

Served Nov 13/06

Court No: 30611

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

BETWEEN:

ATTORNEY-GENERAL OF CANADA,

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

-and-

J.T.I. MACDONALD CORP.,

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

AND BETWEEN:

ATTORNEY-GENERAL OF CANADA,

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

-and-

ROTHMANS, BENSON & HEDGES INC.,

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

AND BETWEEN:

ATTORNEY-GENERAL OF CANADA,

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

-and-

IMPERIAL TOBACCO CANADA LTD.,

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

-and-

**CANADIAN CANCER SOCIETY,
ATTORNEY GENERAL OF NEW BRUNSWICK,
ATTORNEY GENERAL OF MANITOBA,
ATTORNEY GENERAL OF QUEBEC,
ATTORNEY GENERAL OF SASKATCHEWAN,
ATTORNEY GENERAL OF BRITISH COLUMBIA,
ATTORNEY GENERAL OF ONTARIO,**

INTERVENERS

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**FACTUM OF THE INTERVENER
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PART I

STATEMENT OF FACTS

1. The Attorney General of Manitoba (hereinafter "Manitoba") does not dispute and relies on the facts set out in the appeal factum of the Attorney General of Canada (hereinafter "Canada").

PART II

QUESTIONS IN ISSUE

2. The following constitutional questions were stated by the Chief Justice on May 24, 2006:
- 1) Do sections 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*? 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*?

Manitoba's position is that although the provisions infringe section 2(b) of the *Charter*, they represent a reasonable limit on that freedom.

- 2) Do the provisions of the *Tobacco Products Information Regulations*, SOR/2000-272, governing the size of the mandatory messages infringe section 2(b) of the *Canadian Charter of Rights and Freedoms*? If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under section 1 of the *Canadian Charter of Rights and Freedoms*?

Manitoba agrees with Canada that the size of the mandatory messages does not contravene section 2(b) of the *Charter*. If it does however, Manitoba's position is that the infringement is a reasonable limit under section 1.

PART III
ARGUMENT

A. Introduction

3. This is “round two” as it were, of the battle between the tobacco manufacturers and the Government of Canada on the issue of what, if anything, is permissible as far as advertising, promotion and sponsorship of tobacco in Canada is concerned. When this Court heard *RJR-MacDonald* in 1994, only the provinces of Québec and Ontario intervened.¹ Today, Canada is joined not only by those two provinces, but also by New Brunswick, Manitoba, Saskatchewan and British Columbia. Times have changed.

4. The tobacco manufacturers argue in their factum on appeal that the *Tobacco Act*² provisions only purport to allow limited information and brand preference advertising, but in fact represent a total ban on advertising, contrary to this Court’s guidance in *RJR-MacDonald*.

5. Manitoba submits that the claims of overbreadth and vagueness supporting the tobacco companies’ overall theme that the legislation is a total ban are over-stated. It is also submitted that the claims are disingenuous, in light of the tobacco companies’ level of sophistication and expertise in the very sphere in which they say they cannot discern a legally permissible way in which to operate: advertising and promotion.

6. But for the most part, Manitoba submits that the question of whether the legislation represents a total ban is not the critical question. It is submitted that the striking down of the advertising prohibitions by this Court in 1995 turned on a very narrow issue. The majority found that the Attorney General of Canada did not prove on a balance on probabilities that a total ban

1 And only Ontario intervened in support of the legislation; Québec opposed on division of power’s grounds and took no position on the *Charter* issues.

2 S.C. 1997, c. 13.

on tobacco advertising was rationally connected to a decrease in tobacco consumption, nor that a partial advertising ban would be less effective than a total ban.

RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199 at paras. 159 and 163 (Book of Authorities of the Appellant Attorney General of Canada, Volume II, Tab 22)

7. Will this Court require the Attorney General of Canada to prove that question this time? No matter how the advertising prohibitions are characterized, whether as a total ban or as provisions generally restrictive but permitting information and brand preference advertising, it is repeated that “times have changed.” It can reasonably be said, it is submitted, that the government’s burden is attenuated in light of several changes to the law since 1988 when Parliament enacted the first legislation, since 1989 when the trial record was being created in *RJR-MacDonald*, since 1995 when this Court struck down those provisions, and since 1997 when Parliament and the Government of Canada enacted the new provisions.

