidelines imposed by the Constitution of Canada.

²⁰⁷ WHO Framework Convention, art. 13. Factum of the Attorney General of Canada on Appeal, pp. 173 to 181.

²⁰⁸ a) Judgment of Denis J., par. 133 to 138. A.R., Vol. 1, p. 37.

b) *Irwin Toy v. Québec (A.G.)*, [1989] 1 S.C.R. 927, Dickson C.J., p. 984:

“However, in proving that the original objective remains pressing and substantial, the government surely can and should draw upon the best evidence currently available. The same is true as regards proof that the measure is proportional to its objective....” **Book of Authorities, Vol. 1, tab 8.**

9. Conclusions

95. The manufacturers ask this Court to declare that subsections 22(3) (advertising appealing to young persons) and 22(4) (lifestyle advertising) are overly broad and disproportionate to the legislative objective, which is to reduce the incitements to using tobacco and to the smoking that may result.²⁰⁹

96. They add that if subsections 22(3) and 22(4) are found to be of no force or effect, their advertising will still be controlled by the other provisions of the Act.²¹⁰

97. The manufacturers thereby attempt to minimize the importance of subsections 22(3) and 22(4) in regard to the need to protect young persons from smoking. They indirectly challenge the rational connection of these provisions with the purpose of the Act.

98. The protection of young persons is at the heart of the *Tobacco Act*: to declare subsection 22(3) of no force or effect would amount to allowing the manufacturers to insert lifestyle elements or elements appealing to young persons in their advertising, which goes against the purposes of the Act.²¹¹

99. As this Court has often mentioned in the course of analyzing statutory provisions such as subsections 22(3) and 22(4), the issue to resolve is not to identify the least ambitious means to

²⁰⁹ Factum of Appellants on Cross-Appeal, par. 131.

²¹⁰ Factum of Appellants on Cross-Appeal, par. 132.

²¹¹ The judgment of the Supreme Court of the United States, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (QL), cited at par. 78 of the Factum of Appellants on Cross-Appeal, should be ignored, as Dickson J. noted in *R. v. Keegstra*, [1990] 3 S.C.R. 697, p. 743:

“Where s. 1 operates to accentuate a uniquely Canadian vision of a free and democratic society, however, we must not hesitate to depart from the path taken in the United States.” **Book of Authorities, Vol. III, tab 47.**

protect vulnerable groups,²¹² as the manufacturers propose, but rather to determine whether these measures are reasonable.

10. The warnings and freedom of expression

100. The *Tobacco Products Information Regulations* (the “Information Regulations”) impose an obligation on the manufacturers to display warnings on the packaging of their products. The warnings must occupy 50% of the surface of the package (ss. 5(2)(b) and 12(2)), an increase of about 15% over what was provided in the previous regulations. Moreover, a manufacturer can attribute the warnings to Health Canada (s. 4(1)), contrary to what was provided in the *Tobacco Products Control Act*.

101. The manufacturers maintain that the warnings informing consumers of the health effects of smoking contravene freedom of expression in two ways: (1) the warnings would be a form of forced expression that is contrary to freedom of expression; and (2) the warnings would reduce the space that would otherwise be available to them to communicate with their consumers.²¹³

102. The lower courts rejected the manufacturers’ contentions that the increase in the size of the warnings on the packaging infringes freedom of expression. They found that the manufacturers had not demonstrated that the warnings prevented them from communicating with their consumers:²¹⁴

“[170] The main thrust of the manufacturers’ arguments has been that the regulation at issue constitutes an unjustified infringement on their freedom of expression.

²¹² *Irwin Toy v. Québec (A.G.)*, [1989] 1 S.C.R. 927, Dickson C.J., p. 999. **Book of Authorities, Vol. 1, tab 8**; *R. v. Chaulk*, [1990] 3 S.C.R. 1303, p. 1345. **Book of Authorities, Vol. 1, tab 14**; *Keegstra, supra*. **Book of Authorities, Vol. III, tab 47**.

²¹³ Factum of Appellants on Cross-Appeal, par. 144, p. 37.

