

ANNEXE 11

LES FAITS LEGISLATIFS

LE DEROULEMENT DU PROCÈS

LE VERITABLE ENJEU

1. Les demanderesse ont réitéré leur objection à l'admissibilité en preuve de l'ensemble des documents reçus par le tribunal dans son jugement du 2 mai 2002 pour les raisons énumérées à la pièce EP-1, compte tenu de la non fiabilité de cette preuve (annexe conjointe des demanderesse #4).
2. Les demanderesse répètent les mêmes arguments que ceux présentés par écrit et oralement les 22 février et 24 avril 2002.
3. Le Procureur général réitère les arguments écrits et oraux qu'il a présentés au tribunal à ce sujet et ajoute ce qui suit :
4. Les demanderesse se méprennent sur le rôle du tribunal dans un dossier impliquant la constitutionnalité d'une mesure législative en regard de l'article 1 de la Charte. Elles allèguent que parce qu'un fait est contesté, le tribunal ne peut avoir recours à la preuve extrinsèque. Cette thèse est erronée et a été rejetée par les tribunaux. Elles allèguent par ailleurs que le tabagisme soulève des émotions fortes et amène des prises de position souvent extrêmes et contradictoires, d'où la nécessité de tester la preuve. Cet argument est également sans fondement.
5. Le présent litige porte notamment sur la raisonnable de certaines dispositions de la *Loi sur le tabac* en regard de l'article 1 et c'est à ce titre que les documents énumérés à la liste de preuve extrinsèque du Procureur général ont été produits au dossier de la Cour.
6. Il n'y a que deux règles en matière de preuve des faits législatifs :
 - . La partie demanderesse ne doit pas être prise par surprise;
 - . Les documents présentés au tribunal ne doivent pas être douteux en soi.
7. Les documents portant les numéros 1, 16, 24, 27, 28, 46, 48, 127 et 167 qui avaient été exclus par cette Cour le 2 mai 2002 ne peuvent être qualifiés d'émaner de sources douteuses (voir à ce sujet les notes écrites remises au tribunal lors de l'audition des 22 février et 24 avril ainsi que l'argumentation orale).

8. Par ailleurs, il est opportun de souligner que la Cour a donné aux demanderesse l'opportunité de déposer des documents comme preuve extrinsèque, ce qu'elles ont fait. Quant au document ED-16 « World Bank-Curbing the Epidemic » auquel les demanderesse s'objectent, il est opportun de souligner que ce document est présenté à la Cour comme faisant partie du corps d'opinion qui considère que certaines mesures législatives compréhensives peuvent contribuer à réduire le tabagisme. L'objet de ce document a été décrit au tableau du Procureur général du Canada comme suit :

- . Le tabac, un fléau mondial pour la santé
- . Mesures globales contre le tabagisme et restrictions sur la promotion des produits du tabac
- . Recommandation pour la mise en évidence de messages de santé sur les paquets de cigarettes
- . Recommandation pour la mise en œuvre d'une convention internationale interdisant ou restreignant la promotion des produits du tabac
- . Recommandation pour la réglementation des produits du tabac
- . Recommandation pour le contrôle des activités de promotion du tabac
- . Adoption de la législation par le Parlement – caractère raisonnable

9. Le document ED-16 a été entériné par la Banque mondiale. Le document ED-1 qui émane du World Bank Group (mars 2002) y fait référence de manière précise (page 4) :

« Curbing the Epidemic : Governments and the Economics of Tobacco Control », World Bank, 1999. Development in Practice Series. On line at : <http://worldbank.org/tobacco>, or hard copy from the World Bank Infoshop, or HDNHE's tobacco team. Short, readable and clear. Analyzes and summarizes the research and key economic and social issues relating to tobacco control. Also available in 13 other languages, and a key messages summary brochure, and powerpoint slides are available. »

Tobacco Control in Developing Countries », Jha and Chaloupka (editors), OUP for the World Bank and WHO, 2000. Detailed background papers for « Curbing the Epidemic

10. Le document ED-16 a été entériné par le Comité des Nations-Unies chargé de coordonner le travail de 18 organismes des Nations-Unies qui collaborent pour la mise en place de mesures visant à réduire le tabagisme à travers le monde.

11. La demanderesse JTI MacDonald, dans le document « annexes conjointes », à l'onglet 4, paragraphes 8 à 24, affirme que ce document a

été écrit consciemment avec l'intention de tromper. Il s'agit d'une accusation très grave et non fondée.

12. La figure 4.2.a reproduite à la page 40 de ED-16 illustre cet extrait de la page 39 :

« For example, tax increases in Canada between 1982 and 1992 led to a step increase in the real price of cigarette and consumption fell substantially. »

13. Le fait que le graphique 4.2.b indique la réduction de taxe canadienne en 1993 au lieu de février 1994 n'a aucune incidence, car le graphique montre la diminution de consommation pour la période d'avant la réduction de taxe et l'augmentation subséquente, ce qui a été confirmé par M. Swain (voir rapport de M Swain pièce D-245, tableau 5).
14. Les allégations de JTI MacDonald concernant le document ED-16 démontrent bien que la thèse des demanderesse est d'inviter le tribunal à faire de ce litige un procès sur des faits adjudicatifs, ce qui nous le soutenons, n'est pas le rôle du tribunal. Le document ED-16 est comme il apparaît à sa face même, un ouvrage collectif et est de fait un résumé d'études antérieures. Ce document est offert en preuve extrinsèque au support de la raisonnable de la *Loi sur le tabac* et de ses règlements. Le Procureur général du Canada réitère que l'analyse du comportement humain, comme la consommation des produits du tabac et l'effet de la promotion commerciale, sont des questions complexes et non résolues de manière définitive.
15. Le document ED-16 est une étude qui conclue à la nécessité de mettre en place un ensemble de mesures compréhensives qui vont dans le sens du programme recommandé par l'Organisation mondiale de la santé, la Banque mondiale et les Nations-Unis.

« Recommendations

This report makes two recommendations :

1. *Where governments decide to take strong action to curb the tobacco epidemic, a multipronged strategy should be adopted. Its aims should be to deter children from smoking, to protect nonsmokers, and to provide all smokers with information about the health effects of tobacco. The strategy, tailored to individual country needs, would include : (1) raising taxes, using as a yardstick the rates adopted by countries with comprehensive tobacco control policies where consumption has fallen. In these countries, tax accounts for two-thirds to four-fifths of the retail price of cigarettes; (2) publishing and disseminating research results on the health effects of tobacco, adding prominent warning labels to cigarettes, adopting comprehensive bans on advertising and promotion, and restricting*

smoking in workplaces and public places; and (3) widening access to nicotine replacement and other cessation therapies.

2. *International organizations such as the United Nations agencies should review their existing programs and policies to ensure that tobacco control is given due prominence; they should sponsor research into the causes, consequences, and costs of smoking, and the cost-effectiveness of interventions at the local level; and they should address tobacco control issues that cross borders, including working with the WHO's proposed Framework Convention for Tobacco Control. Key areas for action include facilitating international agreements on smuggling control, discussions on tax harmonization to reduce the incentives for smuggling, and bans on advertising and promotion involving the global communications media.*

The threat posed by smoking to global health is unprecedented, but so is the potential for reducing smoking-related mortality with cost-effective policies. This report shows the scale of what might be achieved : moderate action could ensure substantial health gains for the 21st century. » (Curbing the Epidemic, pages 82-83)

16. Les demandereses ont eu tout le loisir de présenter au tribunal une preuve positive, ce qu'elles n'ont pas fait. Elles ont eu également tout le loisir de déposer des éléments de preuve extrinsèque. Or, elles n'ont déposé aucune preuve positive à l'encontre de ED-16. Le tribunal n'a pas à trancher de manière définitive et adjudicative toutes les multiples questions et objections des demandereses, qui ne visent en définitive qu'à inviter la Cour à rendre jugement dans l'abstrait.
17. Quant à l'étude de la Turquie auquel il est fait référence à la page 47 de ED-16 ainsi qu'aux paragraphes 12 à 14 de l'argumentation de JTI MacDonald, l'interprétation de la demandereses JTI MacDonald n'est qu'une inférence non fondée et ne peut remettre en cause la conclusion selon laquelle des messages d'avertissement sur les paquets de cigarettes contribuent à réduire le tabagisme.
18. Par ailleurs, la présentation que fait la demanderesse JTI MacDonald quant aux événements survenus entre les années 1960 et 1988 est non fondée. Les messages de santé ont été apposés sur les emballages des produits du tabac vendus en Turquie en 1982. Les auteurs ont décrit les événements survenus antérieurement en raison du fait qu'ils ont examiné l'évolution des prix et de la consommation pour la période de 1960 à 1982. Il est opportun de reproduire le texte de cet article quant à l'analyse portant sur les messages de santé.