8. First, it is now clear that a strict civil standard of justification in section 1 cases of this nature is not required.

9. Secondly, this Court has on several occasions since *RJR-MacDonald*, recognized the degree of deference that must be accorded to the legislatures in areas of law where vulnerable groups like children are protected.

10. Thirdly, this Court has also recognized an attenuated burden of proof where the issue, in this case the harm caused by smoking to Canadians’ health, is based on social-science research.

11. Fourthly, deference must be accorded to Parliament in light of the considerably changed legislative and social landscape since this issue was last before this Court and since Parliament enacted the *Tobacco Products Control Act* in 1988. By 1997, Canadian society was far less tolerant of illness caused by smoking and was far more committed to legislation restricting smoking, a trend that has accelerated to the present. In that regard, Manitoba will outline laws

restricting smoking in its own jurisdiction, noting that they are part of a broader federal/provincial/territorial scheme to combat a national health problem.

12. It is submitted that all these factors justify restricting tobacco advertising, promotion and sponsorship in the manner undertaken by Parliament in the *Tobacco Act* and that the impugned provisions should be upheld.

13. This factum deals with three issues, two of which are preliminary to actual application of the *Oakes* test. The first issue is the standard of justification that ought to be applied in this case. The second is the claim of vagueness made by the tobacco companies. Finally, Manitoba will argue that in applying the minimal impairment test, a measure of deference commensurate with the nature of the problem being addressed by the *Tobacco Act* ought to be accorded to Parliament.

B. A Flexible Approach is Required in the Context of this Matter

14. The *Oakes* test, as is the case with most of the tests developed by this Court, is not a substitute for the balancing of rights, interests or principles involved. Thus, a strict application of the “tests” and “steps” developed by this Court in *Oakes* cannot replace a considered, normative analysis of whether restrictions on the promotion of a product known to be harmful and that causes enormous sickness and ill health to thousands of Canadians each year, is justified. Accordingly, Manitoba submits that *Oakes* must be applied in a manner commensurate with the specific values underlying the legislation at issue.

15. Section 1 itself reflects values held to be important in our free and democratic society. Some of those values appear in the rights and freedoms enumerated in sections 2 to 23 of the *Charter*. Other values are reflected in the restraint of the rights or freedoms, such as the value of protecting the health of Canadians. One way of achieving this long term goal is to decrease the use of tobacco, which in turn can be achieved by restricting advertising, promotion and sponsorship of tobacco. As Chief Justice Dickson (as he then was) stated in *Oakes*, “It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance.” It is submitted that

the exercise of unrestrained freedom on the part of tobacco companies to promote smoking would be inimical to the collective goal of Parliament and the legislatures, to protect the health of Canadians by discouraging smoking in Canada.

R. v. Oakes, [1986] 1 S.C.R. 103 at 136

16. It is submitted that Justice La Forest described the preferred approach to a section 1 analysis in *RJR-MacDonald*:

The appropriate "test" to be applied in a s. 1 analysis is that found in s. 1 itself, which makes it clear that the court's role in applying that provision is to determine whether an infringement is reasonable and can be demonstrably justified in a "free and democratic society". In *Oakes*, this Court established a set of principles, or guidelines, intended to serve as a framework for making this determination. However, these guidelines should not be interpreted as a substitute for s. 1 itself. It is implicit in the wording of s. 1 that the courts must, in every application of that provision, strike a delicate balance between individual rights and community needs. Such a balance cannot be achieved in the abstract, with reference solely to a formalistic "test" uniformly applicable in all circumstances. The s. 1 inquiry is an unavoidably normative inquiry, requiring the courts to take into account both the nature of the infringed right and the specific values and principles upon which the state seeks to justify the infringement. [Emphasis added]

RJR-MacDonald, *supra* at para. 62

17. This is also the approach taken by the trial judge in this case, who summarized at some length the rather grim, it is submitted, "factual and social context made manifest by the evidence."

