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

BETWEEN:

ATTORNEY GENERAL OF CANADA

APPELLANT  
(Respondent)

- and -

JTI-MACDONALD CORP.

RESPONDENT  
(Appellant)

- and -

CANADIAN CANCER SOCIETY

INTERVENER

- and -

ATTORNEY GENERAL OF ONTARIO  
ATTORNEY GENERAL OF QUEBEC  
ATTORNEY GENERAL OF NEW BRUNSWICK  
ATTORNEY GENERAL OF MANITOBA  
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## PART I

### STATEMENT OF FACTS

1. Eleven years ago, this Honourable Court considered the constitutionality of federal laws regulating tobacco advertising. Justice La Forest summarised the evidence surrounding tobacco: “Put bluntly, tobacco kills.”

*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995]  
3 S.C.R. 199, at para. 32.

2. Nothing in the intervening years has altered that blunt assessment. To the contrary, the findings of fact by the learned trial judge amplify and confirm La Forest J.’s statement. Following a trial lasting 50 days, in which he considered more than 1,065 exhibits, the learned trial judge gave a lengthy decision in which he made a number of findings of fact relating to the hazardous nature of tobacco, its addictive qualities, the nature of tobacco promotion by the tobacco companies, and the credibility of the tobacco companies themselves. The Attorney General for Saskatchewan particularly relies upon the following findings of fact:

[218] In enacting this legislation, Parliament responded to a factual and social context made manifest by the evidence, whose major points can be summarised as follows.

[219] 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. Every year, more Canadians die from smoking than from car accidents, suicide, murder, AIDS and drug abuse combined.

[220] Smoking causes 85% of all lung cancers and chronic lung diseases and, to a lesser extent, countless other cancers and cardiovascular diseases.

[221] Smokers die prematurely and enjoy a greatly diminished quality of life.

[222] Parents who smoke damage their children’s health.

[223] Second-hand smoke is just as hazardous to non-smokers.

[224] Smokers quickly develop a powerful addiction to nicotine.

[225] Smokers usually begin smoking as teenagers, typically between the ages of 13 and 16.

[226] It is extremely difficult to quit smoking.

[227] Smoking does not offer any benefit to smokers apart from satisfying their cravings for nicotine.

Judgment of the Superior Court (Denis, J.), 13 December 2002 (English translation), Dossier de l'Appelant, Vol. II, p. 240.

Appellant's Factum, para. 18.

3. The learned trial judge further amplified his findings of fact in the conclusion to his judgment:

[522] Cigarettes kill 45,000 Canadians each year, more than the population of Drummondville, Quebec or Prince Albert, Saskatchewan.

[523] The testimony of cardiologist Dr. Nancy-Michelle Robitaille was troubling. Smokers die, on average, 15 years prematurely and enjoy a greatly diminished quality of life. When we hear that one of her patients begged her to disconnect his heart monitor so he could go smoke a cigarette, we come to the realization that the fight to curb smoking is not a witch hunt; rather, it is a struggle against a very real social problem.

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

[525] When Dr. Robitaille spoke about the anguish of patients whose smoking had caused them to develop erectile dysfunctions, nobody was laughing.

[526] The evidence shows that second-hand smoke harms everyone, both smokers and non-smokers, and that the children of smokers are particularly affected. This is not an attempt to lay blame. It is a fact.

Judgment of the Superior Court (Denis, J.), 13 December 2002 (English translation), Dossier de l'Appelant, Vol. II, pp. 291-292.

4. In *RJR-Macdonald Inc.*, *supra*, this Court held that the restrictions on tobacco advertising set out in the previous federal legislation were not justifiable under section 1 of the *Charter*, on the facts available in that case. In response to that ruling, much of the federal Attorney General's evidence in this appeal focussed on the role of tobacco advertising and its connexion to the hazards of tobacco consumption, as well as the conduct and goals of the tobacco companies in the promotion of their product. The learned trial judge made comprehensive findings of fact on that issue as well, which he summarised as follows:

[228] **Cigarette advertising and sponsorships encourage people to smoke, reassure smokers and undermine the efforts of those who are trying to quit.**

[229] **Cigarette advertising is aimed at target audiences, especially young people, who are the industry's future.**

[230] The worldwide trend in countries comparable to Canada is toward banning cigarette advertising with a few limited exceptions.

[231] Warnings are effective and undermine tobacco companies' efforts to use cigarette packages as badges associated with a lifestyle.

\* \* \* \* \*

[232] The evidence related to tobacco companies points to the following factual and social contexts.

[233] **The industry has known for 50 years that cigarettes cause lung cancer and are hazardous to health** but have never thought it necessary to warn consumers about this.

[234] **The industry has always known that light cigarettes are as damaging to health as regular cigarettes** but has nevertheless mounted a subtle marketing plan that leads smokers to infer that they should smoke light cigarettes if they are concerned about their health.

