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No. 30611

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

BETWEEN:

**ATTORNEY GENERAL OF CANADA**

**APPELLANT/  
RESPONDENT ON CROSS-APPEAL  
(Respondent)**

AND:

**JTI-MACDONALD CORP.**

**RESPONDENT/  
APPELLANT ON CROSS-APPEAL  
(Appellant)**

AND:

**CANADIAN CANCER SOCIETY**

**INTERVENER  
(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**

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**FACTUM OF THE INTERVENER  
THE ATTORNEY GENERAL OF BRITISH COLUMBIA**

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AND BETWEEN:

**ATTORNEY GENERAL OF CANADA**

**APPELLANT/  
RESPONDENT ON CROSS-APPEAL  
(Respondent)**

AND:

**ROTHMANS, BENSON & HEDGES INC.**

**RESPONDENT/  
APPELLANT ON CROSS-APPEAL  
(Appellant)**

AND:

**CANADIAN CANCER SOCIETY**

**INTERVENER  
(Intervener)**

AND:

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

**INTERVENERS**

AND BETWEEN:

**ATTORNEY GENERAL OF CANADA**

**APPELLANT/  
RESPONDENT ON CROSS-APPEAL  
(Respondent)**

AND:

**IMPERIAL TOBACCO CANADA LTD.**

**RESPONDENT/  
APPELLANT ON CROSS-APPEAL  
(Appellant)**

AND:

**CANADIAN CANCER SOCIETY**

**INTERVENER  
(Intervener)**

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## I STATEMENT OF FACTS

1. The Attorney General of British Columbia (“British Columbia” or “the Province”) adopts the Statement of Facts in the Factum of the Attorney General of Canada, with the following additional observations.

2. This Appeal, and more particularly the Cross-Appeal, concern the right of the Respondents/Appellants by Cross-Appeal (the “manufacturers”) to communicate messages promoting smoking (either smoking generally or using a particular brand) to smokers. British Columbia’s argument is that such activity is not protected by section 2(b) of the *Charter* to the extent that the target audience comprises persons addicted to nicotine and the speech is intended to cause them to smoke. The facts regarding addiction therefore need to be emphasized.

3. Adult smokers remain smokers because they are addicted to nicotine, a powerful pharmacologic agent found in tobacco. Denis J., the trial judge below, found (at para. 224), and it is not disputed, that “Smokers quickly develop a powerful addiction to nicotine”. He said at para 524:

Nicotine is powerfully addictive. This is not mere conjecture. It is a fact.

*J.T.I. MacDonald Corp. v. Canada (Attorney General)*, [2002]  
102 C.R.R. (2d) 188 (the “Trial Judgment”)

4. The U.S. Surgeon General has reported that:

The pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine.

U.S. Department of Health and Human Services, *The Health Consequences of Smoking: Nicotine Addiction; A Report of the Surgeon General*, 1988, Exhibit D-141, Record v.34, p.13304

5. The addictive nature of tobacco products was described at trial by Dr. Robitaille.

Testimony of Dr. Michelle Robitaille. Record v.146, pp.58412-58415

6. One of the warnings issued by the federal government under the Regulations, the accuracy of which the manufacturers do not contest, says that “[s]tudies have shown that tobacco can be harder to quit than heroin or cocaine.”

Source document, Exhibit D-104, Record v. 28, p.10822

7. Historically and globally, tobacco companies have preyed on smokers by exploiting a superior understanding of the phenomenon of nicotine addiction. In a 1,742-page judgment in the United States government’s racketeering suit against multinational tobacco firms (in some instances parent companies of the Respondents in the case at bar<sup>1</sup>), Kessler J. wrote:

882. ...[F]or decades Defendants knew and internally acknowledged that nicotine is an addictive drug, that cigarettes are a nicotine delivery device, and that addiction can be enhanced and perpetuated through manipulating both the amount of nicotine and the method of nicotine delivery. Much of Defendants’ knowledge of nicotine was obtained from in-house and industry funded research into the pharmacological effects of the drug.

883. For example, internal documents reveal that Philip Morris researchers knew in 1969 that nicotine was “a powerful pharmacological agent” and that the company operated on the “premise that the primary motivation for smoking is to obtain the pharmacological effect of nicotine.” ...RJR’s lead nicotine researcher stated in 1972 that nicotine is the “sine qua non of smoking” and that the industry was based on the sale of “attractive dosage forms of nicotine.” ... BATCo’s sophisticated research from the early 1960s demonstrated that “smokers are nicotine addicts.”... B&W, BATCo’s American subsidiary, possessed the BATCo data and marketed cigarettes with the understanding that they “must provide the appropriate levels of nicotine.” ... Lorillard researchers accepted the scientific consensus in the 1970s that “the most probable reason for the addictive properties of the smoke is the nicotine.” .... Liggett, like its larger cigarette manufacturer

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<sup>1</sup>Philip Morris is a 40% owner of Rothmans, Benson & Hedges Inc., and was the parent company of the latter’s predecessor: RJR was, prior to selling aspects of its business to Japan Tobacco, the parent of RJR-Macdonald Inc. (now JTI-Macdonald Corp.); and BATCo has historically been a parent of Imperial Tobacco Canada Ltd.

counterparts, was actively seeking ways to manipulate the nicotine delivery to smokers. ...

884. Defendants have studied nicotine and its effects since the 1950s. The documents describing their research into and resulting knowledge of nicotine's pharmacological effects on smokers -- whether they characterized that effect as "addictive," "dependence" producing or "habituating," -- demonstrate unequivocally that Defendants understood the central role nicotine plays in keeping smokers smoking, and thus its critical importance to the success of their industry.

885. Defendants' internal records also demonstrate that they knew that cigarette smoking, and tobacco in particular, were the vehicles for delivering nicotine -- the critical component in maintaining the addiction necessary to sustain and enhance their profits. Indeed, Defendants purposefully designed and sold products that delivered a pharmacologically effective dose of nicotine in order to create and sustain nicotine addiction in smokers...

*United States of America v. Philip Morris USA Inc. et al.*, US District Ct. (D.C.), Docket 99-2496, Final Opinion (Aug 17, 2006)  
[www.dcd.uscourts.gov/opinions/2006/Kessler/99-2496-082006a.pdf](http://www.dcd.uscourts.gov/opinions/2006/Kessler/99-2496-082006a.pdf)

8. This was what the industry has known for decades.<sup>2</sup> In the decision at trial of the present matter, Denis J. confirmed at para. 530 of the Trial Judgment that "tobacco companies have been aware of [the addictive and harmful attributes of tobacco] for a long time, in some cases over 50 years, and have always denied them or refused to disclose them to consumers."