« The coefficient estimate of the dummy variable D82-88 indicates a 7.7% decline in cigarette demand over the 1982-88 period. The corresponding long-run decline is about 13.6%. This decline can be attributed to the health warning found on the cigarette packages since the end of 1981. The dummy variable D82-88 implies that the initial impact of the health warning remains the same over the years, which may not be true. To allow for the possibility of non-constant effect of the

1982 health warning over time and to separate impacts of the 1986 and 1988 anti-smoking campaigns, a separate dummy variable for each of the years 1982-88 are included. The estimated equation is given in footnote 10. The estimates indicate that each of the years (except 1982) represent significant declines in per adult cigarette consumption including the years 1986 and 1988. The largest annual decline in consumption (by 25%) occurred in 1986 which is the first year of the anti-smoking campaign. The coefficient for 1984 also indicates a significant decline. Since 1984 marks the inception of cigarette advertising, one can conclude that the effect of health warning was stronger than that of advertising.

Studies by Hamilton (1972), Warner (1977) and Baltagi and Levin (1986) indicate that health scares significantly reduced cigarette consumption in the USA. Fujii (1980) and Bishop and Yoo (1985) suggested that rising taxes would be more successful in reducing consumption. McLeod (1986) found that advertising bans brought about a short-lived reduction in cigarette consumption in Australia. Cox and Smith (1984) compared different approaches towards smoking and found that the countries which fought smoking via official regulations such as smoking bans in public places have been more successful in achieving a reduction in consumption than the countries with no such official policy. » (EP-8, pages 525-526)

19. Les allégations et les inférences de la demanderesse JTI MacDonald quant au document ED-16 et la référence à l'étude EP-8 « Cigarette demand, health scares and education in Turkey » sont non fondées.
20. Par ailleurs, il est opportun de souligner que les auteurs de ED-16, quant aux effets des messages de santé, réfèrent à d'autres études dont un sondage canadien de 1996 :

« In Canada, a survey in 1996 suggested that half of smokers intending to quit or cut back their consumption were motivated by what they had read on their cigarette pack. » (page 47)

Voir ED-176 « Environics – Public attitudes Toward the listing of toxic ingredients on cigarette packages : A Survey Report – June 1996 » page 22 :

« 10.2 Perceived Effectiveness of Listing Toxic Constituents and Statements

More than three in four adult Canadians (78%) believe that a list of chemicals, together with one of the warning statements, would be at least somewhat effective in providing information about the chemicals and toxins in cigarettes. A majority also feel that this would be at least somewhat effective in discouraging young people not currently smoking from starting (73%), discouraging themselves personally from smoking (57%), and discouraging smoking among young people who currently smoke (53%). Fewer than half (48%) think this will be effective at discouraging adults who currently smoke. Women, people concerned with their health, occasional smokers and non-smokers are more likely to think such labelling will be effective in all respects.

Most young people (80%) believe that a list of chemicals, together with one of the warning statements, would be at least somewhat effective in discouraging smoking among young people who do not currently smoke. A large proportion (79%) also say that this would be at least somewhat effective in providing information about chemicals and toxins in cigarettes and in discouraging themselves personally from smoking (77%). A slim majority also believe such labelling will be at least somewhat effective in discouraging smoking among young people who currently smoke (55%). Under half (45%) believe this will be at least somewhat effective in discouraging adults from smoking. »

21. Les allégations de la demanderesse JTI MacDonald, selon lesquelles les auteurs de ED-16 sont incompetents, n'ont aucun fondement.
22. La demanderesse JTI MacDonald allègue que puisque l'étude ED-16 réfère à des travaux de M. Henry Saffer qui ont été subséquentement publiés dans un ouvrage dont l'éditeur est M. P. Jha et F.J. Chaloupka, il s'ensuit que les travaux de M. Saffer n'ont aucune valeur. Cette allégation est non fondée. Il est opportun de reproduire la préface de ED-16 :

« This report has its origins in the converging efforts of several partners to address a shared problem: the relative neglect of economic contributions to the debate on tobacco control. In 1997, at the 10th World Conference on Tobacco in Beijing, China, the World Bank organized a consultation session on the economics of tobacco control. The meeting was part of an ongoing review of the Bank's own policies. There was clear recognition at this meeting that insufficient global attention was being paid to the economics of the smoking epidemic. The meeting's participants also agreed that the discipline of economics was not being paid to the economics of the smoking epidemic. The meeting's participants also agreed that the discipline of economics was not being applied to tobacco control in many countries, and that even where economic approaches were being used, their methodology was of variable quality.

At the same time that the World Bank began reviewing its policies, economists at the University of Cape Town, South Africa, had begun a project on the economics of tobacco control for Southern Africa. There initiatives were brought together, in partnership with economists at the University of Lausanne, Switzerland, and others, to form a wider review. The work culminated in a conference in Cape Town in February 1998. The proceedings of that conference are published separately. The collaboration led to a broader analysis of the economics of tobacco control, involving economists and others from a wide range of countries and institutions. Some of the studies resulting from this analysis will be published shortly. This report summarizes the findings of those studies that are relevant to policymakers. » (Curbing the Epidemic, page XI)

23. Par ailleurs, il est opportun de souligner que le document EP-9 « Tobacco Control in developing countries » a été publié par la Oxford Publicity Press pour le compte de « The Human Development Network, the World Bank and the Economics Advisory Service, World Health Organization ». Quant à

l'allégation selon laquelle (par. 17, EP-9, page 231) le Canada a été inclus dans un groupe de pays, y inclus l'Afghanistan ou le Soudan, il est opportun de souligner que ce tableau ne sert qu'à comparer des pays où il y a des prohibitions de publicité avec d'autres où il n'y en a pas. Plusieurs des pays énumérés ont subi des baisses de consommation, comme l'Islande, l'Italie et Singapour. Par ailleurs, l'interprétation de la demanderesse selon laquelle les auteurs ont considéré que plusieurs des pays énumérés au tableau 9.3 dans la colonne « comprehensive ban » n'auraient pas dû y être mentionnés, du fait par exemple qu'au Canada, la Loi réglementant les produits du tabac n'a été adoptée qu'en 1989 n'a aucun fondement. Aux pages 228 et 229 du document EP-9, les auteurs réfèrent à Roemer (1993) (pièce D-127) :

« A number of countries have passed comprehensive advertising bans. These countries are listed in Table 9.3. Comprehensive bans include bans on the use of the names, logos, and trademarks of tobacco products in any medium under any circumstances, including advertising for any product or event. These names may be used as part of the product packaging. Games, prizes, and free distribution are also prohibited. The ideal approach to estimating the effects of comprehensive bans is an econometric model, which would hold constant all other factors that affect consumption, such as price, income, and other economic or cultural variables (see Saffer and Chaloupka, in press). In addition, comprehensive bans are most likely to be legislated along with a series of other restrictions on tobacco, such as limitations on places where smoking is allowed, health promotion sponsorship foundations, health education programs, and counter-advertising. However, for many countries these data are not available, thus limiting econometric studies to samples such as the high-income countries. Even within these countries there are limits to the availability of data that can bias econometric studies)

(...)