[235] **The industry has always known that filtered cigarettes are as dangerous as unfiltered ones** and that smokers unconsciously change the way they smoke to satisfy their need for nicotine, this despite all their marketing efforts claiming the opposite.

[236] Cigarettes produced today contain less tobacco than in the past but have the same levels of nicotine because **manufacturers use leaves from the top of the tobacco plant, specially selected for their high nicotine content**. This fact has never been disclosed to consumers.

[237] **The launch of the Players' Premiere brand of cigarettes, supposedly less irritating to the throat, is nothing more than a massive marketing ploy** that purports to give consumers what they want but offers, in fact, a product that is no different from ordinary cigarettes.

[238] The evidence shows that no cigarette causes less throat irritation than another.

[239] **Although the tobacco companies deny it, their marketing efforts target new smokers, especially adolescents, through advertising deliberately designed to have this effect**. Advertising is also aimed at other target groups: women, blue-collar workers, etc.

[240] **The industry was a willing accomplice of black-market cigarette smugglers**.

[241] The industry says it would accept some limitation on its freedom of expression, but has never offered any precise, effective or realistic recommendations for going about this.

[242] The evidence shows that the typical heavy smoker is male, uneducated, economically disadvantaged and has low self-esteem.

[243] **The evidence also shows that the typical new smoker is an adolescent** [footnote omitted]. It is interesting to note that from 1985 to 2000, the percentage of people who smoke fell for all age groups, except 15 to 19 year olds.

[244] In short, the evidence leads to one inescapable conclusion:

**- The smoker always comes out the loser.**

[245] **Faced with this evidence, the tobacco companies decided not to present any evidence to the contrary.**

Judgment of the Superior Court (Denis, J.), 13 December 2002 (English translation), Dossier de l'Appelant, Vol. II, pp. 240-242 [emphasis added].

5. The learned trial judge made further findings of fact concerning the role of advertising in the conclusion to his judgment:

[527] **Fact: there is incontrovertible evidence that advertising and sponsorship encourage people, especially adolescents, to consume tobacco products.** Advertising is designed to reassure smokers and relies on associating cigarettes with a positive lifestyle.

[528] **Fact: the supposedly less-irritating cigarette is merely the creation of a tobacco company's marketing department;** filters allow every single carcinogenic gas contained in cigarette smoke to pass through; and there is no such thing as a "light" or "healthier" cigarette.

[529] **Fact: tobacco companies "select" the tobacco leaves they use so that they can put less tobacco in their cigarettes while still maintaining the same levels of nicotine.**

[530] **Fact: tobacco companies have been aware of these facts for a long time, in some cases for over 50 years, and have always denied them or refused to disclose them to consumers.**

[531] It should therefore come as no surprise that the government, as fiduciary of public health, would so doggedly pursue a comprehensive policy aimed at curbing

smoking and informing Canadians about tobacco's effects. In Canada, the health costs attributed to smoking are in the neighbourhood of \$15 billion, more than the entire national budget of several countries in the world.

Judgment of the Superior Court (Denis, J.), 13 December 2002 (English translation), Dossier de l'Appelant, Vol. II, p. 292 [emphasis added].

6. The learned trial judge concluded with critical comments that go to the general credibility of the tobacco companies overall:

[532] This is not to suggest that freedom of expression can be bought off for a fistful of dollars. At issue is a painful social problem, **as well as freedom of expression that, it must be said, has hitherto not been used appropriately.**

[533] The tobacco companies are in a particularly difficult position. **They sell a harmful product and they know it.** They have the right to sell it because outright prohibition would be unrealistic.

[534] **They offer no evidence to rebut the claimed ill effects of cigarettes because there is none. Their evidence respecting the effects of advertising was unconvincing.**

[535] They are trying to save an industry in inevitable decline. They have every right to do so.

[536] **Their rights, however, cannot be given the same legitimacy as the government's duty to protect public health.**

Judgment of the Superior Court (Denis, J.), 13 December 2002 (English translation), Dossier de l'Appelant, Vol. II, pp. 292-293. [Emphasis added.]

**PART II**

**POINTS IN ISSUE**

7. The Attorney General for Saskatchewan intervenes as of right in this appeal pursuant to rule 61 of the *Rules of the Supreme Court*, in response to the Notice of Constitutional Question dated May 24, 2006.

8. The Notice of Constitutional Question sets four questions:

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*?

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

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*?

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

9. The Attorney General for Saskatchewan will focus on the section 1 issue raised by Question 2, since the Appellant has conceded with respect to Question 1 that the impugned provisions infringe freedom of expression as guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms*. The Attorney General for Saskatchewan respectfully submits that the infringements are justified, and therefore the impugned provisions are constitutional. If it is necessary to answer Question 4, the same arguments would apply.