9. Denis J. concluded at para. 531 that the Respondents' "freedom of expression... it must be said, has hitherto not been used appropriately."

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<sup>2</sup> The Respondents here were not the same legal entities on trial in the United States. However, under ordinary principles of products liability, manufacturers of a given product will be presumed at law to have the same level of expert knowledge regarding that product as is possessed by other industry participants. See for instance *Lambert v. Lastoplex* [1972] S.C.R. 569 (warnings provided by a non-defendant manufacturer evidence of what warning should have been given by defendant manufacturer of flammable sealant); *Buchan v. Ortho Pharmaceutical (Canada) Ltd.*, (1984), 9 D.L.R. (4<sup>th</sup>) 373 at 386 (H.C.), aff'd (1986), 25 D.L.R. (4<sup>th</sup>) 658 (Ont. C.A.) (knowledge of US parent company used to establish that its Canadian subsidiary should have warned of the danger of stroke with the use of oral contraceptives). Moreover, a review of Kessler J.'s judgment in the RICO action reveals the full extent to which the multinational companies, including Canadian subsidiaries, acted as one in furtherance of the conspiracy that was proven in that case.

10. The overwhelming majority of smokers report that they want to quit, but cannot. Certainly a few succeed, but the majority will be unsuccessful. Denis J. found as a fact that:

Cigarettes... are so powerfully addictive that sheer force of will is usually of no avail when trying to quit. The evidence shows that 80% of all smokers wish they did not smoke but cannot quit.<sup>3</sup>

Trial Judgment, para. 181

11. The above facts are consistent with the findings of this Court in *RJR-MacDonald Inc. v. Canada (Attorney General)*. In that case, La Forest J. wrote:

Many scientists agree that the nicotine found in tobacco is a powerfully addictive drug. For example, the United States Surgeon General has concluded that “[c]igarettes and other forms of tobacco are addicting” and that “the processes that determine tobacco addiction are similar to those that determine addiction to other drugs, including illegal drugs”; see *The Health Consequences of Smoking -- Nicotine Addiction -- A report of the Surgeon General* (1988). Given the addictive nature of tobacco products, and the fact that over one-third of Canadians smoke, it is clear that a legislative prohibition on the sale and use of tobacco products would be highly impractical. ...

...Nearly seven million Canadians use tobacco products, which are highly addictive.

...[O]verwhelming evidence was introduced at trial that tobacco use ... is highly addictive.

*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199  
at paras. 34, 69, 86

12. In British Columbia’s submission, the fact of addiction, and its implications, require a frank reconsideration of the nature and source of the expression right, and are together the most important aspect of this case.

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<sup>3</sup> Nor does this mean that only these 80% of smokers are addicted, of course. A desire to quit, particularly in the face of serious withdrawal symptoms, is not a necessary precondition of addiction.

## II QUESTIONS IN ISSUE

13. The first and third Constitutional Questions stated by this Court are:

1. Do ss. 18, 19, 20, 22, 24 and 25 of the *Tobacco Act*, S.C. 1997, c. 13, in whole or in part or through their combined effect, infringe s. 2(b) of the *Canadian Charter of Rights and Freedoms*?

...

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*?

14. The Respondents/Appellants by Cross-Appeal and the Appellant Attorney General of Canada say “yes” with respect to the first question, and argue their positions within the scope of justification under section 1 of the *Charter*.

15. The Attorney General of British Columbia says, at least to the extent the provisions apply to speech directed at addicted smokers, “No.”

### III ARGUMENT

#### **A. British Columbia's Position**

16. The Province accepts that this Court has historically stated that any expressive content that conveys meaning and falls short of violence comes within the ambit of section 2(b) and receives *prima facie* Charter protection.

17. British Columbia respectfully says that this description is incomplete, and that there is a type of facially-expressive conduct that, while it is not in itself violent, nevertheless falls outside the protection of the *Charter*, and does so by virtue of its content and context, which are inextricably linked with its form.

18. In this Factum the Province uses the term "trigger words" to describe this speech, which is, in all but physical form, violence directed at the audience. "Trigger words" exploit some unusual weakness or disability in the listener in order to trigger a response that is immediately, physically, injurious.<sup>4</sup>

19. The 1978 Jonestown murder/suicide of over 900 cult followers in Guyana is a particularly vivid and tragic example of the use of "trigger words". British Columbia says that Reverend Jim Jones's instruction to his vulnerable followers to drink cyanide-laced Flavor-Aid, and to similarly murder their own children, would not be protected under section 2(b) of the *Charter*. The Province says that promoting tobacco consumption to addicted smokers is an analogous use of "trigger words", and is similarly unprotected by section 2(b).

20. British Columbia's argument is that speech is not protected by section 2(b) under the "trigger words" exception where the following criteria are met:

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<sup>4</sup> Another apt term might be "destructive command", an expression used by computer programmers to describe an input that, exploiting a pre-programmed weakness embedded in a computer language, instructs a computer to begin the erasure of data.

- 1) The speech exploits a particular weakness or condition in the listener to produce a response without a normal opportunity for exercise of rational thought or reflection;
- 2) the listener's response, to the extent that there is one, will be injurious to the listener or a third party, or both; and
- 3) the causing of the injury is the dominant purpose of the speech.

21. This Appeal provides one of the most important opportunities to explore the limits of free expression under section 2(b) since the advent of the *Charter* in 1982. The case at bar is not concerned with speech that is opposed because it is odious, offensive, or untrue, as with the hate speech of *R. v. Keegstra* [1990] 3 S.C.R. 697 or *R. v. Zundel*, [1992] 2 S.C.R. 731. Nor is it concerned with speech that is alleged to be indirectly harmful, such as the pornography in *R. v. Butler* [1992] 1 S.C.R. 452 or *R. v. Sharpe* [2001] 1 S.C.R. 45.

22. This Appeal is concerned with speech that, if acted upon, causes immediate personal injury to the listener in the form of sustained and prolonged addiction. It is speech directed at an actor whose ability to judge and decide whether to act upon it is impaired by that same physical addiction. And it is speech whose *unambiguous purpose* is not to communicate meaning, but rather to cause personal injury in the form of continued smoking.