²¹⁴ Judgment of the Court of Appeal, Beauregard J.A., par. 170 to 173. A.R., Vol. 2, p. 330, [2005] J.Q. no. 10915 (unofficial translation).

[171] This submission is groundless. In requiring the packaging of a tobacco product to feature a warning that manufacturers may attribute to the government, Parliament in no way infringes on the manufacturers' freedom of expression. This freedom would be violated if the warnings were such that they prevented manufacturers from affixing their own messages on the packages. The manufacturers did not, however, show this to be the case: they presented no messages that they wished to communicate on the packages but had been prevented from doing because of the limited space remaining.

[172] In short, because the manufacturers have not demonstrated that their freedom of expression has been infringed, it does not fall to the courts to rule on the appropriateness of the scope of the warnings or on the obligation of manufacturers to reproduce the photographs on their product packaging.

[173] Given my finding that the impugned regulations do not impair the manufacturers' freedom of expression, it would be illogical to demonstrate that the infringement would be justified in any event under section 1 of the *Charter*. It is sufficient to note that in their factums, the respondent and the intervener have each convincingly shown the existence of a rational connection between the legislative objective and the nature of the warnings required, as well as the fact that the text and photographs of the warnings required by the regulations are not disproportionately harsh with respect to the legislative objective."

10.1 Forced expression

103. There are many statutes and regulations that make it mandatory to place information on various products and in various places.²¹⁵

104. The manufacturers refer to the judgments in *Slaight Communications*²¹⁶ and *National Bank of Canada*²¹⁷ dealing with the expression "forced". The right to freedom of expression encompasses the right not to express oneself. However, there is no impairment of this right when

²¹⁵ For example: *Food and Drug Regulations*, C.R.C., c. 870, **F.V.**, pp. 83 et seq.; *Consumer Packaging and Labelling Regulations*, C.R.C., c. 417, **F.V.**, pp. 63 et seq.; *Consumer Chemicals and Containers Regulations*, 2001 (2001), SOR/2001-269, **F.V.**, pp. 88 et seq.; *Surface Coating Materials Regulations*, SOR/2005-109, **F.V.**, pp. 93 et seq.; *Oil and Gas Occupational Safety and Health Regulations*, DORS/94-165, **F.V.**, pp. 79 et seq.; *Aviation Occupational Safety and Health Regulations*, DORS/94-34, **F.V.**, pp. 74 et seq.

²¹⁶ *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. **Book of Authorities**, tab 27.

²¹⁷ *National Bank of Canada v. Retail Clerks' Union*, [1984] 1 R.C.S. 269. **Book of Authorities**, tab 11.

the purpose or effect of the statutory provision does not associate or identify someone with a message or ideology that is not his/her own.²¹⁸

105. A restaurant owner's obligation to publicly display in his business notices reporting the results of a health inspection by the municipal authorities does not infringe freedom of expression.²¹⁹

106. Unlike the municipal bylaws reviewed in the *Vann Niagara*²²⁰ and *Guignard*²²¹ decisions, the Information Regulations do not deprive the manufacturers of a vehicle for communicating with their consumers and do not prohibit them from placing information on their packaging. The Information Regulations do not further limit the form of expression. The manufacturers remain free to produce packages and cartons in the size of their choosing.

107. The mere fact that the manufacturers be required to place warnings attributed to Health Canada does not suffice to conclude to a violation of paragraph 2(b).

108. It is by reason of the fact that the previous warnings were not attributed and that the *Tobacco Products Control Act* prohibited placing any other information that this Court declared section 9 of the TPCA to be of no force or effect.²²²

²¹⁸ *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211. **Book of Authorities, Vol. 1, tab 9.**

²¹⁹ *Ontario Restaurant Hotel & Motel Association v. Toronto (City)*, 2004 CAN LII 34445 (ON. S.C.D.C.). **Book of Authorities, Vol. III, tab 37.**

Ontario Restaurant Hotel & Motel Association v. Toronto (City), (2005) 258 D.L.R. (4th) 447, par. 11:

“The Charter does not prohibit government from communicating messages that contradict commercial messages. We do not accept the submission that by requiring restaurant owners to post the inspection notices, the by-law restricts their freedom of expression.” (Application for leave to appeal to the Supreme Court denied, 18 May 2006, no 31307, (2006) SCC Bulletin 705) **Book of Authorities, Vol. III, tab 38.**

