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PART I
INTRODUCTION

A The Challenge

1. The constitutional challenge with which the Court is dealing has several facets. The plaintiffs are contesting:¹
 - 28 sections of the *Tobacco Act*
 - The entire *Tobacco Products Information Regulations*
 - The entire *Tobacco Reporting Regulations*

B Freedom of Expression and Other Fundamental Rights Claimed by the Plaintiffs

2. The Attorney General of Canada concedes that sections 19, 20, 21, 22, 24, 25, 26(2), 27, 28 and 31 of the *Tobacco Act* (the "Act") infringe upon the right to freedom of *expression* set out in Section 2 of the *Canadian Charter of Rights and Freedoms* (the "Charter"), on the grounds stated in the *RJR-MacDonald v. Canada (Attorney General)* decision:

La Forest J., para. 58, p. 267:

The Attorney General conceded that the prohibition on advertising and promotion under the Act constitutes an infringement of the appellants' right to freedom of expression under s. 2(b) of the Charter, and directed his submissions solely to justifying the infringement under s. 1 of the Charter. In my view, the Attorney General was correct in making this concession. This Court has, on a number of occasions, held that prohibitions against engaging in commercial expression by advertising infringe upon the freedom of expression in s. 2(b) of the Charter.

3. The Attorney General of Canada denies that the other provisions of the Act concerning the other forms of promoting tobacco products adversely affect any right guaranteed by the Charter.
4. With respect to the other Charter infringements raised by the plaintiffs, the Attorney General of Canada denies violation. The plaintiffs have the burden of establishing that the impugned provisions of the Act and the regulations violate their rights guaranteed by the Charter and that the regulations are *ultra vires*.
5. Sections 7 and 17 fall under Parliament's jurisdiction in criminal law and the Reporting and Information Regulations were passed in accordance with the enabling provisions of the *Tobacco Act*.

¹ See Appendix 1 – Table of Impugned Sections

6. The Attorney General of Canada maintains that the *Tobacco Information Regulations* do not constitute an expropriation of the plaintiffs' assets.

C The Contextual Approach

7. In *R. v. Big M. Drug Mart Ltd.*,² Dickson J. set out the general rules for interpreting the Charter. He stressed that the Charter had not been enacted in the absence of any context and that accordingly, it (p. 344):

...must...be placed in its proper linguistic, philosophic and historical contexts.

8. The Supreme Court has reiterated this principle on many occasions, adding that the meaning and tenor of the constitutional guarantees provided by the Charter will vary in accordance with the context.³
9. Many other Supreme Court decisions have had a similar outcome.⁴
10. As Bastarache J. wrote, on behalf of the majority, in *Thomson Newspapers Co. v. Canada (A.G.)*⁵ at para. 87:

The analysis under s. 1 of the Charter must be undertaken with close attention to context. This is inevitable as the test devised in R. v. Oakes [1986] 1 S.C.R. 103, requires a court to establish the objective of the impugned provision, which can only be accomplished by canvassing the nature of the social problem it addresses. Similarly, the proportionality of the means used to fulfil the pressing and substantial objective can only be evaluated through a close attention to detail and factual setting. In essence, context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a Charter right.

11. The courts dealing with cases involving a Charter infringement must also determine the nature and the scope of that infringement in light of the context:

² *R. v. Big M. Drug Mart Ltd.* [1985] 1 S.C.R. 295.

³ *Michaud v. Quebec (A.G.)* [1996] 3 S.C.R. 3, Lamer C.J., para. 49.

⁴ See for example:

- *Edmonton Journal v. Alberta (A.G.)* [1989] 2 S.C.R. 1326 at 1355 and 1356, Wilson J.
- *R. v. Wholesale Travel Group Inc.* [1991] 3 S.C.R. 154, at 224 and 225, Cory J.
- *R. v. Seaboyer* [1991] 2 S.C.R. 577, at 647, L'Heureux-Dubé J.
- *R. v. Laba* [1994] 3 S.C.R. 965, at 1000 and 1001, Sopinka J.
- *R. v. Keegstra* [1990] 3 S.C.R. 697, at 734 and 247.
- *Committee for the Republic of Canada v. Canada* [1991] 1 S.C.R. 139, at 192 and 193, L'Heureux-Dubé J. and at 245 and 246, McLachlin J.
- *Young v. Young* [1993] 4 S.C.R. 3, at 98, L'Heureux-Dubé J. and 124, McLachlin J.
- *RJR-MacDonald Inc. v. Canada (A.G.)* [1995] 3 S.C.R. 199, at page 330, McLachlin J.

⁵ *Thomson Newspapers Co. v. Canada (A.G.)* [1998] 1 S.C.R. 877.

R. v. Sharpe, [2001] 1 S.C.R. 45, McLachlin C.J.:

Para. 32:

*While the Crown concedes that s. 163.1(4) limits freedom of expression, this does not eliminate the need to consider the nature and scope of the infringement in determining whether or not it is justified. Until we know what the law catches, we cannot say whether it catches too much.*⁶

...

*An examination of the factual and social context in which an infringement of that right occurs allows the court to evaluate what truly is at stake in a particular case... Section 1 determinations, therefore, **are not to be made in a vacuum, nor are they to focus exclusively on the right or freedom infringed.***

Para. 155:

*More recently, **this Court has emphasized that close attention must be paid to the factual and social context in which an impugned provision exists** at each stage of the s. 1 analysis.*⁷

12. The Court must also appreciate and evaluate the entire factual and social context surrounding smoking and the behaviour of the tobacco industry before judgment on the foundations and the justification for the infringement.
13. The *Tobacco Act* and its regulations must be interpreted in light of the provisions of the Act, its global context according to the ordinary and the grammatical meaning that harmonize with the spirit of the law, its object and the intent of the legislator: see *R. v. Sharpe*, para. 33:

*Much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), p. 131; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000)). However, E.A. Driedger in *Construction of Statutes* (2nd ed. 1983) best captures the approach on which I prefer to rely. He recognizes that statutory interpretation cannot be [page 75] founded on the wording of the legislation alone. At p. 87, Driedger states: "Today there is only one principle or approach, namely the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." Recent cases which have cited the above passage with approval include: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 144; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411, at para. 30; *Verdun v. Toronto-Dominion Bank*, [1996] 2 S.C.R. 550, at para. 22; *Friesen v. Canada*, [1995] 3 S.C.R. 103, at para. 10. Supplementing this approach is the presumption that Parliament intended to enact legislation in conformity with the Charter: see Sullivan, *Driedger on the Construction of Statutes*, supra, at pp. 322-327. If a legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted: see *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p.*

⁶ *R. v. Sharpe*, [2001] 1 S.C.R. 45, McLachlin J., para. 32.

⁷ *R. v. Sharpe*, [2001] 1 S.C.R. 45, L'Heureux-Dubé J., para. 154 and 155.

1078; *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 1010; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at p. 660; *R. v. Lucas*, [1998] 1 S.C.R. 439, at para. 66.

D The Standard of Proof: Reasoned Apprehension of Harm

14. Smoking is a complex problem. It involves social and human behaviours that are often the source of scientific controversy:

This raises a question pivotal to this appeal: what standard of proof must the Crown achieve in demonstrating harm – scientific proof based on concrete evidence or a reasoned apprehension of harm? The trial judge insisted on scientific proof based on concrete evidence. With respect, this sets the bar too high. In Butler, supra, considering the obscenity prohibition of the Criminal Code, this Court rejected the need for concrete evidence and held that a "reasoned apprehension of harm" sufficed (p. 504). A similar standard must be employed in this case.⁸

...

The lack of unanimity in scientific opinion is not fatal. Complex human behaviour may not lend itself to precise scientific demonstration, and the courts cannot hold Parliament to a higher standard of proof than the subject matter admits of.

15. In this context, this Court must therefore, right from the outset, analyse the conclusions in fact and in law issued by the Supreme Court in *RJR-MacDonald* [1995] 3 S.C.R. 199.
16. The Attorney General of Canada presented to this Court a set of particulars, which the courts call legislative facts, presenting the social, political, economic, cultural and scientific context surrounding smoking.
17. These legislative facts were communicated to the Court as follows:
- (a) Examination on discovery of the three plaintiffs' representatives with regard to their promotion activities as well as to the harmful health effects of tobacco.
 - (b) Cross examination, during the trial, of Mr. Ed Ricard, the only representative of the plaintiffs to have testified, in order for the court to have an appreciation of the nature and scope of the ITL marketing promotion activities and its knowledge of the products it sells to smokers, their health effects and the nature of the information conveyed, as the case may be, to consumers.
 - (c) Testimony from seven experts informing the Court about different aspects of smoking:

⁸ *R. v. Sharpe*, [2001] 1 S.C.R. 45, McLachlin J., para. 85 and 89.

1. André Castonguay:
 - Tobacco
 - Cigarettes
 - Carcinogenic chemicals
 - Irritants
 - Player's Premiere and its "revolutionary" filter
 2. Leonard Ritter:
 - Tobacco and its toxicity
 - The tobacco industry's knowledge and scientific research
 3. Michelle N. Robitaille:
 - Tobacco and its harmful health effects
 - An update on medical knowledge since 1989
 4. Larry Swain:
 - A statistical picture of tobacco consumption in Canada
 - A statistical portrait of the smoker
 - Tobacco product smuggling
 5. Ron Davis:
 - Tobacco product marketing seen from the epidemiological perspective
 - Public health measures to reduce smoking
 - The American and international experience in the matter
 6. Richard Pollay:
 - Tobacco product marketing according to the plaintiffs' marketing documents
 7. Yves-Marie Morissette:
 - Foreign legislation on the regulation and promotion of tobacco products
- (d) Testimony of Judy Ferguson, as Health Canada representative, on the work of the Health Department's officers and the options considered for reducing smoking in Canada in response to the judgment rendered by the Supreme Court of Canada.
- (e) Some of the plaintiffs' internal documents regarding the marketing of their products.
- (f) Legislative facts (extrinsic evidence) presented in the form of documentary evidence from various international organizations, foreign and Canadian governmental bodies, including the Canadian Parliament and Senate, and other, scientific, publications.

18. The Court will thus be able to fully appreciate the importance of the *Tobacco Act* and its objectives in light of extent of the public health problem caused by smoking and make the connection with the reasonableness of the measures enacted.

E The Plaintiffs' Evidence

19. The plaintiffs presented to the Court no positive evidence on:
- The nature of the products they sell, basically cigarettes and cut rolling tobacco
 - The toxicity of their products
 - Their health effects
 - The status of their knowledge about these effects
 - The smuggling of tobacco products, their involvement or lack of it and the impact they have on young people in particular
 - The measures they have taken to reduce the exposure of young people to their promotion activities
 - The measures they have taken to induce smokers to stop smoking and to reduce smoking in our society.
20. The plaintiffs presented a host of objections to the Court, alleging either the relevance or the experts' lack of qualifications, the sole goal of which was to deprive the Court of information allowing the context of their challenge to be appraised.⁹
21. The plaintiffs question much of the social data concerning the harmful effects of tobacco or their marketing promotion activities.
22. They are again asking this Court to draw final and absolute conclusions about certain aspects of the social problem of smoking and tobacco product promotion in spite of what the Chairman of the Tribunal wrote in his judgment of May 2, 2002 in para. 41:

[TRANSLATION] *In the first case on the same theme opposing the parties, Judge Lebel, on behalf of the majority of the Court of Appeal, affirmed in this by the Supreme Court, denounced an overly restrictive evidentiary approach in this type of case:*

⁹ For example, the plaintiffs raised more than 260 objections, 92 of which were during the cross examination of Mr. Ed Ricard alone.

...such an approach is misleading in a constitutional case such as this. It cannot be dealt with as if it were an ordinary civil trial. We are not dealing with a matter in which, for example, a particular litigant seeks to demonstrate that his tobacco consumption and the advertising of a manufacturer whose cigarettes he consumed caused his lung cancer or his emphysema. It is rather a question of determining the basis on which a legislator may choose to act, where the outcome is uncertain.

23. The concessions proposed by the plaintiffs are not concessions. They are only intended to distance the Court from the issues of the case, as well as to minimize the impact of smoking and tobacco promotion.

F Inadmissibility of Recourse under Sections 7, 8 and 11 of the Charter

24. The plaintiffs allege that sections 7, 17, 30, 32, 33, 35, 36, 39, 40, 41, 43, 49, 53, 58, 59(c) and 59(f) of the *Tobacco Act* contravene sections 7, 8 and 11 of the Charter, but offer the Court no factual foundation whatsoever to support their challenge.
25. This Court should decline to issue a judgment on this question, just as the Supreme Court declined to do so in both the *Danson* and *MacKay* decisions:

MacKay v. Manitoba, [1989] 2 S.C.R. 357

p. 361:

Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

Danson v. Ontario (A.G.), [1990] 2 S.C.R. 1086

p. 1099:

The Need for Facts

*This Court has been vigilant to ensure that a proper factual foundation exists before measuring legislation against the provisions of the Charter, particularly where the effects of impugned legislation are the subject of the attack. For example, in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at pp. 767-68, this Court declined to hold that the Retail Business Holidays Act, R.S.O. 1980, c. 453, infringed the s. 2(a) Charter rights of Hindus or Moslems in the absence of evidence about the details of their respective religious observance. Similarly, in *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59, at p. 83, this Court declined to consider a s. 2(b) Charter challenge to certain provisions of the Liquor Control Act, R.S.N.B. 1973, c. L-10, in the absence of evidence on the nature of the conduct that was claimed to constitute "expression" within the meaning of s. 2(b).*

pp. 1101-1102:

The present case is, for these purposes, indistinguishable from MacKay, and I would respectfully adopt and apply Cory J.'s comments to these circumstances. The appellant here seeks to attack the impugned rules on the basis of their alleged effects on the legal profession in Ontario. It would be, in my view, difficult if not impossible for a motions judge to assess the merits of the appellant's application under Rule 14.05(3)(h) without evidence of those effects, by way of adjudicative facts (i.e., actual instances of the use or threatened use of the impugned rules) and legislative facts (i.e., the purpose, history and perceptions among the profession of the impugned rules).

We have discovered by a roundabout route that the appellant is in possession of the facts he needs to bring his challenge, by way of application, to a conclusion on the merits if he so chooses. As the application is presently framed, however, it cannot proceed without a factual foundation. It is not necessary that the appellant prove that the impugned rules were applied against him personally (standing not being an issue); but he must present admissible evidence that the effects of the impugned rules violate provisions of the Charter.

See also *Baron v. Canada* [1993] 1 S.C.R. 416, Sopinka J., pp. 452-453:

Finally, s. 231.3(5) is attacked for following the same kind of "wholesale search and seizures" without prior authorization found under the predecessor legislation to violate s. 8 of the Charter.

...

*The difficulty in dealing with this question is that we face it in a factual vacuum since there is no indication that documents were seized in reliance on this provision. We are always loathe to adjudicate constitutional issues in the absence of a factual foundation: *Danson v. Ontario (Attorney General)* [1990] 2 S.C.R. 1086; *Mackay v. Manitoba* [1989] 2 S.C.R. 357 at pp. 361 and 366; *R v. Edwards Books and Art. Ltd.* [1986] 2 S.C.R. 713, at pp. 762 and 767-68. I think the issue should be left to be resolved until such time as this Court is presented with a situation in which the provision was relied upon to seize documents.*

26. The Attorney General of Canada maintains that this Court should decline to issue a judgment with regard to the plaintiffs' challenge of sections 7, 17, 30, 32, 33, 35, 36, 39, 40, 41, 43, 49, 53, 58, 59(c) and 59(f).
27. With regard to sections 7 and 17 and the Reporting Regulations, there is no factual evidence on file supporting the allegation that the information requested constitutes an abusive search or seizure under section 8 of the Charter.
28. With regard to sections 30 and 33 (f) and (g), the plaintiffs have neither interest nor the standing to challenge these provisions, which concern only the retailers. Moreover, there is no factual basis supporting the plaintiffs' challenge.

29. With regard to sections 35 (visit by inspectors), 36 (warrant for entering a dwelling place), 39 (seizure), 40 (application for restoration), 41 (forfeiture), 53 (proof of exemption), 59(c) (court order for the publication of the conviction) and 59(f) (court order directing the offender to pay an amount of money for conducting research on tobacco products), the Attorney General maintains that there is no basis in fact supporting the plaintiffs' allegations, which are founded solely on suppositions, conjecture or purely hypothetical consequences. It therefore follows that the court should decline to render judgment in the abstract, in particular for the reasons set out in the judgment rendered on August 16, 2002, by Justice Michel Côté, in docket 500-05-065031-013, *Henderson v. Attorney General of Quebec*:

[TRANSLATION]

60. *The same applies with respect to this aspect, which identifies a situation likely to result in the court's issuing an opinion in the abstract, for which there is no justification. With regard to this, the Attorney General of Quebec points out:*

The petitioners' motion is inadmissible because it is not founded upon any real and immediate difficulty but constitutes a request for a legal opinion based on hypotheses and conjecture.

In actual fact, no concrete application of Bill 99 is actually impugned but solely a hypothetical application of that law, which has no factual foundation.

61. *In support of this, he cites numerous authorities, of which the court will only retain a few as examples:*

D. GRENIER. La requête en jugement déclaratoire en droit public québécois. Cowansville, Y. Blais, 2nd ed., 1999, pp. 97-98 and 106:

... in the absence of a real difficulty leads the courts to deny the petitioning party the interest required to initiate recourse under section 453 C.P.C. Since the duty of the courts is not to provide simple legal consultations, hypotheses, conjecture ... academic situations will result in the dismissal of the motion for declaratory judgment. In fact, purely hypothetical situations do not display real difficulty in the meaning of section 453 C.P.C. (the underlining is that of the litigant)

... even if the terms of a contract are ambiguous, this ambiguity may very well cause no difficulty at all to the contracting parties. The same applies to a text of law. Therefore, for example, the Office de la protection du consommateur may give its act of incorporation an interpretation not shared by one or more consumers. This interpretation, whether erroneous or not, does not in itself create any difficulty. If, on the other hand, that interpretation leads to some kind of application, then and only then does a real difficulty arise.

Donderi v. A.G. of Quebec, S.C. Montréal, No. 500-05-038492-987, June 26, 1998, J. Maughan, pp. 6, 7 and 8:

The jurisprudence has consistently held that no one has the right to invoke the jurisdiction of a competent court to obtain a judgment on the interpretation or application of legislation or on its

constitutionality when that person is not either directly affected by the legislation or is not threatened by sanctions for a violation of the legislation. As distasteful as the legislation may be to the individual wishing to bring the matter to Court for a judgment, that is not a reason by itself to seek the Court's assistance.

Therefore, in exercising its discretion as to whether a petitioner has the right to have a genuine problem resolved by way of a declaratory judgment pursuant to Article 453 C.P.C., the Court is of the opinion that the controversy must be of a litigious nature. Article 453 is not to be used to resolve problems which are mainly political in nature. ...

As a general rule, courts do not issue opinions on hypothetical questions. They render judgments on real disputes. It is the opinion of this Court that as matters now stand Mr. Donderi's interest in the dispute involving his billboard is hypothetical, at best.

Operation Dismantle v. R. [1985] 1 S.C.R. 441, pp. 447, 454, 455, 457:

I have concluded that the causal link between the actions of the Canadian government, and the alleged violation of appellants' rights under the Charter is simply too uncertain, speculative and hypothetical to sustain a cause of action.

...

The point of this review is not to quarrel with the allegations made by the appellants about the results of cruise missile testing. They are, of course, entitled to their opinion and belief. Rather, I wish to highlight that they are raising matters that, in my opinion, lie in the realm of conjecture, rather than fact.

...

The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true.

...the preventative function of the declaratory judgment must be based on more than mere hypothetical consequences... (the underlining is that of the litigant)

Operation Dismantle v. R. [1985] 1 S.C.R. 441, pp. 481, 482 and 486 (Justice Wilson):

...as the respondents point out, declaratory relief is only discretionary in the sense that a court may refuse it even if the case for it has been made out... The Court, therefore, on a motion to strike on the basis that no reasonable cause of action has been disclosed in the statement of claim is not in any sense usurping the discretionary power of the trial court. (the underlining is that of the litigant).

G Conclusion

30. It remains only for this Court to decide whether sections 19, 20, 21, 22, 24, 25, 26(2), 27, 28 and 31 impugned by the plaintiffs contravene section 2(*b*) of the Charter and, if so, whether this violation is warranted under section 1.
31. In addition, the Attorney General of Canada maintains that if the court, despite the lack of factual context, decided to consider the other impugned sections, that these sections do not contravene the Charter and even if they did contravene it, they are justified under section 1.

PART II

THE CONTEXTUAL ANALYSIS

A Tobacco and the Supreme Court

32. The conclusions in fact and in law drawn by the Supreme Court of Canada in 1995¹⁰ constitute the cornerstone of the contextual analysis.
33. The following are some of the findings of law to be retained:

(1) With regard to federal jurisdiction

- *Parliament may prohibit tobacco product advertising pursuant to its jurisdiction in criminal law*¹¹
- *Parliament may prohibit or control the manufacture, sale and distribution of products that present a danger to public health and impose labelling and packaging requirements on dangerous products with a view to protecting public health.*¹²

(2) With regard to promotion

- *There is a rational connection between the prohibition of advertising and the objective of the TPCA.*¹³
- *There is a rational connection between prohibiting the placing of a brand element on any other item (whether a smoker's accessory or not) and the objective of the law.*¹⁴

(3) With regard to minimal impairment

- *A law that would prohibit lifestyle advertising would satisfy minimal impairment.*¹⁵

¹⁰ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.

¹¹ Para. 29, La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.); para. 123, McLachlin J.; para. 181, Iacobucci J. (and Lamer CJ.).

¹² Para. 39, La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.); para. 123, McLachlin J.; para. 181, Iacobucci J. (and Lamer CJ.).

¹³ Para. 158, McLachlin J. (and Sopinka and Major JJ.); para. 185, Iacobucci J. (and Lamer CJ.); para. 119 (La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.).

¹⁴ Para. 185, Iacobucci J. (and Lamer CJ.); para. 119 (La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.).

¹⁵ Para. 164, McLachlin J. (and Sopinka and Major JJ.); para. 191, Iacobucci J. (and Lamer CJ.); para. 119 (La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.).

- *A law that would prohibit advertising aimed at young people would satisfy minimal impairment.*¹⁶
- *A law that would allow informative and brand-preference advertising would satisfy minimal impairment.*¹⁷

(4) With regard to warnings

- *The requirement to place on packaging warnings attributed to their author does not contravene section 2(b) of the Charter.*¹⁸
- *The requirement to place warnings, whether attributed to their author or not, is rationally connected to the legislative objective.*¹⁹
- *The requirement to place warnings attributed to their author would satisfy minimal impairment even were it to contravene section 2(b) of the Charter.*²⁰
- *Parliament may validly prohibit the free distribution of products or gift offers, handouts or lottery tickets in consideration for a purchase.*²¹

34. The following conclusions in fact are also to be retained:

(5) With regard to smoking and its harmful effects

- *Tobacco use is widespread in Canadian society and presents serious health risks.*²²
- *6.7 million Canadians or 28% of the Canadian population over the age of 15 years consume tobacco products.*²³

¹⁶ Para. 164, McLachlin J. (and Sopinka and Major JJ.); para. 191, Iacobucci J. (and Lamer CJ.); para. 119 (La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.).

¹⁷ Para. 164, McLachlin J. (and Sopinka and Major JJ.); para. 119 (La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.).

¹⁸ Para. 124, McLachlin J. (and Sopinka and Major JJ.); para. 182 and 190, Iacobucci J. (and Lamer CJ.); para. 59 (La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.).

¹⁹ Para. 158, McLachlin J. (and Sopinka and Major JJ.); para. 185, Iacobucci J. (and Lamer CJ.); para. 119 (La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.).

²⁰ Para. 173, McLachlin J. (and Sopinka and Major JJ.); para. 191, Iacobucci J. (and Lamer CJ.); para. 116 (La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.).

²¹ Para 177, McLachlin J. (and Sopinka J.); para. 83 and 119 (La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.).

²² Para. 30, La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.); para. 123 (McLachlin J.); para. 181, Iacobucci J. (and Lamer CJ.).

- *Cigarettes cause the premature death of 30,000 Canadians every year.*²⁴
- *Tobacco is a leading cause of cancer and fatal cardiac and pulmonary diseases.*²⁵
- *Smoking causes cancer of the lungs, mouth, larynx, oesophagus, bladder, kidneys, pancreas and the mouth.*²⁶
- *Smoking is responsible for:*²⁷
 - *30% of all deaths attributable to cancer*
 - *30% of all deaths attributable to coronary insufficiency*
 - *85% of all deaths attributable to chronic bronchitis or emphysema.*
- *Smoking is a significant cause of deaths attributable to aortic aneurysms, peripheral vascular disease and fires.*²⁸
- *More and more data are establishing that second-hand smoke increases the risk of lung cancer in non-smokers.*²⁹

(6) With regard to addiction

- *The nicotine present in tobacco is a drug that creates a strong dependency.*³⁰
- *The methods for determining tobacco dependency are similar to those used for other drugs, including illegal drugs.*³¹

²³ Para. 31, La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.); para. 123 (McLachlin J.); para. 181, Iacobucci J. (and Lamer CJ.).

²⁴ Para. 31, La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.); para. 123 (McLachlin J.); para. 181, j Iacobucci (and Lamer CJ.).

²⁵ Para. 31, La Forest J.

²⁶ Para. 31, La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.); para. 123 (McLachlin J.); para. 181, Iacobucci J. (and Lamer CJ.).

²⁷ Para. 31, La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.); para. 123 (McLachlin J.); para. 181, Iacobucci J. (and Lamer CJ.).