23. In order for British Columbia's proposed "trigger words" exception to apply in the case at bar, this Court must be persuaded that:

- A "trigger words" exception to section 2(b) as proposed by British Columbia ought to be recognized;
- the manufacturers are asserting in this Appeal and Cross-Appeal a constitutional right to communicate only with existing smokers, and that those persons are, overwhelmingly if not entirely, an audience that is addicted to nicotine;
- persons addicted to a drug such as nicotine are, by definition, restrained or inhibited from making a fully free and rational choice as to whether to continue its use or to quit;

- the creation or maintenance of addiction is in itself a personal injury. Thus smoking is injurious *per se*, and the consumption of each cigarette is a harm in itself, regardless of whether the smoking eventually leads to serious disease or death; and
- even brand preference advertising purportedly aimed at “switchers” is injurious in this way.

24. Each of these propositions will be developed in this Factum.

25. British Columbia says that the activities restricted in ss. 18, 19, 20, 22, 24 and 25 of the *Tobacco Act*, S.C. 1997, c. 13 and the mandated warning provisions of the *Tobacco Products Information Regulations*, SOR/2000-272 do not violate section 2(b) of the *Canadian Charter of Rights and Freedoms*. Tobacco advertising and promotion targeted at addicted smokers attracts no *prima facie* Charter protection. Even a complete ban on such activities would not implicate section 2(b). As such, no resort to justification under section 1 is necessary.

26. The nature of tobacco addiction, amply before this Court on the Record, and the fact that addiction represents, in itself, an ongoing injury to smokers, changes every aspect of the ordinary free expression equation under section 2(b).

## **B. British Columbia’s Argument**

### **The Manufacturers’ Claimed Exclusive Audience: Addicted Smokers**

27. The manufacturers say, at para. 6 of their Factum on Cross-Appeal:

The Manufacturers do not contest this Court’s conclusion in *RJR-Macdonald* that prohibitions against “lifestyle advertising” and against advertising aimed at youth are acceptable limits on their freedom of expression. However, the Manufacturers compete against one another for market share among adult smokers in a market for a legal product and, to that end, seek some means of communicating with

adult smokers about the availability and characteristics of their products.  
[emphasis added]

28. The manufacturers clarify at para. 130 of their Factum on Cross-Appeal that:

The Manufacturers seek only the right... to engage in... product advertising to adult smokers. [emphasis added]

29. The crux of the manufacturers' argument is that the provisions of the *Tobacco Act* amount to a "total ban" on advertising to adult smokers (see for instance paras. 40, 67, and 73 of their Factum on Cross-Appeal). The Attorney General of Canada disagrees that the ban is total. British Columbia says that, even if the provisions of the *Tobacco Act* did amount to a total ban on such advertising, section 2(b) still would not be implicated.

30. The manufacturers' argument, and that of the Attorney General of Canada, is premised on this Court's finding in *RJR-Macdonald* that a total ban had not been justified. British Columbia says that this is a different case, on different facts, and (at least in the case of the Cross-Appeal) with a very different right being asserted.

31. British Columbia's argument addresses the only right asserted by the manufacturers in their Cross-Appeal: a right to reach existing smokers with their marketing. As such, the Province's argument does not rely on the findings of Denis J. at trial that the manufacturers were also intending to target beginning smokers – almost always children – to encourage them to begin smoking or maintain their consumption when they had started.<sup>5</sup>

32. Because the manufacturers in their Cross-Appeal are not asserting a constitutional right to advertise or promote cigarettes to non-smokers, the interesting question of

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<sup>5</sup> Denis J. accepted at paras. 177-185 of the Trial Judgment that it is "the accepted views of the scientific community" that "sponsorship and advertising have the same goal," to increase cigarette consumption, encourage beginning smokers in the 13-16 age group, to discourage smokers from quitting, and to encourage quitters to return to smoking. Denis J. found that advertising and promotion accomplished those goals (see also paras. 122, 228, 272, 273, and 527). The Quebec Court of Appeal apparently thought it was at least plausible that smokers were the prime targets of the manufacturers' advertising: *JTI MacDonald v Canada* 2005 QCCA 726 Per Beauregard J.A. at para. 212.

whether British Columbia's proposed "trigger words" exception would apply to speech directed at (for instance) non-addicted children does not here arise. The manufacturers concede that restrictions against such expression would be justified by section 1 in any event.

33. The most important factor distinguishing *RJR-Macdonald* is that the speech put at issue by the manufacturers in the Cross-Appeal is solely directed at persons who are already smoking – who are already addicted to nicotine. *RJR-Macdonald* proceeded on the question of whether tobacco advertising and promotion generally could be restricted, and to what extent. With respect to a general audience for tobacco advertising, British Columbia agrees that restrictions might have to be justified under section 1. But the Cross-Appeal in the present case is directed much more narrowly: *the manufacturers only oppose a total ban on advertising to adult smokers*. British Columbia says that, when drawn so narrowly, resort to *RJR-Macdonald* is unnecessary, as is the section 1 argument. The entire matter can and should be disposed of under section 2(b).

#### **This Court Must Recognize "Trigger Words" as Speech Unprotected by s. 2(b)**

34. This Court has in a succession of cases defined "expression" broadly to mean any activity or representation that conveys meaning or attempts to convey meaning in a non-violent form: see for example, *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at p. 1180; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 at p. 244; *R. v. Keegstra* [1990] 3 S.C.R. 697 at pp. 729 and 826; and *R. v. Butler* [1992] 1 S.C.R. 452. In *R. v. Zundel*, [1992] 2 S.C.R. 731, the Court unanimously concluded that the content-neutral approach to s. 2(b) held even deliberate falsehoods to be a protected form of expression.

35. As a result, parties almost invariably concede, as they have here, the breach of section 2(b) whenever speech is restricted.

36. But none of these cases has considered the question of “trigger words,” words calculated to cause immediate injury when received by an audience disabled from forming a rational decision as to whether to act upon them. While some cases have considered and rejected a harm-based analysis, in such a case the harm feared was indirect and temporally distant. Even hate speech, considered in *R. v. Keegstra*, or child pornography in *R. v. Sharpe*, did not exploit the audience’s inability to judge the speech’s worth, reflect upon it, and act accordingly. And in neither case would the speech, if acted upon as intended, cause immediate injury. This is therefore a case of first impression.

37. As described earlier, British Columbia’s proposed “trigger words” exception would apply when the following criteria are all satisfied:

- 1) The speech exploits a particular weakness or condition in the listener to produce a response without a normal opportunity for exercise of rational thought or reflection;
- 2) the listener’s response, to the extent that there is one, will be injurious to the listener or a third party, or both; and
- 3) the causing of the injury is the dominant purpose of the speech.