Table 9.3 also shows the rate of growth of tobacco consumption for the former communist countries. Roemer (1993) reports that in 1990, 27 countries had comprehensive advertising bans. Of the 27 countries, nine were formerly communist and had no advertising at all. Table 9.3 shows that the former communist countries increased cigarette consumption over the date period. The weighted average for the communist countries reflects the large increase in consumption in China and its large population. Only Yugoslavia legislated a tobacco advertising ban during the date period. During this period Yugoslavia had a decrease in cigarette consumption. Also, during the period, the countries were experiencing major changes in economic institutions, which might have affected cigarette consumption. Because of these changes, the date should be interpreted only cautiously as indicating that the abandonment of bans increases consumption.

9.7 Policy options and conclusions

The policy options for the control of tobacco advertising include limitations on the content of advertisements, restrictions on the placement of advertising (such as in certain magazines), restrictions on

the time that cigarette advertising can be placed on broadcast media, total advertising bans in one or more media, and counter-advertising. (...) Since they are enacted together, it is difficult to partition the effect of each component of a comprehensive control program. Prior research has shown that counter-advertising can also reduce cigarette consumption. » (EP-9, pages 228, 229)

L'étude de Roemer (1993) (D-127) mentionne à la page 32, ce qui suit :

« In the early 1970s, Finland, Iceland and Norway were the first countries to enact total bans on tobacco advertising for health reasons. Singapore's ban, introduced in 1970 under the Prohibition of Smoking in Certain Places Act, was almost total. As already mentioned in Chapter 2, Spain in 1982 and Portugal in 1983 replaced their moderate controls on advertising with a virtually total ban (Spain allows advertising for new low-tar, low-nicotine products for two years after their introduction on the market). Canada in 1988 and New Zealand in 1990 are the first English-speaking countries to adopt legislation outlawing both advertising and sponsorship. On 10 January 1991, France enacted landmark legislation, effective 1 January 1993, prohibiting all advertising and sponsorship of tobacco and tobacco products and imposing stringent limitations on the promotion of alcoholic beverages. »

24. L'allégation de JTI MacDonald selon laquelle les auteurs de ED-16 ont pris pour acquis que les pays énumérés au tableau 9.3 avaient un « comprehensive ban » pour la période 81 à 91 est erronée.
25. Les allégations selon lesquelles la conclusion citée aux paragraphes 20 et 21 du document EP-10 « Henry Saffer, Frank Chaloupka – The Effect of Tobacco Advertising bans on Tobacco Consumption » serait non fondée, sont erronées. La conclusion de l'étude se trouve à la page 1134 :

« The primary conclusion of this research is that tobacco advertising increases tobacco consumption. The empirical evidence also shows that comprehensive advertising bans can reduce tobacco consumption, but that a limited set of advertising bans will have little or no effect. A limited set of advertising bans will not reduce the total level of advertising expenditure but will simply result in substitution to the remaining non-banned media. When more of the remaining media are eliminated, the options for substitution are also eliminated. The estimated ban coefficients can be used to predict the percentage change in consumption that would result from additional media bans. For example, the consumption level which would have occurred if all OECD countries had Comprehensive Bans during a sample period can be predicted. The regressions from Table 7 are used for this exercise since the HNZ data include more countries than the USDA and is more consistent than the Stewart data. The percentage change in consumption predicted from each regression is reported in Table 7. The data indicate about a 5.4% reduction in tobacco use and about a 7.4% reduction in cigarette use if all OECD countries had enacted Comprehensive Bans.

The regression results can also be used to predict the effects of the new European tobacco advertising policy initiatives. A European Commission directive issued in late 1997 requires that tobacco advertising in the EC countries diminish progressively from 2001 and entirely no later than October 2006. The data for the 11 included EC countries and regressions in Table 7 can be used to predict the effects of this directive. The data predict that the new legislation will reduce tobacco consumption by 6.3% and cigarette consumption by 7.9%.

Finally, the analysis presented in this paper suggests that the new ban on outdoor advertising, required by the 1999 US tobacco industry settlement, will have little effect on consumption. Under the settlement, print advertising, point of purchase advertising, and sponsorships will not be banned. In addition, other forms of promotion will not be banned. This will result in substitution to the remaining three forms of advertising and to increased use of tobacco promotion. »

Le document ED-127 « Conseils et Vérification Canada »

26. Le Bureau du Conseil Privé a mis en place une politique de réglementation (ED-106) que doivent suivre les organismes de réglementation qui veulent proposer l'adoption ou des changements aux règlements. Selon cette politique, les organismes de réglementation doivent :

« Analyse coûts-avantages. Les organismes de réglementation doivent démontrer que les avantages des exigences réglementaires l'emportent sur les coûts. Lorsque les règlements sont liés à la protection de la santé, de la société, de l'économie ou de l'environnement, ils doivent aussi faire la preuve que les efforts de réglementation sont axés sur les secteurs dans lesquels ils sont susceptibles de procurer les plus grands avantages. Pour tous les projets de réglementation, les organismes de réglementation doivent avoir recours à une analyse coûts-avantages pour évaluer leurs répercussions éventuelles, comme l'incidence sur l'environnement, les travailleurs, les consommateurs et les autres secteurs de la société. Il est nécessaire de se servir du Test de l'impact sur les entreprises ou d'effectuer une analyse équivalente, afin de déterminer l'incidence des projets de règlement importants sur les entreprises canadiennes. »

27. En l'espèce, c'est ce qu'a fait le ministère de la Santé en demandant, par l'entremise du ministère de Travaux publics et Services gouvernementaux, à Conseils et Vérification Canada de procéder à l'évaluation des amendements proposés aux règlements sur l'information. Conseils et Vérification Canada est un organisme de services spéciaux de Travaux publics et Services gouvernementaux du Canada. Il s'agit d'un service de certification de comptabilité et de vérification. Cet organisme a fait affaire avec plus de 40 agences internationales, pays développés et en développement (transfert de compétences). Conseils et Vérification Canada a demandé à la firme Hara & Associates d'effectuer l'étude coûts-bénéfices.

28. Les allégations de JTI MacDonald à l'endroit de cette étude ED-127 sont erronées. Les inférences qu'elle demande à cette Cour de tirer sont non fondées.
29. Au début de leur étude, les auteurs soulignent qu'ils ont eu une approche conservatrice. Un examen final démontre le sérieux de l'étude qui ne saurait être comparée au document EP-12.
30. Les auteurs du document ED-127 mentionnent au début de leur étude :

« Assessing the benefits and costs of the proposed tobacco labelling requirements involves significant challenges. These include :

. Estimating consumer response. Warning labels have their impact through persuading consumers to reduce their tobacco consumption. An estimate must be made of how consumers will respond to stronger labels.

. Estimating the impact on mortality and morbidity. A 1% drop in tobacco consumption does not mean an immediate 1% drop in smoking-attributable mortality. The negative health impacts of tobacco use take time to develop. Similarly, the benefits take time to appear. It also matters whether the drop comes from fewer new smokers, smokers who quit or smokers who smoke less. Smokers who quit will regain some, but not all, of the health of non-smokers.

. Valuing life and health. A benefit/cost framework must convert all items to a dollar value so that they may be added together for total dollar benefits and costs. Fortunately, there are well-established methods of valuing life and health which are ethical and reflect the capacity of the economy to support resulting decisions.