²⁸ Para. 31, La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.); para. 123 (McLachlin J.); para. 181, Iacobucci J. (and Lamer CJ.).

²⁹ Para. 31, La Forest J.

³⁰ Para. 34, La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.); para. 123 (McLachlin J.); para. 181, Iacobucci J. (and Lamer CJ.).

- *Prohibiting the manufacture and sale of tobacco products would be an inducement to illegal procurement.*³²

(7) With regard to smuggling

- *Parliament tried to reduce smoking through large tax hikes in 1985, 1989 and 1991, hikes partially eliminated in 1994 because of a serious smuggling problem.*³³

(8) With regard to the need for global tobacco control measures

- *The use of tobacco is itself a problem that can only be attacked effectively through a series of innovative and diversified legislative measures.*³⁴

(9) With regard to the effect of promoting tobacco products

- *Although there has never been a conclusive study on the link between the advertising of tobacco products and their use, we have enough evidence to conclude that the Act logically serves the objective of reducing the use of tobacco products by prohibiting both advertising and promotion.*³⁵
- *It is quite simply difficult to believe that Canadian tobacco companies would spend more than \$75,000,000 a year on advertising if they did not know that it would result in increased use of their products.*³⁶
- *The tobacco companies recognize that advertising is essential to maintaining the size of the market because it serves to reinforce the social acceptability of tobacco use by identifying it with prestige, affluence, youth and vitality.*³⁷

³¹ Para. 34, La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.); para. 123 (McLachlin J.); para. 181, Iacobucci J. (and Lamer CJ.).

³² Para. 34, La Forest J.

³³ Para. 38, La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.); para. 123 (McLachlin J.); para. 181, Iacobucci J. (and Lamer CJ.).

³⁴ Para. 48, La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.); para. 123 (McLachlin J.); para. 181, Iacobucci J. (and Lamer CJ.).

³⁵ Para. 83, La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.); para. 185, Iacobucci J. (and Lamer CJ.).

³⁶ Para. 84, La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.); para. 185, Iacobucci J. (and Lamer CJ.).

³⁷ Para. 88, La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.); para. 185, Iacobucci J. (and Lamer CJ.).

- *It is possible to discern from the marketing documents, the recognition that tobacco companies must target young people if they wish to keep the market for tobacco products at its current size.*³⁸
- *It is even more evident that these companies are aware of the need to attract young people.*³⁹
- *The internal marketing documents submitted at trial strongly suggest that the tobacco companies see advertising as the cornerstone of their strategy to reassure current smokers and expand the market by attracting new smokers, primarily among young people.*⁴⁰
- *The tobacco companies are worried about market shrinkage and recognize that an advocacy thrust is needed to maintain the size of the market.*⁴¹
- *The evidence reveals that the aim of the tobacco companies' advertising campaigns is to enable them to acquire a larger market share, but other evidence shows that they are also used to expand the market as a whole.*⁴²

(10) **With regard to lifestyle advertising**

- *Mr. P. Hoult testified at the trial that lifestyle advertising is designed to create certain associations in the minds of the consumers and, in the case of Export cigarettes, an association with enjoyment, outdoor activities and youthfulness.*⁴³
- *While purely information advertising may not increase the total market, lifestyle advertising may, as a matter of common sense, be seen as having a tendency to discourage those who might otherwise cease tobacco use from doing so.*⁴⁴

³⁸ Para. 91, La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.); para. 185, Iacobucci J. (and Lamer CJ.).

³⁹ Para. 91, La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.); para. 185, Iacobucci J. (and Lamer CJ.).

⁴⁰ Para. 92, La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.); para. 185, Iacobucci J. (and Lamer CJ.).

⁴¹ Para. 88, La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.); para. 185, Iacobucci J. (and Lamer CJ.).

⁴² *RJR-MacDonald Inc. v. Canada (A.G.)* [1995] 3 S.C.R. 199, McLachlin J., para. 158.

⁴³ Para. 91, La Forest J.

⁴⁴ *RJR-MacDonald Inc. v. Canada (A.G.)* [1995] 3 S.C.R. 199, McLachlin J., para. 158.

(11) With regard to the existence of a body of opinion

- *In a report titled "The Functions and Management of Cigarette Advertising," Richard W. Pollay, historian and marketing professor at the University of British Columbia, concluded that advertising and promotion activities are used to change people's perceptions, create more positive attitudes and that they are used as reinforcement for smokers and as inducement and lessons in tolerance for non-smokers.⁴⁵*
- *In a report titled "Effects of Cigarette Advertising on Consumer Behavior," Joel B. Cohen, marketing professor at the University of Florida, makes the observation that tobacco product advertising targets both non-smokers and young people who are particularly vulnerable to the advertising techniques.⁴⁶*
- *In a report titled "A Report on the Special Vulnerabilities of Children and Adolescents," Michael J. Chandler, psychologist, concluded that the cognitive and socio-affective immaturity of children and adolescents makes them vulnerable to the influence of cigarette advertising because they are incapable of evaluating the messages that are presented to them.⁴⁷*
- *The opinions expressed in these reports are obviously neither definitive nor decisive. In fact, there is currently a lively debate in the humanities concerning the connection between advertising and consumption, a debate that has been going on for several years and will, undoubtedly, continue for some time. However, these reports are at least evidence of what Justice LeBel of the Court of Appeal has called a "body of opinion" supporting the existence of a causal connection between advertising and consumption.⁴⁸*

⁴⁵ Para. 92, La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.); para. 185, Iacobucci J. (and Lamer CJ.).

⁴⁶ Para. 92, La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.); para. 185, Iacobucci J. (and Lamer CJ.).

⁴⁷ Para. 92, La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.); para. 185, Iacobucci J. (and Lamer CJ.).

⁴⁸ Para. 93, La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.); para. 185, Iacobucci J. (and Lamer CJ.).

35. In 1994, the Supreme Court,⁴⁹ in dismissing a motions to stay the coming into force of new warnings, concluded:

- *The government passed the regulations with the intention of protecting public health and thereby furthering the public good.*⁵⁰
- *Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society.*⁵¹

(12) In summary:

36. The Supreme Court has laid the following groundwork:

- Tobacco is a widespread evil in our society.
- Tobacco is a drug that creates a strong addiction.
- Tobacco kills.
- Smuggling has undermined the efforts of Parliament.
- Tobacco control requires a series of innovative and diversified legislative measures.
- The promotion of tobacco products increases or maintains consumption.
- Young persons are vulnerable to the influences of tobacco product advertising.
- The promotion of tobacco products is aimed at young persons.
- The promotion of tobacco products reassures smokers.
- Lifestyle advertising attempts to establish in the minds of consumers, a connection between the product, its brand and pleasure, affluence, youth, vitality and outdoor activities.

37. Such was the situation in 1989 and so it remains in 2002.

⁴⁹ *RJR–MacDonald v. Canada*, [1994] 1 S.C.R. 311.

⁵⁰ *RJR–MacDonald v. Canada*, [1994] 1 S.C.R. 311, at 353

⁵¹ *RJR–MacDonald v. Canada*, [1994] 1 S.C.R. 311, at 353

B Tobacco and its Toxicity⁵²

(1) Introduction

38. Tobacco is sold primarily in the form of cigarettes and cut rolling tobacco and marketed by the plaintiffs and several other manufacturers, distributors and importers.
39. The cigarette is not the mainstream item one might suspect, even if its ubiquity in society makes it a familiar product.
40. The cigarette is a unique consumer product that cannot be compared with any other ordinary consumer product.

(2) A chemical factory

41. The cigarette, when smoked, and that is its sole use, produces a veritable cocktail of toxic chemical substances that the smoker inhales.
42. When burning, the 2,500 chemical substances present in tobacco produce more than 4,000 substances.
43. Non-smokers inhale the second-hand smoke that contains even more toxic chemical substances than the primary smoke.

(3) Pesticides and insecticides

44. The tobacco used by the plaintiffs contains pesticides and insecticides.
45. The plaintiffs have never reported, to the government or to consumers, the level of pesticides or insecticides contained in their product or their effects on the health of smokers or non-smokers.

(4) Modifications to the product

46. Over the years, the plaintiffs have altered the physical and chemical characteristics of Canadian cigarettes without informing the consumers about those changes.
47. The different kinds of papers, filters, glue or filter tips can raise or lower the quantity of toxic substances present in the cigarette's primary or second-hand smoke.
48. The tobacco used by the plaintiffs has also been modified by genetic manipulation as well as by the selection of certain parts of the plant in order to keep a steady level of nicotine present in the cigarette.

⁵² See Appendix 2 – Tobacco.

49. The nicotine content present in cigarette tobacco has risen since the 1980s.

(5) Nicotine: A drug

50. Nicotine is one of the most powerful drugs known.

51. Two or three drops placed on the tongue will rapidly kill an adult.

52. The cigarette is simply a tool, like a syringe for a heroin addict, which the smoker uses to get his or her dose of nicotine.

(6) Light cigarettes

53. Many so-called "light" Canadian cigarettes are ventilated by tiny holes in the filter tip.

54. This ventilation increases the entry of air into the cigarette and dilutes the concentration of the smoke inhaled by the smoker.

55. However, the smoker-whose body will attempt to obtain the same dose of nicotine-will compensate for the loss by inhaling more deeply, blocking the ventilation holes or smoking more.

56. The smokers of light cigarettes will therefore absorb just as much smoke and as many toxic substances as smokers of cigarettes with high tar and nicotine levels.

(7) Smoking machines

57. The traditional tests performed using smoking machines did not account for that compensation phenomenon.

58. The government therefore required that the test be carried out according to the normal method and the so-called "intense" method.

59. Manufacturers are therefore required to inform consumers of the real quantity of toxic substances present in the smoke by displaying the minimum and intense test results on the package.

(8) The plaintiffs' evidence

60. The plaintiffs did not provide to the Court any information on the product they sell, its composition, its toxicity or its effects on health.

(9) What the plaintiffs do not say

61. The plaintiffs have known about tobacco product toxicology for decades.

62. Imperial Tobacco Ltd., with its parent company British American Tobacco, has studied the carcinogenicity of tobacco in humans.
63. For decades, ITL has been aware of the compensation phenomenon amongst the smokers of light cigarettes.
64. ITL has never publicly revealed the findings of its research and studies to consumers or to the public.

C Tobacco and Health⁵³

(1) Tobacco and health

65. As Justice La Forest underscored in 1995: "Tobacco kills." The evidence presented by the Attorney General of Canada and sharply disputed by the plaintiffs was abundant and damning.
66. The plaintiffs are content to admit simple correlations between smoking and certain diseases.
67. The plaintiffs have not admitted to the Court nor informed consumers of the extent of the harmful health effects caused by smoking.
68. According to the latest statistics, 45,000 Canadians die every year from a disease caused by smoking.
69. In comparison, alcohol caused some 1,900 deaths in Canada in 1996, suicides account for 3,900 and traffic accidents, 3,000.⁵⁴
70. Scientific evidence had revealed in 1990, at the time of the first trial, that smoking caused:
- Lung cancer
 - Cancer of the mouth
 - Cancer of the larynx
 - Cancer of the oesophagus
 - Cancer of the bladder
 - Cancer of the kidneys
 - Cancer of the pancreas

not to mention heart disease and cerebrovascular accidents.

71. Since then, we have to add:
- Cervical cancer
 - Colorectal cancer
 - Cancer of the vulva
 - Breast cancer

⁵³ See Appendix 3 – The Health Effects of Smoking.

⁵⁴ D-245, Statistical Report on the Health of Canadians – Prepared by Federal, Provincial and Territorial Advisory Committee on Population Health, 1999, at at 251, 308, 310 and 313.

- Impotence
 - Emphysema
72. Smoking has multisystemic repercussions. In reality, it affects the entire body: from the skin that wrinkles prematurely to the bones that will suffer from osteoporosis.
73. Smoking has an impact on every age, affecting even babies in the womb.
74. Smokers also expose non-smokers to fatal diseases caused by smoking.

(2) Attitude of Imperial Tobacco

75. ITL states it has conducted no research into the health effects of smoking since 1986.
76. ITL provided to the court no research into the health effects of smoking that it might have conducted or may have been aware of prior to 1986.
77. Yet, as a BAT document highlighted:

*Knowledge of smoke chemicals was usually greatest within the industry.*⁵⁵

⁵⁵

D-99 – Minutes and draft minutes of a Research Policy Group Meeting, September 18-22, 1989.

D Tobacco and Society⁵⁶

(1) Initiation to smoking

*Perhaps the most distressing aspect of the evidence introduced at the trial is that tobacco consumption is most widespread among the young and the less educated – those segments of the population who are the least able to inform themselves about, and to protect themselves against, its hazards. The majority of Canadian tobacco smokers start smoking regularly in their teens and approximately one in five begin smoking regularly as early as 13;...*⁵⁷

78. The plaintiffs are well aware of this phenomenon of early initiation to smoking and exploit it commercially.⁵⁸ They are simply content to concede before this Court that the majority of smokers start smoking before age 20, which allows them to avoid providing an opinion on the phenomenon of consumption among adolescents.

(2) Consumption in Canada

79. Six (6) million Canadians use tobacco every day.
80. The majority of smokers come from an underprivileged socio-economic background.
81. The consumption rate declined from 35% to 24% between 1985 and 2000.
82. In 2000, 26% of men and 23% of women smoked.
83. Generally speaking, smoking has declined in all age groups since 1985 except for the group aged 15 to 19 whose rate remained fairly stable.
84. Since 1985, smokers have been smoking fewer cigarettes per day.
85. Quebec has shown the highest rate of smoking in Canada since 1985 and British Columbia the lowest.
86. Domestic sales of tobacco products have been declining constantly since 1985.
87. The years between 1991 and 1994 were marked by the smuggling of tobacco products, including those of the plaintiffs, first exported to the United States and then illegally brought back into Canada.
88. This smuggling period corresponds to an increase in the rate of smoking among young people for the same time frame.

⁵⁶ See Appendix 4 – Tobacco Consumption.

⁵⁷ *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199, La Forest J., para. 66

⁵⁸ See Appendix 5 – Tobacco Product Promotion.

89. For young people, smoking is also the doorway to the consumption of other drugs.

E Tobacco and its Promotion⁵⁹

(1) Introduction

90. The effects of promoting tobacco products are as complex as is human behaviour.
91. It is utopian to suggest definitive and absolute conclusions regarding this to the Court.
92. It is instead important to ask whether, through the evidence at trial, there is reasoned apprehension of harm with regard to the promotion of tobacco products.
93. In other words, is it reasonable to fear that promoting tobacco products has a harmful effect on the population, young persons or smokers?
94. Is this fear reasonable or not?
95. The Supreme Court responded in the affirmative to this question in 1995.
96. The Supreme Court justices basically held that the promotion of tobacco products played several prejudicial roles:
 - It raises the social acceptability of the use of tobacco by identifying it with prestige, affluence, youthfulness and vitality;
 - It is the cornerstone of a strategy aimed at reassuring current smokers;
 - It expands the market by attracting new smokers, primarily among young people.
97. The situation is still the same in 2002. The plaintiffs' marketing documents, the scientific research into smoking and the opinions of the experts all lean toward the same findings and uphold the reasoned apprehension of harm that existed at the time of the pronouncement of the Supreme Court's judgment in 1995.
98. The "body of opinion" to which the Supreme Court referred has grown and is far from being as anaemic as the plaintiffs claim.

(2) Promotion of the social legitimacy of smoking

...the tobacco companies... recognize that advertising is critical to maintaining the size of the market because it serves to reinforce the social acceptability of smoking by identifying it with glamour, affluence, youthfulness and vitality.⁶⁰

⁵⁹ See Appendix 5 – Tobacco Product Promotion.

⁶⁰ *RJR-MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199, La Forest J., para. 88.

99. The plaintiffs marketing documents are evidence of their desire to increase, if not maintain the social legitimacy of smoking:

The following philosophies have effectively governed ITL's marketing planning and activities. They remain valid.

...

Support the continued social acceptability of smoking through industry and/or corporate actions (e.g. product quality, positive lifestyle advertising, selective field activities and marketing public relations programs).⁶¹

* * * *

The BAT objective is and should be to make the whole subject of smoking acceptable to the authorities and to the public at large since this is the real challenge facing the Industry. Not only do I believe that this is the right objective but I also believe that it is an achievable one.⁶²

* * * *

The overriding desire is for a proposition which generates greater social acceptability.⁶³

(3) Lifestyle advertising

Mr. P. Hoult, ex-CEO of Imperial, testified at trial that lifestyle advertising is designed to create certain associations in the minds of consumers, and in the case of EXPORT cigarettes, and association with enjoyment, outdoors and youth.⁶⁴

The appellants submit that Parliament has unjustifiably imposed a complete prohibition on tobacco advertising and promotion when it could have imposed a partial prohibition with equal effectiveness. They suggest that Parliament could have instituted a partial prohibition by forbidding "lifestyle" advertising (which seeks to promote an image by associating the consumption of the product with a particular lifestyle) ...⁶⁵

Moreover, while purely informational advertising may not increase the total market, lifestyle advertising may, as a matter of common sense, be seen as having a tendency to discourage those who might otherwise cease tobacco use from doing so.⁶⁶

Concerning positive advertising, I would say, based on the evidence, that it falls into three categories: there is the type which primarily contains information

⁶¹ D-222 – ITL Marketing Plan – 1989 (ITL-431), p. 17524.

⁶² D-97 – Letter from Sheehy BAT to Crawford, December 29, 1986.

⁶³ D-230 – (RBH-4162) Project 21, Toronto, June 1995, p. 10.

⁶⁴ *RJR-MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199, La Forest J., para. 91.

⁶⁵ *RJR-MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199, La Forest J., para. 95.

⁶⁶ *RJR-MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199, McLachlin J., at 158.

on the relative tar, nicotine and carbon monoxide levels of the brand being advertised; there is the type which is aimed solely at promoting one brand over another based on the effect of the colour, design and appearance of the packaging; and there is the third type which also tries to promote one brand over another but does so by creating an image and associating its consumption with a particular lifestyle (lifestyle advertising).⁶⁷

Counsel acknowledges, albeit very cautiously, that lifestyle advertising may be an inducement to young people to become smokers; they add, equally cautiously, that if this type of advertising only were banned, they would probably not be in court but, they point out, the Act does not ban only this type of advertising but all advertising of whatever type and kind.⁶⁸

100. The distinctions made by the courts between the different types of advertising, including lifestyle advertising, in the first case were suggested by ITL.
101. In its trial briefs to the Superior Court, the Court of Appeal and the Supreme Court, ITL admitted that certain types of advertising were "problematic" and were aimed at certain vulnerable groups in society.
102. Imperial Tobacco Limited suggested, by way of example, some measures intended to prohibit "lifestyle" advertising or others allowing only the depiction of a cigarette package:

*In respect to advertising in particular, measures can be envisaged which would be specifically tailored to deal directly with **types of advertising considered problematic and which target groups considered vulnerable***

***For example, legislation could prohibit "lifestyle" advertising or prohibit people from appearing in advertisements or even limit advertising to pictures of cigarette packages.** It could restrict or prohibit advertising in the media which are seen as more powerful while allowing more freedom in the less psychologically powerful media which have to be purchased (e.g. print). **It could also prohibit any advertising in media aimed at youngsters or of a nature to specifically appeal to youngsters.** Such legislative measures already exist in the Quebec Consumers' Protection Act regarding television advertising aimed at children (see, especially, art. 249) which has been held constitutional by the Supreme Court in *Irwin Toys*.⁶⁹*

103. This type of distinction likely led Brossard J.A. to conclude that there were three types of advertising:⁷⁰
 - That which contains information regarding the brand's tar or nicotine content.

⁶⁷ *RJR-MacDonald v. Canada (A.G.)*, [1993] R.J.Q. 375, Brossard J.A., at 437.

⁶⁸ *RJR-MacDonald v. Canada (A.G.)*, [1993] R.J.Q. 375, Brossard J.A., at 437.

⁶⁹ Argument of ITL before the Superior Court.

⁷⁰ *RJR-MacDonald v. Canada (A.G.)*, [1993] R.J.Q. 375, Brossard J.A., at 437.

- That which is intended to promote one brand rather than another through the effect of its colour, packaging and display design.
- That which seeks to promote one brand at the expense of another by creating an image and by associating a style of life with its use, "lifestyle advertising."

104. The Supreme Court repeated the same distinctions as those suggested by ITL.
105. The plaintiffs' marketing documents are full of examples in which one brand is associated with a lifestyle.
106. Used here under the name "lifestyle advertising," there under that of "image advertising," lifestyle advertising is everywhere.

1989 MARKETING OBJECTIVES

...

9. *Maximize the use of lifestyle/image oriented creative in all remaining media.*⁷¹

107. Lifestyle advertising seeks to reach its target audience through the emotion it evokes.

3. *Motivation with psychological appeals. This type of ad uses emotional appeals. It tries to enhance the appeal of the product by attaching pleasant emotional connotation to it. The ad creates a mood. Selling points are then both explicit and implicit. Cosmetic, cigarette, and beer and liquor products are heavy users of this approach.*⁷²

108. The plaintiffs' advertising is designed to create emotions in the consumer. These emotions are intentional, calculated and measured. Many of the plaintiffs' documents therefore focus on verifying the "emotional" content of an advertisement.
109. The plaintiffs know that the advertisements that convey an image produce a greater effect in young persons.
110. The plaintiffs know how to separate what is "lifestyle" from what is not.
111. A review of documents D-209, D-210 and D-211 shows that RBH makes a distinction between "lifestyle advertising" and "non lifestyle advertising." Generally speaking, an advertisement will be described in these documents as not being lifestyle if it only shows or recalls the package.

⁷¹ D-222 – ITL Marketing Plan – 1989 (ITL-431), p. 17538-17539.

⁷² ED-180, Froese, B., Marketing of Tobacco Products, p. 36.

112. An advertisement will also be lifestyle without the depiction of persons; the plaintiffs' marketing documents illustrate this abundantly.
113. Scenes of bathtubs with tulips or heavenly sunsets all conjure up images of a leisurely lifestyle, femininity, relaxation, vitality, etc...

(4) Brand preference advertising

*...there is the type which is aimed solely at promoting one brand over another based on the effect of the colour, design and appearance of the packaging;*⁷³

114. ITL has already designed advertising that is intended to promote its brand through the effect of the colour, packaging and display design. Some examples of this are found in exhibit D-218. The "Evolution of quality" advertisement is one of them.

(5) Young persons and the tobacco industry

*In particular, the following general conclusions can be drawn from these documents: the tobacco companies are concerned about a shrinking tobacco market and recognize that an "advocacy thrust" is necessary to maintain the size of the overall market; the companies understand that, in order to maintain the overall numbers of smokers, they must reassure current smokers and make their product attractive to the young and to non-smokers.*⁷⁴

...it is also possible to discern from these marketing documents a recognition that tobacco companies must target the young in order to ensure the continued maintenance of the tobacco market at its current size. I find it significant that, in these documents, strategies to attract the young are usually accompanied by extensive discussions concerning the "image" of the product...

...

[It is even more evident] that these companies are aware of the need to attract the young...

...

Importantly, for some brands, not only do target groups include adolescents as young as 12, but youth aged 12-17 are weighted far more heavily than older age groups.

...

The internal marketing documents introduced at trial strongly suggest that the tobacco companies perceive advertising to be a cornerstone of their strategy to

⁷³ *RJR-MacDonald v. Canada (A.G.)*, [1993] R.J.Q. 375, Brossard J.A., at 437

⁷⁴ *RJR-MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199, La Forest J., para. 88

*reassure current smokers and expand the market by attracting new smokers, primarily among the young.*⁷⁵

115. The plaintiffs are fully aware that young people are their future.
116. The initiation to smoking unfortunately occurs early for the adolescent.
117. Since smokers demonstrate very strong loyalty to their brand of cigarettes and since it is essential to establish that loyalty as early as possible, circumstances dictate that they become the plaintiffs' target customer group.

- *although **the key 15-19 age group is a must for RBH** there are other bigger volume groups that we cannot ignore*⁷⁶

* * * *

IMPERIAL TOBACCO

STRENGTHS

...

- *Owns the 18-24 age segment with 81% of consumers in this segment smoking an Imperial brand.*
- *Owns the 14-17 age segment with over 90% of consumers smoking du Maurier or Player's.*⁷⁷

* * * *

EXPORT SOURCE OF BUSINESS/PRODUCT REVIEW

SOURCE OF BUSINESS

*THERE ARE TWO MAJOR SOURCES OF SMOKERS: NEW SMOKERS AND BRAND SWITCHERS.*⁷⁸

118. The initiation to smoking begins in adolescence. The plaintiffs are interested in this phenomenon and their documents make ample reference to it.

⁷⁵ *RJR-MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199, La Forest J., para. 91-92.

⁷⁶ D-170 - Strategic Plan 1997-1998, Sales & Marketing (RBH-1134), p. 2757.

⁷⁷ D-174- (RBH 1146) Strategic Plan 1996-1997, Sales and Marketing – October 1995, p. 5672.

⁷⁸ D-227 - (RJR-342) Export Source of Business / Product – Review, p. 80090 8826.

THE ENTER/EXIT SYNDROME

...

Most indicated that they had their first cigarette between the ages of 10-15 and comments suggest that the initial experience may be slightly earlier in Quebec than in Ontario.⁷⁹

* * * *

Most claimed that they started when they were around 14 to 16 years of age. A few (more often males) started as young as 10.⁸⁰

* * * *

Most of the smokers reported first experimenting with tobacco when they were around 14 years of age.⁸¹

119. Young people are influenced by their peers, by their group of friends. The promotion of tobacco products will therefore target the group whose effect will subsequently reach the young person. The plaintiffs' marketing documents are evidence of this phenomenon:

...Imagery must be reinforced by the peer group to gain legitimacy. A brand's particular imagery becomes relevant only if the peer group sanctions it.⁸²

* * * *

Go Your Own Way

This campaign establishes the Export "A" Light smoker as an individual who is independent-minded, unconventional and rebellious. These are qualities[sic??] which the target audience judge[sic] to be reflective of the mindset of young adults, such as themselves.