38. British Columbia recognizes that denying section 2(b) protection to the activities at issue here would represent a novel development in *Charter* jurisprudence. Yet, on at least one occasion, members of this Court have questioned the categorical approach in the jurisprudence. In *R. v. Sharpe*, L’Heureux-Dubé J., writing for herself, Gonthier and Bastarache JJ., said:

151 From our jurisprudence, it is unclear whether the requirement that an activity convey or attempt to convey meaning excludes all activities which are not *prima facie* communicative from the scope of the right to free expression in s. 2(b). For example, this Court speculated that the parking of a car is not protected expression since it is not a *prima facie* communicative activity; see *Irwin Toy*, *supra*, at p. 969... Thus, in our view, it is unfortunate that the Crown conceded that the right to free expression was violated in this appeal in all respects, thereby depriving the Court of the opportunity to fully explore the content and scope of s. 2(b) as it applies in this case. At the same time, we recognize that, at this stage, our jurisprudence leads to the conclusion that, although harmful, the content of

child pornography cannot be the basis for excluding it from the scope of the s. 2(b) guarantee. [emphasis added]

39. It might be thought that, if restrictions on speech such as British Columbia describes can be justified through section 1, it is not necessary to consider whether the speech is *prima facie* protected by section 2(b). The Province would argue that such an approach is wrong. First, because it misses the opportunity to set out guidance for consideration in future “trigger words” cases, but second and most importantly, because if such speech ought not to be *prima facie* protected, it would trivialize the *Charter* to behave as if it were. In British Columbia’s submission, it is desirable that this Court clarify that the speech is not protected in this context, and why.

#### **The Message is the Medium: Where “Content” and “Form” are “Blurred”**

40. This Court has recognized that not all expressive conduct is worthy of section 2(b) protection. An exception is expression that takes the form of violence, with political assassination put forward as the example. Other exceptions are expression that occurs on private property, or even on public property that is not appropriate for the purpose.

41. While lower courts have from time to time held that certain expression does not attract 2(b) protection on the basis of its content,<sup>6</sup> this Court has repeatedly turned aside attempts to introduce new exceptions to the general rule that expressive content is *prima facie* protected, short of violence. In *Keegstra*, McLachlin J. (dissenting, but not on this point), wrote at p. 828:

As this Court has repeatedly affirmed, the content of a statement cannot deprive it of the protection accorded by s. 2(b), no matter how offensive it may be. The content of Mr. Keegstra’s statements was offensive and demeaning in the extreme; nevertheless, on the principles affirmed by this Court, that alone would appear not to deprive them of the protection guaranteed by the *Charter*.

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<sup>6</sup> See for instance *R. v. Baig* (1992), 78 C.C.C. (3d) 260 (B.C.C.A.) (section 2(b) not engaged by a prohibition against mis-stating one’s professional qualifications). The United States Supreme Court has similarly found that misleading advertising is not subject to *prima facie* protection: *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980), pp. 563, 566.

42. The exception for violence has been justified on the basis that it is the *form or method* that deprives it of protection, not the *content*. British Columbia says that, in some rare cases such as that at bar, the distinction is not so simple. In fact in *Montréal (City) v. 2952-1366 Québec Inc.*, this Court recognized that:

[T]he distinction made in *Irwin Toy* between content (which is always protected) and “form” (which may not be protected)... may sometimes be blurred.

*Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, 2005 SCC 62 at para. 57

43. One example of the “blurring” is with respect to mere *threats* of violence. McIntyre J., writing for the majority in *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, said at p. 588: “*Charter* protection for freedom of expression... of course, would not extend to protect threats of violence or acts of violence. [emphasis added]” One obvious question therefore arising is on what basis the mere threat of violence can fall outside 2(b) protection, except on the basis of its content.

44. This Court has never definitively resolved the constitutional status of “threats of violence”. The passage from *Dolphin Delivery* cited above has been subsequently repeated in *Irwin Toy* and by L’Heureux Dubé J. in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139. In *R. v. Keegstra*, the majority of the Court (Dickson C.J. and Wilson, L’Heureux-Dubé and Gonthier JJ.) thought that mere “threats” *would* be *prima facie* protected, and others (La Forest, Sopinka and McLachlin JJ.) thought that threats of violence were themselves violence and therefore *would not* be protected on the basis of their “form”. But no actual “threat of violence” case has yet come before the Court under 2(b), and in *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, the unanimous Court was only able to say at para. 107 that the protection of section 2(b) extended “to hate speech and *perhaps* even threats of violence. [emphasis added]”

45. Despite the best efforts of members of this Court to distinguish “content” from “form”, in certain cases (as this Court itself recognized in the quote from *Montréal (City)* above) they are sometimes inextricable, such as when a word is uttered for no other purpose but its physiological effect.<sup>7</sup> Indeed this distinction might explain the exclusion from 2(b) of “threat[s] of violence”, as discussed in the previous paragraph.

46. Consider speech that carries with it an immediately violent or harmful response, such as the shouting of “ready, aim, fire” amidst an armed mob, or yelling “Jump!” at a mentally-troubled person threatening suicide. Either form of speech, British Columbia would argue, is not worthy of section 2(b) protection in those contexts, although saying either would be perfectly acceptable in a different context with a different audience (perhaps at a firing range or aerobics studio, respectively). And in either case the reason for excluding the speech from 2(b) protection is that, while it might have “meaning” on some level, it is not an appeal to a rational actor who will, with time to reflect, consider whether or not to act. It is not designed or intended, in the words of Sopinka J. in *R. v. Butler* at p. 64, to “conve[y] ideas, opinions, or feelings”; it is instead intended to exploit a weakness in the listener in order to produce immediate physical injury. The content of the speech is simply the method of injury. Refusing to protect such speech *ab initio*, therefore, in no way undermines the objectives of the expression right.

47. In the present case the addicted smoker is not suffering under a disability of insufficient time to reflect, discuss and decide. Instead the disability arises from the fact of addiction. That is the crucial contextual factor.