. Estimating employment impacts. A reduction in tobacco consumption will have negative impacts on the tobacco industry. However, what must not be forgotten is that there will also be positive impacts on other industries as former smokers spend their money elsewhere. A third consideration is how government program spending may or may not respond to the drop in tax revenues, as tobacco is a very heavily taxed product. » (page 1-3)

« In general, this study has taken a conservative approach to assessing the benefits and costs of the proposed regulations. For example, where an estimate of a benefit could not be reasonably calculated, it was not included in the calculation. Where assumptions needed to be made, a conservative assumption was chosen. The time frame for the study was 26 years, from 2001 to 2026. The full health benefits or reduced tobacco use will take much longer than 26 years to be fully realized because younger generations will go through life with a greater proportion of individuals never having smoked. A time frame of 26 years is conservative because it means that health benefits beyond 2026 are effectively valued at zero. In addition, to reduce future values to present day dollars, the Treasury Board recommended 10% rate was used. Thus a dollar of benefits earned in year 2026 is treated as worth less than one-tenth of a dollar of benefit today. » (page 1-4)

31. Il souligne par ailleurs la difficulté soulevée par l'étude de l'effet des messages de santé comme suit :

« There are a number of conceptual steps between the placement of warning labels on cigarette packages and the ultimate impact on tobacco use. For an impact to occur, consumers must :

- . notice the warning*
- . read and understand the warning*
- . give credibility to the warning*
- . recall the warning when considering purchasing tobacco products*
- . choose to change their tobacco buying habits.*

These steps are discrete. Consumers may notice the label but not read it or find the wording obscure. They may notice, read and understand but not believe. They may believe at the moment but forget later. They may believe and remember but choose to continue to smoke.

Ideally, we seek an estimate of the last step, the impact of warning labels on actual tobacco use. Do they have a lasting impact? In developing an empirical estimate, there are a number of these challenges :

. Most of the available literature focuses on the earlier steps : Are labels noticed and understood? Is there recall at a later date? The argument is that if there is no recall, there cannot be an impact on future buying.

. Empirical estimates face a number of challenges. Tobacco demand models must account for the impact of changes in price, income, quantity of advertising and the impact of other health initiatives.

. There are no published empirical estimates of Canadian tobacco demand, which include direct estimates of the impact of warning labels.

. Warning labels in different countries vary in strength of wording and visibility. This may limit the relevance of studies in other countries.

. We are considering the incremental impact of stronger warning labels. This may be less than the initial impact of placing the current warning labels on tobacco packages. This will influence how we may interpret other country studies. » (page 3-1)

« Warning labels are expected to have an impact by allowing the consumer to make a more informed choice. Consumers need to know that a product has adverse health effects and is addictive.

The case for stronger warning labels rests on these ideas :

. Consumers need to be better informed about the variety and magnitude of the risks. For example, most older consumers may be aware that cigarettes cause lung cancer. They may not be aware that lung cancer accounts for less than 31% of tobacco mortality. Their risk of premature death is more than tripled, once other tobacco-related diseases are factored in. Consumers may also not be fully aware of the impacts of

smoking on unborn children or side-stream smoke on other family members.

. Stronger wording and visibility will increase the credibility consumers accord those warnings. Canadians face a wide variety of cautionary messages from public authorities every day, ranging from speed limits to advice on nutrition. The strength of the warning is expected to communicate to consumers how conclusive the evidence is believed to be on the risks of tobacco use and how significant the risks are.

. The use of pictures, graphs and inserts will increase the comprehension and recall of the message. It is generally known that more graphic displays assist in learning and recall. In addition, while Canada is a well-educated country, it should be remembered that the degree of literacy still varies widely among its citizens. Reliance on the written word alone, or on obscure statements, is expected to have less impact than stronger wording accompanied by pictures and graphs. » (page 3-2)

32. Les allégations de JTI MacDonald (paragraphe 30 et 31) selon lesquelles cette étude ne serait fondée que sur l'étude de Turquie (EP-8), que l'étude australienne a conclu à un impact négligeable et que les autres auraient négligé d'examiner le contexte canadien, sont erronées.

33. Les auteurs de l'étude d'impact ont noté ce qui suit :

a) Quant à la situation canadienne, les auteurs mentionnent aux pages 3-2 et 3-3 :

« Available evidence suggests that current tobacco warning labels do have a significant impact on tobacco use. In a 1999 survey of 2,018 adults and 746 youths aged 12-18 sponsored by Health Canada, it was found that :

. A large proportion of adult Canadians can recall the specific warning messages. In an unprompted question, 43% recalled ²Smoking during pregnancy can harm your baby², 41% recalled ²Smoking can kill you², 37% recalled ²Smoking cause cancer², and smaller proportions for the rest. Smokers were more likely to recall the messages than non-smokers. Those with less than high school education were the most likely either not to recall any of the messages or to offer no response.

. Young Canadians also notice current warning labels. ²Smoking during pregnancy can harm your baby², was recalled by 58% of teenagers; 48% recalled ²Smoking can kill you², and smaller proportions for the rest. Youths aged 15 to 18 are more likely to remember all the messages than younger ages.

. Canadians find the warnings credible. Eighty-four percent of adults and ninety percent of young Canadians agreed with the statement that health warning messages provide important information for smokers. Sixty-three percent of adults and seventy percent of young Canadians agreed with the statement that current health warning messages on cigarette packages are worth reading again, even after seeing them several times.

. *Warning labels have a role in encouraging smokers to quit. Thirty-six percent of adult smokers and thirty-two percent of young Canadian smokers reported that the messages had either a major impact or some impact on their desire to quit. Twenty-five percent of adult smokers and twenty-seven percent of young Canadian smokers stated that the labels had caused them to smoke less. Twenty-two percent of adult smokers and twenty-four percent of young smokers indicated that the warning labels had played a role in motivating recent attempts to quit smoking.*

. Canadians support warning labels. *When asked whether current warning labels go too far, 81% of adults and 88% of youth believe either that current labels are about right or do not go far enough.*

. *More Canadians support stronger labels than weaker labels. Among adults, 25% of smokers and 39% of non-smokers feel that current labels do not go far enough, compared to 14% of smokers and 3% of non-smokers who feel the labels go too far. Among youth, 26% of smokers and 43% of non-smokers feel that current labels do not go far enough, compared to 12% of smokers and 3% of non-smokers who feel the labels go too far.*

. *Adding pictures is the most often suggested method of improving warning labels. In an unprompted question, 20% of adults and 25% of youth suggested the use of pictures. Other suggestions garnered about 10% each: more detailed information, increasing size, and more eye-catching presentation. »*

b) Quant à la situation américaine, les auteurs mentionnent à la page 3-3 :

« The effectiveness of Canadian labels may be related to their current strength of presentation. U.S. warning labels are considerably less well displayed. Rootman (1995) compared the responses to U.S. and Canadian warning labels among 2,132 Ontario and Chicago school children in grades 7 and 8. Eighty-three percent of Ontario school children were able to recall warning label content, while only six percent of Chicago students were able to make similar recollections of U.S. warning label content. The results of this study also suggest that the mixed recollections of U.S. warning labels does not apply to Canada. For example, MacKinnon (1993) found that there was only a weak relationship between recall of U.S. warning label content and smoking. Since smokers presumably see the warning labels more often than non-smokers do, a stronger correlation had been expected. In a small sample survey of 209 U.S. college students, Richards et al. (1989) found that while almost all survey respondents were aware of the existence of warning labels, 70% could not recall their content, and there was no difference between smokers and non-smokers. »

c) Quant à l'étude australienne, les auteurs ont fait leur propre analyse de l'étude et mentionnent aux pages 3-4 et 3-5 :

« Finally, the recent experience in Australia also suggests the importance of the presentation and content of the warning messages. Australia has required warning labels on cigarette packages since 1972.