²²⁰ *Vann Niagara v. Oakville (Town)*, [2003] 3 S.C.R. 158. **Book of Authorities, tab 28.**

²²¹ *R. v. Guignard*, [2002] 1 S.C.R. 472. **Book of Authorities, tab 17.**

²²² *R.J.R. MacDonald Inc. v. A.G. (Canada)*, [1995] 3 S.C.R. 199, McLachlin J., par. 174, p. 349, **Book of Authorities, Vol. 2, tab 22.**

109. Subsection 15(3) of the Act and subsection 4(1) of the Information Regulations provide that the warnings may be attributed to Health Canada and do not prohibit the manufacturers from expressing their views on or in the packages. The manufacturers retain the possibility of repudiating the warnings. They can place their own warnings and express their views. They retain the possibility of communicating on their tobacco products packaging for the purpose of conveying information about their products and about their brands. The increase in the size of the warnings attributed to Health Canada does not impair freedom of expression.

10.2 Size of health messages and freedom of expression

110. To determine whether a legislative measure contravenes s. 2(b) of the *Charter*, it is necessary to examine (1) whether the activity in question constitutes a form of expression and (2) whether the contested measure has for purpose or effect to restrict freedom of expression.²²³

111. The Attorney General concedes that the use of packaging to communicate information about a product is a means of expression.

112. The purpose of the Information Regulations is to enhance public awareness “of the health hazards of using tobacco products” (s. 4(d)) and serves to educate the public about the consequences of smoking and to reduce its incidence. It doesn’t have for purpose to limit the manufacturers’ freedom of expression.

113. The manufacturers have not demonstrated that the Information Regulations had for effect to limit their ability to use the packaging to communicate their own message:

“Even if the government’s purpose was not to control or restrict attempts to convey a meaning, the Court must still decide whether the **effect** of the government action was to restrict the plaintiff’s free expression. Here, **the burden is on the plaintiff to demonstrate that such an effect occurred**. In order so to demonstrate, a plaintiff must

²²³ *Irwin Toy Limited v. Québec (A.G.)*, [1989] 1 S.C.R. 927, pp. 967 to 972. **Book of Authorities, Vol. 1, tab 8.**

state her **claim with reference to the principles and values underlying the freedom.**²²⁴

114. The lower courts found that the manufacturers had not made that demonstration.

115. In *RJR-MacDonald*, this Court insisted on the burden of demonstration that falls to the Attorney General at the stage of the section 1 *Charter* analysis. Similarly, the burden is on the manufacturers to demonstrate that they are unable to communicate a message consistent with the fundamental values of the right to freedom of expression.

10.3 The Information Regulations and section 1 of the *Charter*

116. In his factum on the main appeal, the Attorney General has set out certain arguments concerning the size of the warnings and section 1 of the *Charter*²²⁵, and adds the following.

117. This Court has previously found that the obligation to place warnings attributed to their author on tobacco products packages was consistent with the *Charter*.²²⁶ It has also imposed an obligation on the manufacturers of pharmaceutical products, for example, to warn consumers of the hazards of their products.²²⁷

118. The nature and extent of the duty to warn vary according to the danger in using a product.²²⁸ Tobacco is a poison that gives rise to mortal illnesses. Logically, warnings occupying 50% of the packaging allow better communication of clear and complete messages.

²²⁴ *Irwin Toy Limited v. Québec (A.G.)*, [1989] 1 S.C.R. 927, at page 976. **Book of Authorities, Vol. 1, tab 8.**

²²⁵ Factum of the Attorney General of Canada on Appeal, par. 175 to 181.