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<sup>7</sup> Professor Tribe uses the example of shouting “Boo!” behind an unsuspecting cardiac patient: Lawrence H. Tribe, *American Constitutional Law* (2d) (Mineola, NY: Foundation Press, 1988) at 838. But of course that example is easy because the objection is clearly to form, and not content: it wouldn’t matter what word was shouted – the effect would be the same. To give a better example, if a hypnotist has conditioned his subject to fall into a narcoleptic state when the word “Rosebud” is uttered, the speaking of that word, while expression in form, and even arguably uttered to convey “meaning” on some level, is primarily designed to obtain a particular automatic response. If the hypnotist said “Rosebud” when his subject was standing on a high ledge, British Columbia would argue that there is no section 2(b) right to such “speech”. But importantly, in that case the exception is based on the speech’s *content*, given the particular audience and context. The medium is the message, and vice versa: as this Court put it, “the distinction... between content... and ‘form’ [is] blurred”.

48. United States jurisprudence has long recognized this class of words which, “by their very utterance inflict injury.” although the category of cases in American jurisprudence is arguably broader than the very narrow one proposed here. The United States Supreme Court held in *Chaplinsky v. State of New Hampshire*:

...There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include ... those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

*Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942) at p. 5

49. Judge Learned Hand described this distinction between protected and unprotected speech as one between “triggers of action” on the one hand and “keys of persuasion” on the other.

*Masses Publishing Co. v. Patten*, 244 Fed. 535 (S.D.N.Y. 1917) at 540

50. Holmes J. wrote in 1919 that:

...[T]he character of every act depends upon the circumstances in which it is done... The most stringent protection of free speech... does not... protect a man from an injunction against uttering words that may have all the effect of force. [emphasis added, citations omitted]

*Schenck v. United States*, 249 U.S. 47 (1919) at 52

51. And while the examples from the United States jurisprudence, like the example of “ready, aim. fire” above, almost always deal with triggers of *illegal* action (the second “branch” of *Chaplinsky*).<sup>8</sup> the example of the person shouting “Jump!” (where the suicide

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<sup>8</sup> In *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the United States Supreme Court wrote: “[our] decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a

itself would be legal), like the activity at bar, is concerned with words that are designedly and *per se* injurious, whether illegal or not.

52. British Columbia recognizes that the absolutist language of the First Amendment has led to jurisprudence in the United States that does not distinguish truly excluded speech from speech the infringement of which is justified under various balancing tests. But just as it might be problematic to include the justification analysis in the question of whether the speech is *prima facie* protected under the First Amendment, so in the Province's submission is it a mistake to roll the question of *prima facie* protection into section 1. The unique structure of the *Canadian Charter* invites this Court to weigh the question of inclusion fully and separately from justification.

53. British Columbia says that Justice McLachlin's admonition in *Keegstra* that speech cannot be excluded from section 2(b) on the basis of content *alone* can stand alongside the Province's proposed exception that speech *can* be excluded on the basis of content combined with a particular context: where the content is used against an audience unable to exercise ordinary reflection and autonomous choice, in a situation where it will cause immediate personal injury in the listener (or possibly in a third person, though that is not at issue here), and where its dominant purpose is to cause that injury.<sup>9</sup>

54. In the case at bar, the right asserted is to communicate pro-smoking messages to a particular audience (smokers) in a particular context (where because of addiction they cannot exercise ordinary reflection and autonomous choice). British Columbia says that such speech falls outside 2(b) because it is *per se* injurious in the same way as "ready, aim, fire" and "Jump!". This is because the act of smoking is in itself harmful, regardless of whether it leads to secondary disease.

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State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

<sup>9</sup> Until recently it was thought that, in the United States, prohibitions on "fighting words" or words immediately injurious must be content-neutral. This is no longer the case. In *R. A. F. v. St. Paul*, 505 U.S. 377 (1992) (a "cross-burning" case) the US Supreme Court held at 388 that there could be content-based proscription when the basis for it consists entirely of the very reason its entire class of speech is proscribable.

## Smoking Is, In Itself, Harm

55. British Columbia's assertion that smoking equates with personal injury does not rely on the existence of traditionally acknowledged tobacco-related diseases. It is uncontroversial that addiction to tobacco often leads, more or less directly, to familiar, serious health consequences – cancer, emphysema, heart disease, and on and on. The Trial Judge made numerous findings regarding the deadly diseases caused by smoking that need not be reiterated here.

56. British Columbia says that it is not only these consequential harms that are “damage” from smoking. The act of smoking is not simply an activity bearing a risk of harm – the act of smoking, of maintaining the addiction to nicotine, *is in itself harm*.

57. As noted earlier in this Factum, it is uncontested that the existing market for cigarettes consists entirely or almost entirely of persons who are addicted to nicotine. Addiction, or the continuance thereof, has been recognized as sufficient damage to found a cause of action.

58. In the Court of Appeal decision in *Norberg v. Wynrib*, both the majority and the dissent recognized the continuation of addiction as damage giving rise to compensation (the majority denied recovery on the basis of *ex turpi causa*). McEachern C.J. wrote for the Court :

The learned trial judge, however, found that the Plaintiff had not been damaged in any way. He found emotional hurt or injury in the absence of physical harm did not support a cause of action.

With respect, I am unable to agree with that conclusion. In my view the continuation of the Plaintiff's addiction, and the physical harm done to her by continued addiction is sufficient for this purpose.

*Norberg v. Wynrib* (1990), 66 D.L.R. (4th) 553 (B.C.C.A.), at 557

59. On appeal to this Court, La Forest J., writing for himself, Gonthier, and Cory JJ., allowed the appeal on the basis that there had been a battery, which was actionable *per*

se, and therefore didn't need to consider whether addiction was itself actionable harm. However, McLachlin J. writing for herself and L'Heureux-Dubé J. at pp. 295-296 considered "prolongation of addiction" as compensable harm arising from a breach of fiduciary duty, and Sopinka J., who argued that liability should flow from a breach of the doctor-patient relationship, similarly recognized at p. 317 that the prolongation of addiction was compensable damage.<sup>10</sup>

*Norberg v. Wynrib* [1992] 2 S.C.R. 226

60. Similarly, in *Welch v. Doré*, Lax J. considered whether the prolongation of addiction was "damage" caused by a doctor's acts or omissions, and wrote:

Drawing any causal correlation between Mrs. Welch's current state and Dr. Doré's conduct is extremely problematic. It is problematic because Dr. Doré's acts or omissions, namely his boundary violations, his continued prescribing of addictive medication and his continued therapy with Mrs. Welch after he recognised her addiction, do not appear to have harmed her. Nevertheless, I am prepared to find that Dr. Doré contributed to her damage, because he prescribed her addictive medication for a period of about six months after he recognised that she was addicted, and thereby prolonged her dependency. [emphasis added]

*Welch v. Doré* [2000] O.J. No. 737 at para. 350 (Sup. Ct. J.)