The most serious potential risk with this campaign is that this perspective is not a mainstream positioning. There is a danger that the product and user imagery will entrench the brand as an alternative to popular brands. For new smokers, fitting in is an important consideration. Consequently, these new smokers

⁷⁹ D-201 - Johnston & Ass. Segmentation - Phase I Focus Group Research, February 1991 (RBH-2234), p. 27365.

⁸⁰ D-171 - Marketing Research Debrief – August 1994, An Investigation of Factors Contributing to the Growth of du Maurier (RJR-88), p. 80093 9359 – 80093 9360.

⁸¹ D-207 - (RJR-224) Research Report – A Qualitative Exploration to Reposition Export "A" with Young Smokers (19 to 24) December 1995, p. 80154 1531.

⁸² D-221 - (ITL-317) Project Spur – Preliminary Qualitative Investigation Final Report – ITL, May 26 1988, p. 16809.

*gravitate to brand alternatives they consider to be popular with their peer group.*⁸³

120. The plaintiffs market cigarettes that exploit adolescent psychology by associating the product with appealing images that convey independence, youthfulness, vitality, masculinity and rebellion.

STUDY HIGHLIGHTS

(1) *Juvenile dabblings with smoking take place mostly for reasons of seeking to people forbidden fruit, plus an element of rebelliousness.*⁸⁴

* * * *

Go Your Own Way

*These executions encourage the smoker to defy the rules and pressures of society and do what they really want to do. Smoking Export A? Light is promoted as being associated with other defiant pleasures. The focus here appeals to one's sense of individualism pleasures. **The focus here appeals to one's sense of individualism and maybe even rebellious nature.***⁸⁵

* * * *

Rebel with a Cause

*Clearly, there is an opportunity to appeal to the **defiant nature of young smokers today who gather together in "smoking pits" at schools or smoking sections at bars.***⁸⁶

121. The plaintiffs target young people by associating their brands with appealing images:

⁸³ D-206 - Marketing Research Report – An Evaluation of Alternative Advertising Campaigns for Export "A", April 1996, p. 80150 3545 / 80150 3456.

⁸⁴ D-172 - Project Plus/Minus - May 7, 1982 (AG-217).

⁸⁵ D-206 - Marketing Research Report – An Evaluation of Alternative Advertising Campaigns for Export "A", April 1996, p. 80150 3535.

⁸⁶ RF-75 (RBH-4125) Development of New Product Ideas for Project 20.

CANADIAN CIGARETTE BRAND IMAGES – 1990S <i>from industry document descriptions of brand image, brand position, brand personality, brand character, etc.</i> ⁸⁷			
Players	Export ?A?	Can. Classics	Belvedere
<i>Independence</i>	<i>Independent</i>	<i>Independent</i>	<i>Young, youthful</i>
<i>Freedom</i>	<i>Individuality</i>	<i>Strong, proud</i>	<i>Cool, hip</i>
<i>Self-confidence</i>	<i>Confidence</i>	<i>Sociable</i>	<i>Sociable</i>
<i>Self-reliance</i>	<i>Adventurous</i>	<i>Adventurous</i>	<i>Active</i>
<i>Youthful</i>	<i>Exciting</i>	<i>Excitement</i>	<i>Energetic</i>
<i>Modern</i>	<i>Up-to-date</i>	<i>Young</i>	<i>Fun</i>
<i>Masculine</i>	<i>Masculinity</i>	<i>Outdoorsy</i>	<i>Unpretentious</i>
	<i>Virility</i>	<i>Natural</i>	<i>Down-to-earth</i>
	<i>Rebellious</i>		<i>Not rebel</i>

122. To give the brands the appropriate image that will be appealing to young people, the plaintiffs have to know their psychological profile. This is the "psychographics" to which the marketing documents refer and that are evidence of this unending attempt to study the adolescent psychological profile. For example:

FOREWORD

*THE 1988 TRACKING STUDY is the second of a planned series of research studies into **the lifestyles and value systems of young men and women in the 13 to 24 age range**. A benchmark was established in 1987 against which changes or trends will be identified.*

*The purpose of the research is to provide marketers and policymakers with an enriched understanding of the mores and motives of this important emerging adult segment which can be applied to better decision making in regard to products and programs designed to compete for brand share. To this end, a custom section which focuses exclusively on smokers aged 18 years or older is provided.*⁸⁸

* * * *

GENERATION Y (WHY?)
13-19 YEARS OLD

TWO CATEGORIES

- A. "BE-BOP":** *Street tough and deeply cynical kids who are determined to take care of themselves no matter how screwy the world gets.*
- B. "ALTERNATIVE":** *Criticism of adult society:*
- *The world is screwed up*
 - *The environment is crewed[sic] up*

⁸⁷ D-191B Canadian Cigarette Brand Images – 1990s.

⁸⁸ D-90 Tracking Study 1988 (ITL -230), p. 16176.

- *Everything is screwed up*
- *So persuade us that there is any hope*
- *It is almost impossible to be idealistic*
- *First native inhabitants of the "Global Village"*
- *Vast ecological problems*
- *Global instability*
- *Teens today (have and) do worry about aids, violence and the environment.*
- *They are realistic and pragmatic:*
 - *Primary goal is to survive.*
 - *They dream of becoming plumbers, mechanics, nurses, etc.*
 - *Jobs that fill basic needs, jobs for people with a no-nonsense approach.*
- *Their rebellion takes passive forms:*
 - *smoking over exercise*
 - *fast food*
 - *body piercing*
- *They are forced to grow up too fast – Little adults with responsibilities: grocery shop meal preparation, doing laundry, caring for younger siblings.⁸⁹*

* * * *

*The lessened negativity around smoking is evident among young smokers especially. Those people in Generation X (18-30 years old) and **Generation Y (13-19 years old)** have and are growing up in a time of unprecedented social problems. Issues such as high crime rates, divorce, AIDS and poor education are much higher on these peoples' agenda than is smoking. They simply have more important things to worry about. Additionally, these people are not terribly idealistic or positive about the world in which they live or their future. Given this outlook, the positive benefits of smoking outweigh the negative, helping to create an environment in which smoking is becoming less of an evil than it used to be (or indeed than it may still be for their parent's generation).⁹⁰*

(6) "Appealing to young people"

The large sums these companies spend on advertising allow them to employ the most advanced advertising and social psychology techniques to convince potential buyers to buy their products.⁹¹

123. In spite of their claims to the contrary, the plaintiffs have a whole arsenal of marketing research tools that enable them to ascertain whether an advertisement, a design or another promotional tool is likely to be appealing to young people:

⁸⁹ JPB-54 (ITL-329) Generation Y, p. 21879.

⁹⁰ JPB-5 (ITL-261) Planning forecast 1993/1994/1995, p. 20215.

⁹¹ *RJR-MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199, La Forest J., para. 76.

3.4 TARGET – WHO IT COMMUNICATES TO

Subsequently, the participants felt that Rothmans was attempting to reach a younger target than its established brands are currently reaching.

“Young people would be attracted to this package.”

“Kids would buy it cause it looks cool ... it looks spray painted.”

“The colours, the Plus, the design – the design is different than any other pack out there. This all suggests it is for a younger age group.”⁹²

* * * *

3. Respondents believed certain executions were more likely than others to appeal to the younger set, i.e. those under the aged of 19. Generally speaking, **ads that identified with “adventure or sex” were said to more likely appeal to the teen and even pre-teen segment.** Specific executions mentioned were: Exciting, Extra-curricular, Explicit and Ex-rated.

- “school kids might see it as an after school activity”
- “appeals to younger age groups, even as low as 8 to 15”
- “too much for the younger generation”
- “bungy jumping itself is geared toward the younger generation”

More men than women concerned that a few of the ads might be a public relation issue. While **all groups spontaneously (without prompting) raised concerns that certain ads in the series might appeal to the under 19 segment,** such opinions among men came up much sooner in the discussion than they did with the women’s groups.

The vast majority of respondents did not believe that the ads’ probable appeal to the younger set was intentional on the part of the advertiser.⁹³

* * * *

3.00 CONCLUSIONS

1. The new series strongly supports the new brand character... modern, bold, unique and attention-seeking.
2. An updated, positive message is successfully getting across... the brand is more (and less) than what consumer thinks... it has more appeal, but less of the old image most can’t live with in the same quality cigarette.
3. The series will successfully appeal to a wide cross-action... much wider than ever before...it will also appeal to those younger than 19 years of age.⁹⁴

⁹² D-174 - (RBH 1146) Strategic Plan 1996-1997, Sales and Marketing – October 1995, p. 5741.

⁹³ D-184 - Project Print ads – Topline Report – prepared for RJR-MacDonald Inc., May 21, 1996, (RJR-477), p. 80150 2044.

* * * *

Rebel with a Cause

Clearly, there is **an opportunity to appeal to the defiant nature of young smokers today** who gather together in "smoking pits" at schools or smoking sections at bars.⁹⁵

(7) Smokers

Second, even if this Court were to accept the appellants' brand loyalty argument, the appellants have not adequately addressed the further problem that even commercials targeted solely at brand loyalty may also serve as inducements for smokers not to quit. The government's concern with the health effects of tobacco can quite reasonably extend not only to potential smokers who are considering starting, but also to current smokers who would prefer to quit but cannot...⁹⁶

It is, therefore, clear from this report that a central aspect of the "advocacy thrust" suggested in *Project Viking* is advertising. It is difficult to see how companies could "reassure" smokers that they are not "social pariahs" or "stroke" them merely by reducing the price or the content of their products. To reassure smokers effectively, it is also necessary to convince them that smoking is socially acceptable or even admirable. Advertising is a proven and effective method for achieving this result.⁹⁷

[Concerning "light" cigarettes], they submit no evidence that such products are actually healthier, nor logically could they, since the evidence seems to point in the other direction; such products are no safer than high tar products and serve mainly to induce smokers who might otherwise quit to keep smoking "lighter" brands,⁹⁸

124. Most smokers feel somewhat guilty about their smoking and are thinking of quitting. The promotion of tobacco products is aimed at eliminating or at least mitigating this feeling, using various means:

- Promotion of so-called less irritating cigarettes
- Promotion of "light" cigarettes
- Promotion of cigarettes "without additives"
- Promotion of "100% natural" cigarettes

⁹⁴ D-184 - Project Print ads – Topline Report – prepared for RJR-MacDonald Inc., May 21, 1996, (RJR-477), p. 80150 2050.

⁹⁵ RF-75 - (RBH-4125) Development of new product ideas for Project 20, p. 4.

⁹⁶ *RJR-MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199, La Forest J., para. 84.

⁹⁷ *RJR-MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199, La Forest J., para. 90.

⁹⁸ *RJR-MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199, La Forest J., para. 108.

125. The industry promotes so-called light cigarettes that smokers believe are better for their health even though they are not.

Sensitivity to personal health risk generates a range of responses including attempts to quit, consumption rationing and moves (real or perceived) to a lower T & N count. Among those who move “down” some are aware of a specific T & N count but many are not, relying more on nomenclature.⁹⁹

* * * *

Many smokers recognize and frequently resent the guilt they feel as smokers. This guilt appears driven by both internal (health concerns) and external (social and financial) pressures. Their resentment of their own feelings of guilt appears generated in some cases by their inability to give up smoking and in many cases by a reluctance to give up the benefits or pleasures which they experience from cigarettes.¹⁰⁰

* * * *

A low tar product was, however, viewed as less harsh (inoffensive if unsatisfying) and, above all, healthier/less harmful.¹⁰¹

126. Smokers basically want to quit smoking for reasons of health, price and social pressure. From there to marketing so-called light cigarettes that consumers would believe to be better for their health, there was only one step.

Oona women do appear motivated to escape the anger or embarrassment resulting from anti-smoking pressure. Anger aside, the descriptions of their sense of “embarrassment” provide important clues to their desires...i.e. product propositions and packages which provide antidotes to those feelings.

The negative feelings were describes as...guilty, conspicuous, humiliated, second-class, feeling like a leper, like an outcast”. Direct antidotes, therefore, would be Oona propositions designed to make the smoker feel “carefree, discreet, confident, first-class, feeling healthy, feeling sociable...”¹⁰²

127. The Vantage, Viscount, Du Maurier Ultra Light and Medallion cigarette brands are intended to reassure smokers by presenting the product to them as better for or less harmful for their health.

⁹⁹ D-201 Johnston & Ass. Segmentation - Phase I Focus Group Research, February 1991 (RBH-2234), p. 27343.

¹⁰⁰ D-201 Johnston & Associates. Segmentation - Phase I Focus Group Research, February 1991 (RBH-2234), p. 27356.

¹⁰¹ D-213 Johnston & Associates – Project Linebacker Qualitative Research – Calgary – Vancouver, July 1994 (RBH-2051), p. 27779.

¹⁰² D-232 - (RBH-4182) OONA IV, Qualitative Research Calgary – July 1995, p. 6.

Low Tar Smoker

The prime motivation in smoking a low tar cigarette appears health related. These smokers appear more conscious and aware of T&N counts than others and a low tar product is viewed as part of or as an alternative to cutting down for health reasons. (Toronto/Calgary March 1992)

Low tar smokers appear driven by the desire for a safer, healthier product rather than by any unique aversion to the taste or hit of a stronger cigarette.” (Toronto/Calgary April 1993)¹⁰³

* * * *

Overall, due to the sensitivity and awareness about the “health” issues surrounding smokers, they believe that a move down the scale to a lower tar and nicotine cigarette will be healthier. They, therefore, understand that in going lighter and lighter with its mainstream brand, du Maurier is keeping in touch with its consumers. It is seen as a natural progression – one that they will follow.¹⁰⁴

* * * *

Reinforce Medallion’s lowest tar, “safest” perception.¹⁰⁵

128. RBH presents the Canadian Classics cigarette as being "Pure Canadian Classics," "100% Canadian Tobacco" and "Without Additives."
129. So, in the minds of consumers, these claims create a false impression with regard to the product, which they imagine is healthier or less harmful to their health.¹⁰⁶
130. Nevertheless, RBH marketed its Canadian Classics cigarette in spite of what it had learned from its focus groups.

“100% Canadian Tobacco” is a distinct positive.

...

- *The phrase does contribute to a synergism which, along with the name, the scene, the moose and the additive copy suggests a more natural, more healthful image.¹⁰⁷*

¹⁰³ D-177 RBH – 1994-95, Business Assessment, October 24-25th, 1994 (RBH-1138), p. 3990.

¹⁰⁴ D-214 Document from F.Y. Caya to: ITL Distribution, April 22, 1991, re: Du Maurier Ultra Light, p. 24080.

¹⁰⁵ D-215 A Review of ITL Brand Strategies, November 1998 – Prepared for: Imperial Tobacco (ITL-231), p. 20154.

¹⁰⁶ See Appendix 9 and ED-163, ED-46 and ED-275.

¹⁰⁷ D-236 - (RBH-4100) Project Apollo, A Qualitative Study of Opportunities in the YAM Segment – Spring 1999 – Prepared for Rothmans, Benson & Hedges, p. 10.

- “The “additive-free/without additives” proposition does not suggest a healthy cigarette. Instead, **it suggests a less harmful one.** ...¹⁰⁸

131. Advertisements for light cigarettes usually appear in January of each year at the time when smokers are making resolutions to quit smoking.

Psychographics

- *The target audience is healthier/guilt driven. At this time of year, they are moving into “New Year’s resolution” time, and so are beginning to rethink their brand choice. By moving to the lowest brand available, they offset some of the guilt factor.*¹⁰⁹

(8) Women

132. The tobacco industry markets cigarette brands aimed at women and targets them through images reflecting an appealing lifestyle projecting images of vitality, youth and health, while trying to erase the feeling of guilt they express with regard to their smoking:

1993 MARKETING PLANS

MATINEE TRADEMARK – KEY CHANGES TO PLAN

POSITIONING STRATEGIES

- *Relaxation, youth fitness and self-indulgence expressed in female fashion will be the key elements in the trademarks lifestyle position.*¹¹⁰

(9) The general public

*Cigarette advertising cannot be created so that it is only effective for brand switching. The ads are developed (and researched) to insure that they are maximally effective against targeted segments. Non-smokers in those segments (e.g., young males) have similar motivations and concerns, and there is no way to lower a “magic curtain” around them in order to shield them from the enticement of such advertising.*¹¹¹

133. The public does not escape the marketing efforts of the tobacco industry.

¹⁰⁸ D-236 - (RBH-4100) Project Apollo, A Qualitative Study of Opportunities in the YAM Segment – Spring 1999 – Prepared for Rothmans, Benson & Hedges, p. 11.

¹⁰⁹ RF-37 (RBH-3829) Memo from Wilson J. to Feeny J. re: Print advertising for Viscount 1 Ultra Light, September 26, 1996, p. 10592.

¹¹⁰ D-196- Sponsorships – Communications Plans – 1992 – ITL (ITL-176), p. 13874.

¹¹¹ *RJR-MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199, La Forest J. quoting Joel Cohen, para. 92.

3. **Who are we after?**

Primary **The masses.** We want everyone to notice the Export "A" Inc. logo. The communication programs need to be tasteful to avoid backlash from anti-smoking groups which then create negative press.

Secondary To have the local sports person want to participate or attend the event.¹¹²

* * * *

The Export A? Inc. Skins Game

...

Executorial Considerations

- *pre-promote the event as widely as possible for as long as possible prior to the actual event;*
- **target the general population** (Adults 18-49) with the advertising, not just the golfing target;
- *leverage the appeal and high profile of the world's top golfers;*
- *create positive association between the event and the brand by way of advertising and in store trade presence.*¹¹³

(10) Sponsorship advertising

134. The plaintiffs' marketing documents reveal that after the implementation of the TPCA they used sponsorship advertising as a replacement for traditional advertising.
135. Sponsorship advertising is another form of lifestyle advertising. This excerpt from an RJR document could not be a better summary of the role of sponsorship advertising:

SPONSORSHIP PROGRAM

Overview: The role of sponsorship is simply a means to an end to allow us to advertise.

SPONSORSHIP = ADVERTISING

WHY IS IT CRITICALLY IMPORTANT?

- *Brand advertising restrictions*
- *Sponsorships:*
 - *Reinforce brand strategy*
 - *Provide broadcast brand i.d.*
 - *Focus in-store communication*¹¹⁴

¹¹² D-186 - Briefing document for Export "A" Inc., September 9th, 1993 (RJR-695), p. 80093 6416.

¹¹³ D-200 - (RJR-682) RJR-MacDonald Inc. Inter-office Correspondence to Patrick Mispolet from Nancy Marcus, March 25, 1996, p. 80151 3320.

¹¹⁴ D-192 - Export "A" Inc. – How Do We Build A Success Story, 1997 + Beyond (RJR-705), p. 80150 3496.

136. Sponsorship advertising, used by the plaintiffs to circumvent prohibitions against traditional advertising, is aimed at conveying the "image" the companies wish to associate with a brand:

*In terms of understanding, it is very clear that while the event itself is a communications vehicle, the true value is the amount of targeted imagery communications which surround the event. It gives us the legitimate excuse to promote*¹¹⁵

* * * *

IV- Associative marketing

*Associative marketing allows us to associate the brand with images which we are prevented from using in brand advertising. In other words, the actual sponsorship is simply the price we pay in order to feature a particular image in our advertising.*¹¹⁶

* * * *

*... Player's with it's racing portfolio in particular, and du Maurier with the arts, golf and equestrian events do provide the opportunity to make lifestyle messages through sponsored vehicles. Matinée will soon be in a similar position.*¹¹⁷

137. Through sponsorship and celebrity testimonials, the plaintiffs associate their brands with youth heroes.

Auto Racing

Association with Player's is strong

Speed and excitement suggests a young, adventurous audience

*Skews male both in terms of imagery and interest*¹¹⁸

* * * *

*If a cigarette brand wants to use such sponsorships to increase the modernity of its image, it must pay particular attention to the interests of the young public.*¹¹⁹

* * * *

¹¹⁵ D-196 Sponsorships – Communications Plans – 1992 – ITL (ITL-176), p. 13835.

¹¹⁶ D-193 (RJR-708) Letter from Éric Blais – V.P. Director Strategic Planning of Harrold & Mirlin – to Daphne Bykerk, Vice President Marketing RJR-MacDonald Inc., September 16, 1996, p. 80154 2472.

¹¹⁷ P-49 - Broad Strokes Plan 1992 (ITL-267), p. 16358.

¹¹⁸ D-171 Marketing Research Debrief – August 1994, An Investigation of Factors Contributing to the Growth of du Maurier (RJR-88), p. 80093 9368.

¹¹⁹ D-180 Consumer Research Library – presented to Imperial Tobacco Ltd – May 8, 1990 (ITL-131), p. 13242.

- sponsorships (help the brand's image of being a good corporate citizen more than the image of modernity; sponsorship of events young people attend, music, leisure activities...);¹²⁰

138. Sponsorship advertising is designed to be published and distributed throughout the year, irrespective of the length of the event with which it is associated:

1994/95 BUSINESS ASSESSMENT – BELVEDERE

SPONSORSHIP

Objectives

1. Increase the awareness of Belvedere Ltd. Rock and its image with target consumers.
2. Continuity of presence throughout the fiscal year in Belvedere's major markets (Quebec, Atlantic & Thunder Bay)
3. Greater local media coverage of sponsorship events and promotions
4. Maximize sponsorship exposure and imagery in locations and social situations frequented by target consumers¹²¹

* * * *

*"Belvedere must solidify its year round program elements to realize the full potential of the sponsorship's imagery and exposure opportunities."*¹²²

* * * *

BENEFITS (cont'd)

- Doubles period of brand marketing activity
- Facilitates increase in television schedule and coverage
- Has significant long term potential for Player's Ltd.
- Is the right sponsorship at the right time¹²³

139. Sponsorship advertising that is disseminated everywhere reaches the entire population, which contradicts the statements of the plaintiffs, who declare they target only smokers.
140. The sums spent on sponsorships are intended primarily for advertising and secondly for the event itself:

¹²⁰ D-180 Consumer Research Library – presented to Imperial Tobacco Ltd – May 8, 1990 (ITL-131), p. 13279.

¹²¹ D-177 - RBH – 1994-95, Business Assessment, October 24-25, 1994 (RBH-1138), p. 3928.

¹²² D-177 - RBH – 1994-95, Business Assessment, October 24-25, 1994 (RBH-1138), p. 3933.

¹²³ D-181 - Autosport Player's Ltd. Racing Study (ITL-62), p. 11849.

SPONSORSHIP

- *Focus spending against maximum consumer exposure as opposed to event production.*¹²⁴

* * * *

*"Ideally, the majority of our spending, about 65%, should be allocated to media and about 35% to event costs."*¹²⁵

* * * *

4.5 Sponsorship Strategies

The role of sponsorship is to support the brand's positioning by connecting with activities which reflect the expression of confidence and individuality represented by the brand.

In order to communicate Export A's association with individual sponsorships the minimum amount possible will be allocated to sponsorship operations in order to retain the maximum amount for working media.

All spending will be aligned relative to regional priorities.

*Sponsorship will also be used to create a presence for the brand amongst "Influencers" in the category.*¹²⁶

141. Sponsorship is used by the plaintiffs as a pretext for advertising on the radio and on television.

*A solution to the quality of viewership is available through the hour or more broadcast of our major events. With appropriate on-site signage, they become one hour commercials.*¹²⁷

* * * *

COMMUNICATIONS EVENTS – PLAYER'S LTD.**STRATEGIES**

- *Pursue alternate television coverage, live where possible, incorporating the brand characteristics and imagery.*
- *Review event costs and re-channel to communications. Eliminate those activities that do not enhance the imagery.*

¹²⁴ D-195- RBH Strategic Plan – 1994-95. Sales & Marketing, October 1993 (RBH-1144), p. 5381.

¹²⁵ P-49 - Broad Strokes Plan 1992 (ITL-267), p. 16360.

¹²⁶ D-205 (RJR-418) RJR-MacDonald Inc. Export "A" 1997 Marketing Communications Plan, October 16, 1996, p. 80151 0574.

¹²⁷ D-197 - 1993 Communications Plans – ITL (ITL-179), p. 14723.

- *If television coverage is live and Series based, investigate the opportunity for highly targeted, image commercials on Player's Ltd. Racing.*¹²⁸

* * * *

COMMUNICATIONS EVENTS – MATINEE LTD.

STRATEGIES

*In television, where appropriate, introduce brand characteristics and imagery.*¹²⁹

* * * *

1. Television

*Television was chosen to form part of the total communication mix for this program. Its role was to provide the perception of mass, total reach and credibility for the Belvedere Rock program.*¹³⁰

* * * *

CONCLUSION:

- *The Belvedere Rock Spring Tour was successful in the building of a sponsor image which is consistent with Belvedere Rock's target key personality attributes: cool, hip, young and edgy.*¹³¹

(11) Cause marketing

142. Charitable activities can also be used to promote the brand and its image.
143. ITL wishes in particular to give its Matinée brand an image that reflects altruism and, to do so, intends to publicize its charitable activities:

COMMUNICATIONS EVENTS – MATINEE LTD.