**PART III**

**ARGUMENT**

**A. Outline of Argument**

10. The Attorney General for Saskatchewan will focus on two aspects of the section 1 inquiry raised by this appeal. First, the Attorney General will argue that the dangerous nature of tobacco is a key factor in assessing the contextual analysis under section 1, because tobacco promotion cannot be separated from the hazardous nature of the product. The fact that the product is inherently dangerous, and that the expression in issue is commercial expression to promote that hazardous product, means that the courts should pay considerable deference to Parliament's policy choices respecting the promotion of that hazardous product. This more deferential approach should inform the entire section 1 analysis. Restrictions on the promotion of a hazardous product raise considerably different policy and contextual issues than would restrictions on other types of expression which are closer to the core of the guarantee of freedom of expression, such as political or religious expression. The Attorney General of Canada has amply demonstrated the dangerous nature of the product and the inventiveness of tobacco companies in marketing their dangerous product. Restrictions on those marketing steps are justifiable, in light of the hazardous nature of the product.

11. The second aspect of the section 1 issue which the Attorney General will address is the Court of Appeal's disagreement with some of the crucial facts found by the learned trial judge. This Honourable Court has ruled that an appellate court must find palpable and overriding error by the

trial judge before it can disagree with those facts. In *RJR-Macdonald Inc.*, this Court held that findings of fact in the section 1 inquiry are generally subject to the same approach as other findings of fact, although appellate courts may have greater leeway in factual findings relating to the more subjective areas of social science.

12. The Attorney General for Saskatchewan submits that the findings of fact challenged by the Court of Appeal did not relate to the more intangible areas of social science. The learned trial judge made specific findings of fact about the credibility of the tobacco companies; the motivation of the tobacco companies in promoting their hazardous product; and the nature of their efforts to promote their tobacco products. The learned trial judge also explicitly stated that he did not believe the tobacco companies on certain key points, and found their evidence unconvincing. Those are exactly the type of findings of fact that come within the particular advantage of the trial judge, and cannot be set aside on appeal, absent palpable and overriding error. The Quebec Court of Appeal did not identify any such palpable and overriding errors, and therefore erred in law by disagreeing with the findings of fact of the learned trial judge. To the extent the Court of Appeal relied upon its own view of the evidence in holding that the impugned provision of the federal Act could not be justified under section 1, the Court of Appeal erred in law and its decision should be set aside. This Honourable Court should decide this appeal based on the facts as found by the learned trial judge.

**B. Section 1 and Freedom of Expression**

13. This Honourable Court has recognized on several occasions that the nature of the expression in issue is a key contextual factor to consider under section 1. Justice Bastarache summarized this point in *Thomson Newspapers Co. v. Canada (Attorney General)*, a case concerning a restriction on the publication of opinion polls on election day:

91 Another contextual factor to be considered is the nature of the activity which is infringed. The degree of constitutional protection may vary depending on the nature of the expression at issue (*Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1355-56; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, at pp. 246-47; *Keegstra, supra*, at p. 760; *RJR-MacDonald, supra*, at paras. 71-73 and 132; *Libman, supra*, at para. 60). **This is not because a lower standard is applied, but because the low value of the expression may be more easily outweighed by the government objective.**

*Thomson Newspapers Co. v. Canada (Attorney General)*,  
[1998] 1 S.C.R. 877, at para 91.

14. In *Thomson Newspapers*, the expression in question was political expression, one of the types of expression which falls within the core of the constitutional guarantee of freedom of expression. Bastarache J., speaking for the majority, therefore concluded that a deferential approach to the law in issue in that case was not appropriate.

*Thomson Newspapers Co., supra*, at para 95.

15. In other contexts, however, this Court has been willing to take a more deferential approach to restrictions on expression:

92 In that case [*R. v. Keegstra*], hate speech was found to interfere with the ability of a specific and identifiable group to participate in the political process by directly

undermining their dignity and their membership in the community. The same could be said of pornographic expression in *Butler*. **And in *Irwin Toy*, the interest of advertisers meant that there was a likelihood that such speech would be manipulative of children and would play on their vulnerability.**

93 In each of these cases, the type of speech involved systematically and consistently undermined the position of some members of society.

*Thomson Newspapers Co., supra*, at paras. 92, 93 [emphasis added].

16. The Attorney General for Saskatchewan submits that the nature of the expression in this case, and the conduct of the tobacco companies in marketing their hazardous product, both point to a deferential standard under section 1 of the *Charter*.