²²⁶ *R.J.R. MacDonald Inc. v. A.G. (Canada)*, [1995] 3 S.C.R. 199, McLachlin J., par. 173-174, p. 349, **Book of Authorities, Vol. 2, tab 22.**

²²⁷ *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, McLachlin J., par. 20, pp. 652-653. **Book of Authorities, Vol. III, tab 34.**

²²⁸ *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, McLachlin J., par. 22, pp. 653-654 and par. 24-25, pp. 655 to 657. **Book of Authorities, Vol. III, tab 34.**

119. The tobacco manufacturers dispute the warnings only from the standpoint of the minimal impairment test.²²⁹ They allege, on the one hand, that the Attorney General has failed to demonstrate that the previous warnings occupying 35% of the display surface of the packaging were insufficient to inform the public about the dangers of their products and, on the other hand, that there are other means of communicating these messages.²³⁰

120. These contentions are contrary to the findings of Mr. Justice Denis:²³¹

“[486] The evidence shows that, in order for warnings to be effective, they must be varied, innovative and non-repetitive, or consumers will ignore them.

[487] Health Canada developed a series of alternating messages that catch the attention. The exercise has been a success. In the oral arguments from the first case, one of the tobacco companies’ lawyers conceded that Parliament had the right to make its warnings “more hard-hitting and punchy”.

121. In the course of the regulatory process, Health Canada obtained and had prepared about fifty studies on the packaging of tobacco products and the warnings.²³²

122. Health Canada found that the previous warnings occupying 35% of the principal display surface of the packaging had lost their effectiveness:

²²⁹ Factum of Appellants on Cross-Appeal, par. 145.

²³⁰ Factum of Appellants on Cross-Appeal, par. 148.

²³¹ Judgment of Denis J., par. 486 and 487. A.R., Vol. 2, pp. 285, 286. Judgment of the Court of Appeal, par. 173. A.R., Vol. 2, p. 330.

²³² See Appellant’s Record, Vol. 16, p. 3126, Extracts – Tobacco Products Information Regulations. Amended Affidavit of François Choquette, ref. 131.1 [CAQ. Vol. 16, pp. 17574 et seq.] A.R., Vol. 16, p. 3153.

ED-123 to ED-130 [CAQ, Vol. 172, pp. 68713 to 69067]

ED-131 to ED-134 [CAQ, Vol. 173, pp. 69069 to 69349]

ED-140 [CAQ, Vol. 173, p. 69434]

ED-141 to ED-146 [CAQ, Vol. 174, pp. 69509 to 69937]

ED-146 to ED-150 [CAQ, Vol. 175, pp. 69938 to 70378]

“Research has indicated that the impact of the current health warning messages seen on packages of tobacco products is wearing out. They are no longer as effective as before since they have been in place for some years.”²³³

* * * * *

“An alternative to these Regulations which was considered was to simply reintroduce the same health messages and toxic emissions information requirements of the former *Tobacco Products Control Regulations*. This alternative was rejected because research indicates that these health warnings would not be as effective as those provided for in the Regulations.”²³⁴

* * * * *

“As indicated earlier, the display of information on packages must be noticeable, believable, relevant and memorable to be effective. Research has indicated that enlarging the area occupied by the health warning (when compared to the area currently utilized by tobacco manufacturers on a voluntary basis), using colourful graphic images for health warnings and adding facts and statistics, increases the effectiveness of the displayed health warning.”²³⁵

123. Canadians had become used to the previous warnings and were paying less attention to them. It was becoming necessary to modify their content and size in order to arouse renewed attention.²³⁶

124. The use of colour and of a greater surface area has an increased impact:

“Most participants felt that the new larger health warning messages, featuring colour photographs, were a definite improvement over the current warning messages. Teenagers

²³³ Regulatory Impact Analysis Statement, Factum of the Attorney General of Canada on Appeal, p. 105.

²³⁴ Regulatory Impact Analysis Statement, Factum of the Attorney General of Canada on Appeal, p. 107.

²³⁵ Regulatory Impact Analysis Statement, Factum of the Attorney General of Canada on Appeal, p. 107.