However, the original labelling requirements were fairly weak, stating only *Warning – Smoking is a health hazard*². The resulting impact on per capita tobacco use was significant in the statistical sense but not of appreciable magnitude. (See further discussion below of Bardsley & Olekalns (1999)). Some changes were introduced in 1985 but were again muted in both strength of wording and size (15% of package). More recent initiatives with stronger labels appear to have been more effective (see Figure 3.1). In 1995, Australia implemented a strong tobacco control program, including stronger labelling. The new labels must take up 25% of the face of a package, with additional explanatory messages on 33% of the opposite side. Warning messages includes :
 . *Smoking causes cancer* » (page 3-4)

« The resulting impact on 1995 per capita tobacco consumption appears to have been immediate, as illustrated in Figures 3.1 and 3.2. While tobacco use had been on a downward trend, the annual rate of decrease was tailing off until the introduction of the new labels. The annual decrease in consumption fell from 6.2% in 1992 to 3.2% in 1994. In 1995 and 1996, the rate of decrease rose again to 4.6% and 4.9%. Although the impact is masked by the general downward trend, it appears clear that there was a change in 1995. Unfortunately for our purposes, it is not possible to determine how much of the changes in 1995 and 1996 were associated with warning label improvements, since other anti-smoking measures were implemented at about the same time. The difficulty in sorting out causative factors is one of the reasons why impact estimates drawn from a multivariate statistical model are preferred. These estimates are discussed next. » (page 3-5)

d) Quant aux études internationales, les auteurs mentionnent aux pages 3-6 et 3-7 :

« . Tansel (1993) examines the demand for cigarettes in Turkey between 1960 and 1980. His model includes advertising, price, income and a variety of government initiatives, including the introduction of warning labels. He estimates that the introduction of warning labels reduces tobacco consumption by 7.6% in the short run and by a further 13.6% in the long run. The distinction between the short run and the long run arises from the addictive nature of smoking, causing changes in consumption to lag behind changes in determining factors. This approach is common to most of the studies reviewed.

. Bardsley & Olekalns (1999) undertake a similar experiment for Australia from 1962 to 1995. They find that warning labels introduced by Australia in 1972 had a statistically significant impact but of negligible magnitude. As noted above, this warning was quite weak in content. Unfortunately, they do not include a separate variable for assessing the impact of the change to Australian labels in 1985/86, and the sample stops short of the 1995 impact of even stronger labelling requirements.

. Tegene (1991) is also on topic. Unlike much of the literature on U.S. tobacco demand, Tegene sets the timing of the dummy variables to correctly capture the warning labels which were first introduced in 1965. He also tests the introduction of revised labels in 1970. Both labelling measures are found to significantly affect the structure of consumer demand. Unfortunately, the method employed (Kalman Filter) did not

produce ready estimates of the percentage impact of the labels on tobacco consumption.

Table 3.1 : Empirical Estimates of Impact of Warning Labels

Author	Country & Sample Period	Impact of Warning Label	Comments
Estimates Directly Related to Warning Labels			
Tansel (1993)	Turkey 1960 to 1988	7.7% short run; 13.6% long run.	Explicit to labels.
Bardsley & Okekalns (1999)	Australia 1962-1995	Negligible, but statistically significant.	Omits from sample period sharper labels introduced in 1995.
Tegene (1991)	U.S. 1929-1986	n/a Finds significant impact of warning labels on consumer demand structure.	Correct years used for warning labels : 1995 and 1970; uses Kalman Filter to detect changes in structure of demand.
Estimates of the Impact of the U.S. 1964 Surgeon General's Report			
Hamilton (1972)	U.S. 1926-1970	23.3% to 51% reduction in growth of demand.	Based on 1994. Labels not until 1995.
Fujii (1980)	U.S. 1929-1973	None.	Redoes Hamilton (1972) using a ridge regression to eliminate multi-collinearity. Based on 1994. Labels not until 1995.
Bishop & Hoo (1985)	U.S. 1954-1980	6.8% to 7.8% but not statistically significant.	Supply and demand approach, but no allowance for addiction. Based on 1994. Labels not until 1995.
Doroodian & Seldon (1991)	U.S. 1952-1984	4.1% short run; 12.8% long run.	Based on 1994. Labels not until 1995.
Seldon & Boyd (1991)	U.S. 1953-1984	9.7%.	Based on 1994. Labels not until 1995.
Rezitis, Foster & Brown (1999)	U.S. 1951-1992	None.	Cost function approach. Based on 1994. Labels not until 1995.

The balance of the articles in Table 3.1 represent the stream of academic studies of U.S. tobacco demand. The focus of the literature is on advertising bans and measuring the impact of health scares. A drawback of this literature is that, with the exceptions already noted, it does not include separate dummy variables to capture the impact of warning labels.

Warning labels were introduced in the U.S. in 1965. The read: ²Caution : Cigarette Smoking May be Hazardous to Your Health.² In 1970, a new label was introduced: ²WARNING : The Surgeon General has determined that Cigarette Smoking is Dangerous to your Health². In 1985, rotating messages were introduced, covering health impacts ranging from lung cancer, to heart disease, to fetal damage.

These key years are not consistently covered in any of the literature. Instead, dummy variables are included for years when the U.S. Surgeon General issued key reports (1964 and 1979), and for other years when advertising restrictions were introduced. The focus on reports rather than labels makes most of the literature moot for our purposes. The closest match is typically for the 1964 U.S. Surgeon General Report, which was followed in the next year by the introduction of warning labels. Estimates for the impact of 1964 are shown. The balance of evidence is for a reduction in tobacco demand of between 6.8% and 12.8%. However, the evidence is mixed and not clearly related to labels. »

34. Par ailleurs, l'annexe B de ED-127 « Conseils et Vérification Canada » est une liste bibliographique de la littérature examinée.
35. Il est opportun de souligner que l'étude ED-127 est un estimé des coûts-bénéfices et que les auteurs ont été très prudents dans leurs conclusions :

« The literature which deals directly with warning labels finds their impact significant but leaves us with a range of estimates of long-run impact from negligible to a 13.6% reduction in demand. In the absence of additional data, we would suggest the midpoint of the range (6.8%) as a conservative choice for initial impact of labelling. The choice is conservative because the bottom end of the range, established through the evidence from Australia, is based on a very weak label and does not reflect stronger labelling introduced in 1985/986 and 1995, which appears to have had a more significant impact on per capita demand.

While a 6.8% in tobacco demand is the midpoint estimate for the introduction of warning labels, we are seeking an incremental estimate of the impact of moving from the current labels to stronger ones. It seems likely that there may be declining rates of return in warning label visibility for subsequent improvements. In the absence of other evidence, and with the above-notes research on improvements in visibility and recall in mind, we estimate that the incremental impact of new labels will have one half of the effectiveness generally estimated for warning labels. This is one quarter the estimate of Tansel (1993) or 3.4%.

We believe that an estimate long-run reduction in tobacco demand of 3.4% is a reasonable and conservative estimate for the likely impact of the proposed new warning labels. » (page 3-8)

36. Les allégations de JTI MacDonald à l'endroit du document ED-181 « Environics – Public Attitudes Toward Toxic Constituent Labelling on Cigarette Packages – April 1996 » démontrent encore qu'elle tente d'inviter la Cour à trancher toutes sortes de questions adjudicatives, comme si le procès qu'elle a intenté en était un en responsabilité civile, ce qui n'est pas le cas.
37. Autrement dit, pour chacun des éléments de preuve extrinsèque présentés, les demanderesse tentent de convaincre la Cour de faire de multiples

procès dans un seul procès. Les auteurs de l'étude coûts-bénéfices réfèrent à d'autres études, elles-mêmes contestées par les demanderesse parce que insuffisantes ou erronées!

38. Le Procureur général du Canada soutient que la décision rendue par le tribunal canadien du commerce extérieur ne porte que sur le processus administratif d'octroi d'un contrat. Le tribunal du commerce n'a jamais examiné les qualités de l'étude ED-129 «The relative importance of the size, content and pictures on cigarette package warning messages – April 24, 2000 ». Le Dr. Liefeld est étranger à ce qu'a fait Santé Canada.
39. Par ailleurs, il est opportun de souligner que les appréhensions de Santé Canada quant au fait que le Dr. Luik était en conflit d'intérêt étaient plus que des appréhensions :
- a) En 1988, M. J. Luik a comparu devant le Comité parlementaire chargé d'étudier la Loi réglementant les produits du tabac.