17. On the first point, tobacco promotion does not fall within the core areas of expression protected by section 2(b), such as political expression and religious expression. Not only is it a form of commercial expression, it is commercial expression aimed at selling a hazardous product. Tobacco promotion is inextricably linked to the hazardous nature of that product. It has long been accepted governments have a particular responsibility to protect the public from hazardous products, through regulation of the product itself (e.g. – food and drug purity laws), and also by providing consumer protection laws. The Attorney General for Saskatchewan submits that the responsibility of governments to regulate hazardous products extends as well to the promotion of those hazardous products.

18. The commercial promotion of a hazardous product is inextricably linked to product itself. The more hazardous the product, the greater the responsibility of the promoter to be scrupulously

frank and accurate in its promotion of the product. If the promoter fails to meet these standards in its promotion, then it is not just appropriate, but necessary that the government regulate the promotion to protect the public.

19. On the second point, the nature of the expression in this case is ineluctably coloured by the learned trial judge's findings of fact with respect to the conduct of the tobacco companies in promoting their product. The learned trial judge found a pattern of suppression of the truth about their products by the tobacco companies, stretching back in some cases for over 50 years.

20. The evidence demonstrates that the promotion of tobacco, a hazardous and addictive product, systematically and consistently undermines the position of members of society, particularly young people who are particularly vulnerable. The learned trial judge's findings of fact about the lack of credibility of the tobacco companies is an important part of this assessment. Parliament has ample reason to act to protect Canadians from tobacco promotion.

21. The learned trial judge also found that their marketing campaigns suggested that certain tobacco products, such as filtered cigarettes, "light" cigarettes, and premium cigarettes were more healthy choices for the consumer, when in fact the tobacco companies knew that there were no such distinctions: all cigarettes are equally hazardous to the user's health. He also found that tobacco

companies have known for over 50 years that cigarettes cause lung cancer, but did not warn the consumers.

Judgment of the Superior Court (Denis, J.), 13 December 2002 (English translation), paras. 233-238, Dossier de l'Appelant, Vol. II, p. 241.

22. And, as the learned trial judge found, at least some tobacco companies had so little respect for the law that they assisted in tobacco smuggling operations to circumvent taxes on cigarettes.

Judgment of the Superior Court (Denis, J.), 13 December 2002 (English translation), para. 240, Dossier de l'Appelant, Vol. II, p. 241.

23. The Attorney General for Saskatchewan submits that the federal government had ample reason to consider not only the hazardous nature of the tobacco products, but the conduct of the tobacco companies, including not only the manner in which they promoted their hazardous products, but also the five decades in which they concealed the truth about the hazards of tobacco. The learned trial judge referred to this issue when he commented that this appeal involves "... freedom of expression that, it must be said, has hitherto not been used appropriately."

Judgment of the Superior Court (Denis, J.), 13 December 2002, para. 532 (English translation), Dossier de l'Appelant, Vol. II, p. 292.

24. Another point of significance is that the learned trial judge found as a fact that the tobacco companies targeted young people in their promotions, all the while denying that they were trying to

do so. In reaching this conclusion, the learned trial judge also made highly critical findings about the credibility of the tobacco companies:

[121] Furthermore, **the Court does not believe** that cigarette advertising is solely aimed at smokers over 19 years of age. All the advertising campaigns contain elements that are attractive to the young people who are the industry's future. **The tobacco companies are well aware that most people start smoking between the ages of 12 and 18 and systematically target this susceptible age group with its advertising and marketing.**

...

[229] **Cigarette advertising is aimed at target audiences, especially young people, who are the industry's future.**

...

[239] **Although the tobacco companies deny it, their marketing efforts target new smokers, especially adolescents, through advertising deliberately designed to have this effect.** Advertising is also aimed at other target groups: women, blue-collar workers, etc.

...

[527] **Fact: there is incontrovertible evidence that advertising and sponsorship encourage people, especially adolescents, to consume tobacco products.** Advertising is designed to reassure smokers and relies on associating cigarettes with a positive lifestyle.

Judgment of the Superior Court (Denis, J.), 13 December 2002 (English translation), Dossier de l'Appelant, Vol. II, pp. 230, 240, 241, 292 [emphasis added].

25. The Attorney General for Saskatchewan submits these findings of fact indicate that the promotion of tobacco meets the test set out by Bastarache J. in *Thomson Newspapers*: tobacco advertising systematically and consistently undermines the position of some members of society, particularly young persons. The prime time for people to try tobacco is in their teens. Given the addictive nature of tobacco, once they start, they will find it very difficult to stop – and the tobacco companies will have the new consumers they need to survive.

*Thomson Newspapers Co.*, *supra*, at para. 93 [emphasis added].

26. This Court in *Irwin Toy Ltd.* upheld restrictions on advertising aimed at young persons. The rationale for the restriction in *Irwin Toy Ltd.* was to protect a group that was most vulnerable to commercial manipulation. There was no suggestion in that case that the products in question were harmful.

*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at pp. 986-1000.