Judgment of Justice Denis J.S.C., December 13, 2002 at paras. 218 – 245
(Record of the Appellant Attorney General of Canada, Volume II, pp. 240 – 242)

18. Moreover, as Justice McLachlin (as she then was) observed in *RJR-MacDonald*, the standard of proof will vary depending on the context and the degree of deference required:

Context and deference are related to a third concept in the s. 1 analysis: standard of proof. I agree with La Forest J. that proof to the standard required by science is not required. Nor is proof beyond a reasonable doubt on the criminal standard required. As the s. 1 jurisprudence has established, the civil standard of proof on a balance of probabilities at all stages of the proportionality analysis is more appropriate: *Oakes, supra*, at p. 137; *Irwin Toy, supra*, at p. 992. I thus disagree with La Forest J.'s conclusion (in para. 82) that in these cases "it is unnecessary . . . for the government to demonstrate a rational connection according to a civil standard of proof". Discharge of the civil standard does not require scientific demonstration; the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view: [reference omitted] [Emphasis added]

RJR-MacDonald, supra at para. 137

19. This flexible standard was applied in *Sharpe*, where this Court upheld the *Criminal Code* prohibition on possession of child pornography (with two exceptions/defences). Although the evidence of whether pornography incites paedophiles to offend was equivocal and it was on that basis that the trial judge had struck the provision, Chief Justice McLachlin, writing for the majority, stated that scientific proof based on concrete evidence was not required, rather it was sufficient to prove that there was a "reasoned apprehension of harm":

The second alleged harm is that possession of child pornography fuels fantasies, making paedophiles more likely to offend. The trial judge found that studies showed a link between highly erotic child pornography and offences. However, other studies suggested that both erotic and milder pornography might provide substitute satisfaction and reduce offences. Putting the studies together, the trial judge concluded that he could not say that the net effect was to increase harm to children (para. 23). Absent evidence as to whether the benefit from sublimation equals the harm of incitement or otherwise, this conclusion seems tenuous. More fundamentally, the trial judge proceeded on the basis that scientific proof was required. The lack of unanimity in scientific opinion is not fatal. Complex human behaviour may not lend itself to precise scientific demonstration, and the courts cannot hold Parliament to a higher standard of proof than the subject matter admits of. Some studies suggest that child pornography, like other forms of pornography, will fuel fantasies and may incite offences in the case of certain individuals. This reasoned

apprehension of harm demonstrates a rational connection between the law and the reduction of harm to children through child pornography. [Emphasis added]

R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2 at para. 89

20. This Court has accorded a degree of deference to the legislative bodies where a law is designed in part to protect a vulnerable group such as children, or is based on social science research, both of which are factors in this case. The explicit purpose of the *Tobacco Act* is in part to protect children and youth:

The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

- (a) to protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
- (b) to protect young persons and others from inducements to use tobacco products and the consequent dependence on them;
- (c) to protect the health of young persons by restricting access to tobacco products; and
- (d) to enhance public awareness of the health hazards of using tobacco products.

Tobacco Act, s. 4

21. In supporting an attenuated standard of justification in cases involving socio-economic legislation, Justice La Forest cited Justice LeBel's judgment for the majority of the Québec Court of Appeal (where he then was), in *RJR-MacDonald*, where Justice LeBel observed that the Supreme Court had "recognized the need for an attitude of deference with regard to legislative choices."

RJR-MacDonald, *supra* at para. 21

22. Part of the reason is the difficulty in proving scientifically the nexus between the problem being addressed and the legislative choice made by the legislature. Justice La Forest addressed the difficulty in proving the link between advertising and tobacco consumption in *RJR-MacDonald*:

At this point, there is no definitive scientific explanation for tobacco addiction, nor is there a clearly understood causal connection between advertising, or any other environmental factor, and tobacco consumption. This is not surprising. One cannot understand the causal connection between advertising and consumption, or between tobacco and addiction, without probing deeply into the mysteries of human psychology. Many of the workings of the human mind, and the causes of human behaviour, remain hidden to our understanding and will no doubt remain so for quite some time.