61. The consumption of every cigarette by an addicted smoker sustains addiction in the same way as did the consumption of every pill by Ms. Norberg or Ms. Welch. Each cigarette smoked is an inherently harmful event, a fresh and legally-recognized personal injury. It may be only one laceration in what will likely be death by ten thousand cuts, but it is a cut nonetheless.

62. It follows that an activity that advertises or promotes tobacco use among smokers, to the extent that it has an effect, will lead to the increased or sustained consumption of tobacco and thus cause harm. Either the speech is of no consequence or value to anyone,

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<sup>10</sup> This is entirely logical: if a person could produce in another all the physiological effects of addiction, could it be argued that this was not doing injury even if no other damage resulted?

or it causes harm in the population of its victims that is precisely proportional to the speech's efficacy. In other words, like shouting "ready, aim, fire!" or "Jump!", *the expression only has effect (or value to the speaker) to the extent that it causes harm.*

63. It is difficult to think of any supposedly "expressive" activity so concomitant with physical harm except violence itself.

64. In *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, this Court upheld the constitutionality of a law that imposed criminal sanction on any person who "(a) counsels a person to commit suicide, or (b) aids or abets a person to commit suicide, whether suicide ensues or not..."<sup>11</sup> Sopinka J., writing for the majority, cited with approval the following passage from the Law Reform Commission of Canada:

Aiding or counselling a person to commit suicide, on the one hand, and homicide, on the other, are sometimes extremely closely related. Consider, for example, the doctor who holds the glass of poison and pours the contents into the patient's mouth. Is he aiding him to commit suicide? Or is he committing homicide, since the victim's willingness to die is legally immaterial? [emphasis added]

65. British Columbia recognizes that this passage was cited in the context of challenges not premised on section 2(b). However, the point made is simply that counselling a person to do violence to herself is sometimes only marginally distinct from doing that violence directly. This is particularly so if the person is in a weakened state of resistance and unable to exercise full freedom of rational reflection.

66. Nor is it any reply to protest, as the manufacturers appear to do, that the "harm" – *i.e.*, the consumption of tobacco – is in itself legal. This is no more relevant than in the case of the suicidal man on the ledge, or the unfortunate followers of Reverend Jones in Guyana. The legal right (and even the manufacturers acknowledge that it is not a *constitutional* right) is to make and sell the product in accordance with the law. For the reasons accepted in *RJR-Macdonald*, the government is not in a position to criminalize

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<sup>11</sup> Ms. Rodriguez was seeking active assistance in her suicide, not counselling. It would appear that the constitutionality of the counselling prohibition has not yet been examined under section 2(b).

tobacco use.<sup>12</sup> This does not give rise to a constitutional right to persuade someone addicted to it to continue with destructive behaviour.

### Addiction and the Values Underlying Expression

67. This Court has repeatedly said that the definition of a right or freedom must be consistent with its purpose and the *Charter*'s larger objects. In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 Dickson C.J. wrote at p. 344

[I]t is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore... be placed in its proper linguistic, philosophic and historical contexts.

68. This is no less so with respect to the freedom of expression. McLachlin J. said in *Commonwealth* at p. 232 that the Court must consider the "values and interests" underlying the freedom of expression in order to determine which expression will be protected by section 2(b):

The state should not be obliged to defend in the courts its restriction of expression which does not raise the values and interests traditionally associated with the free speech guarantee. Indeed, a failure to invest s. 2(b) with meaningful content reflective of those principles threatens to trivialize the *Charter* guarantee of free expression.

*Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 at p. 232

69. In *Montréal (City)*, this Court said:

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<sup>12</sup> And of course it is the very addictiveness of the product that is at the root of this historical accident as well. La Forest J. wrote in *RJR-Macdonald* at para 34:

Why, then, has Parliament chosen to prohibit tobacco advertising, and not tobacco consumption itself? In my view, there is a compelling explanation for this choice... a prohibition upon the sale or consumption of tobacco is not a practical policy option at this time. It must be kept in mind that the very nature of tobacco consumption makes government action problematic... Given the addictive nature of tobacco products, and the fact that over one-third of Canadians smoke, it is

Expressive activity may fall outside the scope of s. 2(b) protection because of how or where it is delivered. While all expressive *content* is worthy of protection (see *Irwin Toy*, at p. 969), the *method or location* of the expression may not be.

*Montréal (City) v. 2952-1366 Québec Inc.*, *supra* at para. 60.

70. In *Montréal (City)* this Court would have excluded the expression from 2(b) protection if it either “impede[d] the function” of the location or “fail[ed] to promote the values that underlie the free expression guarantee.” [paras. 66-68]

71. Location in the cases is usually viewed with regard to who is in that location and for what purpose. Thus “location” is, generally speaking, a proxy for an “audience”. The distinction is generally of little consequence, because “audience” and “location” are in virtually every case coterminous: people have a physical location in which they receive expression. But as L’Heureux-Dubé J. observed in *Committee for the Commonwealth of Canada v. Canada*, after reviewing the American position on “public forums”:

An overly rigid categorization focusing exclusively on place would tend to lose sight of the forest for the trees. The First Amendment as well as the *Canadian Charter of Rights and Freedoms* were designed to protect people, not places. While certain areas can acquire a distinctive character, and people’s expectations may be affected by where they find themselves, the rights and freedoms do not extend to the locations, but rather to the people occupying them.

*Committee for the Commonwealth of Canada v. Canada*, *supra* at p. 202

72. Here the speech at issue is to an audience of addicted smokers, without a fixed geographic location. When expression is so strictly restricted to a particular audience based on a definable characteristic (addiction to smoking), British Columbia suggests that the Court may consider the appropriateness of extending constitutional protection of 2(b) there, as it would if all of those persons with that particular characteristic were gathered in one place with no one else present.

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clear that a legislative prohibition on the sale and use of tobacco products would be highly impractical...

73. The question framed by the Court in *Montréal (City)* would therefore be whether speech to a particular audience (i.e. one consisting of addicted smokers) “failed to promote the values that underlie the free expression guarantee.” British Columbia says that it would.

74. In *R. v. Keegstra*, Dickson C.J.C. said:

[This] court has attempted to articulate more precisely some of the convictions fueling the freedom of expression, these being summarized in *Irwin Toy* (at p. 612) as follows: (1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged, and (3) diversity in forms of individual self- fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed.