27. That is not the case here. Tobacco is an inherently dangerous product. Advertising that has the goal of inducing young persons to start smoking is a far more serious social problem than advertising aimed at inducing young people to encourage their parents to buy them toys or cereals.

28. Similarly, this Court in *R. v. Butler* upheld restrictions on degrading and dehumanizing pornography because of the potential harm such pornography poses to society generally, and to women in particular. The Attorney General for Saskatchewan submits that the potential harm posed by the promotion of a hazardous and addictive product, particularly to young persons, can similarly justify the restriction on freedom of commercial expression. The product is harmful in itself, and its use almost invariably creates an addiction. Tobacco promotion is aimed at increasing the use of this dangerous and addictive product.

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

29. As well, to the extent that tobacco promotion relies on visual images of activities, it is difficult if not impossible for those images not to have some appeal to young persons, as the learned

trial judge found in his assessment of tobacco promotions. Strict regulation provides the only effective means of preventing promotion that appeals to young persons.

Judgment of the Superior Court (Denis, J.), 13 December 2002, paras. 210-211, 229, 239, 527 (English translation), Dossier de l'Appelant, Vol. II, pp. 238, 240, 241, 292.

30. The Attorney General for Saskatchewan submits that all of these factors indicate that this Honourable Court should take a deferential approach to the section 1 analysis in this case, at each stage of the analysis. Tobacco promotion is inextricably linked to the hazardous nature of the product and its addictive qualities. For the reasons outlined above, commercial tobacco promotion is far from the core area of freedom of expression protected by section 2 of the *Charter*.

### **C. The Court of Appeal Erred in Setting Aside Facts as Found by the Learned Trial Judge**

#### **1. Summary of Position**

31. In the Quebec Court of Appeal, Mr. Justice Beauregard criticized some of the findings of fact made by the learned trial judge. Although Beauregard J.A. dissented on certain parts of the Court of Appeal's decision, it appears that on this point he was speaking for the Court.

Judgment of the Court of Appeal, 22 August 2005, per Beauregard J.A. at paras. 195-214; per Brossard J.A., at para. 236; per Rayle J.A., at para. 323, Dossier de l'Appelant, Vol. II, pp. 335-338; 343; 358.

32. The tobacco companies rely on this part of Beauregard J.A.'s decision, stating that "the Court of Appeal also deemed it necessary to address a number of Denis J.'s findings of fact, which it characterized as superfluous, exaggerated and in certain cases, unfounded."

Factum of the Appellants on Cross-Appeal, para 31.

33. The Attorney General for Saskatchewan respectfully submits that the Quebec Court of Appeal erred in law in its treatment of the facts as found by the trial judge. This Honourable Court has repeatedly held that an appellate court is only entitled to interfere with a trial judge's findings of fact if the appellate court finds "palpable and overriding error" on the part of the trial judge. As will be explained in more detail below, Beauregard J.A. made no attempt to assess the learned trial judge's findings of fact against this demanding standard. Therefore, for the purposes of the section 1 analysis, the facts as found by the learned trial judge govern.

## **2. The Test of "Palpable and Overriding Error"**

34. In two recent cases arising from Saskatchewan, this Court has affirmed that the test for overturning a trial judge's findings of fact is "palpable and overriding error". Unless an appellate court identifies palpable and overriding error on the part of the trial judge, it must respect the trial judge's findings of fact.

*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33.

*H.L. v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25.

35. Of particular significance to this appeal, this Court in both of those cases held that the standard of palpable and overriding error applied both to the primary facts, including findings based on credibility, and to secondary facts, such as inferences of fact to be drawn from the primary facts. In both *Housen* and *H.L.*, the Saskatchewan Court of Appeal had disagreed with inferences of fact drawn at trial. In both cases, this Court set aside the decisions of the Saskatchewan Court of Appeal, ruling that the test of palpable and overriding error had not been met in relation to the impugned inferences of fact.

*Housen v. Nikolaisen, supra*, paras. 19-25.

*H.L. v. Canada (Attorney General), supra*, paras. 4, 110.

36. The Attorney General for Saskatchewan submits that the requirement of appellate deference to the fact-finding function of the trial judge applies in constitutional litigation, just as in other litigation. The learned trial judge here made a variety of factual findings based on the evidence before him in relation to the analysis under section 1. Absent palpable and overriding error on his part, which has not been demonstrated, the Court of Appeal should not have interfered with the learned trial judge's findings of fact. This Court should rely upon the learned trial judge's findings of fact in determining the section 1 issue in this appeal.