RJR-MacDonald, supra at para. 66

23. That being said, the evidence before the trial judge in the case at bar has gone considerably further in making that link. Justice Denis accepted the following testimonial evidence in his reasons for judgment at trial:

- Cigarette packaging is designed to convey a positive image of the product and a specific lifestyle. (para. 123)
- Internationally, the situation now is that advertising tobacco is prohibited, with exceptions, as opposed to permitted, with exceptions. (para. 137)
- Internationally recognized studies show a direct link between advertising and cigarette consumption. (para. 179)
- The U.S. Surgeon General's 1994 report made the following points: studies conducted around the world show a relationship between spending on advertising and cigarette consumption; cigarette advertising has an influence on children and adolescents; studies show a link between tobacco advertising and the decision to start smoking (para. 184)
- Advertising serves to recruit new smokers between the ages of 13 and 17, according to all studies, including that of the U.S. Surgeon General, and the tobacco companies are aware of this and therefore target their advertising to young people. Between 85 and 90% of new smokers are 14 – 16 years old. (paras. 189 – 190 and 194)
- Adolescents' feelings of insecurity make them more susceptible to advertising (para. 191). Moreover, they believe themselves to be immune to addiction. (para. 196)

- A 1996 research project for a new tobacco advertising campaign explicitly attempted to make smokers feel less guilty about smoking. Recent tobacco advertising has three objectives: reaching out to young people, reaching out to women and reassuring smokers. (para. 199)

Judgment of Justice Denis J.S.C., December 13, 2002 (Record of the Appellant Attorney General of Canada, Volume II, pp. 230 – 237)

24. Much has changed in Canada and world wide since 1989 – 1990, when the trial record in the trial of *RJR-MacDonald* was being created in the Québec Superior Court and since 1994, when that trial record was before this Court. Much has changed even since 1997 when the *Tobacco Act* was passed. Many of the factums in the case at bar have outlined the legislative and social changes with respect to tobacco across Canada and throughout the world. It is submitted that the evolution in the social and legal position of tobacco control in Canada is a critical factor in considering the central issue in this appeal: whether the restrictions on advertising, promotion and sponsorship in the federal *Tobacco Act* represent a reasonable limit on the tobacco companies' freedom of expression in a free and democratic society.

25. The trial judge commented on the changed context in which this matter is being considered, when opining that his own judgement was adding to the considerable jurisprudence already in existence on this topic: “It also becomes clear that nothing could inspire greater humility than, with the passage of time and changes in attitudes, being handed the opportunity to add a 14th opinion.” [Emphasis added]

Judgment of Justice Denis J.S.C., December 13, 2002 at para. 10 (Record of the Appellant Attorney General of Canada, Volume II, p. 205)

26. In the past two years, this Court has had an opportunity to consider two other major legislative initiatives in the overall federal/provincial/territorial scheme to combat the harm caused by tobacco: in *Rothmans*, where the provisions restricting retail display in Saskatchewan's legislation were upheld and in *Imperial Tobacco*, where B.C.'s health care costs recovery legislation was upheld. It should be noted that several provinces intervened in both these cases, and most notably, the Attorney General of Canada intervened in support of

Saskatchewan in *Rothmans*, notwithstanding that the sole issue was whether the provincial legislation was inoperative by reason of federal paramountcy.³

Rothmans, Benson & Hedges Inc. v. Saskatchewan, [2005] 1 S.C.R. 188, 2005 SCC 13 (Book of Authorities of the Appellant Attorney General of Canada, Volume II, Tab 26)

British Columbia v. Imperial Tobacco Canada Ltd., [2005] 2 S.C.R. 473, 2005 SCC 49

27. The changed legislative and social context in which tobacco control exists in Manitoba specifically is outlined in the following paragraphs.

28. The *Tobacco Products Control Act* under consideration in *RJR-MacDonald* received royal assent on June 28, 1988 and came into force on January 1, 1989. At that time, there was no complementary legislation in Manitoba restricting advertising, promotion and display. As stated earlier in this factum, Manitoba did not intervene in the case.

29. Manitoba was one of the first provincial legislatures to restrict smoking in enclosed public places. *An Act to Protect the Health of Non-Smokers*⁴ received royal assent on March 15, 1990, and was proclaimed in force on April 22, 1991. The statute restricted smoking in restaurants and prohibited it in daycares, schools and instructional facilities, retail stores, shopping malls and banks. It also enabled municipalities to pass by-laws limiting or banning smoking and provided that where by-laws were more restrictive than the provisions in the provincial legislation, the by-law would prevail. The statute also prohibited retailers from selling or giving tobacco to a minor.