STRATEGIES

*Develop associate programs which will benefit the altruistic value.*¹³²

In 1992, we will be converting the ladies tennis to Matinee Ltd. The demographic match here, while slightly too much male orientated, it is much more consistent. Efforts will be taken (i.e. ladies day) to encourage the female target. In this case, and because of the altruistic interests of Matinee, communications should include the amounts of money which go back into the development of Tennis in Canada. It could also be discussed with Tennis

¹²⁸ D-196 Sponsorships – Communications Plans – 1992 – ITL (ITL-176), p. 13907.

¹²⁹ D-196 Sponsorships – Communications Plans – 1992 – ITL (ITL-176), p. 13913.

¹³⁰ RF-51 (RBH-1138) Belvedere Rock Event Post-Evaluation – May 31, 1996, p. 10381.

¹³¹ RF-51 (RBH-1138) Belvedere Rock Event Post-Evaluation – May 31, 1996, p. 10397.

¹³² D-196 - Sponsorships – Communications Plans – 1992 – ITL (ITL-176), p. 13913.

Canada that a portion of ticket sales (say \$1.00) could be directed to a designated charity – i.e. Home for battered women, etc.¹³³

* * * *

Developmental Work

- Currently evaluating a “Child Card” program

Concept

- **Packages would contain an insert displaying a full colour photo/description of a small child who has been reported missing along with a 1-800 phone number to call if you have seen this child... All with a Viscount brand image to it.**¹³⁴

* * * *

Cause Marketing

- Social Marketing for business is a methodology for influencing knowledge, attitudes and behaviour of target groups for social benefit and business advantage. It must be connected to corporate mission and values.
- It's an additional marketing opportunity to efficiently communicate with our consumers, through the activities of its operating companies, the corporate mission and characteristics with the objective of improving their perception on the trademark in long-term.¹³⁵

(12) Packaging

"How bad could it be in a nice pack like that?"¹³⁶

144. The package is a promotional tool essential to the industry. It is used to project the brand image as well as to camouflage the harmful effects of cigarettes.
145. "Show me what you smoke and I'll tell you who you are!" The package is a “badge product”.

Badging

In many categories, consumers are attracted to brands that communicate imagery they see as reflecting some aspect of their own personality. To serve as a badge, a product / brand must be something which the consumer feels he

¹³³ D-196 - Sponsorships – Communications Plans – 1992 – ITL (ITL-176), p. 13914.

¹³⁴ D-177 - RBH – 1994-95, Business Assessment, October 24-25, 1994 (RBH-1138), p. 3994.

¹³⁵ JPB-44 - (ITL-65) 1997 Communications Plans – Matinee and ITL Secondary Brands and Related Projects, p. 23551.

¹³⁶ D-235 (JTI-1677) Research Export – Exploration of various design parameters Re: Export “A” Pack re-design prepared for RJR MacDonald, June 1991, p. 80161 5818.

/ she wants to utilize as a statement about themselves. The decline in social acceptability of smoking in Canada has significantly impacted on the desire of smokers to use their brand of cigarettes as a badge. The negative "badge" associated with being a smoker overwhelms any positive imagery conveyed by a particular brand.

The exception to this would be those smokers in segments which are more comfortable with smoking in their peer group.¹³⁷

146. Just like the advertising, the package is designed to alleviate the smoker's guilt.

Feelings of social rejection prompted some smokers to suggest that the ideal cigarette design would make a contribution to alleviating their feelings of guilt.¹³⁸

147. Besides the data whose presence is prescribed by the regulations, the package gives no other valid information to the consumer with regard to the product or its health effects. Its fundamental role is instead intended to communicate images or perceptions:

The primary attributes conveyed by cigarette packaging are: gender appropriateness; socio-economic appropriateness; and strength.¹³⁹

Besides strength, package design can make an inferential statement that, in relative terms, the brand is a more clean and healthy alternative.¹⁴⁰

(13) Merchandising

148. By "merchandising" we mean the use of merchandise or other goods on which tobacco product trademarks or logos appear.
149. The goal of merchandising is to disseminate the brand image as widely as possible: repetition is the key to persuasion. This form of promotion takes on all the attributes of lifestyle advertising.

COMMUNICATIONS EVENTS – PLAYER'S LTD.

STRATEGIES

In all support materials, brochures, etc. include where appropriate:

- *Mention of John Player and Sons*

¹³⁷ D-224 - (RJR-66) Marketing Research Debrief – Evaluation of the Opportunity for American Brands in Canada, Prepared for RJR MacDonald, February 1995, p. 80094 8708.

¹³⁸ D-235 - (JTI-1677) Research Report – Exploration of Various Design Parameters Re: Export "A" Pack re-design prepared for RJR MacDonald, June 1991, p. 80161 5809.

¹³⁹ D-235 - (JTI-1677) Research Report – Exploration of Various Design Parameters Re: Export "A" Pack re-design prepared for RJR MacDonald, June 1991, p. 80161 5810.

¹⁴⁰ D-235 - (JTI-1677) Research Report – Exploration of Various Design Parameters Re: Export "A" Pack re-design prepared for RJR MacDonald, June 1991, p. 80161 5830.

- *Tradition (30 Years)*
- *Portray image of self expression of freedom and independence and self reliance/independence.*¹⁴¹

* * * *

RATIONALE

- *Merchandising is a key element to influence consumers purchase patterns by keeping brand awareness top of mind and enhancing image.*
- *TPCA regulations make merchandising one of the critical marketing tools left.*¹⁴²

* * * *

CONSUMER COMMUNICATION

- *Utilize brand/sponsorship advertising and all merchandising vehicles effectively to reinforce the desired image and created visibility/awareness behind key trademarks.*¹⁴³

(14) Magazines, newspapers and reviews

150. The plaintiffs create or help create reviews that are used to disseminate their advertising:

SPORTS ACHIEVERS MAGAZINE:

Create a branded sports magazine that covers all areas of sports achievements that is fully sponsored and available at newsstand and via subscription either quarterly or monthly. It would feature a broad range of sports interests and could evolve or be targeted at more youthful sports.

- *sample cover and table contents (boards)*
- *self-funding via advertising*
- *builds an exclusive export "A" database*
- *further development of "A" list*
- *proprietary communication and merchandising vehicle*
- *also executable as a proprietary tv show or feature*¹⁴⁴

¹⁴¹ D-196 - Sponsorships – Communications Plans – 1992 – ITL (ITL-176), p. 13907.

¹⁴² RF-45 - (RBH-1128) Marketing Plans 93/94, p. 1554.

¹⁴³ D-170 - Strategic Plan 1997-1998, Sales & Marketing (RBH-1134), p. 2754.

¹⁴⁴ D-192 - Export "A" Inc. – How Do We Build A Success Story, 1997 + Beyond (RJR-705), p. 80150 3516.

(15) Foreign publications

151. In their argument in 1989, the plaintiffs argued, just as they are doing today, that, by permitting advertising in foreign reviews, the TPCA was irrational.
152. It appears that this was an artificial argument because, in reality, Canadians do not like the taste of American cigarettes, ignoring the fact that the penetration volume of American or foreign brands is minimal:

*Overflow advertising has been a strategic focus in the C-51 debate, but needs to be put in perspective. There is little evidence that we face any real threat from U.S. brands. Both taste and trademark ownership weight against this.*¹⁴⁶

153. Nevertheless, to take advantage of the advertising's "spill-over" effect, RJR considered advertising its Export brand in the United States so it could profit from the benefits of that advertising:

*Examine the potential for marketing Export in the United States, in order to obtain the benefits of spill-over advertising.*¹⁴⁷

*One immediate area of potential would be to market the Export brand name in the United States, in order to derive the benefits of spill-over advertising.*¹⁴⁸

(16) Conclusion

154. It is evident on reading the plaintiffs' marketing documents that there is a reasoned apprehension of harm with regard to the promotion of tobacco products.
155. Young people, smokers, women and even the general public are in the plaintiffs' sights.
156. Sponsorship advertising has purely and simply replaced traditional advertising and this has happened in spite of the implementation of the TPCA.
157. The plaintiffs have used radio and television as dissemination tools for their sponsorship advertising to circumvent their own voluntary code and the TPCA.
158. The concerns expressed by the Supreme Court in 1995 were and still are rational.

¹⁴⁶ D-222 - ITL Marketing Plan – 1989 (ITL-431), p. 17531.

¹⁴⁷ D-226 - (JTI-1678) RJR-MacDonald Inc. Competitive Business Development Strategies for the 1990s – Draft, p. 80108 9861.

¹⁴⁸ D-226 - (JTI-1678) RJR-MacDonald Inc. Competitive Business Development Strategies for the 1990s – Draft, p. 80108 9873.

F Tobacco and International Tobacco Control¹⁴⁹

(1) How to combat smoking

The evolution in medical knowledge since the 1950s has radically altered the social and political landscape, producing a growing consensus, both nationally and internationally, that tobacco consumption is a sui generis problem that can only be properly addressed with an array of innovative and multifaceted legislative responses.¹⁵⁰

Tobacco consumption is a multifaceted problem which requires intervention from a variety of public authorities on a number of different fronts.¹⁵¹

159. These statements are still true. There is no single miracle cure for the smoking problem. A comprehensive approach and a set of measures are required.
160. To prevent young people from starting to smoke, and to convince smokers to quit, it is necessary, among other things, to:¹⁵²
- Limit access to tobacco products
 - Increase the number of health promotion messages;
 - Inform the population about the harmful effects of smoking
 - Reduce the marketing inducements promoting tobacco products
 - Raise the price of tobacco products
 - Make the use of tobacco socially unacceptable – Deglamorize
 - Increase measures for protecting the health of non-smokers (like prohibiting smoking in the workplace)
161. In short it is a matter of progressively eliminating all the kinds of incentives that encourage or promote the use of tobacco.

(2) The international situation

162. Tobacco control is critically important for the public health authorities in industrialized countries, including Canada.
163. This concern dates back to the publication in 1994 of the first report by the U.S. Surgeon General establishing the connection between tobacco consumption and lung cancer.

¹⁴⁹ See Appendix 6A – Measures to Reduce Tobacco Use: An International Perspective.

¹⁵⁰ *RJR-MacDonald*, La Forest J., para. 48.

¹⁵¹ *RJR-MacDonald*, La Forest J., para. 106.

¹⁵² See Appendix 6A – Measures to Reduce Tobacco Use: An International Perspective.

164. The *Tobacco Act* is part of a global trend to combat smoking.
165. In 1986, the World Health Assembly asked member states to control the use of tobacco products by using various measures, including
- The progressive elimination of socio-economic, behavioural and other inducements that promote and encourage the use of tobacco.¹⁵³
 - The prominent placement, on cigarette packs and on the packaging of all types of tobacco products, of warnings to specify that tobacco is addictive.¹⁵⁴
166. In 1990, the World Health Assembly
- Asked in particular for collaboration in placing restrictions aimed at eventually eliminating all direct or indirect advertising and all promotion and sponsorship activities involving tobacco.
 - States that it was encouraged by the recent information illustrating the effectiveness of tobacco control strategies and by the general prohibitions and other restrictive legislative measures for fighting effectively against direct and indirect advertising as well as against the promotion and sponsorship activities involving tobacco.
167. In July 1993, the United Nations Economic and Social Council¹⁵⁵ asked governments to maximize their efforts to reduce tobacco consumption through the adoption of comprehensive multisectoral plans.
168. To facilitate and accelerate the implementation of this comprehensive multisectoral tobacco control policy, two years later, in 1998, the WHO published a report titled "Guidelines for Controlling and Monitoring the Tobacco Epidemic."¹⁵⁶ On the strength of the ever-increasing knowledge about smoking, WHO reiterated the terms of its tobacco control policy:

The following elements, derived from World Health Assembly resolutions and recommendations from other international and intergovernmental bodies, should be part of comprehensive national tobacco control programmes. (They are in no particular order of priority.)

1. *Establishment and maintenance of an active national focal point to stimulate, support and coordinate tobacco control activities.*
2. *Establishment of an adequately financed and staffed national coordinating organization on tobacco and health issues.*

¹⁵³ ED-44.

¹⁵⁴ ED-44.

¹⁵⁵ ED-23.

¹⁵⁶ ED-32 Guidelines for Controlling and Monitoring the Tobacco Epidemic, World Health Organization, Geneva, 1998.

3. *Monitoring of trends in smoking and other forms of tobacco use, tobacco-related diseases and effectiveness of national smoking control action.*
4. *Effective promotion and education programmes aimed at smoking prevention and cessation of smoking.*
5. *Effective protection from involuntary exposure to tobacco smoke in transit vehicles, public places and workplaces.*
6. *Health care institutions that are smoke-free, and health care workers who set a good example by not smoking, and through their own training, and counselling and advocacy activities, emphasize the benefits of a smoke-free life.*
7. *Tobacco taxes that increase faster than price and income growth.*
8. *A portion of tobacco taxes used to finance tobacco control measures and to sponsor sports and cultural events.*
9. *A ban on all forms of tobacco advertising, promotion and sponsorship.*
10. *A legal requirement for strong, varied warnings on cigarette packages.*
11. *Restriction of access to tobacco products, including a prohibition on sale of tobacco products to young people.*
12. *Effective and widely available support of cessation of smoking.*
13. *Limitations on the levels of tar and nicotine permitted in manufactured cigarettes.*
14. *Mandatory reporting of toxic constituent levels in the smoke of manufactured tobacco products;*
15. *Strategies to provide economic alternatives to tobacco agricultural workers.*

(p. 10)

169. Influenced by the multisectoral approach advocated by WHO, the United Nations solicited the support of its agencies and international organizations for developing tobacco control policies and implementing the WHO Framework Convention. To coordinate the operations, the United Nations created the United Nations Ad Hoc Interagency Task Force on Tobacco Control.^{157 158 159 160 161 162 163 164}

¹⁵⁷ ED-23 United Nations Economic and Social Council Resolution 1993/79 "Multisectoral collaboration on tobacco or health" July 7-30, 1993.

¹⁵⁸ ED-21 United Nations Economic and Social Council Resolution 1994/97 "Multisectoral collaboration on tobacco or health", July 29, 1994.

¹⁵⁹ ED-19 United Nations Economic and Social Council Resolution 1995/62 "Tobacco or Health", July 28, 1995.

¹⁶⁰ ED-13 United Nations Economic and Social Council resolution 1999/56 "Tobacco or Health", July 30, 1999.

¹⁶¹ ED-22 United Nations Economic and Social Council, Report of the Secretary-General E/1994/83 "Progress made in the implementation of multisectoral collaboration on tobacco or health", June 27-July 29, 1994.

¹⁶² ED-20 United Nations Economic and Social Council, Report of the Secretary-General E/1995/67 "Progress made in the implementation of multisectoral collaboration on tobacco or health", June 26-July 28, 1995.

¹⁶³ ED-14 United Nations, Note by the Secretariat E/1999/114 "Tobacco or Health", July 29, 1999.

¹⁶⁴ ED-10 United Nations – Economic and Social Council – Ad Hoc Interagency Task Force on Tobacco Control – Report of the Secretary-General, May 21, 2000.

170. At the same time as the development of the Framework Convention and the work by the Task Force, the U.S. Food and Drug Administration adopted in 1996 the "Regulations restricting the sale and distribution of cigarettes and smokeless tobacco to protect children and adolescents."¹⁶⁵ Among the recommended public health measures, the fact of restricting advertising by the tobacco companies was deemed essential.
171. In light of all that precedes, it is not surprising that the World Bank, in the report titled "Curbing the Epidemic: Governments and the Economics of Tobacco,"¹⁶⁶ made a series of observations and recommendations to control smoking through some global measures, which included prohibition or restriction of tobacco promotion activities, the placing of prominent health messages, the publication and dissemination of research on the harmful effects of smoking, as well as the prohibition of smoking in the workplace and in public areas.
172. In his 1994 report,¹⁶⁷ the Surgeon General addressed the problem of smoking amongst young people. Among other things, he concluded the following:

Chapter 5 Tobacco Advertising and Promotional Activities

1. *Young people continue to be a strategically important market for the tobacco industry.*
2. *Young people are currently exposed to cigarette messages through print media (including outdoor billboards) and through promotional activities, such as sponsorship of sporting events and public entertainment, point-of-sale displays, and distribution of specialty items.*
3. *Cigarette advertising uses images rather than information to portray the attractiveness and function of smoking. Human models and cartoon characters in cigarette advertising convey independence, healthfulness, adventure-seeking, and youthful activities—themes correlated with psychosocial factors that appeal to young people.*
4. *Cigarette advertisements capitalize on the disparity between an ideal and actual self-image and imply that smoking may close the gap.*
5. *Cigarette advertising appears to affect young people's perceptions of the pervasiveness, image, and function of smoking. Since misperceptions in these areas constitute psychosocial risk factors for the initiation of smoking, cigarette advertising appears to increase young people's risk of smoking.*

Chapter 6 Efforts to Prevent Tobacco Use Among Young People

1. *Most of the American public strongly favor policies that might prevent tobacco use among young people. These policies include tobacco education in the schools, restrictions on tobacco advertising and promotions, a complete*

¹⁶⁵ ED-47 U.S. Food and Drug Administration. "Regulations restricting the sale and distribution of cigarettes and smokeless tobacco to protect children and adolescents." Final Rule. Federal Register, Vol. 61, No. 168, August 28, 1996, 44396-45318.

¹⁶⁶ ED-16 World Bank, Development in practice. "Curbing the Epidemic: Governments and the Economics of Tobacco, 1999.

¹⁶⁷ D-145 1994 Surgeon General's Report "Preventing Tobacco Use Among Young People".

ban on smoking by anyone on school grounds, prohibition of the sale of tobacco products to minors, and earmarked tax increases on tobacco products.

2. School-based smoking-prevention programs that identify social influences to smoke and teach skills to resist those influences have demonstrated consistent and significant reductions in adolescent smoking prevalence, and program effects have lasted one to three years. Programs to prevent smokeless tobacco use that are based on the same model have also demonstrated modest reductions in the initiation of smokeless tobacco use.

3. The effectiveness of school-based smoking-prevention programs appears to be enhanced and sustained by comprehensive school health education and by community-wide programs that involve parents, mass media, community organizations, or other elements of an adolescent's social environment.

4. Smoking-cessation programs tend to have low success rates. Recruiting and retaining adolescents in formal cessation programs are difficult.

5. Illegal sales of tobacco products are common. Active enforcement of age-at-sale policies by public officials and community members appears necessary to prevent minors' access to tobacco.

6. Econometric and other studies indicate that increases in the real price of cigarettes significantly reduce cigarette smoking; young people are at least as responsive as adults to such price changes. Maintaining higher real prices of cigarettes depends on further tax increases to offset the effects of inflation.

173. In 2000, the Surgeon General recalled the importance of adopting global measures to prevent young people from smoking and to help smokers overcome their addiction.¹⁶⁸
174. A review of tobacco legislation and regulations in 23 free and democratic societies reveals a gradual expansion and constant and irreversible hardening of the regulatory control of tobacco products.¹⁶⁹
175. This change has occurred at several levels:
- Regulation of conventional advertising on television, radio, in films and in newspapers
 - Restrictions on advertising content when permitted
 - Prohibition of direct advertising, with provisions for certain exceptions
 - Prohibition of indirect advertising ("brand stretching")
 - Prohibition of testimonials
 - Prohibition of sponsorship advertising

¹⁶⁸ D-147 - 2000 Surgeon General's Report "Reducing Tobacco Use".

¹⁶⁹ See Appendix 6B – Foreign Legislation.

176. Warnings on cigarette packages have gone through a similar evolution:
- The usual "Smoking may be harmful to your health" warning has been replaced by many other warnings. Sweden has about fifteen.
 - Pictograms, photos or visual depictions have been added, filling (as in Brazil) the entire surface of the package.
 - Insertion of outside sources of information, such as advice on smoking cessation.
177. The statutes and regulations are evolving from a policy of general permissiveness, accompanied by restrictions, to a policy of general prohibition, accompanied by defined permissions.
178. In 1993, more than 40 countries had adopted measures to restrict or prohibit tobacco advertising. Australia, New Zealand, France, Portugal, Norway, Finland, Iceland, Singapore and Thailand, in particular, prohibited all advertising.
179. Austria, Belgium, West Germany, Ireland, the Netherlands, Spain and Sweden, among others, imposed significant restrictions with regard to tobacco advertising.
180. For its part, the Canadian Parliament chose to intervene through a comprehensive strategy aimed at protecting Canadians from inducements to use tobacco products.

G The Forerunner of the *Tobacco Act*: The *Tobacco Products Control Act*

181. In 1988, Parliament enacted the *Tobacco Products Control Act*, S.C., c. 20 (hereinafter referred to as the TPCA). This Act prohibited in section 4 all advertising for tobacco products. This prohibition applied, under certain limitations, to sponsorship promotion. However, section 6 of the Act allowed sponsoring sports and cultural events under the manufacturer's corporate name up to a maximum of a certain amount per year.
182. Section 8 prohibited placing the brand element (or logo) of a tobacco company on any non-tobacco product. This prohibition covered both items for smokers (lighters, for example) and items that had nothing to do with tobacco.
183. Another significant element of the TPCA is that it required manufacturers to place warnings on their products. These warnings were not to be attributed.

H Judicial History of the *Tobacco Products Control Act*

(1) The Superior Court of Quebec

184. The TPCA of 1988 was challenged before the Superior Court of Quebec with regard to freedom of expression and division of jurisdiction. In its motion for a declaratory judgment at that time, the plaintiff ITL claimed that by prohibiting all tobacco advertising, the Act prevented the companies involved from communicating with their consumers. It also claimed that the prohibition deprived consumers of the right to receive "useful" information concerning tobacco product brands. Paragraph 38 of the motion at issue indicated the following:

[TRANSLATION] *The prohibition of all Canadian tobacco product advertising will deprive Canadian consumers of information useful for choosing different brands of a product that they continue to be entitled to purchase and to smoke; this information includes:*

Innovations in different tobacco products;

The characteristics and qualities of each brand and type of tobacco products;

The information for differentiating the various brands and types of cigarettes, with regard to length, filtering method, flavour, concentration and so forth, advertising alone being capable of making such a differentiation; this differentiation also enables the smoker to seek a certain sense of belonging, some brands and packaging appealing more to one group of smokers than another, that this group stands out for the age of its members, their gender, their self-perception, their lifestyle or in other ways;

The warning that Health and Welfare Canada considers cigarettes harmful to health.

185. Paragraphs 45 and 46 of the same motion added:

[TRANSLATION] *A free and democratic society cannot justify depriving the individual of any information he deems relevant with regard to a product he is entitled to purchase and to use;*

A free and democratic society cannot justify depriving the smoker of his right to have access to any information he deems useful for making a choice between the many cigarette brands offered in Canada.

186. Therefore, the plaintiff ITL claimed that the TPCA was unconstitutional because it deprived consumers of information they could have obtained through "information" or "brand-preference" advertising.

187. ITL's argument was to the following effect:

Moreover, the evidence clearly discloses that the government was aware of the range of alternative measures available, and had elaborated detailed proposals in respect to many of them. The following is a list of measures which the government itself used or proposed. They were not rejected because studies showed them to be ineffective or a full advertising ban to be more effective. Indeed, many formed part of the government's "negotiating position" with the

CTMC (see annex II E). They were rejected because the government, rather than infringing on the Charter right as little as possible, preferred to do so as much as possible.

PRICING POLICIES

Taxation to ensure increase of real prices of tobacco products ITL-27 (12)
ITL-27 (13)
ITL-27 (20)
ITL-27 (34)
ITL-62

Prohibiting any promotional schemes which decrease the price of tobacco products ITL-27 (22)

EDUCATION AND PUBLIC INFORMATION

Warnings

Rotating warnings ITL-27 (25)
Strengthened warnings ITL-27 (31)
Increasing percentage of pack occupied by warning v. 21, p. 3138
Reporting toxic constituents ITL-27 (28)
ITL-27 (25)

Application of a "fairness doctrine" (i.e. ensuring that media provide equal time to counter-advertising as to tobacco advertising) ITL-27 (13)
ITL-27 (34)

Public education and information concerning tobacco hazards ITL-27 (20)
ITL-27 (34)

Funds to be provided by tobacco companies ITL-27 (31)

Smoking cessation programs ITL-27 (20)

SPONSORSHIP

Prohibiting use of sports personalities in sponsorship of sporting events ITL-27 (27)

Prohibiting sponsorship of any events aimed at youngsters

Prohibiting sponsorship by tobacco companies ITL-27 (4)

RESTRICTING SALES OF TOBACCO PRODUCTS TO MINORS

Enforcing the Tobacco Restraint Act v. 22, pp. 3374-3382

Amending Tobacco Restraint Act to make effective v. 23, p. 3627

Prohibiting tobacco vending machines except in bars ITL-27 (25)

In addition, numerous alternatives exist for restricting advertising in ways which could effectively control advertising practices without effecting a total ban. The following is a list culled from Health and Welfare documents:

Prohibit all tobacco advertising except as specifically permitted ITL-27 (22)
ITL-27 (28)
ITL-27 (31)

Pre-screening all advertising ITL-27 (25)

Restrict media in which tobacco advertising is permitted ITL-27 (25)

Restrict or prohibit lifestyle advertising v. 22, p. 3403
ITL-27 (22)
ITL-27 (25)

Require plain backgrounds ITL-27 (19)

Permit only a picture of the cigarette package ITL-27 (24)
ITL-27 (31)

Prohibit any advertising depicting people

Restrict tobacco company expenditures related to advertising and promotion ITL-27 (20)
ITL-27 (28)

Prohibit all advertising directed towards youngsters ITL-27 (22)

No advertising in magazines directed at youngsters v. 22, p. 3387
ITL-27 (19)
ITL-27 (31)

Most of these restrictions could have been implemented either through a voluntary agreement with the tobacco industry, through legislation or through a combination of both. Compliance could have been monitored through various arrangements for "Compliance Boards" (e.g. ITL-27 (31)). Stiff fines could have been enacted to reinforce the regulations.