37. The Attorney General for Saskatchewan submits that this analysis is further supported by the approach taken by McLachlin J. (as she then was) in *RJR-Macdonald Inc., supra*:

140 As a general rule, courts of appeal decline to interfere with findings of fact by a trial judge unless they are unsupported by the evidence or based on clear error. This rule is based in large part on the advantage afforded to the trial judge and denied to the appellate court of seeing and hearing the witnesses. La Forest J. concludes that

this rule does not apply to the findings of the trial judge in these cases, because those findings were not “adjudicative facts” but rather were “legislative facts”.

141 While this approach sheds some light on the matter, the distinction between legislative and adjudicative facts may be harder to maintain in practice than in theory. Suffice it to say that in the context of the s. 1 analysis, more deference may be required to findings based on evidence of a purely factual nature whereas a lesser degree of deference may be required where the trial judge has considered social science and other policy oriented evidence. As a general matter, appellate courts are not as constrained by the trial judge's findings in the context of the s. 1 analysis as they are in the course of non-constitutional litigation, since the impact of the infringement on constitutional rights must often be assessed by reference to a broad review of social, economic and political factors in addition to scientific facts. At the same time, while appellate courts are not bound by the trial judge's findings in respect of social science evidence, they should remain sensitive to the fact that the trial judge has had the advantage of hearing competing expert testimony firsthand. The trial judge's findings with respect to the credibility of certain witnesses may be useful when the appeal court reviews the record.

*RJR-Macdonald Inc.*, *supra*, at pp. 334-335.

38. The Attorney General for Saskatchewan submits that the findings of fact made by the learned trial judge with which Beaugard J.A. disagreed are based on evidence of a purely factual nature, tied to credibility of the parties and the explanations for their motives and conduct, as well as to scientific evidence of a medical nature. The findings of fact did not relate to social science evidence. Under the approach set out by McLachlin J., in *RJR-Macdonald Inc.*, the learned trial judge's findings of fact should be treated with the normal deference accorded to trial judge's factual findings, and can only be overturned on appeal if palpable and overriding error is found.

### **3. Analysis of Beauregard J.A.'s Comments**

39. Beauregard J.A. challenged the learned trial judge's findings of fact in seven\* areas: the number of Canadians who did not know the dangers of tobacco; international standards respecting lifestyle promotion and promotion aimed at young persons; tobacco smuggling; dependency on tobacco; the level of nicotine in cigarettes; filters and "light" cigarettes; and the targeted consumers. The Attorney General for Saskatchewan submits that Beauregard J.A. erred in his treatment of these factual issues, and will address all but the issue of international standards.

Judgment of the Court of Appeal, 22 August 2005, per  
Beauregard J.A. at paras. 195-214, Dossier de l'Appelant,  
Vol. II, pp. 335-338.

#### **(a) Number of Canadians Unaware of the Dangers of Tobacco**

40. Beauregard J.A. found this factual issue was irrelevant, given his conclusion that the requirement for warning labels was justified. However, he then made the following statement:

[197] Par ailleurs la question de savoir si au départ les fabricants ont volontairement apposé des mises en garde sur leurs emballages ou s'ils ont été forcés de le faire, comme le suggère le premier juge, n'a pas de pertinence non plus.

Judgment of the Court of Appeal, 22 August 2005, per  
Beauregard J.A., Dossier de l'Appelant, Vol. II, p. 335.

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\* Note: there is an error in Beauregard J.A.'s numbering of the factual issues he reviewed. Although he reviewed seven areas, two of these are numbered "3": "Contrebande" and "La Dépendance." Judgment of the Court of Appeal, 22 August 2005, per Beauregard J.A. at paras. 200 and 202, Dossier de l'Appelant, Vol. II, pp. 335, 336.

41. The Attorney General for Saskatchewan respectfully submits that Beauregard J.A. erred in finding a lack of relevance. In *RJR-Macdonald Inc.*, this Court indicated that as part of the section 1 analysis, it was necessary to review the options Parliament had in its attempts to reduce tobacco consumption. For example, the consideration of alternatives was one of the reasons discussed by Iacobucci J. in his minimal impairment analysis. The learned trial judge's finding of fact that the tobacco companies had rejected voluntary warning labels is highly relevant to Parliament's choice of a system of compulsory warnings, including the size of the warning labels in issue in this appeal. This factor should be taken into account when assessing the overall objectives of the legislation, as well as whether the mandatory labels are a minimal impairment of the tobacco companies' freedom of expression.

*RJR-Macdonald Inc.*, *supra*, at para. 186.

**(b) Contraband**

42. The learned trial judge found as a fact that "The industry was a willing accomplice of black-market cigarette smugglers." Beauregard J.A. held that this finding was superfluous and had no relevance to the issues.

Judgment of the Superior Court (Denis, J.), 13 December 2002, para. 240 (English translation), Dossier de l'Appelant, Vol. II, p. 241.

Judgment of the Court of Appeal, 22 August 2005, per Beauregard J.A., para. 201, Dossier de l'Appelant, Vol. II, p. 335.