30. In 1994, the name of the legislation was changed to its current name, *The Non-Smokers Health Protection Act (NSHPA)*.⁵ The prohibition on smoking was expanded to include common

³ In *Rothmans*, in addition to the AG Canada, six provinces intervened: Ontario, Québec, Prince Edward Island, Nova Scotia, Manitoba and British Columbia. In *Imperial Tobacco*, eight provinces intervened: Ontario, Québec, Nova Scotia, New Brunswick, Manitoba, Saskatchewan, Alberta and Newfoundland and Labrador.

⁴ S.M. 1989-90, c. 41.

⁵ *An Act to Amend an Act to Protect The Health of Non-Smokers*, S.M. 1994, c.24.

areas of residential buildings, shopping malls and elevators. The prohibition against selling tobacco to minors was extended to all persons, not just retailers.

31. The 1994 amendment also added regulation-making powers respecting packaging and labeling of tobacco and tobacco products, including the size of packages of tobacco and tobacco products.

32. The *NSHPA* was amended again in 2002⁶ to further restrict the display, advertising and promotion of tobacco, effectively disallowing retail displays and limiting signage in places where minors might attend and prohibiting all advertising and promotion at retail. Fine levels were increased. The prohibition against selling tobacco to minors was extended to “supplying” tobacco to minors, thereby including non-monetary interactions.

33. In 2004 the *NSHPA* was amended to extend the smoking ban with some exceptions (hotel rooms, designated smoking rooms in group living facilities and tobacconist shops) to all enclosed public places, including licensed premises.⁷

34. The display provisions in the *NSHPA* are almost identical to the Saskatchewan provisions upheld by this Court in *Rothmans*. The Manitoba legislation provides:

Tobacco not to be displayed

7.2 No person shall display or permit to be displayed tobacco or a tobacco-related product such that it is visible to children in any place or premises in which tobacco or tobacco-related products are sold.⁸

Tobacco not to be advertised or promoted

7.3(1) No person shall advertise or promote tobacco or a tobacco-related product

(a) in any place or premises in which tobacco or tobacco-related products are sold;

(b) in any place or premises to which children are permitted access;

⁶ *The Non-Smokers Health Protection Amendment Act*, S.M. 2002, c.37.

⁷ *The Non-Smokers Health Protection (Various Acts Amended) Act*, S.M. 2004, c.17.

⁸ Ss. 7.1 exempts tobacconists, but they must ensure the tobacco is not visible from outside the store.

- (c) on an outdoor sign of any type, including
 - (i) a billboard or portable sign, or
 - (ii) a sign on a bench, vehicle, building or other structure; or
- (d) inside a building or other structure or vehicle if the advertisement or promotion is visible from outside the building, structure or vehicle.

35. And similar to the *Tobacco Act*, one of the express objectives of the *NSHPA* is to protect a vulnerable group, children. The preamble to Bill 37, which was the amendment that introduced the restrictions on display and advertising in the *NSHPA*, provided as follows:

WHEREAS there is conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

AND WHEREAS the display, advertising and promotion of products influences children's perception of what is considered normal behaviour, and influences their decisions whether to purchase products;

AND WHEREAS it is important to protect children and others from advertising and other inducements to use tobacco, so that they will not begin smoking and subsequently become dependent on tobacco;

AND WHEREAS to further prevent children from smoking, there should be effective restrictions on their access to tobacco;

THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Manitoba, enacts as follows.....

36. Many other provinces and territories have passed similar legislation in the past 10 to 15 years. Manitoba, together with other provinces and territories, and Parliament, has increased tobacco taxes on numerous occasions in order to reduce smoking.

37. This year in Manitoba, *The Tobacco Damages and Health Care Costs Recovery Act*, received royal assent on June 14, 2006. The *Act* mirrors the British Columbia health care costs recovery legislation recently upheld by this Court in *Imperial Tobacco*.

The Tobacco Damages and Health Care Costs Recovery Act, S.M. 2006,
c. 18

38. The federal Attorney General intervened in *Rothmans* in this Court to oppose the tobacco companies' claim that the display and promotion provisions in the federal *Tobacco Act* were paramount to the Saskatchewan provision.⁹ The Court was very cognizant of the high degree of cooperation between the governments when dealing with smoking:

The conclusion that s. 6 of *The Tobacco Control Act* does not frustrate the purpose of s. 30 of the *Tobacco Act* is consistent with the position of the Attorney General of Canada, who intervened in this appeal to submit that the *Tobacco Act* and *The Tobacco Control Act* were enacted for the same health-related purposes and that there is no inconsistency between the two provisions at issue.