²³⁶ ED-149: Health Warning Labels and Images on Cigarette Packages – Qualitative Study – March 1999, by Environics [CAQ, Vol. 175, p. 70279]

ED-147: Health Warning Design Testing - Qualitative and Quantitative Study – June 1999, by Environics [CAQ, Vol. 175, p. 70164]

ED-144: Canadian Adult and Youth Opinions on the Sizing of Health Warning Messages - Quantitative Study - October 1999, by Environics [CAQ, Vol. 174, p. 69610]

ED-146: Effets d’une augmentation de la surface occupée par les avertissements sur les paquets de cigarettes – Étude quantitative – Sept. 1999, Createc + [CAQ, Vol. 174, p. 69806]

were particularly impressed with the use of pictures and the larger size of the messages that allow for the dissemination of more information.”²³⁷

* * * * *

“Ainsi, lorsque la surface occupée par les avis est augmentée de 30% (actuel) à 50%, les effets observés à 40% sont amplifiés et toutes les catégories d’effets deviennent significatives.

De 50% à 60%, on observe que les effets continuent de s’amplifier, mais c’est surtout l’attrait général de l’emballage qui est affecté au-delà de 50%.”²³⁸

* * * * *

“The best new designs were about 2 times as legible and 3.5 times as effective as those in present use. Size of the printed words was the principle factor determining legibility. Doubling the size of the letters more than doubled the legibility. Warnings with bigger pictures were more effective than those with smaller pictures. Warnings with color pictures were more effective than those with black and white pictures.”²³⁹

* * * * *

“Tous les résultats obtenus convergent pour conclure que les avis modifiés ne changent pas les conclusions de l’étude d’août 1999 quant aux effets d’une surface accrue. En fait, dans l’ensemble, on peut à toutes fins pratiques conclure que les effets auraient été au pire les mêmes. Une analyse très fine, par critère, indique que sur deux aspects seulement, les effets auraient même été amplifiés.

Au-delà de cette validation, cette étude démontre une nouvelle fois qu’une surface accrue à 50% se traduit par des effets significatifs sur tous les critères sondés.”²⁴⁰

125. The manufacturers allege that there are vehicles other than packaging by which to communicate the risks of smoking. However, packaging remains the best means for informing smokers:

²³⁷ ED-123: Testing New Health Warning Messages for Cigarette Packages: A Summary of Three Phases of Focus Group Research - Quantitative Study – May 2000, by Environics [CAQ, Vol. 172, p. 68713]

²³⁸ ED-146: Effets d’une augmentation de la surface occupée par les avertissements sur les paquets de cigarettes - Étude quantitative - September 1999, by Createc + [CAQ, Vol. 174, p. 69806]

²³⁹ ED-145: Legibility and Visual Effectiveness of some Proposed and Current Health Warnings on Cigarette Packages. Quantitative Study - September 1999, Thorny Nilsson, September 1999 [CAQ, Vol. 174, p. 69722]

²⁴⁰ ED-133: Revalidation Study, Créatec +, Mars 2000 [CAQ, Vol. 173, p. 69228]

“Research has demonstrated that the segment of the public that uses, or is most likely to use, tobacco products regards the package as an important source of information. It has also been found that the display of important facts on the package directly assists users in their decision not to smoke. Research has also shown that to be effective, the display of information on packages must be noticeable, believable, relevant and memorable. Moreover, it must address the concerns of smokers and potential smokers alike. To do this, messages should:

- employ colour and graphics;
- be increased in size from the current practices;
- contain concrete facts and statistics; and
- address issues of concern to product users.

The design of the Regulations has been based on these research findings. (...) ²⁴¹

Alternatives

Inclusion of health information on the product itself is a standard requirement for a large range of products. It is the most effective way of targeting information to the users of the product, as well as ensuring that the information is taken into account when decisions about use are being made. Television, radio and print advertising, no matter how pervasive or intrusive, will always miss some key groups of product users. Web sites and 1-800 numbers require active efforts to acquire information. School and community-based programs cannot reach all existing users of the products.”²⁴²

126. In 1994, this Court found that:

“The increased number and revised format of the health messages reflect the strong consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers.”²⁴³

127. As Roderick Power, the manufacturers’ expert, acknowledged in connection with the warnings:

“... It is a very, very complex business that stops people smoking, and I think that health warnings can be one of them...”²⁴⁴

²⁴¹ Regulatory Impact Analysis Statement, Factum of the Attorney General of Canada on Appeal, p. 105.

²⁴² Regulatory Impact Analysis Statement, Factum of the Attorney General of Canada on Appeal, p. 106.