*R. v. Keegstra* [1990] 3 S.C.R. 697 at pp. 727-728

75. The facts as found by the Trial Judge in this case contain nothing to suggest that the manufacturers’ speech advances any of the values underlying expression. The addictive nature of tobacco by definition removes the traditional underpinnings of autonomy and free will from the expression analysis in the present case. Without a truly free choice among options, the resulting decision is meaningless, as this Court pointed out in *Norberg v. Wynrib*, where a woman who was addicted to painkillers was found not to have freely consented to sexual relations with a doctor who exploited her addiction:

As Heuston and Buckley, *Salmond and Heuston on the Law of Torts* (19th ed. 1987), at pp. 564-65, put it: “A man cannot be said to be ‘willing’ unless he is in a position to choose freely; and freedom of choice predicates the absence from his mind of any feeling of constraint interfering with the freedom of his will”. A “feeling of constraint” so as to “interfere with the freedom of a person’s will” can arise in a number of situations not involving force, threats of force, fraud or incapacity. The concept of consent as it operates in tort law is based on a presumption of individual autonomy and free will. It is presumed that the individual has freedom to consent or not to consent. This presumption, however, is untenable in certain circumstances. [emphasis added]

*Norberg v. Wynrib*. [1992] 2 S.C.R. 226 at pp. 246-247

76. Here, British Columbia says that, like the concept of consent in tort, all of the values underlying free expression are “based on a presumption of individual autonomy and free will.” In *Ford v. Quebec (A.G.)*, this Court confirmed that the principal value of commercial expression was to the audience and consumers, and was also premised on the idea of a rational autonomous actor. The Court said:

Over and above its intrinsic value as expression, commercial expression which, as has been pointed out, protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy. [emphasis added]

*Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712 at p. 767

77. Once the premise of free will is so severely undermined, as it is where the expression is directed solely at addicted persons and consists entirely of messages encouraging the sustaining and prolonging of the addiction, it cannot be argued that expression in that “forum” advances the self-fulfilment of anyone. It does not advance social or political – or indeed any – discourse; it undermines, rather than advances, the search for truth. This is because, again, all of these ‘values’ are premised on the assumption of an audience of autonomous persons free to make decisions, a view incompatible with addiction, which is in this case the defining characteristic of this group.

78. It might be thought that the argument advanced here would force this Court to reconsider its decision in *Irwin Toy*, where section 2(b) was said to cover even advertising that was targeted at children. Certainly it could be argued that children, like addicts, are not fully able to exercise free will and reflection in the same way as an ordinary adult might. But the distinguishing feature in the case at bar is the use of speech *to inflict physical injury*. Useful resort can be had to the “expectations” analysis from *Montréal (City)*: Canadians would not be surprised to learn that encouraging a child and his parents to buy a particular toy or breakfast cereal is *prima facie* protected expression. But if an adult were to tell a child of impressionable and obedient age to wet his finger and stick it in a nearby electrical socket, the quality of the speech act is entirely different.

In the latter case, British Columbia says that Canadians would be shocked if the courts concluded that such speech should be entitled to constitutionally-protected status.

### **Is Brand-Preference Marketing Injurious *Per Se*?**

79. The manufacturers claim that their intention with their marketing and promotion efforts is only to influence smokers with respect to which brand to smoke, not whether to smoke or not. It could of course be argued that causing an addicted smoker to switch from one brand to another would only be harmful if that smoker would otherwise have quit or smoked less. British Columbia says that such an argument cannot be accepted.

80. The Province has argued throughout this Factum that, in order to consider its effect, the speech cannot be considered in a vacuum. Rather it must be viewed in the context of its intended audience, addicted smokers. The record in the present case indicates that it does: Denis J. found as a fact that the targeted speech was designed and intended, *inter alia*, to discourage existing smokers from quitting and to encourage those who had managed to stop to take up smoking again.<sup>13</sup>

81. This makes intuitive sense: a smoker hearing “Smoke du Maurier”, “Smoke Export ‘A’”, “Smoke Player’s”, and “Smoke Benson & Hedges” is also hearing “Smoke, smoke, smoke, and smoke”. A person who is considering quitting (and the evidence is that the overwhelming majority of smokers would like to quit) is therefore hearing messages from the manufacturers that, cumulatively, encourage the sustained use of tobacco, whatever its brand.<sup>14</sup> In other words, the “switch” message precludes the “quit”.

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<sup>13</sup> See footnote 5, *supra* and accompanying text.

<sup>14</sup> In *Banzhaf v. FCC*, 132 U.S. App. D.C. 14, 32-33, 405 F.2d 1082, 1100-1101 (1968), cert. denied, 396 U.S. 842 (1969), the Federal Communications Commission had agreed with the complainant that cigarette commercials, taken together, “present the point of view that smoking is ‘socially acceptable and desirable, manly, and a necessary part of a rich full life.’” Invoking the “fairness doctrine”, the FCC ordered that broadcasters must provide sufficient time to anti-smoking groups to present a point of view opposite to that of the tobacco industry. On appeal to the D.C. Circuit Court of Appeals, Bazelon J., writing for a unanimous Court of Appeals, noted some of the effects of the ubiquitous commercials, said at p. 1104: “cigarette advertising inherently promotes smoking as a desirable habit. [emphasis added]” A similar point was reflected in the Court of Appeal judgment below when Beauregard J.A. said at a para. 85 that: “[I] est

82. The “brand-switching” argument is that the “trigger words” exception should apply if the words cause harm in the vulnerable intended audience. It should be no counter to say that, absent the manufacturer’s injurious words, the victim would have been injured by another. Could Dr. Wynrib have escaped being characterized as the source of Ms. Norberg’s injury by arguing that, if he had not prescribed the painkillers, someone else might have?

83. In fact there is an element of absurdity to this alternative. To follow an earlier analogy, it is as if two Jonestown preachers were competing to convince their flock to drink deadly cyanide of one flavour or another, each extolling the virtues of superior colour or taste. Would it matter that, if the commands of one had not swayed, the commands of his companion would have? It might be an interesting causation question in a first-year torts exam, but it does nothing to bring the speech within constitutional protection. A person saying “drink the purple cyanide” is still saying “drink the cyanide”. A corporation saying “smoke *du Maurier*” is still saying “smoke”.