188. Chabot J. held the following:

[TRANSLATION] *But is seductive advertising, such as advertising showing healthy young people engaging in various sports, not so inherently attractive as to distort reality? Many smokers take baths and smoke while doing so, may take part in sports and others simply relax.... These advertisements (known as "lifestyle advertisements") are not inherently false or misleading. The concern is that they maintain the social respectability of the product and convey a message which the government does not want its citizens to hear, because these advertisements contribute to maintaining their beliefs about the product and perpetuating their behaviour. However, the TPCA prohibits not only this*

form of advertising, but all forms, including the Du Maurier trade mark on a lighter... as if the word "Du Maurier" were a greater call to smoking than the lighter itself...

189. The Superior Court granted cause to the plaintiff and struck down the Act.

(2) The Court of Appeal of Quebec

190. The Court of Appeal of Quebec concluded unanimously that the TPCA permitted a valid exercise of federal jurisdiction in the matter of peace, order and good government in Canada. The majority of the judges – Brossard J. dissenting – were of the opinion that the Act constituted a reasonable limit on the freedom of expression under the s. 1 meaning of the Charter. The Act was accordingly declared valid by the Court of Appeal.

191. It is interesting to note that in paragraphs 27 and 129 of its brief presented to the Court of Appeal at that time, ITL once again established the distinction between "information" and "brand-preference" advertising on the one hand, and "lifestyle" advertising on the other:

27. Though the TPCA leaves quite untouched the manufacture, sale, purchase or consumption of tobacco products, the advertising ban is extremely far-reaching, if not total, and does away with advertising of whatever nature, big or small, pictures or text, lifestyle or not, outdoor or indoor, in publications of whatever readership and without any regard to the content of the advertisement, as long as it is Canadian.

129. ...the TPCA prevents any advertising, however truthful and informative, and...it is not concerned with the content of tobacco advertising as such or with the impression conveyed by such advertising,...

192. Brossard J. notes at page 418 of the judgment that the plaintiffs ITL and RJR had conceded, albeit "cautiously," that "lifestyle" advertising was capable of encouraging the consumption of tobacco products:

[TRANSLATION] *Counsel acknowledges, albeit very cautiously, that lifestyle advertising may be an inducement to young people to become smokers; they add, equally cautiously, that if only this kind of advertising were banned, they would probably not be in court but, they point out, the Act does not ban only this type of advertising but all advertising of any type and kind whatsoever.*

(3) The Supreme Court of Canada

193. Before the Supreme Court of Canada, ITL reiterated essentially the same arguments as those expressed to the Superior Court and, in particular, invited the Supreme Court to make a distinction between the various kinds of advertising:

112. For example, the government at various times considered or had before it the following alternatives to a full advertising ban, all of which would have had less of an impact on protected rights, and yet chose to impose a complete ban

on advertising without any evidence, or without even seeking evidence, that the alternatives would have been less effective:

A ban short of a total ban of Canadian advertising, such as the prohibition of all advertising save those types explicitly permitted.

...

*A ban or regulation **only of lifestyle advertising** (or even of all advertising depicting people)*

...

Measures such as those which already exist in Quebec's Consumer Protection Act (R.S.Q. C. 40.1) to prohibit advertising aimed at children or advertising in media aimed at children.

...

Prohibiting tobacco-related sponsorship of events of particular interest to youngsters.

Measures such as those which already exist with regards to broadcast advertising of alcoholic beverages, designed to allow only that brand-preference advertising which satisfies a Board that it will not stimulate overall consumption and that it is directed at people over the age of eighteen.

...

Labelling requirements, which Health and Welfare Canada believed to be preferable to an advertising ban.

(a) Division of powers

194. Seven of the nine Supreme Court justices affirmed that Parliament could prohibit advertising and impose labelling and packaging requirements under its criminal law jurisdiction (para. 91(27) S.C. 1867). The Court did not, however, deem it necessary to rule on the government's power to legislate in the matter of peace, order and good government in Canada.

(b) Freedom of expression and justification under section 1 of the Charter

195. In a five-to-four judgment, the Court declared sections 4, 5, 6, 8 and 9 of the Act *ultra vires* under section 2(b) of the Charter guaranteeing the freedom of expression.
196. Section 4, which introduced a total advertising ban, was deemed *ultra vires* as was section 8, which prohibited placing a trademark on non-tobacco products, and section 9, which prescribed the placing of warnings exempt from attribution.
197. Sections 5 and 6, which respectively dealt with point of sale displays and sponsorship advertising displaying solely the manufacturer's corporate name, were not deemed unconstitutional *per se*, but were deemed *ultra vires* because they could not be separated from sections 4, 8 and 9.

198. Therefore, the Court concluded that the infringement of the freedom of expression was not justified under section 1 of the Charter. We recall that in *R. v. Oakes*, [1986] 1 S.C.R. 103, this question was analysed on the basis of the four following tests:
- (1) Did the government show that the objectives of the law are important enough to compromise the application of a Charter right?
 - (2) Is there a rational connection between the measures taken and the desired effects? (In other words, is it reasonable to think that the law will achieve its objective?)
 - (3) Is the impairment of the right in question reduced to a minimum?
 - (4) Are the benefits of the law greater than its constitutional drawbacks?
199. The Court concluded that the law did not meet the third test, that of minimal impairment. It did not therefore have to examine the balance between benefits of the law and its drawbacks. The opinion rendered by the Court on the three tests considered is as follows:
- (i) The real and important objective
200. The Court unanimously concluded that the objective of the TPCA, namely that of protecting Canadians from the harmful effects of tobacco, was sufficiently "urgent and real" to permit limiting a Charter right.
- (ii) The rational connection
201. The Court unanimously felt that section 4 of the Act, which imposed a total advertising ban, as well as section 9, which concerned the placing of warnings exempt from attribution, met the rational connection test. Accordingly, it was reasonable to think that these measures would contribute to reducing the harmful health effects of tobacco on Canadians.
202. Similarly, the justices decided, in a majority of 6 to 3, that section 8, which prohibited the placing of logos and "brand elements" on non-tobacco products, satisfied the rational connection test. Only McLachlin, Sopinka and Major JJ. were of the opposing opinion.

(iii) Minimal impairment

203. In paragraph 107 of its brief presented to the Supreme Court of Canada at the time of the challenge of the TPCA, the plaintiff ITL made a distinction between different forms of advertising:

The TPCA clearly bans some expression entirely without in any way furthering the objectives of the TPCA. The aims of the TPCA do not reasonably require, and the record discloses no requirement, that Canadians be deprived, for example, of purely informational advertising or of simple reminders of package appearance or of advertising disclosing availability of different or new brands.

204. By a majority of 5 justices to 4, the Court was of the opinion that sections 4, 8 and 9 of the TPCA did not satisfy the minimal impairment test. With respect to section 4, the Court based its conclusions on the fact that the prohibition stipulated in it referred to any type of advertising, including "brand-preference" advertising and "information" advertising.

205. With respect to section 8, which concerned the placing of logos and "brand elements" on non-tobacco products, the Court justified its opinion by the fact that the Act imposed a total ban.

206. The Court also concluded that section 9 on the warnings did not meet the minimal impairment test in view of the fact that the messages were not to be attributed. The prohibition on attributing the messages to some authority or another was considered excessive.

207. Furthermore, the Court pointed out that a law that would prohibit "lifestyle" advertising or advertising aimed at young people while allowing "information" or "brand-preference" advertising would be justifiable with regard to section 1. Iacobucci J. (backed by Lamer CJ.) underscores that established fact at page 354:

...the amount of legislative tailoring required to sustain minimal impairment analysis would not be very significant.

208. Moreover, Iacobucci J. proposes, at page 355, replacing the total prohibition of the TPCA by a partial prohibition:

At this juncture, I should like to offer some indication of what sorts of measures would, in my mind, have survived Charter scrutiny... [A]s evidenced in some of the testimony at trial, partial bans in the order of prohibitions on lifestyle advertising only and limitations on advertising aimed at adolescents could have been given more constructive attention.

209. For her part, McLachlin J. (with the support of Sopinka and Major JJ.) writes the following at page 344:

[W]hile one may conclude as a matter of reason and logic that lifestyle advertising is designed to increase consumption, there is no indication that purely informational or brand preference advertising would have this effect. The

government had before it a variety of less intrusive measures when it enacted the total ban on advertising, including: a partial ban which would allow information and brand preference advertising; a ban on lifestyle advertising only...In my view, any of these alternatives would be a reasonable impairment of the right to free expression, given the important objective and the legislative context.

I The *Tobacco Act* – The Work by Health Canada and Parliament

210. It is advisable to describe the roles and responsibilities of the different authorities who were required to intervene in the passing of the *Tobacco Act* because we must not confuse, as the plaintiffs did, the Department of Health, the Governor in Council, the House of Commons and its committees and the Upper House (the Senate) and its committees.
211. What is at issue in the present case is not the decision of the officers of the Department of Health, but rather the work of the legislator, that is, the Canadian Parliament, composed of the House of Commons and the Upper House called the Senate.
212. Since the publication in 1969 of the *Report of the Standing Committee on Health, Welfare and Social Affairs on Tobacco and Cigarettes Smoking*,¹⁷⁰ the Department of Health has proposed several programs for informing Canadians of the harmful effects of cigarettes.
213. As the members of the Standing Committee on Health stressed in 1969:
- While it is clear that cigarette sales cannot be banned at this time, it is equally clear that the production, distribution and sale of cigarettes should no longer be considered in the same light as the production, distribution and sale of other products. (RJR-MacDonald – 1995, p. 249)*
214. Over the years, the Department of Health has presented a whole array of educational programs¹⁷¹ intended, in particular, to raise the population's awareness of the harmful effects of smoking:

¹⁷⁰ *RJR MacDonald*, [1995] 3 S.C.R. 199, p. 249, 250, 278.

¹⁷¹ ED-199 (1983) – Canada, Health and Welfare Canada. Canadian Tobacco Control Initiatives.
 ED-198 (1985) – Canada, Health and Welfare Canada. Federal and Provincial Agreement for Developing and Implementing a National Tobacco Control Program.
 ED-198 (1987) – Canada, Health and Welfare Policy paper on the National Program to Reduce Tobacco Use. Appendix to the *National Program to Reduce Tobacco Use: Orientation Manuals & Historical Perspective*.
 ED-197 (1989) - *National Program to Reduce Tobacco Use: Orientation Manuals and Historical Perspective*.
 ED-191 (1995) – Health Canada, Tobacco Demand Reduction Strategy, [Year One Review and Update]. January 1995.
 ED-189 (1995) – Health Canada, Tobacco Control – A Blueprint to Protect the Health of Canadians.
 ED-162 (1998) – Health Canada – *Evaluation of the tobacco demand reduction strategy, Final report*.
 ED-159 (1999) – New tobacco control initiatives in Canada, “National Strategy”.
 ED-139 (1999) – Report on Tobacco Control – Health Canada.

215. The Health Canada vision regarding the smoking problem was developed around three points:

1. The product and its emissions

- The product itself (tobacco) is toxic and creates dependency; it contains several dangerous chemical products, including some known carcinogens.
- Smoking is the primary cause of a series of preventable diseases, such as coronary diseases, cerebral vascular accidents, respiratory diseases and cancer.
- Smoking is the leading cause of premature death: from 40,000 to 45,000 Canadian men and women die every year as a result of smoking.
- Second hand smoke has several deleterious effects on health; it is in particular linked to heart disease, sudden infant death syndrome and respiratory diseases.
- The costs related to tobacco consumption are estimated at 15 billion dollars a year in lost productivity and 3.5 billion dollars a year in health care.
- On average, smokers begin smoking between the age of 14 and a half and 15 years; 14% of children between 10 and 14 years are smokers.
- Roughly 300,000 young persons start smoking every year. They believe they will not become addicted but will likely have trouble quitting.
- About half of the addicted smokers will die of a smoking-related disease.

2. Access to tobacco products

- Tobacco products are widely sold at thousands of retail outlets and minors can obtain them quite easily, whether through older friends or from retailers who do not obey the law.

3. Factors that prompt tobacco use

- Price can be considered an inducement factor. That was the case prior to 1994, during the years when smuggling was rampant and consumers had extensive access to cheaper cigarettes sold illegally.

ED-122 (2001) – The National Strategy: Moving Forward, The 2001 Federal Provincial Territorial Progress Report on Tobacco Control.

ED-120 (2001) – *Press release: The Government Announces a Detailed Strategy to Discourage Tobacco Use.*

- Advertising also constitutes a powerful means of encouraging the consumption of tobacco products:
 - advertising is everywhere and invasive; it can be found on billboards, on walls, in kiosks, on buses, etc.;
 - it gives smoking a positive image and transmits messages that are appealing to young people;
 - it reinforces smokers' behaviour and discourages them from giving up their usage;
 - it gives the impression that smoking is a pleasant, socially acceptable activity, and more widespread than it is in reality;
 - advertising suggests that smokers can derive advantages or benefits from smoking.
216. Health Canada has favoured a comprehensive approach because smoking is influenced by several factors at once. Under this comprehensive approach, various measures can be implemented at the same time: increase in the level of taxes on tobacco products, educational, awareness and prevention campaigns, cessation programs for smokers, enacting legislation, etc. Applied individually and in isolation, all these measures risk being ineffective, hence comprehensive solutions were favoured.
217. The Supreme Court decision of 1995 had a considerable impact:
- it created a legislative vacuum that allowed tobacco companies to advertise without limitation (with the result of contradicting the health messages and causing a potential increase in consumption, especially among young people);
 - it confirmed the importance of the purpose of the TPCA, which was to protect the health of Canadians, objective that was deemed of sufficient validity for restricting the tobacco companies' freedom of expression;
 - it made provisions for alternative solutions that the Court might consider reasonable, such as prohibiting "lifestyle" advertising and advertising aimed at young people, while allowing "information" or "brand-preference" advertising.
218. Health Canada decided to explain its policy development process to Canadians and to consult them through a public document titled "Tobacco Control: A Blueprint to Protect the Health of Canadians" (D-274).
219. This blueprint informed citizens about what is involved in smoking, described the health goals pursued by the government, and set out the intended legislative orientations.

220. Consultation is an integral part of the democratic process, as was put forth by the Supreme Court in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at pages 256, 257, para. 68:

Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas" (Saumur v. City of Quebec, supra, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.

221. The consultation process on tobacco lasted several months and many respondents of divergent opinion participated: provincial governments, municipal administrations, tobacco manufacturers, retailers, health organizations, arts and sports associations, teaching establishments, unions, etc. Health Canada received approximately 3,000 responses, including nearly 85 detailed briefs, and has held bilateral consultations with thirty or so groups.¹⁷²
222. The task of Health Canada officials involved examining the responses and suggestions received from citizens, reviewing studies and research from foreign organizations and developing various legislative solutions, keeping in mind the directives of the Supreme Court and the legislative objectives pursued.
223. Scientific research makes it possible to learn more on a multitude of factors connected to smoking. The state of knowledge in this matter rests on a vast array of international studies. A dozen studies were commissioned by Health Canada, which wanted to understand the prevailing situation in the country on issues such as the marketing and promotion of tobacco products, access to those products, the effectiveness of voluntary codes, product contents, factors that encourage people to smoke, and smoking.
224. Research has confirmed the necessity of adopting a comprehensive approach to tobacco control (the factors that lead to the consumption of tobacco being complex, multi-faceted, multi-dimensional and interconnected). The state of understanding has also advanced Health Canada's thinking on certain aspects of tobacco-product regulation, smoking and its causes.

¹⁷²

ED-188: List of representations tabled following the publication of the Blueprint submissions.

225. The document “Analysis of Options for Tobacco Product Promotional Activity Restrictions”¹⁷³ focuses on tobacco-product promotional activities and the options considered by Health Canada to restrict such activities.
226. In the judgment on the TPCA, the Supreme Court was critical of the fact that the legislative options were not documented. That document describes Health Canada’s position on that issue.
227. That document has the following objectives:¹⁷⁴
- Explain Health Canada’s approach regarding regulation for the promotion and marketing of tobacco products;
 - Document the options considered.
228. The document covers several aspects of smoking, notably:
- Information on tobacco products and the use of tobacco;
 - The objectives regarding legislation and public health;¹⁷⁵
 - The applicable principles in the development of options;¹⁷⁶
 - A statement on the options considered regarding the restriction of tobacco product promotion;¹⁷⁷
 - Option 1: A voluntary packaging and advertising code
 - Option 2: Negotiate a voluntary code with the tobacco industry
 - Option 3: Total ban on all forms of tobacco-product advertising¹⁷⁸
 - Option 4: Partial ban (general legislation with controlled bans¹⁷⁹
229. The favoured option is described as follows:¹⁸⁰

A legislative package to restrict TPPA by effectively reducing its appeal and extent of pervasiveness would have to be comprehensive in scope. This would respond to the emerging marketing and social science information which acknowledges that multi-dimensional marketing strategies have an aggregate impact. All the major means available for promoting tobacco products must be addressed by legislation, including advertising that depicts the product or

¹⁷³ D-271.

¹⁷⁴ D-271, s.1, p. 1.

¹⁷⁵ D-271, pp. 5 and 8.

¹⁷⁶ D-271, p. 9.

¹⁷⁷ D-271, s.7, p. 77.

¹⁷⁸ D-271, p. 82.

¹⁷⁹ D-271, p. 83.

¹⁸⁰ D-271, p. 104.

package, advertising by means of tobacco-linked sponsorship promotions and other types of promotion which enhance the visibility, prominence and appeal of tobacco products, such as the use of expanded product displays at retail as a form of promotion. All regulations would be crafted, on the basis of research, to ensure that TPPA which is not limited to information or brand preference as distinct from lifestyle, or which is youth-oriented, is prohibited or restricted in venue.”

230. The Health Canada document summarizes international experience (p. 111 of D-271) and contains a bibliography of 115 references used in preparing the analysis.
231. Apart from Ms. Judy Ferguson, a team of 10 to 12 people worked from the very beginning of the process on Health Canada’s anti-tobacco policy.
232. This team continued its activities after the bill was tabled in December 1996, since the Minister had to be ready to testify before the Standing Committee on Health and before the Senate Committee. The possibility remained that amendments would need to be made to the bill. That is why the options had to be continuously reviewed.
233. Health Canada assumed that the Supreme Court had confirmed the existence of a link between advertising and consumption and did not feel it was necessary to establish such a link again.
234. The expression “advertising that is associated with young persons or could be construed on reasonable grounds to be appealing to young persons” was preferred to “advertising targeting young persons” in order to take into account the distinction between the intention (real or apparent) of the advertising and its impact: many people who are not targeted by advertising are still exposed to it and influenced by it. Targeting only the intention would therefore be ineffective.
235. The plaintiffs allege that the Health Canada officials acted in bad faith. Yet, there is not one ounce of proof to this effect. Health Canada officials divulged all the studies that were conducted or consulted. No studies were hidden and all options were stated.
236. It is important to point out that during the first case, all the studies the government had in its possession were handed over to the plaintiffs. Once again, no study was left hidden.
237. Moreover, Chabot J., in the judgment he rendered in *Imperial Tobacco Ltd. v. Canada*, 1991 R.J.Q. 2260, did not refer to a study that had remained hidden, but rather to a mysterious third option recommended by the civil servants (see p. 2311). However, in the document in question, RJR-53 now labelled as P-158, that third option was revealed in a perfectly clear manner.
238. In the first case, the plaintiffs complained that the Attorney General of Canada had not divulged all the options examined. However, in this case, the plaintiffs

criticized the Attorney General of Canada for having tabled before the Court all of the legislative options examined by Health Canada officials, including all drafts of those options (labelled D-271, D-272 and D-273 (a) to (g)). The plaintiffs' argument is futile and without basis.

239. The democratic consultation process conducted with Canadians continued in the House of Commons and the Senate.¹⁸¹
240. It is important to note that it was not Health Canada officials who made the decision to adopt the *Tobacco Act*, it was the Canadian Parliament. In order to do so, it had to take into consideration varied and opposing interests.
241. The plaintiffs are trying to convince this Court, without any evidence, that Parliament had a colourable purpose in adopting the *Tobacco Act*, in this case reintroducing a total ban on advertising, thereby circumventing the directives of the Supreme Court.
242. This argument is groundless since throughout the work done by the House of Commons and the Senate, Parliament has kept the Supreme Court judgment at the centre of its concerns.
243. At several times throughout the work, reference was made to the Supreme Court judgment:

The Minister of Health:

*Mr. Dingwall:...Great care has been taken to ensure the measures contained in this legislation reflect the guidance provided by the Supreme Court of Canada and respect the charter of rights and freedoms.*¹⁸²

244. In addition to taking into account the judgment rendered by the Supreme Court, the House of Commons and the Senate had to deal with various interest groups, notably:
- The retailers (Canadian Council of Grocery Distributors, National Association of Tobacco and Confectionary Distributors, Alimentation couche-tard inc., Canadian Federation of Independent Grocers);
 - Farmers who grow tobacco (Ontario Flue-cured Tobacco Growers Marketing Board, l'Office des producteurs de tabac jaune du Québec);

¹⁸¹ Appendix 7A: Chronological Excerpts from Parliamentary Business, containing excerpts from exhibits ED-52 to ED-103.

Exhibits ED-80 and ED-81: Lists of briefs submitted to Senate committee (33 briefs) and to the House of Commons (44 briefs).

Appendix 7B: List of Witnesses Heard by Various Parliamentary Committees.

¹⁸² ED-55, pp. 7-8.

- Manufacturers of matches (Eddy Match Company Ltd.);
 - The owners of vending machines (Regroupement des exploitants de distributrices automatiques de cigarettes (REDAC));
 - Tobacco manufacturers, health organizations;
 - The many cultural and sports organizations sponsored by the three major tobacco manufacturers;
 - The City of Montréal, Montréal International and the Chamber of Commerce of Greater Montréal.¹⁸³
245. It was observed that, during the work of the House of Commons and the Senate, section 24, dealing with sponsorship, generated some great concerns by cultural and sports organizations, notably the organizers of the Player's Canadian Grand Prix and the Indy Race in Vancouver. These organizations stated that section 24 would compromise the hosting of international events in Canada and would have significant financial and social repercussions. The two-year transition time, in the opinion of several organizations, was insufficient.¹⁸⁴
246. Thus, the Minister of Health agreed with the senators to review section 24, given that the plaintiffs were not interested in continuing to spend over 60 million dollars per year in sponsorships within the framework allowed by section 24 of the Act.
247. The *Tobacco Act* (Bill C-71) received royal assent on April 25, 1997.
248. Subsequently, the Canadian social context changed, notably in Quebec, after the National Assembly adopted the *Tobacco Act* on December 17, 1998. This Act prohibits all sponsorship activities as of October 1, 2003, and stipulated the implementation of a transition fund.
249. The international context also changed when the European Economic Community adopted a directive banning the sponsorship of sports and cultural events (including F-1 automobile racing) as of 2006.
250. In November 1998, the U.S. tobacco industry signed agreements with all fifty (50) states through which the industry agreed to restrict its sponsorship activities.
251. On June 3, 1998, the Minister of Health, Mr. Allan Rock, tabled, for its first reading, Bill C-42 modifying section 24 of the Act regarding sponsorship advertising, in response to the commitment made with the Senate.

¹⁸³ See Appendix 7A: Chronological Excerpts of Parliamentary Business, including several excerpts from the work by the House and the Senate.

¹⁸⁴ See Appendix 7A: Chronological Excerpts of Parliamentary Business.

252. During the presentation of the bill in its first reading, Lynn Myers stated the following:¹⁸⁵

Because of the concerns of event organizers it was agreed that the federal government would take another look at tobacco sponsorship and motor sports. But I must add that this should never have been seen as a carte blanche to water down our commitment to reduce tobacco use.

At that time we said that we would respect the charter of rights and freedoms, that we would respect international standards and that we would respect the health obligations and objectives of the Tobacco Act. As we consulted we heard from event organizers and we heard from health groups that were concerned with the potential influence of sponsorship on young people.

Through the process we remained determined to make this act even more solid than it was already. In the end we decided that we could not and would not create one set of rules for some motor sports events and another for everyone else. We recognized that we did and had to treat all currently sponsored events equally.

... That ban is more than even the Tobacco Act originally envisaged. That act would have simply brought in the 90-10 rule as a new status quo.

We have gone one step further in protecting the health of Canadians by cutting any ties between appealing and wholesome activities and tobacco consumption.

Some may ask why we have decided on a period of five years. The five year transition period provides event organizers with plenty of time and plenty of opportunities to seek alternative sponsors. In our consultations with those organizers, it was clear that if we were determined to eliminate the use of sponsorship as a promotional vehicle for tobacco products, and we are, then they wanted time to make alternative arrangements and they could. In fact I know that process has already begun.

For example, we as a government are very pleased that Air Canada will become the new title sponsor of the Formula One Canadian Grand Prix next year. We believe that the five year time frame will allow other event organizers to demonstrate to other potential sponsors how valuable an association with their event can be.

If this was all we were doing on tobacco control, it would be noteworthy enough. Yet we are actually doing far more and that is why Canada is recognized as a world leader in tobacco control. Indeed we keep track of the steps that other governments are taking on this issue. I want to tell my hon. colleagues on both sides of this chamber that our approach is consistent with evolving international standards. Let me offer some examples.

The European Union recently announced that it is moving in the same direction as we are. It intends to ban tobacco sponsored promotions by the year 2006. It intends to pursue a transitional strategy on the way to that ban.

¹⁸⁵

ED-87, p.54, 56-57.

Australia announced last week that it too will totally prohibit tobacco sponsored promotions by the year 2006.