43. The Attorney General for Saskatchewan respectfully disagrees with Beauregard J.A.'s conclusion that this finding of fact was irrelevant. When Parliament assesses whether legislation is an appropriate response to a particular problem, it is entitled to consider how an industry will react to regulation. If an industry has a reputation for general compliance with regulation, such as voluntary codes, that is a factor counting against the need for strong legislation. But if members of a particular industry have assisted in circumventing laws in an effort to sell their product, Parliament is entitled to take that factor into account in assessing the need for mandatory, comprehensive legislation. The learned trial judge's finding of fact respecting black-market cigarettes is thus relevant to all four stages of the section 1 analysis.

**(c) Dependence on Nicotine**

44. Beauregard J.A. summarized the issue as follows:

[202] Le premier juge a affirmé que «[la nicotine] crée une dépendance contre laquelle la volonté ne peut rien» et «La nicotine crée une dépendance foudroyante».

[203] Il s'agit **peut-être** d'affirmations **quelque peu exagérées**. Mais les éléments de preuve recevables et la connaissance d'office que le premier juge possédait lui permettaient certainement de dire que la nicotine crée une dépendance et que la très grande majorité des fumeurs qui ont cessé de fumer l'ont fait parce qu'ils étaient grandement motivés et après beaucoup d'efforts de volonté.

Judgment of the Court of Appeal, 22 August 2005, per  
Beauregard J.A., Dossier de l'Appelant, Vol. II, p. 336  
[emphasis added].

45. The Attorney General for Saskatchewan submits that the learned trial judge's statement about dependence on nicotine is a factual one: he has assessed the addictive nature of nicotine based on the evidence before him, and reached a conclusion. That is not the sort of social science issue to

which the lesser standard of review set out by McLachlin J. in *RJR-Macdonald Inc.* would apply. Absent a finding of palpable and overriding error, the Court of Appeal erred in substituting its own position on nicotine's addictive effects. The Attorney General for Saskatchewan submits that Beauregard J.A.'s assessment of the learned trial judge's finding, "Il s'agit **peut-être** d'affirmation **quelque peu exagérées**," does not come anywhere near the level of palpable and overriding error. The learned trial judge's finding of the highly addictive nature of tobacco in turn is relevant to the general issue of the objective of the legislation: the reduction of tobacco consumption overall.

**(d) Nicotine Levels**

46. The learned trial judge found that the tobacco companies had reduced the amount of tobacco in cigarettes while keeping the same level of nicotine by choosing the tobacco leaves that had the highest level of nicotine. Beauregard J.A. admitted that there were elements of proof in support of this position and the learned trial judge could reasonably reach this conclusion. However, he then commented that there was also evidence that suggested the tobacco companies had taken this approach to reduce the amount of tobacco in their cigarettes, and thus the amount of tar produced.

Judgment of the Court of Appeal, 22 August 2005, per  
Beauregard J.A., para. 204, Dossier de l'Appelant, Vol. II,  
p. 336.

47. The Attorney General for Saskatchewan submits that Beauregard J.A. again erred in putting forward an alternative explanation, especially once he recognised that there was evidence which could reasonably support the learned trial judge's conclusion. Trial judges routinely decide what the motive of a party was in taking a particular course. Where there is more than one possible

explanation for that course of action, the trial judge may find that the party may have been motivated by all of the factors, some of the factors but not others, or only one of the factors. That assessment of a party's motive is tied to the credibility of the party and the surrounding facts. Here, the learned trial judge concluded that the tobacco companies took this step to keep the level of nicotine constant, while reducing the amount of tobacco in the cigarettes. Absent palpable and overriding error, the Court of Appeal could not reject that finding and advance a different motivation for the conduct of the tobacco companies.

**(e) Filters and Light Cigarettes**

48. Beauregard J.A. noted that the learned trial judge found that so-called "light" cigarettes are just as bad for one's health as regular cigarettes, but that the industry nonetheless had carried on subtle marketing campaigns suggesting that smoking a "light" cigarette was better for one's health. The learned trial judge also held that the industry had known "depuis toujours" that a filtered cigarette is just as noxious as a regular cigarette and that smokers unconsciously alter their method of smoking to satisfy their need for tobacco, "bien que tous les efforts de marketing disent le contraire." The learned trial judge also held that the "cigarette moins irritant est une création de la mise en marché des cigarettiers," and that cigarette filters let pass all of the carcinogenic components of the smoke; that the "light cigarette" simply does not exist, and that a cigarette "bonne pour la santé" is an illusion. Beauregard J.A. then criticised the learned trial judge's findings of fact as "un

peu injuste,” suggesting that other parts of the evidence could lead to other inferences as to the motivations of the tobacco companies.