²⁴³ *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, p. 352. **Book of Authorities, Vol. IV, tab 55.**

²⁴⁴ Roderick Power, 5 March 2002 [CAQ, Vol. 147, p. 58954]

128. The size of the warnings is a reasonable measure tailored to the problem of smoking:²⁴⁵

“ . . . in dealing with social issues like this one, where interests and rights conflict, elected officials must be accorded a measure of latitude. The Court will not interfere simply because it can think of a better, less intrusive way to manage the problem. What is required is that the City establish that it has tailored the limit to the exigencies of the problem in a reasonable way.”

11. Conclusions

129. Paragraph 5(2)(b) and subsection 12(2) of the *Tobacco Products Information Regulations* concerning the size of the mandatory warnings do not infringe paragraph 2(b) of the *Charter*. If there is an infringement, these provisions are justified under section 1 of the *Charter*.

12. Answers of the Attorney General of Canada to the constitutional questions

Question 1:

130. The Attorney General concedes that subsection 22(3) combined with the definition of “lifestyle advertising” in subsection 22(4) infringes freedom of expression.

Question 2:

131. The answer is affirmative.

Question 3:

132. The answer is negative.

²⁴⁵ *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, Deschamps J., par. 94. **Book of Authorities, Vol. 1, tab 10.**

Question 4:

133. The answer is affirmative.

13. Remedies

134. Should this Court find that subsection 22(3) or the definition of “lifestyle advertising” in subsection 22(4) of the *Tobacco Act*, or sections 5(2)(b) and 12(2) of the *Tobacco Products Information Regulations*, concerning the size of the warnings, are of no force or effect, the Attorney General maintains that the appropriate remedy is to suspend the declaration of invalidity for a period of one year.²⁴⁶

²⁴⁶ *R.J.R. MacDonald*, Cory J., p. 325, par. 121. **Book of Authorities, Vol. II, tab 22**, Iacobucci J., p. 355, par. 192. **Book of Authorities, Vol. II, tab 22**.

PART IV – COSTS

135. The Attorney General asks that the cross-appeal be dismissed with costs, including costs in the Quebec Court of Appeal.

PART V – ORDER SOUGHT

136. The Attorney General asks that the cross-appeal be dismissed with costs, including costs in the Quebec Court of Appeal.

Respectfully submitted.

Made at Montreal, province of Quebec, December 1, 2006

John Sims, Q.C.
Deputy Attorney General of Canada
Mtre. Claude Joyal
Federal Department of Justice
Counsel for the Cross-Respondent
The Attorney General of Canada

ALPHABETICAL TABLE OF AUTHORITIES

Jurisprudence	Paragraph(s)
<i>Canada (Minister of the Environment) v. Canada (Information Commissioner)</i> , 2003 FCA 68	..... 18
<i>Comité national contre le tabagisme (CNCT) v. Société nationale d'exploitation industrielle des tabacs et allumettes – SEITA, Société Altadis Financial Service (A.F.S.)</i> , 28 July 2006, Tribunal de grande instance de Paris	..... 43
<i>Hollis v. Dow Corning Corp.</i> , [1995] 4 S.C.R. 634	..... 56,117,118
<i>Imperial Oil Ltd. v. Canada</i> , 2006 SCC 46	..... 73
<i>Irwin Toy Ltd v. Québec (A.G.)</i> , [1989] 1 S.C.R. 927	..... 48,76,93,99,110,113
<i>Lavigne v. Ontario Public Service Employees Union</i> , [1991] 2 S.C.R. 211	..... 104
<i>Lévis (City) v. Tétreault</i> , [2006] 1 S.C.R. 420	..... 45
<i>Little Sisters Book & Art Emporium v. Canada</i> , [2000] 2 S.C.R. 1120	..... 45
<i>Lorillard Tobacco Co. v. Reilly</i> , 533 U.S. 525 (QL)	..... 98
<i>Medovarski v. Canada (Minister of Citizenship and Immigration)</i> , [2005] 2 S.C.R. 539	..... 74
<i>Montréal (City) v. 2952-1366 Québec Inc.</i> , [2005] 3 S.C.R. 141	..... 128
<i>National Bank of Canada v. Retail Clerks' Union</i> , [1984] 1 R.C.S. 269	..... 104
<i>Ontario Restaurant Hotel & Motel Association v. Toronto (City)</i> , (2005) 258 D.L.R. (4th) 447 (Application for leave to appeal to the Supreme Court denied, 18 May 2006, no. 31307, (2006) SCC Bulletin 705)	..... 105