Rothmans, supra at para. 26

39. Although it was in the context of dismissing the tobacco companies' claim that British Columbia's health care costs recovery legislation violated the constitutional principle of judicial independence, Justice Major's comment regarding the judiciary's role in advancing the law and bringing it into step with society are apposite:

The judiciary has some part in the development of the law that its role requires it to apply. Through, for example, its interpretation of legislation, review of administrative decisions and assessment of the constitutionality of legislation, it may develop the law significantly. It may also make incremental developments to its body of previous decisions -- i.e. the common law -- in order to bring the legal rules those decisions embody "into step with a changing society": *R. v. Salituro*, [1991] 3 S.C.R. 654 (S.C.C.), at p. 666. See also *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.), at paras. 91-92. But the judiciary's role in developing the law is a relatively limited one. "[I]n a constitutional democracy such as ours it is the legislature and not the courts which has the major responsibility for law reform": *Salituro*, at p. 670.

It follows that the judiciary's role is not, as the appellants seem to submit, to apply only the law of which it approves. Nor is it to decide cases with a view simply to what the judiciary (rather than the law) deems fair or pertinent. Nor is it to second-guess the law reform undertaken by legislators, whether that reform consists of a new cause of action or

⁹ It is ironic, in light of their present argument that the advertising and promotion provisions represent a total ban on advertising, to recall that in *Rothmans*, the tobacco companies argued the opposite, that the display provisions granted them a positive entitlement to display tobacco products. *Rothmans, supra* at paras. 19 – 21.

procedural rules to govern it. Within the boundaries of the Constitution, legislatures can set the law as they see fit. "The wisdom and value of legislative decisions are subject only to review by the electorate": *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 (S.C.C.), at para. 59.

In essence, the appellants' arguments misapprehend the nature and scope of the courts' adjudicative role protected from interference by the Constitution's guarantee of judicial independence. To accept their position on that adjudicative role would be to recognize a constitutional guarantee not of judicial independence, but of judicial governance.

Imperial Tobacco, supra at paras. 51 – 53

40. Manitoba submits that it would be appropriate in this case to again apply a flexible standard of justification to the section 1 analysis, in the context of the facts established in the trial surrounding smoking and advertising not only in Canada, but worldwide, the efforts being made by all levels of government in Canada on various fronts to combat smoking and its effects, and the efforts being made to protect children in particular.

41. The standard of justification will of course apply at all levels of the section 1 analysis. The last section of this factum covers only one stage of that analysis, "minimal impairment". Much of the argument above applies equally to the degree of deference that ought to be afforded to the government in analyzing whether the provisions in the *Tobacco Act* restrict the tobacco companies' freedom of expression in a reasonably minimal way.

42. But first, a few words on the issue of 'vagueness' raised by the tobacco companies.

C. Limit "Prescribed by Law" – no Vagueness

43. The tobacco companies claim that the provisions prohibiting lifestyle advertising and advertising that "could appeal to a young person" are vague and overbroad. Manitoba submits the impugned provisions are a reasonable limit "prescribed by law" and are not vague or overbroad as stated by the tobacco companies.

44. It is trite that a law must not be vague; otherwise, its limits cannot be enforced. Inherent in the phrase “prescribed by law” is the requirement that a law not be vague. The provisions in the *Tobacco Act* are capable of being understood, however.

45. The phrase “prescribed by law” has been interpreted in the European Convention on Human Rights. In the *Sunday Times* case, the European Court on Human Rights had to decide whether the common law contempt power was sufficiently precise to limit freedom of expression. The Court held that it was. Even though it was a common law power and not a legislative provision, it was adequately accessible to the public and formulated with sufficient precision to enable a newspaper to regulate its reporting of pending judicial proceedings.