Judgment of the Court of Appeal, per Beaugard J.A., August 22, 2005, paras. 205-210, Dossier de l’Appelant, Vol. II, pp. 336-337.

49. The Attorney General for Saskatchewan respectfully submits that Beaugard J.A. erred in setting aside the learned trial judge’s facts on this point. Beaugard J.A.’s statement that he found the learned trial judge’s findings of fact to be “un peu injuste” does not come anywhere near the requirement of “palpable and overriding error.” Nor is an appellate court justified in drawing a different inferences from other parts of the evidence which was before the learned trial judge. This Court ruled in *Housen*, and confirmed in *H.L.*, that the standard of palpable and overriding error applies not just to the primary facts found by the trial judge, but also to inferences of fact from the primary facts. It appears in this case that the learned trial judge was not satisfied by the alternative explanations put forward by the tobacco companies, and made the findings of fact that he did. The Court of Appeal erred in law in setting aside those findings of fact.

**(f) The Intended Consumers**

50. The final factual issue concerned the consumers which the tobacco industries intended to reach with their promotions. The learned trial judge rejected two key arguments put forward by the tobacco industry: that their advertising was aimed only at consumers who wished to switch brands, and was not intended to induce people to start smoking, and that they were not aiming at young people. The learned trial judge expressed himself as follows:

Contrairement à ce qu'affirme M. Ricard, **la Cour ne croit pas** que la publicité des cigarettiers s'adresse d'abord et avant tout aux consommateurs volages (switchers). Elle s'adresse tout autant et sans doute plus aux nouveaux fumeurs.

De plus, **la Cour ne croit pas** que la publicité des cigarettiers ne s'adresse qu'aux fumeurs de plus de 19 ans. Toutes les campagnes de publicité contiennent des éléments séduisants pour les adolescents qui sont l'avenir de l'industrie. **L'industrie sait que l'on commence à fumer entre 12 et 18 ans et vise systématiquement ce public vulnérable dans sa publicité et sa mise en marché.**

Jugement de la Cour supérieure (Denis, J.), 13 décembre 2002, paras. 121-122, Dossier de l'Appelant, Vol. I, p. 36. [Emphasis added.]

51. Beauregard J.A. rejected these findings of fact, stating “Je ne partage pas l’avis du premier juge...” and that “Il est également exagéré de dire...” With respect, absent a finding of palpable and overriding error, it is not open to an appellate judge simply to reject findings of fact because the appellant judge does not agree with them. The fact-finding process is the reserve of the trial judge. The learned trial judge in this particular case made very strong findings of fact: he simply did not believe the submissions of the tobacco companies. He found that their advertising is aimed at tobacco consumers generally, not just at “switchers”, and that “Tous les campagnes de publicité” contain seductive elements for the adolescents who are the future of the industry. The learned trial judge’s statement that he did not believe the tobacco companies is clearly a question of credibility. Absent a finding of palpable and overriding error, which Beauregard J.A. did not make, the Court of Appeal was bound by those findings of fact. Beauregard J.A. erred in law in setting them aside.

Judgment of the Court of Appeal, per Beauregard J.A., August 22, 2005, paras. 212-213, Dossier de l'Appelant, Vol. II, pp. 337-338.

52. Both of these findings of fact are highly significant for the section 1 analysis, because they help to put in context the federal government's decision to enact the strict legislation before the Court. The learned trial judge simply did not believe the tobacco companies' protestations that their promotional campaigns are aimed solely at people who already smoke. Nor did he believe their denials about targeting young people. The conclusion that tobacco promotion is aimed at encouraging non-smokers to begin smoking, particularly adolescents, is a key factor for Parliament to rely upon in concluding that strict restrictions on tobacco promotion is necessary to achieve its goals.

**PART IV**

**COSTS**

53. The Attorney General for Saskatchewan submits that he is neither liable for, nor entitled to, any amount of costs.



**PART VI**

**LIST OF AUTHORITIES**

	<b><u>Paragraph Number</u></b>
<b><u>CASES</u></b>	
<i>H.L. v. Canada (Attorney General)</i> , [2005] 1 S.C.R. 401, 2005 SCC 25.	34, 35, 49
<i>Housen v. Nikolaisen</i> , [2002] 2 S.C.R. 235.	34, 35, 49
<i>Irwin Toy Ltd. v. Quebec (Attorney General)</i> , [1989] 1 S.C.R. 927.	15, 26
<i>RJR-MacDonald Inc. v. Canada (Attorney General)</i> , [1995] 3 S.C.R. 199.	4, 11, 13, 37, 38, 41, 45
<i>Thomson Newspapers Co. v. Canada (Attorney General)</i> , [1998] 1 S.C.R. 877.	13, 14, 15, 25
<i>R. v. Butler</i> , [1992] 1 S.C.R. 452.	15, 28