« Mr. Luik : Mr. Chairman and members of the committee, my name is John Luik and I am a professor of philosophy at Brock University. With me today are Mr. John Foss, President and Chief Executive Officer for the Association of Canadian Advertisers Inc., and Mr. Claude Thomson, a partner in the legal firm of Campbell, Godfrey and Lewtas and a past President of the Canadian Bar Association.

We are here today to represent Coalition 51 a diverse group of Canadians drawn together by a serious concern about certain aspects of Bill C-51.

Mr. Luik : I would also like to respond. I have absolutely no vested interest in this. I am an academic. I do not receive – nor does my university – any money from the tobacco industry. Like Mr. Thomson, I approach this entirely as a civil liberties issue, not as a professional lobbyist. The activities or the interests of the tobacco industry are not privy to me. However, as our brief has attempted to point out, we feel that, in a democratic society, the rights under the law protect even those groups that tend to be most socially out of favour, whether it be Mr. Keegstra, the tobacco industry or anybody else. That is the unfortunate thing about rights – they are there precisely to protect people who may need them the most. »

- b) M. Luick a comparu devant le Comité parlementaire chargé d'étudier le projet de Loi C-71 le 3 avril 1997.

« M. John Luik : Contrairement a beaucoup de vos témoins, je viens aujourd'hui vous parler simplement à titre particulier et en m'appuyant sur les connaissances que je possède au sujet d'une petite partie de la question dont vous êtes saisis. Je ne parle pas au nom de qui que ce soit; à un moment donné cependant, j'aimerais présenter quelques preuves. Je vous ai d'ailleurs fait venir des exemplaires d'un livre que moi-même et M. Mike Waterson avons publié au Royaume-Uni. Dans

un certain sens, la présentation que je fais aujourd'hui est conjointe, bien que M. Waterson ne soit pas en mesure d'être parmi nous aujourd'hui.

Tous les ans, plusieurs douzaines d'organismes m'engagent comme consultant pour toute une gamme de projets. J'ai par exemple travaillé pour de nombreux organismes de services de santé sur tout un éventail de questions liées à la santé. En toute franchise, je dirais que j'ai également travaillé pour plusieurs sociétés de tabac au sujet de la question dont vous êtes saisis, c'est-à-dire la publicité et, en particulier la publicité du tabac et les jeunes.

J'aimerais parler brièvement du travail que M. Waterson et moi-même avons accompli ces dix dernières années au sujet de la publicité en général et de la publicité du tabac en particulier. Ce travail a fait l'objet d'articles publiés dans plusieurs revues spécialisées. Ils sont maintenant regroupés dans un livre intitulé Advertising and Markets, que nous avons publié l'année dernière au Royaume-Uni et dont je vais vous remettre des exemplaires. »

c) Lors de son contre-interrogatoire, M. Waterson a répondu comme suit aux questions portant sur ses liens avec M. Luik :

« Q- The work referred to it, the very last paragraph of the first page, is it co-edited with Mr. John Luik?

A- I'm sorry, where is this?

Q- The last paragraph, it says :

²Mike Waterson is currently undertaking the review of literature on tobacco advertising and consumption, to be published later in the year.²

Is that a reference to the book that you published with Mr. John Luik?

A- I can't see that paragraph. Where we ...

Q- The very first page, last paragraph, sir.

A- I don't think it mentions John Luik.

Q- No, it doesn't, that's why I'm asking you the question.

A- I don't think I co-edited a book with John Luik, called ²Advertising and Markets². Whether that is the same but that was never a review of the literature, that was simply a collection of papers published in the International Journal of Advertising, which is an advertising association journal. And John Luik and I sat down for about two (2) hours and went through the International Journal of Advertising back copies and selected those papers that we thought were most suitable. So, that's the extent of my contact with John Luik on that book. And I suspect that this is simply something that I was undertaking on my own, I don't believe ... It could be the same thing but I think it's unlikely.

Q- Well, in nineteen eighty-five (1985), sir, how many books have you published on the issue of literature on tobacco advertising and consumption?

A- Well, the Advertising and Markets book was not on Tobacco, it was simply a collection of papers relating to the impact of advertising on market size, some of which, a significant proportion of which related to tobacco, a significant proportion of which related to drink and a significant proportion of which related to the impact of advertising in general on markets not specified.

It could have been but I simply can't. But on the other hand, it's entirely possible that the Advertising Association asked me to look at recent literature on tobacco advertising and consumption separately. I simply wouldn't know and I couldn't state with any certainty whatsoever.

Q- *I'd like, My Lord, to file this documents as D-43?*

Me Simon Potter :

My Lord, for the same reasons as invoked before, this is a document which simply mentions Mr. Waterson. Now, there may be thousands and thousands of documents out there which happen to mention Mr. Waterson but that's all it does. It's hardly useful.

The Court :

Considering the answers of the witness, I'll take the objection under reserve and we may file it.

Me Maurice Régnier :

Q- *Now, sir, are you aware of the fact that Mr. John Luik testified before the Canadian Standing Senate Committee on Legal and Constitutional Affairs while this committee was studying the Bill C-71, the Tobacco Act which is presently challenged, are you aware of that?*

A- *I don't think, I know very little about Mr. Luik and I don't know, I don't believe I have been aware of any specific activities that he's undertaken. It's possible I've come across documentation that showed that but I have no memory of it whatsoever.*

Q- *Well, sir, my question was a little bit more specific. Were you ever invited by the ... to attend, to appear before the Standing Senate Committee on Legal and Constitutional Affairs in nineteen ninety-seven (1997)?*

A- *This is the precursor of this one, are we talking about? Sorry, I'm not ...*

Q- *Well, let me show you a document which is an excerpt from the proceedings of this committee, this will maybe help you.*

(...)

Q- *Now, it says, Mr. Luik says at the fourth paragraph of this document, in his appearance, the very last sentence, he says :*

²In some sense, the submission is a joint ont, although Professor Waterson is unable to be here today.²

Do you recall having been invited to attend, or to appear before this session of the Standing Senate Committee on Legal and Constitutional Affairs?

R- I have no memory of being invited to it but I am invited to a lot of thing that I turn down, so, it is possible but I have no memory whatsoever of being invited to this one.

Q- Not, the sixth (6th) paragraph reads,

²I should like to say something briefly something about the work that Mr. Waterson and I have done over the last 10 years on the issue of advertising in general and, more particularly, the issue of tobacco advertising. This work has been published in a number of academic journals. It is most conveniently brought together in a book which we published last year in the United Kingdom, called Advertising and Markets, copies of which will be provided to you.²

Now, Mr. Luik seems to express the scope of your relationship in maybe broader terms than yours.

Me Simon Potter :

Objection, My Lord, that is a clear misreading of this document, that is a misstatement.

Me Maurice R gnier :

Q- Do you agree with the statement of Mr. Luik that you have done work with him over the last ten (10) years on issue of advertising?

Me Simon Potter

That is not what the document says, My Lord.

The Court :

Q- Do you have something to say about the sixth paragraph, sir?

A- I'd very much like to say something about both fourth paragraph and the sixth paragraph, My Lord, if I may.

Q- Yes.

A- The highlighted bit on paragraph 4, contains two (2) demonstrably false points. I'm not a professor and never have been, I don't know where he got that from. And in no sense that I can imagine was the submission a joint one. I don't believe I was ever asked to submit anything, I'm sure I didn't submit anything, and I think it most unlikely that I would have ever made a joint submission with Dr. John Luik. So I can't understand where that reference came from at all other than the fact he may have been trying to increase his own credibility by associating himself with me, but I certainly have no long-term association with Dr. John Luik, and I certainly would not have and did not make any kind of joint submission.