Sunday Times v. United Kingdom (1979), 2 European Human Rights Reports 245 (Eur. Ct. of Hum. Rts.) at 270 – 273

46. In *Irwin Toy*, where provisions prohibiting commercial expression in the form of advertising directed to children were challenged on the basis of vagueness, this Court held that the legislature cannot be held to an unachievable standard of “absolute precision”. The majority held that a law would fail the “prescribed by law” test on the basis of vagueness only “where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances.” That is hardly the case in section 22(3) of the *Tobacco Act*.

Irwin Toy Ltd. v. Québec (Attorney General), [1989] 1 S.C.R. 927 at 983
(Book of Authorities of the Respondents/Appellants on Cross-Appeal,
Tab 8)

47. To the contrary, it is submitted that the provisions of the *Tobacco Act* are quite precise. In the trial of the case at bar, Professor Morissette, an expert in comparative law, gave evidence and filed reports on his compendious comparative analysis of legislation respecting promotion of tobacco products. He observed that Canadian legislation, similar to legislation in other common law countries, is explicit and detailed. His evidence was that the Canadian provisions are very

specific in nature such that they should generally reduce the degree of uncertainty when applying the *Act* to specific cases.

Evidence of Yves-Marie Morissette, Appendix I to Judgment of Justice Denis J.S.C., December 13, 2002 at paras. 130 - 147 (Record of the Appellant Attorney General of Canada, Volume I, pp. 119 – 125, especially p. 121)

48. It is submitted that the test to determine whether a provision is vague is not a demanding one. This Court has upheld several prohibitions on expression couched in terms less precise than those in the case at bar: a prohibition on communications in public for the purpose of prostitution and the keeping of common bawdy-houses in *Reference re Criminal Code (Man.)*; a prohibition on public servants from engaging in work for or against a political party or candidate in *Osborne v. Canada (Treasury Board)*; a prohibition on telephonic messages likely to expose a person or a group to hatred or contempt in *Canada (H.R.C.) v. Taylor*; and a prohibition on the definition of obscenity in *R. v. Butler*. All were upheld as providing a sufficiently intelligible standard to meet the “prescribed by law” test.

Reference re Criminal Code (Man.), [1990] 1 S.C.R. 1123

Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69

Canada (H.R.C.) v. Taylor, [1990] 3 S.C.R. 892

R. v. Butler, [1992] 1 S.C.R. 452

D. Minimal Impairment – Deference to a Range of Legislative Choices

49. Chief Justice Dickson recognized in *Edwards Books* that legislatures must be accorded some deference in choosing from a range of reasonable legislative options and must not be held to one option. Thus legislators may choose a provision “that was reasonable for the legislature to choose.” He stated the test as whether the law abridges the *Charter* right “as little as is reasonably possible.” In subjecting the law to a section 1 analysis, Chief Justice Dickson stated

that the courts are “not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line.”

R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713 at 772, 781 – 782

50. It is submitted that a degree of deference is necessary at this stage of the analysis; otherwise legislators will be constrained from effectively addressing pressing issues. This Court has recognized that principle. In *Whyte*, this Court considered the *Criminal Code* presumption that the person occupying the driver’s seat has care and control of a vehicle for the purpose of an impaired driving offence. In upholding the reverse onus to displace the presumption, Chief Justice Dickson described it as “a restrained parliamentary response to a pressing social problem.”

R. v. Whyte, [1988] 2 S.C.R. 3 at 26 – 27

51. In *Newfoundland v. N.A.P.E.*, this Court upheld under section 1 provincial legislation which deferred payouts under to a pay equity agreement that the government had signed with its health care workers.¹⁰ Justice Binnie writing for the unanimous Court noted that in certain types of cases there may be no obviously correct or obviously wrong solution, but a range of available options, each with its advantages and disadvantages. Governments act properly within a range of reasonable alternatives and the Court recognized that the government is best placed to make those types of policy decisions. Justice Binnie recognized that governments have a large “margin of appreciation” within which to make such choices.

Newfoundland (Treasury Board) v. N.A.P.E., [2004] 3 S.C.R. 381, 2004 SCC 66 at paras. 83 – 84

52. Justice Binnie considered the conflicting rights and interests that the government had to weigh in ultimately violating the equality rights of its female health sector employees, as follows:

¹⁰ After finding that the legislation violated section 15(1) of the *Charter*.