Factum of the Cross-Respondent

Alphabetical Table of Authorities

<i>Ontario Restaurant Hotel & Motel Association v. Toronto (City)</i> , 2004 CAN LII 34445 (ON. S.C.D.C.)	105
<i>Proulx v. Krukowski</i> , (1993), 109 D.L.R. (4th) 606 (Ont. C.A.)	35
<i>Pub. Sch. Bds. Ass. v. Alberta (A.G.)</i> , [2000] 1 S.C.R. 44	15
<i>R. v. B. (G.)</i> , [1990] 2 S.C.R. 30	62
<i>R. v. Chaulk</i> , [1990] 3 S.C.R. 1303	99
<i>R. v. Creighton</i> , [1993] 3 S.C.R. 3	67
<i>R. v. Daniels</i> (1990), 60 C.C.C. (3d) 392 (BCCA)	35
<i>R. v. DeSousa</i> , [1992] 2 S.C.R. 944	67
<i>R. v. Fisher</i> (1994), 17 O.R. (3d) 295 (Ont. C.A.)	35
<i>R. v. Guignard</i> , [2002] 1 S.C.R. 472	106
<i>R. v. H.(P.)</i> , (2000) 143 C.C.C. (3d) 223 (Ont. C.A.)	35
<i>R. v. Keegstra</i> , [1990] 3 S.C.R. 697	98,99
<i>R. v. Lee's Poultry Ltd.</i> , (1985) 17 C.C.C. (3d) 539 (Ont. C.A.)	35
<i>R. v. Malmo-Levine</i> , [2003] 3 S.C.R. 571	15
<i>R. v. Perka</i> , [1984] 2 S.C.R. 232	35
<i>R. v. Schwartz</i> , [1988] 2 S.C.R. 443	35
<i>R. v. Sharpe</i> , [2001] 1 S.C.R. 45	65,66,73,75
<i>R. v. Shoker</i> , 2006 SCC 44	73
<i>R. v. Tremblay</i> , [1993] 2 S.C.R. 932	62
<i>R. v. Wholesale Travel Group Inc.</i> , [1991] 3 S.C.R. 154	42,48,61
<i>R.J.R. MacDonald Inc. v. A.G. (Canada)</i> , [1995] 3 S.C.R. 199	17,25,108,115,117,134

<i>Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)</i> , [1990] 1 S.C.R. 1123	86
<i>République Française v. KROONDIJK Onno, NIEUWOUDT Daniel, La Société British American Tobacco Europe BV, La Société British American Tobacco Export BV, La Société British American Tobacco Manufacturing BV</i> , 3 May 2006, Cour de cassation, chambre criminelle	42
<i>RJR-Macdonald Inc. v. Canada (Attorney General)</i> , [1994] 1 S.C.R. 311	126
<i>Slaight Communications Inc. v. Davidson</i> , [1989] 1 S.C.R. 1038	104
<i>Vann Niagara v. Oakville (Town)</i> , [2003] 3 S.C.R. 158	106

TABLE OF RECORDS

Other references

EWASCHUK, E. G., <i>Criminal Pleadings and Practice in Canada</i> , 2nd ed., Canada Law Book, 2006	62
HOGG, Peter, et al. “The Charter Dialogue Between Courts and Legislatures” (1997) 35 Osgoode Hall Law Journal 75	28
Le Nouveau Petit Robert de la langue française – 40 th ed. (Paris: 2007)	84,85,88
SULLIVAN, Ruth, <i>Driedger on the Construction of Statutes</i> , 4th ed. (Toronto: Butterworths, 2002)	74,81
The Canadian Oxford Dictionary (Toronto, Oxford, New York: Oxford University Press, 1998)	84,85,89