He does say ²in some sense², whatever... I can only presume he's referring to the fact that I did select a series of articles together in one (1) book with him, and that if he was introducing that book, he could, I suppose, suggest that in some senses he

was giving my views as well as his on what was appropriate literature. But to suggest I was unable to be there of that I'm a professor is clearly wrong.

In relation to the sixth paragraph, the first point that he makes is utterly misleading unless it's read as that he has done some work over the past ten (10) years and I have done some work over the past ten (10) years, and in that sens, it's perfectly true. But it is quite untrue to say that I have been working with him for ten (10) years. There's a very great distinction between the way one can read that first sentence, and it is only true if he is simply referring to the work he has done quite separately from me and the work that I have done quite separately from him.

I don't believe that the work that we did together lasted for more than a few hours at the absolute most, and as I've already described, consisted in sitting down at the request of the Advertising Association to select articles to put into a book called ... I believe it was called Advertising and Markets.

So I do believe that the outline ... the highlighted elements here could be read in a very very misleading way, and indeed demonstrably false in one respect, I am not and have never been a professor.

Me Maurice Régnier :

Q- I would like you to turn to the third page of these proceedings of the Senate Committee, the second to last paragraph, which reads,

²Approximately three years ago, Mr. Waterson and I did a detailed analysis about the Smee Report which has appeared in three reviewed articles and journals.²

Is that true?

R- I did a review of the Smee Report and I believe he did a review of the Smee Report, but I certainly didn't sit down with him and go through the Smee Report. I believe he's referring to the work we did in exactly the same way he is referring to the work in paragraph 6, the work that we did separately.

A number of critiques of the Smee Report were pulled together by various people so much ... there were so many references which were clearly wrong in the Smee Report and I believe that my work may well have appeared in documents which pulled together different critiques, but I certainly have no memory ... I don't believe I did ever sit down with him and analyze Smee together.

It's conceivable my memory is utterly at fault but I'd be surprised.

Q- My Lord, I would like to file this Excerpt from the ... - may I finish, Maître Potter? - ... Excerpt from the Proceedings of the Standing Senate Committee ...

(...)

My question is : Do you have any idea ... have you ever been contacted by Mr. Luik to be a potential contributor to every work to be conducted by Mr. Luik.

A- *I don't think so, I must restate that my contacts with John Luik have been extremely infrequent and extremely little, very, very, very brief. I don't know a major work with him, as far as I remember, at all and I don't remember him ever asking me to undertake some writing or anything of that kind.*

(...)

Q- *Did you prepare a written text when you appeared before the House of Commons Committee in nineteen eighty-seven (1987)?*

A- *I believe I had a written text, yes.*

Q- *Was that written text, in any manner, reviewed, cleared or submitted to Canadian lawyers?*

A- *I simply have no memory. It was thirteen (13) ... how long ago was it? Fifteen (15) or sixteen (16) years ago, and I simply can't remember. I believe I was working with the Canadian Advertising body rather than with tobacco lawyers. In any event, I don't believe that it was ... again, I could be wrong, fifteen (15) years is a long time, but I believe I was working, I do remember visiting the Canadian Association involved, the Canadian Advertisers Associations, but not either lawyers, offices or tobacco agencies, in any sense. »*

(Cross-examination, M. Waterson, Q. 54 à 74)

- d) M. Luik a fait partie de ARISE (Associates for Research Into the Science of Enjoyment), organisme financé secrètement par l'industrie du tabac (ED-27 « Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organization – Report of the Committee of Experts on Tobacco Industry Documents – July 2000 », page 35, note 34, paragraphe 55).
- e) M. Luik a comparu le 9 décembre 1998 devant le Comité du Sénat (ED-98) et il a déclaré :

« M. John C. Luik témoigne à titre personnel :

Honorables sénateurs, je comparais devant vous à titre individuel. Vous avez reçu mon mémoire. Le plus utile, dans les dix minutes qui me sont accordées, serait de répondre aux questions soulevées par les sénateurs Lynch-Staunton et Joyal, et c'est ce que je veux faire.

C'est la sixième fois depuis que le ministre Epp a présenté son projet de loi en 1987 que je me présente devant votre comité ou devant un comité de la Chambre des communes pour parler de la publicité sur le tabac.

Les questions que posent les sénateurs cet après-midi offrent un excellent contexte aux observations que je veux faire.

(...)

En février 1998, la grande revue Médicale Lancet a notamment publié un de mes articles sur la question qu'aborde le projet de loi à l'étude actuellement, soit la commandite.

Plus pertinente encore est la question que le sénateur Lynch-Staunton a directement posée aux agents de Santé Canada, à savoir s'il existe des preuves qu'une seule personne se mettra à fumer parce qu'une personnalité comme M. Villeneuve porte un tee-shirt ou un vêtement sur lequel apparaît le logo de Rothman's. » (page 18)

« Le sénateur Kenny : Monsieur Luik, travaillez-vous ou avez-vous déjà travaillé pour des fabricants des produits du tabac ?

M. Luik : J'ai effectivement agi à titre de consultant, oui.

Le sénateur Kenny : Monsieur Parker, dans votre déclaration préliminaire, vous avez dit que vous n'étiez pas contre la réglementation gouvernementale. Tout ce que vous vouliez, c'est que les normes sur lesquelles s'appuie la réglementation des produits du tabac soient les mêmes que celles appliquées dans d'autres domaines.

M. Parker : C'est bien ce que j'ai dit, oui. » (page 20) »

40. Le Procureur général du Canada soutient que les allégations de JTI MacDonald ne mettent pas en doute le sérieux et la valeur de l'étude menée par M. Liefeld, il ne s'agit en définitive que d'allégations sans aucun fondement. (ED-129 « Partial replication – The relative importance of the size, content and pictures on cigarette package warning messages – Dr. John Liefeld, April 14, 2000 », ED-143 « The relative importance of the size, content and pictures on cigarette package warning messages – Dr. John P.Liefeld, October 18, 1999 »)

« Purpose of the Study

In September of 1995, the Supreme Court of Canada struck down significant sections of the Tobacco Products Control Act (1989), citing infringement of the tobacco industry's commercial rights. This provided the impetus for the enactment of the Tobacco Act in 1997. The purpose of this Act, among other, is to ²enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products². In response, the development of comprehensive health messages on tobacco products is currently under review by Health Canada.

This study is part of a series of survey and evaluative efforts, undertaken during the summer of 1999, in support of the proposed labelling regulations.

Specifically, the purpose of this study is to identify consumer response to health warning messages, with respect to size, configuration and impact on the decision-making process to smoke or not. » (ED-143)

« Executive Summary

(...)

This study estimated the relative impact of :

1. *Larger warning messages – specifically 50% or 60% of the principal display surface of cigarette packages.*
2. *Messages with stronger appeal to emotion and with greater information content.*
3. *Pictures added to warning messages to illustrate the hazard.*
4. *The absence of trade-mark colours and logos.*

ON :

- A. *Encouraging teen and adult smokers to stop smoking; AND,*
- B. *Encouraging non-smoking teens not to start smoking.*

A conjoint method of measurement was employed. This method has high external validity compared to other methods that rely on asking people direct questions about individual attributes. The study was conducted in Ontario and Quebec with three types of respondents – teens who smoke, teens who do not smoke and adults who smoke. Six hundred and seventeen persons, 417 teens and 200 adults, took part in the study.

The study also examined the relative importance of warnings with larger, stronger messages supported by pictures, compared to six other types of influence on one's thinking about smoking.