It is also true that the government here wore two hats potentially in conflict, firstly as steward of the financial health of the Province and secondly as an employer who owed a \$24 million debt to its female workers. The beneficiaries of other public programs did not necessarily have a contractual right to the benefit, as did the women hospital workers. Nevertheless there were numerous legitimate claims on the public purse by disadvantaged people which the government was bound to mediate and this provides important context to the budgetary decisions that were made. This point was made by La Forest J. in upholding the constitutional validity of the *Retail Business Holidays Act* in *R. v. Videoflicks Ltd.*, [1986] 2 S.C.R. 713 (S.C.C.), at p. 795:

...having accepted the importance of the legislative objective, one must in the present context recognize that if the legislative goal is to be achieved, it will inevitably be achieved to the detriment of some. Moreover, attempts to protect the rights of one group will also inevitably impose burdens on the rights of other groups. There is no perfect scenario in which the rights of all can be equally protected.

In seeking to achieve a goal that is demonstrably justified in a free and democratic society, therefore, a legislature must be given reasonable room to manoeuvre to meet these conflicting pressures. [Emphasis added in original]

Newfoundland (Treasury Board) v. N.A.P.E., *supra* at para. 94

53. In upholding a Montreal noise by-law under section 1, Chief Justice McLachlin and Justice Deschamps, writing for the majority, described the second part of the proportionality analysis from the *Oakes* test as whether it impaired freedom of expression in “a reasonably minimal way.” It is submitted that this language reflects the necessary contextual and balancing exercise that takes place at this stage of the analysis.

Montreal (City) v. 2952-1366 Québec Inc., [2005] 3 S.C.R. 141, 2005 SCC 62 at para. 88

54. It is submitted that the degree of latitude afforded the City of Montreal in that case would be appropriate in the case at bar:

First, 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. This is particularly so on environmental issues, where views and interests conflict and precision is elusive: *Canadian Pacific Ltd.*

Montreal (City), *supra* at para. 94

55. For many of the reasons outlined in the first part of this factum, it is submitted that the provisions restricting the right of tobacco companies to advertise and promote tobacco do so “in a reasonably minimal way.”

56. Accordingly, Manitoba submits that sections 18, 19, 20, 22, 24 and 25 of the *Tobacco Act* ought to be upheld under section 1. Although not discussed in this factum, Manitoba also submits that the provisions of the *Tobacco Products Information Regulations*, SOR/2000-272, governing the size of the mandatory messages do not infringe section 2(b). However, if they are found to infringe section 2(b), Manitoba submits that they can be justified under section 1.

PART IV

ORDER SOUGHT CONCERNING COSTS

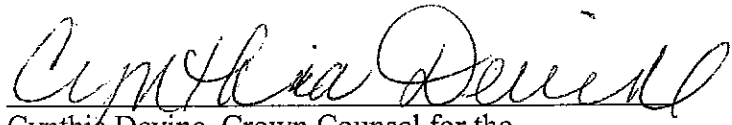
57. Manitoba is not seeking costs with respect to this matter.

PART V

ORDER SOUGHT

58. Manitoba respectfully requests this Court to allow the appeal of the Attorney General of Canada and dismiss the cross-appeal of J.T.I. MacDonald Corp.

ALL OF WHICH IS RESPECTFULLY SUBMITTED


Cynthia Devine, Crown Counsel for the
Attorney General of Manitoba

Dated at Winnipeg, Manitoba, this 10th day of November, 2006.

PART VI

TABLE OF AUTHORITIES

<u>Case Law</u>	<u>Paragraph No.</u>
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<i>An Act to Protect the Health of Non-Smokers</i> , S.M. 1989-90, c. 41.....	29, fn4
<i>The Non-Smokers Health Protection (Various Acts Amended) Act</i> , S.M. 2004, c.17	33, fn7, 34, 35
<i>The Non-Smokers Health Protection Amendment Act</i> , S.M. 2002, c. 37	32, fn6

<i>The Tobacco Damages and Health Care Costs Recovery Act,</i> S.M. 2006, c. 18	37
<i>Tobacco Act,</i> S.C. 1997, c. 13.....	2(1), fn2, 4, 12, 13, 20, 24, 35, 38, 41, 44, 46, 47, 56
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<i>Tobacco Products Information Regulations,</i> SOR/2000-272.....	2(2), 56