### **The Exploitation of Addiction is Not a Constitutional Right**

84. The argument British Columbia develops here does not require that this Court finds that addiction renders smokers devoid of any capacity to make rational decisions or incapable of developing preferences for one brand or another. But nor is it right to say that an addicted smoker is regulating his smoking concordant with his autonomous free will in a marketplace of ideas, and therefore “anything goes”.

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difficile de prétendre que, si tous les fabricants entreprenaient de placarder les villes et les campagnes avec de la publicité informative ou préférentielle, il n'en résulterait pas un certain sentiment que fumer n'est pas aussi mauvais pour la santé qu'on le dit."

85. An addict cannot make rational choices with respect to whether to use the product to which he or she is addicted. That is tautological: it is the essence of addiction, its very definition. Smokers are driven by physiological symptoms of craving and withdrawal to be predisposed to messages of reinforcement and reassurance such as those the manufacturers put forward.

86. In such circumstances, where freedom of choice is impaired by the very product being promoted by the manufacturers, it cannot be “expected” that those manufacturers should enjoy a constitutional right to jockey for position to exploit the smoker’s unique disability.

87. It is this combination of addiction and exploitation that animated both the majority reasons of La Forest J. and the concurring reasons of McLachlin J. in *Norberg v. Wynrib*. La Forest J. wrote:

The respondent argues that the position of the plaintiff is tantamount to an assertion that an addict cannot give consent. An addict, he continues, will thus not be held responsible for his or her actions. Although an addiction may indicate an inequality in power, this will not by itself render consent legally ineffective. Under the formulation I have suggested, there must also be exploitation. In *Black v. Wilcox* (1976), 70 D.L.R. (3d) 192 (Ont. C.A.), at p. 197. Evans J.A., in discussing the principle of unconscionability stated:

... the Court will invoke the equitable rule that a person who is not equal to protecting himself will be protected, not against his own folly or carelessness, but against his being taken advantage of by those in a position to do so by reason of their commanding and superior bargaining position. The combination of inequality of position and improvidence is the foundation upon which the doctrine is based...

The aim is not to absolve an addict from all responsibility; rather it is to protect an addict from abuse from those in special positions of power. [Emphasis added.]

*Norberg v. Wynrib, supra* at p. 261

88. Advertising and promotion of an addictive product to an addict is “communication” on only the most superficial level. A cigarette brand placed before an addicted smoker has a single intention: its true purpose is to take advantage the disability

of addiction to achieve an injurious effect – smoking. Such communication serves none of the values underlying freedom of expression, and moreover bears no relation to the liberal philosophy that nurtures its root: that society is best served when citizens are given the opportunity to weigh competing points of view and, exercising their autonomy and free will, decide on the best course of conduct free from coercive interference.

### **C. British Columbia's Interest**

89. No superlative can give a sense of scale to the harm caused by the products of the Respondents. Denis J.'s findings of fact on this issue are not in dispute:

Smoking is by far the most serious health problem facing Canada. Smoking killed 30,000 people in 1981 and will kill 45,000 this year.

Trial Judgment at para. 219

90. Nor is there any question that the provincial governments, with primary responsibility for the provision of health care, bear a heavy burden with respect to the costs of smoking referred to by the Trial Judge.

91. British Columbia appears as Intervener in this case because of the provincial government's strong interest in the reduction and control of tobacco use, a subject that falls concurrently within both federal and provincial jurisdiction.

92. It is also a fact established at trial that stopping smoking leads to significant improvements in health and outlook (Trial Judgment paras. 147-152).

93. British Columbia, like all provinces, has historically been active in legislating with respect to tobacco control. In recent years British Columbia alone has litigated against the Respondents to recover the cost of health care benefits that it has incurred, the Province alleges, in significant part because of the Respondents' abuse of their rights of expression over the last six decades.

94. British Columbia's interest is in maintaining the strength, diversity, and effectiveness of weapons in its tobacco control arsenal. British Columbia has only a limited regime restricting the sale and marketing of tobacco. It relies upon the federal legislation in this regard. The restrictions imposed by the *Tobacco Act* and the warnings mandated by the *Regulations* are an integral part of British Columbia's tobacco control strategy.

#### **D. Conclusion**

95. British Columbia argues that the marketing and promotion of tobacco products to addicted smokers is not protected by section 2(b) of the *Charter of Rights and Freedoms*. Such activity is not "expression" as that term is understood and valued, but rather consists of "trigger words" designed to cause and exacerbate personal injury. British Columbia argues that the manufacturers' intended audience, addicted smokers, is a peculiarly vulnerable group harmed by the "trigger words".

96. The Province also says that this is a case usefully viewed from first principles. The values underlying the expression right have been well articulated throughout this Court's jurisprudence. The undisputed fact of addiction, coupled with the indisputable fact that the speech in question aims to promote, prolong, and sustain that addiction, means *ipso facto* that the common foundation for all such values from the listeners' point of view – the idea of autonomous actors exercising free will – is severely undermined for those millions of persons.

97. The manufacturers are expressly determined to target those persons addicted to their product, to exploit that addiction, and thereby to cause their customers an injury from which they profit. This Court should not recognize any aspect of this deadly, predatory exploitation as a constitutional right.

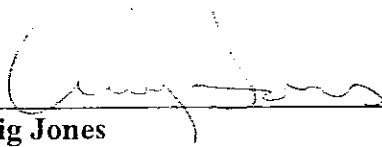
**IV SUBMISSIONS CONCERNING COSTS**

98. As is customary, the Attorney General of British Columbia does not seek costs and asks that no costs be awarded against him.

**V ORDER SOUGHT**

99. The Attorney General of British Columbia seeks an order that the Appeal be allowed and the Cross-Appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:



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**Craig Jones**  
Counsel for the Attorney General of British Columbia

VI TABLE OF AUTHORITIES

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<i>R. v. Zundel</i> , [1992] 2 S.C.R. 731	21, 34
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<i>Welch v. Doré</i> , [2000] O.J. No. 737 (Sup. Ct. J.)	60, 61

## **TEXTS**

Tribe, Lawrence H., <i>American Constitutional Law</i> (2d) (Mineola, NY: Foundation Press, 1988)	45
U.S. Department of Health and Human Services, <i>The Health Consequences of Smoking: Nicotine Addiction; A Report of the Surgeon General</i> , 1988	4

**VII STATUTES AND REGULATIONS****TAB**

- A. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982 (U.K.)*, 1982 c. 11, ss. 1, 2(b)
- B. *Tobacco Act*. 1997 c. 13
- C. Tobacco Products Information Regulation SOR/2000-272