The study also investigated the impact of larger messages on trade-mark recognition by simulating the recognition on store shelves, of the regular brand (smokers), and the most familiar brand (non-smokers). Two sizes of warning messages were used in this simulation – the current message size, 35% of package surface and warnings covering 60% of the principal display surface of the cigarette package. » (ED-143)

« Summary of Findings :

1. *Larger warning messages were more encouraging to stop / not start smoking for all sample groups (except teen smokers in Quebec only for the 50% size).*
2. *Packages with trade-mark colours and logos were more encouraging to stop / not start smoking for four of the six samples groups. Only fortwo of these four were differences beyond those expected by chance. This unexpected result is possibly a consequence of the inability of the research to present pictures of packages on which the trade-mark colours and logos were those of the smoker's regular brand or the brand most familiar to non-smokers.*

3. *Messages with strong emotional appeal were more encouraging to stop / not start smoking than messages of a factual or unemotional nature.*
4. *Pictures with warning messages were, on average, approximately 60 times more encouraging to stop / not start smoking than messages without pictures.*
5. *The relative importance of the four attributes is approximately.*

	%
Message Content	51
Presence of picture	29
Size	12
Trade-mark	<u>8</u>
	100%

6. *These findings apply, with few exceptions, to all sample groups – teens vs. adult smokers, teen smokers vs. teen non-smokers, and in both Ontario and Quebec. It is concluded that the potential effect of larger, more strongly worded warning messages supported by emotion arousing pictures will have similar effects across different population segments in the two major regions of Canada.*
7. *Larger, more strongly worded warning messages supported by emotionally strong pictures will, at least initially, increase the relative influence of warning messages on cigarette packages on people's thinking about smoking, compared to other sources of influence such as a smoking related illness or death of a family member of acquaintance or scientific reports of the hazards of smoking in the media.*
8. *For 95% of smokers and 80%, the time taken to correctly recognize their regular brand on store shelves, will not likely be affected by increasing the size of warning messages to 60% of the principal display surface of cigarette packages. For only 5% of smokers will increasing the size of warning messages from 35% to 60% of the principal display surface of cigarette packages, initially increase the error rate of recognizing their regular brand. But this effect will likely disappear with learning.*
9. *Overall, the effects of increasing the size and emotional content of warning messages on cigarette packages and including message enhancing pictures, has the potential, compared to the current warning messages, to encourage more smokers to stop smoking and deter more non-smokers from starting to smoke. » (ED-143)*

« Executive Summary

A partial replication of the study- ²The relative Importance of the Size, Content & Pictures On Cigarette Package Warning Messages² (conducted August 1999), was executed Marc 13-17

2000. The wording of the message with the Mouth Picture was different. The replication was conducted with sample of 100 teenage smokers in Ontario. The observed pattern of the relative importancies of the attributes and their levels was the same as reported in the August 1999 study. The actual values of the relative importancies of the attributes and levels for Warnings Message, Size, Message Content, Picture Condition and Trademark condition were different, as expected by chance and the passage of time. However, the magnitudes of the differences were not greater than expected by chance it is concluded that the change in the wording of the mouth message does not alter the conclusions presented in the August 1999 study. » (ED-129)

41. Par ailleurs, la demanderesse JTI MacDonald ou les autres demandereses auraient pu appeler M. Luik comme témoin en preuve principale et apporter ainsi une preuve positive quant aux messages de santé, puisque le Dr. Luik, que les demandereses connaissent bien, s'est présenté comme qualifié pour faire pareille étude.
42. Le Procureur général du Canada ne demande pas au tribunal de tirer une inférence négative du fait que les demandereses n'ont pas fait témoigner le Dr. Luik, car ce serait inviter le tribunal à un exercice de spéculation et d'hypothèse pour le moins équivoque. Ce qui importe, ce sont les éléments de preuve, y compris la preuve des faits législatifs qui ont été présentés au tribunal.
43. Les demandereses demandent au tribunal de tirer de multiples inférences négatives à l'endroit de la preuve des faits législatifs présentés par le Procureur général du Canada. Ces inférences ne s'appuient sur aucune preuve positive.
44. Le tribunal a accordé aux demandereses toute la latitude voulue pour présenter une preuve positive contraire. Aucune preuve positive n'a été présentée à l'encontre du document ED-16 « Curbing the epidemic », du document ED-127 « Conseils et Vérification Canada » et du document ED-129 « Partial replication – The relative importance of the size, content and pictures on cigarette package warning messages – Dr. John Liefeld, April 14, 2000 ».
45. Les allégations des demandereses à l'encontre des documents précités ne visent qu'à discréditer leurs auteurs en l'absence de toute preuve positive contraire.
46. Ces allégations sont de même nature que celles présentées à l'encontre de chacun des témoins du Procureur général qui ont témoigné sur les faits législatifs concernant le problème de santé publique posé par le tabagisme.

Le déroulement du procès

47. Les demanderesse demandent au tribunal de conclure que :
- le Dr. Ritter n'est pas crédible;
 - le Dr. Robitaille est incompétente pour parler d'autre chose que les maladies cardiaques;
 - le Dr. Davis, bien qu'épidémiologue, ne peut rien dire sur les effets du marketing des produits du tabac, eu égard au problème épidémiologique qu'est le tabagisme;
 - le professeur Castonguay ne connaît rien à la chimie du tabac;
 - le Dr. Pollay n'est pas crédible;
 - le professeur Morissette n'a pas vérifié toutes les sources de législation;
 - le professeur Castonguay aurait dû vérifier les capacités irritantes des 4,000 composés chimiques de la cigarette Première, même si ITL n'en a examiné aucune;
 - M. Swain aurait dû examiner la consommation de tabac pour la période de 1970 à 2000, plutôt que de 1985 à 2000, malgré qu'il ait expliqué au tribunal les raisons pour lesquelles il ne pouvait comparer des études de méthodologies différentes;
 - Mme Judy Ferguson n'était pas compétente pour expliquer le travail de Santé Canada et les options législatives examinées, même si les demanderesse y réfèrent abondamment dans leur argumentation.
48. Les demanderesse allèguent à de nombreuses reprises dans leur argumentation que les avocats représentant le Procureur général ont pris, au cours de l'audition, toutes sortes de décisions visant à induire le tribunal en erreur.
49. Les avocats représentant le Procureur général considèrent qu'il est inutile de répondre à chacune des allégations dont ils sont l'objet, car ce qui est au cœur de ce litige, ce sont les nombreux articles de la *Loi sur le tabac* ainsi que les règlements sur l'information et les rapports dont la constitutionnalité est contestée par les demanderesse.
50. Les demanderesse ont retiré elles aussi certains témoins qui devaient être présentés :
- M. Zalman Amit, premier témoin annoncé en 1997;
 - M. Stan Smith, co-demandeur et Président de RJR MacDonald;
 - Lucy Henke qui devait témoigner pendant 2 journées et répondre à la « key question » suivante :

« Does advertising affect overall consumption as the Attorney General of Canada contends or brand choice as the Plaintiffs contend. Dr. Henke has special expertise with respect to the impact of advertising on children and she will touch on this issues. Her evidence will also cover lifestyle advertising and the impact of sponsorships. »¹

- et Gérald Wilde qui devait témoigner sur l'effet des messages de santé et la psychologie des adolescents.
51. Aucun des représentants des demanderesse, qui avaient pourtant signé des affidavits à l'appui de la demande de suspension des règlements sur l'information et les rapports, n'ont témoigné pour appuyer leur contestation des règlements.
 52. Le Procureur général du Canada ne demande pourtant pas au tribunal d'en tirer quelque inférence que ce soit puisque ce qui importe c'est la preuve positive qui a été présentée au tribunal y compris la preuve des faits législatifs.

Le véritable enjeu

53. Ce litige impliquant la Charte, doit s'élever au-delà des intérêts immédiats des parties, car les intérêts en jeu dépassent les intérêts économiques des demanderesse et ne concernent en définitive que l'intérêt présent et futur des Canadiens et Canadiennes, fumeurs ou non, des jeunes et des prochaines générations qui doivent être protégées des méfaits de la cigarette dans le respect de la *Charte des droits et libertés*.

¹ Plaintiffs' pre-trial conference memorandum