The United States is moving ahead on actions that will limit the exposure of children to tobacco promotion in ways that are consistent with much that is already in our Tobacco Act.

...

In Quebec, the Parti Quebecois government has passed strong legislation that among other things restricts tobacco sales to minors and the promotion of tobacco products. [our emphasis]

253. Bill C-42 was submitted to the Standing Committee on Health on October 8, 1998.

254. It is important to point out that several organizations and individuals with opposing interests have appeared before the House Committee and tabled briefs¹⁸⁶. On November 25, 1998, Ms. Elinor Caplan (Parliamentary Secretary to the Minister of Health) intervened during the presentation, in the third reading of Bill C-42. She presented the following:¹⁸⁷

At the end of five years, by 2003, promotional sponsorship by cigarette makers will be banned altogether. That is why I say that Bill G42 strengthens the Tobacco Act. Instead of merely restricting promotional activity, the bill will prohibit them entirely.

These legislative changes will put Canada ahead of other nations that hold the health of their citizens in high regard. Indeed we are moving faster than Australia and the European Union, which are both implementing a similar sponsorship ban in the year 2006, three years after ours.

255. On December 1, 1998, Bill C-42 was adopted after the third reading:
[TRANSLATION]

Senator Lynch-Staunton: *Sponsorship is a form of communication, just like advertising. When Bill C-71 was adopted by Parliament, the balance established was such that, even though the authorized communication was limited, it was still permitted in a certain form. Bill C-42 goes further and eliminates this type of communication. We carefully studied the issue of whether or not, in acting this way, we were crossing the boundary established by the Supreme Court of Canada.*

¹⁸⁶ ED-102, ED-90 and Appendix 7B: "List of Witnesses Heard by the Various Parliamentary Committees".
ED-103, ED-91.

The compilation tabled by the Canadian Cancer Society: "Compilation of Selected Evidence Regarding the Impact of Tobacco Advertising and Promotion: A Submission to Parliamentarians for Use During Consideration of Bill C-42", labelled ED-273.

Declarations from the representative of the Canadian Tobacco Manufacturers Council, A council formed of three plaintiffs, ED-90.

¹⁸⁷ ED-94, p. 56 to 58.

As far as we can tell, this way of doing things is defensible from a constitutional point of view, because even once this form of communication is eliminated, the other authorized forms pursuant to Bill C-71 will continue to be able to be used. There are other ways for tobacco manufacturers to communicate information regarding their products to their customers, in limited-distribution publications, in specific areas where only people of a certain age have to right to frequent or on the packaging itself.¹⁸⁸

256. On December 10, 1998, Bill C-42 received royal assent.

4 Conclusion

257. Parliamentary debates are useful in that they pinpoint the social, economic and political context in which Parliament was required to make difficult choices regarding smoking, the commercial promotion of cigarettes and the sponsorship activities of the plaintiffs.

258. Upon reading the Parliamentary Debates, the intention of Parliament seems clear and unequivocal. Parliament had been careful to respect the directives of the Supreme Court.

259. The interpretation the Court must make is not limited to the *Blueprint*, (D-274) or the work of Health Canada officials: it must also take into account the documents tabled. The House of Commons and the Senate have met numerous witnesses, consulted several Canadian and international studies and read many documents, including those tabled by the Canadian Cancer Society.

260. It is clear the Parliament allowed “informative” and “brand preference” advertising, following in this regard the Supreme Court Judgment. Ultimately, it is this Parliamentary decision on which the present Court must focus.

¹⁸⁸ ED-99, p.10-11 (evening session).

J Section 39 of the Evidence Act

261. The plaintiffs allege that the Court should draw negative inferences from the fact the Clerk of the Privy Council tabled 3 certificates issued in accordance with section 39 of the *Evidence Act*.
- (a) Certificate dated September 19, 1997, regarding the documents (462) of the first RJR-MacDonald case in 1989;
 - (b) Certificate dated September 25, 1997, regarding the documents (39) referring to Bill C-71;
 - (c) Certificate dated January 10, 2002, regarding the documents (320) referring to Bill C-42 (amendment to sections 24 and 25).

(1) The RJR-MacDonald Case in 1989

262. In the first case, certificates issued in accordance with section 39 of the *Evidence Act* were tabled in the file.
263. These certificates were contested by the plaintiff ITL, for reasons of unconstitutionality.
264. When the ITL request regarding section 39 was taken into deliberation by the Chabot J., ITL retracted its request.

(2) One legislative option

265. In his judgment on July 26, 1991, Chabot J., at page 2311, referred to a mysterious third option.
266. Brossard J. of the Appeal Court referred to this option at page 2311.
267. La Forest J. of the Supreme Court referred to that option in subsections 100 and 102.
268. McLachlin J. of the Supreme Court referred not to this legislative option, but rather to a study and concluded the following in paragraph 166:

This omission is all the more glaring in view of the fact that the government carried out at least one study of alternatives to a total ban on advertising before enacting the total ban. The government has deprived the courts of the results of that study. The Attorney General of Canada refused to disclose this document and approximately 500 others demanded at the trial by invoking s. 39 of the Canada Evidence Act, R.S.C., 1985, c. C-5, thereby circumventing an application by the tobacco companies for disclosure since the courts lack authority to review the documents for which privilege is claimed under s. 39. References to the study were blanked out of such documents as were

produced: Reasons at Trial, at p. 516. In the face of this behaviour, one is hard-pressed not to infer that the results of the studies must undercut the government's claim that a less invasive ban would not have produced an equally salutary result.

269. However, as mentioned in appendix 7 “Background on the Tobacco Act,” the legislative option was produced as exhibit RJR-53, now exhibit P-158.
270. The legislative option described in exhibit P-158, consisted in particular in requiring the plaintiffs to include health messages on their advertising, occupying 50 % of the space.
271. The plaintiffs are asking the Court to draw negative inferences, that is to say to conclude that the *Tobacco Act* is not justified pursuant to section 1 of the Charter based on the sole fact that certificates pursuant to section 39 were tabled.
- Arguments of the plaintiff ITL, para. 5.2.2.2.;
 - Arguments of the plaintiff JTI MacDonald Corp., para. 95 to 101;
 - Arguments of the plaintiff Rothmans, Benson & Hedges Inc., para. 29 to 33.
272. The Attorney General of Canada contends that the Court should refuse to draw any inference whatsoever based on the fact that 3 certificates pursuant to section 39 were tabled.
- (a) The Court has no evidence to conclude that the Attorney General of Canada hid legislative options examined by Health Canada (D-271 and D-273 a, f);
- (b) During a hearing before the Supreme Court on November 29, 1994, counsel for the plaintiff ITL recognized that he was drawing no inference due to the fact that certificates pursuant to section 39 had been tabled in the case:

MR. SIMON V. POTTER: The Cabinet confidentiality was claimed as to the blacked out areas but the document itself is not subject to Cabinet confidentiality only the blacked out area is.

So you are allowed to take from the document which is in the record and is before you and there are a good fifty others like this – you are allowed to take as clear inference from this that there was another option and the transcript is full of ...

... IACOBBUCCI, J.: That has not been contested that there was another option ... “

ED-209, pages 117, 118

- (c) What counsel for ITL attorney presented before the Supreme Court was that the Attorney General of Canada presented no evidence or document explaining why the other legislative options had not been chosen:

*MR. SIMON V. POTTER: No, and I am not saying it was contested. **What I am saying is the Attorney General never and still does not come and explain why the other option was not chosen** or why any one of the great number of other options explained over three to four pages of our factum, pages 7, 8, 9 and 10 and over the twenty-two pages that I have mentioned from the Chabot judgment, there is no explanation as to why any of those would not work.*

There is simply to bold assertion which applies – which appears in the factum and, in fact, it becomes almost funny in the end because the Attorney General at 119 :

²... reiterates that all forms of publicity ... induce consumption².

But there is never anywhere an explanation or a reference to any evidence.

ED-209, p. 118, 119

- (d) The Attorney General of Canada, despite the objections of the plaintiffs, placed in the record the options examined by Health Canada and that were also explained by Judy Ferguson (D-271 “Policy Analysis of Options for Tobacco Products” and D-273 “Promotional Activity Restrictions” (a to (f)).

Moreover, the documents tabled as extrinsic evidence exposed the pros and cons of the various options for reducing smoking, for example document ED-47 of the Food and Drug Administration, to which the plaintiffs also objected.

273. The Supreme Court confirmed the constitutionality of section 39 of the *Evidence Act* in *Babcock v. Canada (Attorney General)* [2002] S.C.C. 57 (No. 28091, July 11, 2002), para. 53 to 61.
274. The Court reiterated the importance of secrecy in the Cabinet’s deliberations and gave the clerk and only the clerk the responsibility to decide whether or not to divulge the confidences of Cabinet.

(3) Conclusion

275. The Attorney General of Canada argues that the Court must not draw inference of any kind based on the fact that certificates were tabled.
276. The Attorney General of Canada argues that the Court must rather examine the positive evidence presented regarding the various legislative options examined and which are presented in particular in ED-271 “Analysis of Options.”

PART III
TOBACCO ACT

277. Before undertaking a constitutional interpretation of an act, it is important to determine the clear sphere of application intended by the legislator and the context in which the Act is situated:

R. v. Sharpe [2001] 1 S.C.R. 45, McLachlin C.J., on behalf of the majority:

While the Crown concedes that s. 163.1(4) limits freedom of expression, this does not eliminate the need to consider the nature and scope of the infringement in determining whether or not it is justified. Until we know what the law catches, we cannot say whether it catches too much. This Court has consistently approached claims of overbreadth on this basis. It is not enough to accept the allegations of the parties as to what the law prohibits. The law must be construed, and interpretations that may minimize the alleged overbreadth must be explored.... So we must begin by asking what s. 163.1(4) truly catches as distinguished from some of the broader interpretations alleged by the respondent and some of the interveners in support. The interpretation of the section is a necessary pre-condition to the determination of constitutionality, although it is understood, of course, that courts in future cases may refine the analysis in light of the facts and considerations that emerge with experience.

Much has been written about the interpretation of legislation (see, e.g., R. Sullivan, Statutory Interpretation (1997); R. Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994); P.-A. Côté, The Interpretation of Legislation in Canada (3rd ed. 2000)). However, E. A. Driedger in Construction of Statutes (2nd ed. 1983) best captures the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87, Driedger states: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." Supplementing this approach is the presumption that Parliament intended to enact legislation in conformity with the Charter: see Sullivan, Driedger on the Construction of Statutes, supra, at pp. 322-27. If a legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted.... [references omitted]

Intention of the Legislator

278. The *Tobacco Act* is the legislative response to the Supreme Court of Canada judgment.
279. Parliament, in all steps preceding the adoption of the Act, took into account the conclusions of fact and law in the judgment.¹⁸⁹

¹⁸⁹ See Appendix 7 – Background on the *Tobacco Act*.

280. Parliament followed all of instructions of the Court regarding the types of advertising that should be permitted, specifically informative advertising and brand-preference advertising.
281. Throughout the debates, Parliament considered the presentations and submissions from political and social players before arriving at a compromise.
282. Parliament understood the damaging effects of smoking, the addiction it produces and the 45,000 deaths that stem from it.
283. It took into account the fact that teenagers start smoking early and constitute a choice target for manufacturers.
284. Parliament tried as best as possible to balance the concurrent values opposing public health and the commercial advertising of tobacco products.
285. The *Tobacco Act* is far from being a copy of the TPCA. Judge Danielle Grenier wrote to that effect:
[TRANSLATION]
- The comparative situations prepared by the parties at the request of the Court made it possible to identify the substantial differences between the two laws. The new law allows for informative advertising and brand-preference advertising. It bans “lifestyle” advertising and advertising aimed at children and teenagers. Warnings can be “attributed” in compliance with the new Regulation which is not yet in effect. The Court cannot therefore conclude that the new law constitutes a replica of the former law and that it is contrary to the judgment made by the Supreme Court in RJR-MacDonald (1995).¹⁹⁰*
286. The *Tobacco Act* does not completely ban the advertising of tobacco products.
287. Compared to the TPCA, the Act is more complete inasmuch as it addresses several of the problems caused by smoking and attempts, at the same time, to implement remedies.
288. The Act is designed so that the different means proposed complete one another and, acting in a synergetic manner, contribute to the general reduction of smoking.
289. The objective of the Act, stated in section 4, is to protect the health of Canadians from the damaging effects of tobacco by:
- Reducing the incentives to use tobacco products and their accessibility to young people;
 - Informing the population on its dangers.

¹⁹⁰

Rothmans, Benson & Hedges v. Canada (A.G.)[1997] A.Q. 1261, para. 21.
The comparative table can be found in Appendix 8.

290. Those objectives are in the same vein as those of the TPCA, but the aim of the approach is to be more comprehensive in respecting the constitutional imperatives stated by the Supreme Court.

Part I – The Product (sections 5-7)

291. Cigarettes are a product destined for human consumption. In that respect, it is therefore normal that it be made the subject of regulation.
292. This first part “Tobacco Products” provides the government with the means of adopting regulations regarding tobacco products.
293. In order to protect the health of Canadians, the government can regulate to:
- Control the quantities of substances contained in the products and their emissions;
 - Designate what may not be added;
 - Describe text methods;
 - Obtain information from the manufacturer on the products, their emissions, composition, ingredients, hazardous properties as well as brand elements.
294. It should be noted that the European Union regulates the levels of nicotine and tar and in Germany, Italy and the United States, the levels of pesticides and insecticides are controlled.
295. Tobacco is a drug in which nicotine content can be regulated in the same way as other drugs and medications on the market such as Nicorette chewing gum or nicotine patches, which are subject to the *Foods and Drugs Act*.

Part II - Access (sections 8-14)

296. Part II, “Access,” focuses on the means of limiting access to tobacco products by young persons.
- Section 8 bans the sale of those products to people under the age of 18.
 - Section 10 bans the sale of cigarettes offered in packages of fewer than twenty cigarettes.
 - Section 11, subject to the exceptions stipulated in the regulation, bans the sale of tobacco products by means of a display that permits a customer to handle them before paying for them.
 - Section 12 bans the sale of tobacco products in vending machines, except where that device is located in the following areas: a place to which the

public does not reasonably have access, a bar or a tavern. Those vending machines would have to be equipped with a prescribed security mechanism.

- Section 13 bans, except between manufacturers and retailers, the inter-provincial delivery of tobacco products in order to avoid young persons being able to purchase them illegally.

297. These measures replace and complete those stipulated in the *Tobacco Sales to Young Persons Act of 1993*.

298. These measures are similar to those proposed by the Food and Drug Administration (FDA) in 1996.¹⁹¹

Part III – Labelling (sections 15-17)

299. Part III, entitled “Labelling,” stipulates the mandatory presence, on the packaging of tobacco products, warnings regarding the health risks of these products. These warnings can be attributed to an authority designated by regulation¹⁹² and contain detailed information on the contents of tobacco products and their emissions.

300. These provisions contribute to the Act’s objective of better informing the population on the health dangers of smoking:

- The labelling of all consumer products is regulated just as the obligation to give the consumer certain information on the product, its use and its contents.
- These provisions are not exorbitant and do not release the manufacturers from their civil obligation to inform users on the characteristics or dangers of their products.

Part IV – Promotion (sections 18-33)

301. Section 19 enacts a total ban on advertising, subject to the express permission expressed elsewhere in the Act.

302. The Supreme Court decided that Parliament must allow the plaintiffs to inform adult consumers on the characteristics of their products so they can compare the contents of the products of various brands in order to reduce the damaging effects of smoking on health.

303. Section 22 allows “information” and “brand-preference” advertising in publications read principally by adults, in mailings addressed to adults and in areas where people under the age of 18 are not allowed to be.

¹⁹¹ Exhibit ED-47, p. 44426 et seq.

¹⁹² *Tobacco Products Information Regulations*, s. 4.

304. Section 27 prohibits the distribution and advertising of tobacco products when one of its brand elements is on an article other than a tobacco product and when this item is associated with young persons or lifestyle.
305. Regarding sponsorship advertising containing a brand element, for the moment section 24 stipulates the following:
- Brand elements can only appear within the bottom ten per cent of the display surface of any promotional material.
 - Sponsorship advertising is permitted in publications read principally by adults, in mailings addressed to an adult, on sites where sponsored activities are taking place as well as areas where young persons 18 and under are not allowed.
306. Moreover, as of October 2003, all sponsorship advertising will be banned.

Part V – Enforcement (sections 34-42)

307. Part V, Enforcement, provides for the appointment of inspectors responsible for enforcing the Act (seizures, inspections).

Part V.1 Laying of Proposed Regulations (sections 42.1).

308. This part stipulates that a regulation must be tabled before the House of Commons and examined in committee before being adopted.
309. This provision was added to Bill C-71 in order to respond to RJR's representations to the Standing Committee on Health.

Part VI – Offences and Punishments – (sections 43-59)

310. Part VI stipulates the penalties for infractions.

Part VII – Agreements (section 60)

311. Part VII stipulates the signing of agreements between the federal government and the provinces regarding the execution and enforcement of the Act.
312. The aim of all these provisions, combined together, is to fulfill the legislative objective: deal with a serious and national public health problem.

Part VIII – Consequential Amendments, Repeals and Coming Into Force (sections 61-66)

313. The *Tobacco Act* repeals the *Tobacco Products Control Act* and the *Tobacco Sales to Young Persons Act*.

PART IV

CHALLENGE WITH REGARD TO FREEDOM OF EXPRESSION

314. The Attorney General of Canada admits that sections 19, 20, 21, 22, 24, 25, 26(2), 27, 28 and 31 of the *Tobacco Act* infringes the right to freedom of expression stated in section 2 of the Charter.
315. The Attorney General of Canada contends that these restrictions are justified within the meaning of section 1 of the Charter.

A The Test for section 1

316. Section 1 of the Charter stipulates the following:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

317. The general principles governing the analysis based on the first section have been outlined many times since *R. v. Oakes*, [1986] 1 S.C.R. 103. In *RJR-MacDonald v. Canada*, [1995] 3 S.C.R. 199, in particular, McLachlin J. summarized the issue at page 329-30 of the judgment:

*The factors generally relevant to determining whether a violative law is reasonable and demonstrably justified in a free and democratic society remain those set out in Oakes. The first requirement is that the objective of the law limiting the Charter right or freedom must be of **sufficient importance** to warrant overriding it. The second is that the means chosen to achieve the objective must be **proportional to the objective** and the effect of the law -- proportionate, in short, to the good which it may produce. Three matters are considered in determining proportionality: the measures chosen must be rationally connected to the objective; they must impair the guaranteed right or freedom as little as reasonably possible (minimal impairment); and there must be overall proportionality between the deleterious effects of the measures and the salutary effects of the law.*

(1) Sufficiently important objective

318. According to *Oakes*, in order to constitute a justifiable limit of a right, the impugned legislation must have an objective deemed urgent and real in a free and democratic society.
319. The objective of the *Tobacco Act* is presented in section 4:

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

(a) To protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

(b) To protect young persons and others from inducements to use tobacco products and the consequent dependence on them;

(c) To protect the health of young persons by restricting access to tobacco products; and

(d) To enhance public awareness of the health hazards of using tobacco products.

320. The plaintiffs also recognized that this objective was sufficiently urgent and real to justify the limitation of a right guaranteed by the Charter.¹⁹³
321. The array of facts presented to the Court amply demonstrates the urgency of the objective and its reality.
322. The plaintiffs recognized that the first of these objectives, to reduce the consumption of tobacco products, was sufficiently urgent and real to justify the limitation of a right guaranteed by the Charter (see list of plaintiff admissions, June 13, 1997, para. 6 to 11(ii)(b)).
323. The validity of that objective was also recognized by the Supreme Court in the 1995 judgment.
324. The second objective is to protect young people from being encouraged to consume tobacco products.
325. Young people are a particularly vulnerable group in society. They can be influenced and allow themselves to be easily convinced by manipulative advertising techniques:

The power differential between advertiser and consumer is even more pronounced with respect to children who, as this Court observed in Irwin Toy, at p. 987, are "particularly vulnerable to the techniques of seduction and manipulation abundant in advertising".¹⁹⁴

326. In *Irwin Toy v. Quebec (A.G.)*, [1989] 1 S.C.R. 927, the Supreme Court recognized that protecting young people from exposure to advertising was an objective allowing the restriction of a Charter right:

In our view, the Attorney General of Quebec has demonstrated that the concern which prompted the enactment of the impugned legislation is pressing and substantial and that the purpose of the legislation is one of great importance. The concern is for the protection of a group which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising. In the words of the Attorney General of Quebec, [TRANSLATION] "Children experience most manifestly the kind of inequality and imbalance between producers and consumers which the legislature wanted to correct."

¹⁹³ See list of plaintiff admissions dated June 13, 1997, para. 6 to 11(ii)(b).

¹⁹⁴ *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R. 199, La Forest J., para. 76.

327. In *Irwin Toy*, the ban not only targeted tobacco but other dangerous products posing a health hazard. It targeted advertising for all products. The objective was not to protect young people from certain products, but rather to protect them from the manipulation of advertising itself.
328. The objective of protecting young people from exposure to certain phenomena was also recognized in *Reference re Prostitution (Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123.
329. In that case, the objective of the law was identified as being protection from the social nuisance associated with the sex trade in public. Lamer J., in a concurrent opinion, stated the following (p. 1195):

I find that s. 195.1(1)(c) of the Code does address pressing and substantial concerns, specifically the curbing of nuisances caused by the public solicitation of prostitution, the curbing of related criminal activity such as the possession and trafficking of drugs, violence and pimping, the curbing of the exposure of street solicitation to uninterested pedestrians and property owners and the curbing of the exposure to potentially vulnerable and impressionable young people of what is in many respects a degrading, exploitive and, in some cases, dangerous activity."

330. It should be mentioned finally that the Supreme Court, in the 1995 *RJR-MacDonald* judgment, mentioned that banning advertising aimed at teenagers would be a valid measure under section 1 (para. 164, McLachlin J. (Sopinka and Major JJ); para. 191, Iacobucci J. (and Lamer J.); para. 119 (La Forest J. (and L'Heureux-Dubé, Gonthier and Cory JJ.))
331. The third objective mentioned in section 4 of the Act is to protect the health of young people through the limitation of access to tobacco. This objective is very important.
332. The fourth objective of section 4 is to better inform the public of the health dangers of tobacco use. This objective pertains to the authority granted by the Act to adopt regulations stipulating the inclusion of health information on cigarette packages. This authority has been exercised and has led to the adoption of the Information Regulations.
333. The four objectives of the Act along with the other provisions act in a synergetic manner and generally constitute an array of measures for fighting smoking.

(2) The principle of proportionality

334. This second criteria has three requirements:
- (i) The legislative measure must have rational connection with the objective of the Act;
 - (ii) This measure must impact, as little as possible, rights and freedoms; and

(iii) There must be a balance between the benefits of the Act and its effect on the rights or freedoms in question.

(i) Rational connection

335. For this criteria to be respected, it must be determined if a rational connection exists between, on the one hand, the means used by the *Tobacco Act*, and, on the other hand, the objective targeted, which is to reduce the damaging effects of tobacco.

336. The standard for evidence at this stage can be based on logic and reason and the effects of the Act do not need to be demonstrated scientifically.

337. In *RJR-MacDonald*, *supra*, Iacobucci J. (with the support of Lamer C.J.) wrote at page 352:

Rational connection is to be established, upon a civil standard, through reason, logic or common sense. The existence of scientific proof is simply of probative value in demonstrating this reason, logic or common sense but is by no means dispositive or determinative.

338. McLachlin J. (with the support of Sopinka J.) wrote at page 154 of the same judgment:

The causal relationship between the infringement of rights and the benefit sought may sometimes be proved by scientific evidence showing that as a matter of repeated observation, one affects the other. Where, however, legislation is directed at changing human behaviour, as in the case of the Tobacco Products Control Act, the causal relationship may not be scientifically measurable. In such cases, this Court has been prepared to find a causal connection between the infringement and benefit sought on the basis of reason or logic, without insisting on direct proof of a relationship between the infringing measure and the legislative objective.

339. La Forest J. (with the support of Cory, Gonthier and L'Heureux-Dubé JJ.) wrote, on pp. 290-91:

...it is unnecessary in these cases for the government to demonstrate a rational connection according to a civil standard of proof. Rather, it is sufficient for the government to demonstrate that it had a reasonable basis for believing such a rational connection exists; ...

...Although the appellants observe, quite correctly, that there has not to date been a definitive study conducted with respect to the connection between tobacco advertising and tobacco consumption, I believe there was sufficient evidence adduced at trial to conclude that the objective of reducing tobacco consumption is logically furthered by the prohibition under the Act on both tobacco advertising and promotion.

340. This approach based on logic and reason was confirmed in several other subsequent judgments of the Supreme Court.¹⁹⁵
341. Given that in the *RJR-MacDonald supra*, the Supreme Court unanimously recognized the rational connection between the objective and the TPCA and the ban on advertising, the Attorney General of Canada contends that provisions challenged in this case have a rational connection with the purpose of the Act, as it is stated in section 4.

(ii) Minimal impairment

342. According to the *Oakes* decision, the impugned provision must have a minimal impact on the rights guaranteed by the Charter.
343. The Supreme Court has expressed its hesitancy in substituting its opinion for that of the legislator in the choice of means to reach the objective:

R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713:¹⁹⁶

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

R. v. Keegstra, [1990] 3 S.C.R. 697:¹⁹⁷

[S.] I should not operate in every instance so as to force the government to rely upon only the mode of intervention least intrusive of a Charter right or freedom. It may be that a number of courses of action are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction upon a right or freedom.

Black v. Law Society of Alberta, [1989] 1 S.C.R. 591:¹⁹⁸

... "a legislature must be given reasonable room to manoeuvre ..." in struggling with questions of social policy and attempting to deal with conflicting pressures. The term "reasonable limit" is used in s. 1 and must be given meaning. Inherent in the word "reasonable" is the notion of flexibility. Section 1 does not advocate perfection.

¹⁹⁵

See notably:

- *Ross v. New Brunswick School District 15*, [1996] 1 S.C.R. 825, at 881.
- *Radio-Canada v. New Brunswick (A.G.)*, [1996], 3 S.C.R. 480, at 506-507.
- *R. v. Lucas*, [1998] 1 S.C.R. 439, at 465.
- *R. v. Sharpe*, [2001] 1 S.C.R. 45, at 96-101.

¹⁹⁶

Dickson C.J. (with the support of Chouinard and Le Dain JJ.), at 782.

¹⁹⁷

Dickson C.J. (supported by the majority), at 784-785.

¹⁹⁸

La Forest J. (on behalf of the majority), at 627-628.

RJR-MacDonald, supra, at 342-43:¹⁹⁹

The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement.

344. In conclusion, the Attorney General of Canada contends that sections 19, 20, 21, 22, 24, 25, 26(2), 27, 28 and 31 of the *Tobacco Act* are reasonable and minimally affect freedom of expression, given the real and urgent objective to fight the damaging effects of smoking.

(iii) Benefits of the Act as opposed to its harmful effects

345. The third requirement connected to the analysis of proportionality involves a balance between the effects of the measure and its purpose, so that the impact to the guaranteed right does not outweigh the fulfillment of the legislative purpose. (*Oakes, supra*).

346. The Attorney General of Canada contends that the restrictions to commercial advertising are not disproportionate compared to the real and urgent objective represented by the fight against the damaging effects of smoking.

B The need for a flexible approach adapted to the context

347. The criteria of the *Oakes* decision have been nuanced since 1986 so they can be adapted to the specific context of each challenge. The Supreme Court emphasized at which point it was important to take into account the factual circumstances of each case and not apply the first section in a rigid and mechanical manner:

R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713:

*...the nature of the proportionality test would vary depending on the circumstances. Both in articulating the standard of proof and in describing the criteria comprising the proportionality requirement the Court has been careful to avoid rigid and inflexible standards.*²⁰⁰

...

Let me first underline what is mentioned in the Chief Justice's judgment, that in describing the criteria comprising the proportionality requirement, the Court has been careful to avoid rigid and inflexible standards. That seems to me to be essential. Given that the objective is of pressing and substantial concern, the Legislature must be allowed adequate scope to achieve that objective. It must be remembered that the business of government is a practical one. The Constitution must be applied on a realistic basis having regard to the nature of

¹⁹⁹ McLachlin J. (on behalf of the majority), at 342-343.

²⁰⁰ Dickson J., at 768-769

the particular area sought to be regulated and not on an abstract theoretical plane.

...In seeking to achieve a goal that is demonstrably justified in a free and democratic society, therefore, the legislature must be given room to manoeuvre. What is reasonable will vary with the context, regard being had to the nature of the interest infringed and the legislative scheme sought to be implemented.²⁰¹

United States of America v. Cotroni, [1989] 1 S.C.R. 1469:²⁰²

In the performance of the balancing task under s. 1, it seems to me, a mechanistic approach must be avoided. While the rights guaranteed by the Charter must be given priority in the equation, the underlying values must be sensitively weighed in a particular context against other values of a free and democratic society sought to be promoted by the legislature.

348. Other judgments follow the same line of thought:

Ross v. New Brunswick School District 15, [1996] 1 S.C.R. 825, at 871-872:

What has to be kept in mind is that all rights under the Charter are guaranteed by s. 1 subject to the limitations there described. The important thing is that the competing values of a free and democratic society have to be adequately weighed in the appropriate context. I need not further explore when or under what circumstances a more peremptory process may be justifiable.

R. v. Keegstra, [1990] 3 S.C.R. 697, at 737, Dickson C.J. on behalf of the majority:

It is important not to lose sight of factual circumstances in undertaking a s. 1 analysis, for these shape a court's view of both the right or freedom at stake and the limit proposed by the state; neither can be surveyed in the abstract.

From the discussion so far, I hope it is clear that a rigid or formalistic approach to the application of s. 1 must be avoided. The ability to use s. 1 as a gauge which is sensitive to the values and circumstances particular to an appeal has been identified as vital in past cases...

349. The courts will show restraint regarding the legislator's choice in light of the:

- Low value of the expression used;
- Vulnerability of the group the Act is trying to protect;
- The divergent interests government must be governed and accommodated in a complex area.

²⁰¹ La Forest J., at 794-795.

²⁰² La Forest J., on behalf of the majority of the Court, at 1489-1490.

(1) Freedom of Expression in Commerce: A Value Far Removed from Fundamental Values

350. While the Charter, in section 2(b), protects the freedom of expression, not all “expressions” have the same weight or value.

351. Found at the heart of the values protected by s. 2(b) of the Charter are:

- The search for truth;
- Participation in the decision-making process on social and political issues;
- The diversity and forms of personal enrichment and development;

Irwin Toy Limited v. A.G. of Quebec, [1989] 1 S.C.R. 927:

At page 976

We have already discussed the nature of the principles and values underlying the vigilant protection of free expression in a society such as ours. They were also discussed by the Court in Ford (at pp. 765-67), and can be summarized as follows: (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.

At page 977:

But the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.

352. It is apparent that the message transmitted by the plaintiffs in their advertising is situated on the opposite end of this search for truth, for participation within society or for individual self-fulfillment:

*In my view, the harm engendered by tobacco, and the profit motive underlying its promotion, place this form of expression as far from the "core" of freedom of expression values as prostitution, hate mongering, or pornography, and thus entitle it to a very low degree of protection under s. 1. It must be kept in mind that tobacco advertising serves no political, scientific or artistic ends; nor does it promote participation in the political process. Rather, its sole purpose is to inform consumers about, and promote the use of, a product that is harmful, and often fatal, to the consumers who use it. The main, if not sole, motivation for this advertising is, of course, profit.*²⁰³

²⁰³

RJR-MacDonald Inc. v. Canada (A.G.), [1995] 3 S.C.R. 1999, La Forest J., para. 75.

353. When the Act does not affect the “heart” of a right protected by the Charter, restriction of such a right is easier to justify.²⁰⁴
354. The protection stipulated by the Charter applies differently based on the type of activity in question. Restriction of the freedom of expression can be easier to demonstrate in certain cases rather than others, depending on whether or not the activity in question is situated at the heart of the right guaranteed in paragraph 2(b). Restriction of the freedom of expression is more difficult to justify if it applies to activities of a political nature, for example, rather than activities of a commercial, pornographic or defamatory nature:

CBC v. New Brunswick (A.G.), [1996] 3 S.C.R. 480.²⁰⁵

It is important to stress that the particular expression that is limited in a given case may impact upon the s. 1 balancing. In RJR-MacDonald, supra, I noted that the evidentiary requirements of a s. 1 analysis will vary substantially with the nature of the right infringed. In the case of freedom of expression, this Court has consistently held that the level of constitutional protection to which expression will be entitled varies with the nature of the expression. More specifically, the protection afforded freedom of expression is related to the relationship between the expression and the fundamental values this Court has identified as being the "core" values underlying s. 2(b). I put the matter this way in RJR-MacDonald, at para. 72:

Although freedom of expression is undoubtedly a fundamental value, there are other fundamental values that are also deserving of protection and consideration by the courts. When these values come into conflict, as they often do, it is necessary for the courts to make choices based not upon an abstract, platonic analysis, but upon a concrete weighing of the relative significance of each of the relevant values in our community in the specific context. This the Court has done by weighing freedom of expression claims in light of their relative connection to a set of even more fundamental values. In Keegstra, supra, at pp. 762-63, Dickson C.J. identified these fundamental or "core" values as including the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process. [Emphasis added.]

This Court has subjected state action that jeopardizes these "core" values to a "searching degree of scrutiny". Where, on the other hand, the expression in

²⁰⁴ *R. v. Schwartz*, [1988] 2 S.C.R. 443, at 491.
Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232, at 247.
United States v. Cotroni, [1989] 1 S.C.R. 1469, at 1490.
R. v. Keegstra, [1990] 3 S.C.R. 697, at 785-86.
Libman v. A.G. Quebec, [1997] 3 S.C.R. 569, at 606.
R. v. Lucas, [1998] 1 S.C.R. 439, para. 57.
Thomson Newspapers v. A.G. Canada, [1998] 1 S.C.R. 877, para. 91-92.

²⁰⁵ La Forest J., on behalf of the Court, at 513.

question lies far from the "centre core of the spirit" of s. 2(b), state action restricting such expression is less difficult to justify.

355. In the analysis step under section 1 of the Charter, it is important to examine how the commercial expression that the plaintiffs are trying to protect is compatible with the search for truth, participation within society or individual fulfillment, which are at the heart of freedom of expression.
356. According to the evidence in this case, the plaintiffs are promoting a product toxic to human health with the sole goal of making a profit.
357. Although it is important for consumers to obtain information allowing them to make educated economic choices favouring their independence and development, it must be remembered that within the specific context of smoking, the Supreme Court declared that:

[T]he harm engendered by tobacco, and the profit motive underlying its promotion, place this form of expression as far from the core of freedom of expression values as prostitution, hate mongering, or pornography, and thus entitle it to a very low degree of protection under s. 1. It must be kept in mind that tobacco advertising serves no political, scientific or artistic ends; nor does it promote participation in the political process. Rather, its sole purpose is to inform consumers about, and promote the use of, a product that is harmful, and often fatal, to the consumers who use it.

358. From the perspective of the general public, the only use of tobacco advertising is to inform consumers. That is why the Supreme Court indicated to Parliament that informative and brand-preference advertising is permitted.

(2) Vulnerability of the group the Act is intended to protect

359. Included in the factors likely to encourage respect for Parliament's choices is the vulnerability of the group that the Act is intended to protect.²⁰⁶
360. Young people and smokers in under-privileged socio-economic conditions are a vulnerable group in relation to the plaintiffs.
361. The plaintiffs, all three large multinationals, spend millions of dollars every year to promote their products. In 1996, the total amount spent was more than \$158,000,000.²⁰⁷

²⁰⁶ *Irwin Toy v. A.G. Quebec*, [1989] 1 S.C.R. 927, at 993.
Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232, at 248-49.
R. v. Butler, [1992] 1 S.C.R. 452, at 505.
Egan v. Canada, [1995] 2 S.C.R. 513, at 573.
Thomson Newspapers v. Canada (A.G.), [1998] 1 S.C.R. 877, at 955-56.

²⁰⁷ See D-239.

362. The large sum they commit to advertising allows them to also establish promotional activities based on the most recent discoveries in the areas of marketing and psychosocial science.
363. These advertising campaigns consequently create a significant imbalance of forces between tobacco manufacturers and consumers:

76. *The appellants, both of whom are large multinational corporations, spend millions of dollars every year to promote their products (in 1987 alone, RJR and Imperial spent over \$75 million dollars on advertising and promotion); see RJR-MacDonald Inc., "Advertising and Promotion Spending (CND\$)" (1976-1987); Imperial Tobacco Ltd., "Domestic Advertising Expense Summary" (1982-1987). The large sums these companies spend on advertising allow them to employ the most advanced advertising and social psychology techniques to convince potential buyers to buy their products. The sophistication of the advertising campaigns employed by these corporations, in my view, undermines their claim to freedom of expression protection because it creates an enormous power differential between these companies and tobacco consumers in the "marketplace of ideas". As noted by M. L. Rothschild in Advertising: From Fundamentals to Strategies (1987), at p. 8, and cited in Dr. Richard W. Pollay, "The Functions and Management of Cigarette Advertising", Report, prepared July 27, 1989, at p. 2:*

Advertising is salesmanship, and is paid for by a firm, a person or a group with a particular point of view. The message advocates that point of view, and its goal is to create awareness, attitude, or behaviour that is favourable to that advocacy position. The message attempts to inform and to persuade; it is intentionally biased, and there is no intent to present a balanced point of view.

The power differential between advertiser and consumer is even more pronounced with respect to children who, as this Court observed in Irwin Toy, at p. 987, are "particularly vulnerable to the techniques of seduction and manipulation abundant in advertising"; see, e.g., expert report of Dr. Michael J. Chandler, "A Report on the Special Vulnerabilities of Children and Adolescents" (1989), at p. 19; expert report of Simon Chapman and Bill Fitzgerald, "Brand Preference and Advertising Recall in Adolescent Smokers: Some Implications for Health Promotion" (1982), 72 Am. J. Pub. Health 491; Gerald J. Gorn and Renée Florsheim, "The Effects of Commercials for Adult Products on Children" (1985), 11 J. Consumer Res. 962. In this respect, it is critical to keep in mind Dickson C.J.'s reminder in Edwards Books, supra, at p. 779:

In interpreting and applying the Charter I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.

77. *I conclude, therefore, that an attenuated level of s. 1 justification is appropriate in these cases.*²⁰⁸

364. This imbalance is even more pronounced in the case of young people who, as stated by the Supreme Court in *Irwin Toy, supra*, at page 987, are "particularly

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RJR-MacDonald Inc. v. Canada (A.G.), [1995] 3 S.C.R. 1999, La Forest J., para. 76 to 77.

vulnerable to the many techniques of seduction and manipulation by advertising.”

(3) Government: Arbitrator of divergent interests

365. The fact that government acted as an arbitrator to reconcile divergent interests is a factor of a contextual nature that proves the validity of this Court in showing restraint regarding Parliament’s choice.
366. Laws of a social character that regulate the diverging rights of various sectors of various social entities and groups deserve a certain legal restraint.²⁰⁹
367. In this case, the government is dealing with a situation in which opposing socio-economic interests must be reconciled.
368. The government had to reconcile the interests of young people, in particular, smokers, non-smokers, the different members of the tobacco industry, players in the field of advertising, cultural and sports organizations sponsored by the tobacco industry, the impact on employment, the tourism industry, non-smokers’ rights protection groups and health groups.
369. When the legislator acts as an arbitrator between the divergent claims of various groups in the community, the legislator must draw a line of demarcation without being capable of knowing exactly where this line is located.
370. Consequently, the factors mentioned previously must encourage the Court to show restraint regarding the *Tobacco Act* and facilitate the justification of the impact on paragraph 2(b) of the Charter.

C Sections 19 and 22 (Permitted and Prohibited Advertising)

371. Section 19 of the Act states a general ban on the promotion of tobacco products. It reads as follows:

19. No person shall promote a tobacco product or a tobacco product-related brand element except as authorized by this Act or the regulations.

372. Section 22 allows information and brand-preference advertising and bans lifestyle advertising as well as advertising that would be attractive to young people:

22.(1) Subject to this section, no person shall promote a tobacco product by means of an advertisement that depicts, in whole or in part, a tobacco product,

²⁰⁹

Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, at 993-994.
Stoffman v. Vancouver General Hospital, [1990] 3 S.C.R. 483, at 521.
RJR-MacDonald, *supra*, at 331 (McLachlin J.); at 276-278 (La Forest J.).
Ross, *supra*, at 876.
Libman v. Quebec (A.G.), [1997] 3 S.C.R. 569, at 605-606.

its package or a brand element of one or that evokes a tobacco product or a brand element.

22. (2) *Subject to the regulations, a person may advertise a tobacco product by means of information advertising or brand-preference advertising that is in*

(a) a publication that is provided by mail and addressed to an adult who is identified by name;

(b) a publication that has an adult readership of not less than eighty-five per cent; or

(c) signs in a place where young persons are not permitted by law.

22. (3) *Subsection (2) does not apply to lifestyle advertising or advertising that could be construed on reasonable grounds to be appealing to young persons.*

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

"lifestyle advertising" means advertising that associates a product with, or evokes a positive or negative emotion about or image of, a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring.

"information advertising" means advertising that provides factual information to the consumer about

(a) a product and its characteristics; or

(b) the availability or price of a product or brand of product.

"brand-preference advertising" means advertising that promotes a tobacco product by means of its brand characteristics.

(1) Appropriate interpretation of sections 19 and 22 (introductory remarks)

373. There are more types of advertising banned by law than those that are permitted. Banning is the principle, permission the exception.
374. The only types of advertising that stem from the exception are:
- (1) Those designed of inform, in an objective manner, adult consumers on products offered and their material characteristics; and
 - (2) Those where the package design is used to make the brand more attractive than another.
375. These types of advertising, although permitted, must not be lifestyle advertising or be attractive to young people.
376. These advertisements, although permitted, can only circulate or appear:

- In publications mailed to an adult;
- In publications whose readership is at least 85% adult;
- On signs placed in areas where young people are not allowed to be.

377. The advertisement must at least be an information or brand-preference advertisement before it is evaluated as pertaining to lifestyle or being attractive to young people.
378. Any advertising not belonging to one of those two categories will be considered illegal pursuant to section 19, whether or not it pertains to lifestyle or is attractive to young people.

(2) Rational connection

- (i) According to the Supreme Court of Canada

379. The Attorney General of Canada, in compliance with the Supreme Court judgment in *RJR-MacDonald*, contends that section 22 has a rational connection with the purpose of the Act, which is to reduce smoking and protect young people from incentives to consume tobacco products;

- McLachlin J. (concurring in by Sopinka J.) writes at page 342 of the judgment mentioned above:

This leaves the question of whether there is less direct evidence that suggests as a matter of "reason" or "logic" that advertising bans and package warnings lead to a reduction in tobacco use. The evidence relied upon by La Forest J. in support of rational connection falls into this category. Without duplicating his thorough review, it may be seen as consisting largely of evidence of advertising practices as well as the assumptions and conclusions of bodies concerned with reducing the health risk associated with tobacco use.

The question is whether this evidence establishes that it is reasonable or logical to conclude that there is a causal link between tobacco advertising and unattributed health warnings and tobacco use. To use the words of the Meese Commission on Pornography relied on in Butler, at p. 502, "would [it] be surprising . . . to find otherwise"? The government argues that it would be "surprising . . . to find otherwise". Why would tobacco companies spend great sums on advertising if not to increase the consumption of tobacco, it asks?

To this the tobacco companies reply that their advertising is directed not at increasing the size of the total market but at obtaining a larger share of the existing market. The evidence indicates that one of the thrusts of the advertising programs of tobacco companies is securing a larger market share, but there is also evidence suggesting that advertising is used to increase the total market....Moreover, while purely informational advertising may not increase the total market, lifestyle advertising may, as a matter of common sense, be seen as having a tendency to discourage those who might otherwise cease tobacco use from doing so. Conversely, package warnings, attributed or

not, may be seen as encouraging people to reduce or cease using tobacco. All this taken together with the admittedly inconclusive scientific evidence is sufficient to establish on a balance of probabilities a link based on reason between certain forms of advertising, warnings and tobacco consumption.

- Iacobucci J., in the same case, wrote (concurrented in by Lamer C.J.) at pages 353-354:

Although tobacco advertising as a whole certainly affects consumption, the evidence is unclear whether all types of tobacco ads affect consumption.

- La Forest J. made the following comments (concurrented in by Gonthier, L'Heureux-Dubé and Cory JJ.), at pages 291-294:

I begin with what I consider to be a powerful common sense observation. Simply put, it is difficult to believe that Canadian tobacco companies would spend over 75 million dollars every year on advertising if they did not know that advertising increases the consumption of their product. In response to this observation, the appellants insist that their advertising is directed solely toward preserving and expanding brand loyalty among smokers, and not toward expanding the tobacco market by inducing non-smokers to start. In my view, the appellants' claim is untenable for two principal reasons. First, brand loyalty alone will not, and logically cannot, maintain the profit levels of these companies if the overall number of smokers declines....

Second, even if this Court were to accept the appellants' brand loyalty argument, the appellants have not adequately addressed the further problem that even commercials targeted solely at brand loyalty may also serve as inducements for smokers not to quit. The government's concern with the health effects of tobacco can quite reasonably extend not only to potential smokers who are considering starting, but also to current smokers who would prefer to quit but cannot.

I observe in passing, based upon the recent jurisprudence of this Court, that the foregoing common sense observation is sufficient in itself to establish a rational connection in these cases. In this respect, there is a direct analogy between the present case and Butler, supra. In Butler, where this Court addressed the constitutionality of a prohibition on "obscene" material under the Criminal Code, R.S.C., 1985, c. C-46, the critical question raised at the rational connection stage was whether a rational connection existed between "obscene" material and violence against women. There was little or no evidence adduced to establish such a causal connection in a definitive manner. Indeed, in reviewing the evidence in that case, which consisted largely of two conflicting government reports, Sopinka J. observed, at p. 501, that "the literature of the social sciences remains subject to controversy" and that the social science evidence was "inconclusive". Nonetheless, Sopinka J. decided, at p. 502, that a common sense analysis was sufficient to satisfy the rational connection requirement...

Thus, following the reasoning adopted by this Court in Butler, the power of the common-sense connection between advertising and consumption is sufficient to satisfy the rational connection requirement.

However, it is not necessary to rely solely upon common sense to reach this conclusion because there was, in any event, sufficient evidence adduced at trial to bear out the rational connection between advertising and consumption.

380. The plaintiffs brought before the Court no positive evidence invalidating the conclusions of the Supreme Court regarding the rational connection between advertising and consumption.²¹⁰

[TRANSLATION] *The appellant, having the burden of proof in this case, had to establish that the measure was no longer justifiable under s. 1 of the Canadian Charter and s.9.1 of the Quebec Charter.*

381. Waterson's testimony brought nothing new to the Court. Waterson only repeated what he had already said before Chabot J. in 1989, although now adding that his point of view on the effects of advertising was "unusual":²¹¹

The reason that I've been asked to testify is because I have an unusual perspective on the way that brand behaviour and brand advertising works.

382. The exercise that Mr. Waterson undertook, comparing consumption in various countries in relation to the existence or absence of a ban on advertising restrictions has no probative value:

*Boddewyn has used selective data on the total number of cigarettes sold in a particular country as the basis for his analysis and has used it to justify a finding that, in those countries where advertising bans have been introduced, decreases in the total number of cigarettes sold have not followed. Relying solely on the number of cigarettes sold in a country to measure the effects of government restrictions fails to take into account the myriad of influences that can affect cigarette consumption and, thus, will not yield accurate results.*²¹²

383. Mr. Wilkinson's testimony has no probative value as well. Tobacco being the entryway towards to consumption of illegal drugs, it is normal that their consumption follow that of tobacco. Mr. Wilkinson also admitted that the consumption of illegal drugs would be higher if they were legalized and advertised. Obviously, Mr. Wilkinson would be opposed to heroin being advertised even if it were legalized.

(ii) According to legislative facts

384. The Attorney General of Canada contends that all of the legislative facts presented to the Court reveal the existence of a rational connection between advertising and the consumption of tobacco:

- D-145, U.S. Department of Health and Human Services U.S. Department of Health and Human Services. *Preventing Tobacco Use Among Young People. A Report of the Surgeon General.* Atlanta, Georgia: Public Health

²¹⁰ *Quebec (Attorney General) v. Entreprises W.F.H.*, [2001] R.J.Q. 2557 (C.A.), Biron J.

²¹¹ Testimony of Mr. Waterson, Vol. 5 January 21, 2002, Q. 318.

²¹² ED-47 FDA Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents.

Service, Centers for Disease Control and Prevention, Office on Smoking and Health, 1994. (U.S. Government Printing Office document #S/N 017-001-00491-0).

Page 10:

Chapter 5. Tobacco Advertising and Promotional Activities

1. *Young people continue to be a strategically important market for the tobacco industry.*
 2. *Young people are currently exposed to cigarette messages through print media (including outdoor billboards) and through promotional activities, such as sponsorship of sporting events and public entertainment, point-of-sale displays, and distribution of specialty items.*
 3. *Cigarette advertising uses images rather than information to portray the attractiveness and function of smoking. Human models and cartoon characters in cigarette advertising convey independence, health-fulness, adventure-seeking, and youthful activities – themes correlated with psychosocial factors that appeal to young people.*
 4. *Cigarette advertisements capitalize on the disparity between an ideal and actual self-image and imply that smoking may close the gap.*
 5. *Cigarette advertising appears to affect young people's perceptions of the pervasiveness, image, and function of smoking. Since misperceptions in these areas constitute psychosocial risk factors for the initiation of smoking, cigarette advertising appears to increase young people's risk of smoking.*
- ED-47, U.S. Food and Drug Administration. Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents. *Federal Register* 1996 (August 28); 61 (168).

Page 44476:

Finally, FDA recognizes that advertising may not be the most important factor in a child's decision to smoke; however, the studies cited by the agency establish that it is a substantial contributing, and therefore material, factor.

...

Page 44488:

Finally, the agency, like the 1994 SGR and IOM Report, finds that an adequate basis does exist to conclude that advertising plays a "mediated relationship" to adolescent tobacco use. The proper question is not, "Is advertising the most important cause of youth initiation?" but rather, "does FDA have a solid body of evidence establishing that advertising encourages young people's tobacco use such that FDA could rationally restrict that advertising?" The answer to this question is "yes".

385. The U.S. Surgeon General wrote in his 1994 report "Preventing Tobacco Use Among Young People," p. 194:

Even though the tobacco industry asserts that the sole purpose of advertising and promotional activities is to maintain and potentially increase market shares of adult consumers, it appears that some young people are recruited to smoking by brand advertising. Two sources of epidemiological data support this assertion....

...

Advertising and promotional activities also appear to influence risk factors for adolescent tobacco use, even if this is not the intention of the tobacco industry.

- National Cancer Institute (ED-183), at page 9:

There is substantial evidence that young people are aware of, and respond to, cigarette advertising. The U.S. Surgeon General's 1994 Comprehensive Review of the Tobacco Marketing Literature concluded that advertising and promotional activities influence key risk factors for tobacco use among adolescents. The U.S. Food and Drug Administration's (1995) Review of Available Tobacco Industry Documents concludes that "cigarette manufacturers know that young people are vital to their markets and that they need to develop advertising and other promotional activities that appeal to young people."

... p. 14

Other sources maintain that given the body of research evidence available today, there does appear to be a causal relationship between tobacco sales promotion and the smoking habits of young people. Those supporting this position include the 1994 Surgeon General's Report and the Institute of Medicine's report (1994) which both found to be sufficient evidence to conclude that tobacco promotion plays a significant contributory role in a young person's decision to use tobacco products.

- D-271 Health Canada – Policy Analysis of Options for Tobacco Product Promotional Activity Restrictions:

... However, the overall conclusion that can be drawn from the best designed and controlled studies available to date remains that cigarette advertising acts as a reinforcement of underage smoking that is independent of, and somewhat less powerful than, peer and family influences.

While no single study has demonstrated unequivocally that tobacco product promotion instigates the initial smoking experiments by youth, studies from different countries consistently show that tobacco product promotion does influence key aspects of the smoking-decision process, such as beliefs about smoking and perceptions of smoking or of smokers. ...

Looking at the body of social science studies on tobacco advertising and youth, however, the totality of information now available tends to confirm and strengthen the conclusion reached in 1988 by a WHO review of the factors involved in smoking onset :

Advertising has been found to reinforce smoking among under-age-smokers. Compared to non-smokers of the same age, under-age smokers pay more attention to cigarette advertisements, they are more appreciative of the idea of cigarette advertising, and they are more appreciative of specific examples of cigarette advertising. This suggests that young smokers are deriving "some kind of

reward or pleasure out of cigarette advertising ... Part of the reward-value...comes in the form of perceived support from society...” Furthermore, “it is likely that young smokers attempt to reduce the dissonance between knowledge that smoking is harmful and the symbolic appeal of smoking by seeking out or paying attention to attractive features in cigarette advertisements.”

- Constitutional Court – Order stating that the first paragraph of section 10 of the Law regulating the Restriction of the Use of Tobacco Products does not conflict with the Constitution – p. 10954 / No. 104 / 19/12/2001 - Official Journal of the Republic of Slovenia, at pages14-15:

Suitability

*27. In addition, it is not possible to deny the suitability of the challenged intervention. The plaintiff, though, quotes that “all the empirical data show that the advertisement of tobacco and its products have practically no effect on peoples’ behaviour. Specifically, no credible, independent empiric research has revealed any causality between the restriction of advertising and decreased tobacco use.” But the Constitutional Court regards the plaintiff’s statement, referring solely to the standpoint of one of the professors at the Institute of the University in Bonn that “the ban on the advertising of the use of tobacco and its products is not an effective way to decrease tobacco use”, as not appropriately indicated. Advertising specifically commercial ads, is a form of communication to increase the sale of the advertised product. The fundamental nature of advertising is to increase the sale of the advertised product, which necessarily leads to increased use. The plaintiff, however, affirms that it is not his intention to increase tobacco use, but only to increase his market share, specifically that, by advertising, he does not intend to generate new smokers, but only to attract the consumers of competitive tobacco products. This would be the sole effect of commercials if aimed directly to smokers only. **If they are presented to the general public, it is not possible to separate their effect on potential smokers. The majority of smokers start smoking before the age of eighteen.***

***Commercials presenting a certain lifestyle have a very strong effect on young people, who are searching for their identify.** The same derives also from research ordered by the World Bank, in cooperation with the World Health Organization in 1999, which demonstrates that advertising and the promotion of cigarette definitely affect the use of tobacco and tobacco products.*

(iii) According to the plaintiff’s internal marketing documents

386. Many of the plaintiffs’ documents revealed that tobacco company advertising is intended to acquire a greater market share by making cigarettes attractive and appealing to young people, by increasing the social legitimacy of tobacco and by reassuring smokers concerned with the effects of tobacco on their health and feelings of guilt over their smoking.²¹³

²¹³ See Appendix 5 –Tobacco Product Promotion.

(iv) According to expert evidence

387. Professor Richard Pollay testified on the effects of promotion:²¹⁴

10.1 Promotion, Advertising and Sponsorships are Important. *Cigarette promotional campaigns and their imagery rehearses, shapes and reinforces perceptions of smoking, both in general and for specific brands, biasing judgments about the popularity of smoking, the healthfulness of smoking, the social approval of smoking, and the independence and self-reliance characteristic of those addicted to nicotine. It is assumed by the industry to influence perceptions and attitudes, not only of smokers and pre-smokers, but also the parents and peers of the youth target market that is the future of the industry. Because they promote sales, profit maximizing firms support their products with generous budgets for promotional communications. Cigarette advertising images are carefully crafted and controlled through research on both the target persons and their reactions to promotional efforts.*

...

10.6 Promotional Imagery Reassures Concerned Smokers. *Associations with athletic events, facilities and related imagery of physical lifestyles (playing tennis, hang gliding, skiing, biking, windsurfing, etc) convey healthfulness. Other images vividly convey that sophisticated, intelligent people are smokers. These brand images are inherently false, as it is neither healthful nor "intelligent" to smoke rather than quit*

10.7 Promotional Imagery Recruits Starters. *Associations with sponsored events and related imagery of these serve to shape perceptions of smokers as adventuresome risk takers, independently self-reliant, getting social approval - sometimes precisely because of the risk taking as in auto racing. This appeals to adolescents= pressing psychological need to assert their independence, making cigarettes an easily appropriated and highly lauded and publicized tool for displaying "independence". The typical brand image is inherently false and misleading, as smoking does not deliver independence, but addiction.*

388. Allowing information and brand-preference advertising only in areas or publications for adults also serves the objectives of the Act.
389. Repeated exposure to tobacco advertising creates "friendly familiarity" with the product and increases its social legitimacy.

(3) Minimal impairment

(i) Dialogue between the Supreme Court and Parliament

390. The Attorney General of Canada, in light of the legislative purpose, contends that the disputed measures in the *Tobacco Act* minimally restrict the right to freedom of expression.

²¹⁴

D-166, Pollay, Richard, "How Cigarette Advertising Works: Rich Imagery and Poor Information," at pages 50 and 51.

391. Parliament has tried hard to follow the indications given by the Supreme Court in 1995. As noted by the Minister of Health, David Dingwall, during his address in presenting the *Tobacco Act* before the House of Commons:²¹⁵

Mr. Dingwall: ...Great care has been taken to ensure the measures contained in this legislation reflect the guidance provided by the Supreme Court of Canada and respect the charter of rights and freedoms.

...

Contrary to what the tobacco industry may suggest, the Supreme Court of Canada recognized a link between certain forms of tobacco advertising and consumption. In particular the court stated that lifestyle advertising may as a matter of common sense be seen as having a tendency to discourage those who would otherwise cease tobacco use from doing so.

The court identifies options which would be a reasonable impairment of the right of free expression, namely: a partial ban on advertising which would allow product information and brand preference advertising; a ban on lifestyle advertising; measures to prohibit advertising aimed at children and adolescents; and attributed health messages on tobacco product packaging. These are precisely the measures that are incorporated in this bill. These clarifications are important because they set the context for the comprehensive and integrated set of measures that are contained in the legislation before us.

This legislation is a product of a deliberate and thoughtful process. We have taken the guidance of the Supreme Court of Canada. We have studied the results of the research conducted by and on behalf of Health Canada as well as the extensive body of international data on tobacco promotion and tobacco use.... [emphasis added]

392. The *Tobacco Act*, in allowing “information” advertising and “brand-preference” advertising and by prohibiting advertising that could be attractive to young people and “lifestyle” advertising, is complying with the opinion rendered by the Supreme Court in *RJR-MacDonald*. McLachlin J., on behalf of the majority of the Court, stated on this point, at page 344:

As noted in my analysis of rational connection, while one may conclude as a matter of reason and logic that lifestyle advertising is designed to increase consumption, there is no indication that purely informational or brand preference advertising would have this effect. The government had before it a variety of less intrusive measures when it enacted the total ban on advertising, including: a partial ban which would allow information and brand preference advertising; a ban on lifestyle advertising only; measures such as those in Quebec’s Consumer Protection Act, R.S.Q., c. P-40.1, to prohibit advertising aimed at children and adolescents; and labelling requirements only (which Health and Welfare believed would be preferable to an advertising ban: A. J. Liston’s testimony). In my view, any of these alternatives would be a reasonable impairment of the right to free expression, given the important objective and the legislative context.

- Iacobucci J. (concurring in by Lamer J.) wrote at pages 354-355:

²¹⁶

ED-55, pages 7-8.

To this end, the amount of legislative tailoring required to sustain minimal impairment analysis would not be very significant. However, context does not eliminate the need for any tailoring at all. In this appeal, the government chose not to do any tailoring and, ultimately, this constitutes the lynch-pin of the Act's unconstitutionality. I note that the partialness of bans on commercial expression has often been key to their constitutional validity: Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712; Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232; Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927.

...

At this juncture, I should like to offer some indication of what sorts of measures would, in my mind, have survived Charter scrutiny. As I have already mentioned, it is clear that health warnings can and should be placed on the packages, but the strictures of the Charter necessitate that they be attributed to their author, in all likelihood Health and Welfare Canada. Regarding the advertising ban, it is clear to me that an effort could have been made to regulate tobacco advertising along the lines of alcohol advertising. Given that the tobacco companies had agreed as early as 1972 (through the Voluntary Code) to refrain from advertising on television and radio, these regulations would only involve advertising in the print media anyway. Alternatively, as evidenced in some of the testimony at trial, partial bans in the order of prohibitions on lifestyle advertising only and limitations on advertising aimed at adolescents could have been given more constructive attention. The main point I wish to make is that in this case we are faced with a total and absolute ban on advertising without a justifiable basis for it. Perhaps proof exists for such a ban, but in my view the record does not establish it.

393. The enactment of the *Tobacco Act* following the 1995 *RJR-MacDonald* decision is an example of what Dean Peter Hogg calls the “dialogue” between the Court and the legislative authority.
394. In an article published in collaboration with Allison Bushell: “The Charter Dialogue Between Courts and Legislatures,”²¹⁶ Dean Hogg explained that legislatures often respond to a judgment striking down a law by re-enacting another law targeting the same objectives, but which is more careful to protect rights and freedoms. This indicates that the Charter is not an anti-democratic instrument.
395. The concept of this dialogue is stated as follows (at pages 79-81):

Where a judicial decision striking down a law on Charter grounds can be reversed, modified, or avoided by a new law, any concern about the legitimacy of judicial review is greatly diminished. To be sure, the Court may have forced a topic onto the legislative agenda that the legislative body would have preferred not to have to deal with. And, of course, the precise terms of any new law would have been powerfully influenced by the Court's decision. The legislative body would have been forced to give greater weight to the Charter values identified by the Court in devising the means of carrying out the objectives, or the legislative body might have been forced to modify its objectives to some extent to accommodate the Court's concerns. These are

²¹⁶ (1997) 35 *Osgoode Hall Law Journal* 75.

constraints on the democratic process, no doubt, but the final decision is the democratic one.

The dialogue that culminates in a democratic decision can only take place if the judicial decision to strike down a law can be reversed, modified, or avoided by the ordinary legislative process....There is usually an alternative law that is available to the legislative body and that enables the legislative purpose to be substantially carried out, albeit by somewhat different means. Moreover, when the Court strikes down a law, it frequently offers a suggestion as to how the law could be modified to solve the constitutional problems. The legislative body often follows that suggestion, or devises a different law that also skirts the constitutional barriers. Indeed, our research, which surveyed sixty-five cases where legislation was invalidated for a breach of the Charter, found that in forty-four cases (two-thirds), the competent legislative body amended the impugned law. In most cases, relatively minor amendments were all that was required in order to respect the Charter, without compromising the objective of the original legislation.

Sometimes an invalid law is more restrictive of individual liberty than it needs to be to accomplish its purpose, and what is required is a narrower law. ...But it is rare indeed that the constitutional defect cannot be remedied. Hence, as the subtitle of this article suggests, "perhaps the Charter of Rights isn't such a bad thing after all." The Charter can act as a catalyst for a two-way exchange between the judiciary and legislature on the topic of human rights and freedoms, but it rarely raises an absolute barrier to the wishes of the democratic institutions. [Emphasis added. References omitted]

396. When the courts strike down a law while specifying an alternative that would have been constitutionally valid, they give the legislator the opportunity to re-enact a law that respects the rights and freedoms while still pursuing its legitimate objective (at page 85):

When a law that impairs a Charter right fails to satisfy the least restrictive means standard of section 1 justification, the law is, of course, struck down. But the reviewing court will explain why the section 1 standard was not met, which will involve explaining the less restrictive alternative law that would have satisfied the section 1 standard. That alternative law is available to the enacting body and will generally be upheld. Even if the court has a weak grasp of the practicalities of the particular field of regulation, so that the court's alternative is not really workable, it will usually be possible for the policymakers to devise a less restrictive alternative that is practicable. With appropriate recitals in the legislation, and with appropriate evidence available if necessary to support the legislative choice, one can usually be confident that a carefully drafted "second attempt" will be upheld against any future Charter challenges. [Emphasis added. References omitted]

397. At pages 85-86, the authors illustrate this reality by citing the example of the Tobacco Act:

*In *RJR-MacDonald Inc. v. Canada (A.G.)* (1995), the Supreme Court of Canada struck down a federal law that prohibited the advertising of tobacco products. In its discussion of the least restrictive means standard, the Court made clear that it would have upheld restrictions that were limited to "lifestyle advertising" or advertising directed at children. Within two years of the decision, Parliament enacted a comprehensive new Tobacco Act. The new Act*

prohibits lifestyle advertising and restricts advertising to media which is targeted at adults, but allows tobacco manufacturers to use informational and brand-preference advertising in order to promote their products to adult smokers.

The common elements of these cases are: (1) the law impaired a Charter right; (2) the law pursued an important purpose; and (3) the law was more restrictive of the Charter right than was necessary to accomplish the purpose. In each case, the invalidity of the law could be corrected by the enactment of a new law that was more respectful of the Charter right while still substantially accomplishing the important purpose. The form of the new law would have to take account of the way in which the Court analyzed the least restrictive means standard of section 1 justification. Dialogue seems an apt description of the relationship between courts and legislative bodies. Certainly, it is hard to claim that an unelected court is thwarting the wishes of the people. In each case, the democratic process has been influenced by the reviewing court, but it has not been stultified. [Emphasis added. References omitted]

398. Another example of dialogue between the Court and Parliament is in *R. v. Darrach*, [2000] 2 S.C.R. 443. This judgment confirms the validity of the new *Criminal Code* provisions regarding the past sexual behaviour of the victim in sexual assault trials. These provisions were adopted following a judgment by the Supreme Court in *R. v. Seaboyer*, [1991] 2 S.C.R. 577, a judgment that had struck down the old provisions and suggested alternate provisions.
399. In exercising this “dialogue” with the courts, Parliament has a right to a certain amount of manoeuvring room. The legislator did not use the solutions advanced by the Court in their entirety. The law will be declared valid as long as the general ideal underlying the Court’s reasoning is respected.
400. For example, in *R. v. O’Connor*, [1995] 4 S.C.R. 411, the Supreme Court set out the criteria that would allow an accused, in cases of sexual assault, to have access to medical files and other private files that are in the hands of third parties.
401. At the time, there was no legislation regarding this issue and the Court established these criteria pursuant to its authority under Common Law and in light of the constitutional requirements of s. 7 and para. 11(d) of the Charter.
402. Afterwards, Parliament amended the *Criminal Code* to implement legislation that would allow access to the files of plaintiffs in sexual assault cases.
403. Overall, this amendment to the *Criminal Code* respected the constitutional requirements stated in *O’Connor* with a few differences as to the procedure and the criteria determining if these files could be produced by the accused.
404. In other words, although the law respected the spirit of *O’Connor*, the legislator modified the approach proposed by the Court.
405. The *Criminal Code* amendment was the subject of a constitutional challenge in *R. v. Mills*, [1999] 3 S.C.R. 668. The accused argued that given that the

parameters stated by the Court in *O'Connor* were not respected in every detail, the amendment infringed on s. 7 and para. 11(d) of the Charter.

406. The Court rejected this argument and declared the new law valid. It concluded that Parliament did not have to respect the solution developed in *O'Connor* in every detail. McLachlin and Iacobucci JJ. noted, on behalf of the majority:²¹⁷

The respondent and several supporting interveners argue that Bill C-46 is unconstitutional to the extent that it establishes a regime for production that differs from or is inconsistent with that established by the majority in O'Connor. However, it does not follow from the fact that a law passed by Parliament differs from a regime envisaged by the Court in the absence of a statutory scheme, that Parliament's law is unconstitutional. Parliament may build on the Court's decision, and develop a different scheme as long as it remains constitutional. Just as Parliament must respect the Court's judgments, so the Court must respect Parliament's determination that the judicial scheme can be improved. To insist on slavish conformity would belie the mutual respect that underpins the relationship between the courts and legislature that is so essential to our constitutional democracy: Vriend, supra.

407. They added in paragraphs 58 and 59:

If constitutional democracy is meant to ensure that due regard is given to the voices of those vulnerable to being overlooked by the majority, then this court has an obligation to consider respectfully Parliament's attempt to respond to such voices.

Parliament has enacted this legislation after a long consultation process that included a consideration of the constitutional standards outlined by this Court in O'Connor. While it is the role of the courts to specify such standards, there may be a range of permissible regimes that can meet these standards. It goes without saying that this range is not confined to the specific rule adopted by the Court pursuant to its competence in the common law. In the present case, Parliament decided that legislation was necessary in order to address the issue of third party records more comprehensively....It is perfectly reasonable that these many concerns may lead to a procedure that is different from the common law position but that nonetheless meets the required constitutional standards.

408. We contend that the *Tobacco Act* follows the indications given by the Supreme Court in the 1995 *RJR-MacDonald* judgment.

(ii) Pre-authorization

409. The plaintiffs propose, as a measure that is less prejudicial to freedom of expression, the implementation of a prerequisite authorization system for advertising. Thereby, before publishing an advertisement, a manufacturer could submit the draft to an organization of some sort that would examine its compliance with the law. The moment this advertisement is approved by this organization, it could be published without risk of criminal prosecution. Because

²¹⁷

R. v. Mills, [1999] 3 S.C.R. 668, at para 55.

the law does not have such a prerequisite authorization system, the plaintiffs are arguing that it does not respect the criterion of minimal impairment.

410. The solution proposed by the plaintiffs is not less detrimental than the present plan.
411. The implementation of a prerequisite authorization system for advertisements might even be perceived, in certain respects, as being more prejudicial than the current provisions of the law.
412. The concept of “prior restraint” considers that a prerequisite authorization system is more dangerous to the freedom of expression than a ban with criminal penalties applied *a posteriori*, as is the case with the *Tobacco Act*.
413. As Professor P. W. Hogg wrote at page 1000 of his work entitled *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997):

Expression may be restricted in a variety of different ways. The restriction that is usually regarded as the most severe is a “prior restraint” on publication.

414. The concept of “prior restraint” is largely recognized by the U.S. courts, which consider this type of restriction as suspect in terms of the first amendment of the U.S. Constitution, which protects the freedom of expression.
415. Laws including such a restriction are the most likely of being struck down by the U.S. courts in cases that involve the freedom of expression: see L. H. Tribe, *American Constitutional Law*, 2nd ed. (Mineola, N.Y.: Foundations Press, 1988), p. 1041:

Although the first amendment is not an absolute bar to prior restraints, the Supreme Court has repeatedly said that any “system of prior restraints comes to this Court bearing a heavy presumption against constitutional validity.”
[references omitted]

416. Professor Tribe explains this mistrust regarding “prior restraint” (ibid, p. 1042):

In some case, the primary concern is that any restraint before dissemination, however temporary, allows the government to destroy the immediacy of the intended speech, overriding the individual’s choice of a persuasive moment or an editor’s decision of what is newsworthy; dissemination delayed might prove tantamount to dissemination denied. In other cases the primary concern is that any system of censorship insufficiently constrained by the safeguards of the judicial process is apt to overreach; censors uncontrolled by courts tend to deny publication to material protected by the first amendment. [references omitted]

417. In matters of freedom of expression, the traditional legal system presents superior guarantees greater than those from administrative organizations responsible for prerequisite authorizations.

418. When a criminal charge pursuant to the *Tobacco Act* is brought before the courts, several elements contribute to protecting the rights and freedoms of the accused, which would not necessarily be the case with an administrative organization.
419. Judges know the principles of interpreting the law and are more apt to correctly interpret the provisions of the law than the personnel of an administrative organization.
420. A prerequisite authorization organization composed of civil servants who are neither judges nor lawyers could give an interpretation of the law that run contrary to the essential principles of interpretation without it necessarily being to the advantage of the plaintiffs' freedom of expression.
421. A poor interpretation of the law could restrict the freedom of expression more than the existing law actually stipulates and more than the Parliament can legitimately do.
422. Trial evidence provides us with an example. Mr. Rafe Engle, an expert witness for the plaintiffs²¹⁸ on prerequisite authorization systems contended that an advertisement that would post only the name of a brand of cigarettes and a price could, in his opinion, be in violation of the law, for simply mentioning the cigarette brand could evoke a "risk" and, in so doing, enter into the category of "lifestyle" advertising prohibited by law.²¹⁹
423. This interpretation is manifestly false. It does not take into account the principle of interpretation according to which the legislator does not speak without a purpose.
424. Since the law expressly stipulates the possibility of having "information" and "brand-preference" advertising, certain content must be provided to that permission.
425. It is therefore erroneous to argue that any evocation of a cigarette brand would be in violation of the law.
426. The law states that when faced with two interpretations of a law, the one that preserves constitutional validity is favoured.²²⁰
427. Mr. Engle is interpreting the law in a manner that would be contrary to the 1995 *RJR-MacDonald* judgment.

²¹⁸ The objections formulated during the expert testimony of R. Engle are reiterated.

²¹⁹ See transcription of January 16, 2002, at 615.

²²⁰ See P. A. Côté, *The Interpretation of Legislation in Canada*, 3rd ed. (Montréal: Éditions Thémis, 1999), at 468-72.

428. The interpretation that gives manoeuvring room to tobacco companies to produce “information” and “brand-preference” advertising must therefore be favoured.
429. Secondly, the judges rely on a body of case law to interpret the provisions of the law. They also guide themselves by the example and study of other similar laws and provisions.
430. Judges derive inspiration and authorization from case law to guide their decisions. Prerequisite authorization administrative organizations are less likely to do so and consequently their decisions would be more arbitrary.
431. Thirdly, the function of judge presents guarantees of independence and impartiality, which is not necessarily the case for prerequisite authorization organizations.²²¹ Tobacco companies whose advertisements would be submitted to such organizations would not be ensured in any way that they would render decisions with as much objectivity as judges.
432. Fourth, within the framework of a criminal process taking place before a court, the accused can have recourse to a defence of due diligence for regulatory offences and demonstrate that he has taken precautions to make sure not to violate a law and therefore benefit from an acquittal.²²²
433. Therefore, a cigarette company that, in good faith, took steps to verify the perceptions of potential consumers regarding a given advertisement could use the defence of due diligence and benefit, depending on the circumstances, from an acquittal.
434. Parliament must benefit from manoeuvring room in the choice of its legislative methods.
435. By way of example, see the following judgment:
- Constitutional Court – Order stating that the first paragraph of section 10 of the Law regulating the Restriction of the Use of Tobacco Products does not conflict with the Constitution – p. 10954 / No. 104 / 19/12/2001 - *Official Journal of the Republic of Slovenia*, p. 15-16:

Proportionality in a strict sense

*28. When evaluating proportionality in a strict sense, the Constitutional Court weighed the need for the restriction of advertising for health protection and the need for the intervention into the plaintiff's freedom of expression. Besides statements in point 20 and 21 of the explanation, the Court also took into consideration the standpoint of the European Court of Human Rights, a legal practice under which **the freedom of expression in the sphere of***

²²¹ See *Reference re: Remuneration of Judges in the Provincial Court of PEI*, [1997] 3 S.C.R. 3.

²²² *R. v. Sault Ste-Marie*, [1978] 2 S.C.R. 1299.

commercials has a lower degree of protection compared to other spheres.

29. Tobacco products are considered consumer goods and, for this reason, the measure restricting their use should be such that it can affect as large a part of the public as possible. It is true that the legislator also has other available measures to limit tobacco use, but, by warning of the hazards of tobacco products, by sponsoring anti-smoking programs and medical tobacco addiction programs (as proposed by the plaintiff), it cannot achieve the same effect on the circle of consumers or regarding preventive effects. It is true that, this way, the opportunity of mass advertising is taken away from the plaintiff, but with this, the vital function of commercial communication is still possible for him – specifically the presentation of new products and services by which he accelerates the possibility of competition and incites the development of new products and services. According to section 12 of the LRUTP, he has the guaranteed possibility to inform consumers about new tobacco products with single actions.

436. Minimal impairment is not necessarily violated because Parliament has chosen one option rather than another. What is important is that the choice be exercised among a series of measures that are the least detrimental possible. The courts remain the guardians of the Constitution.

(4) Benefits of the Act as opposed to its harmful effects

437. The Attorney General of Canada contends that given the nature of the Act and that of the right violated in this case, the harmful effects of the restriction on the rights of tobacco companies to advertise, for commercial purposes, products that are addictive and are in themselves dangerous and damaging to the health of consumers do not supersede the objective of the Act.

D Sections 24 and 25 (Sponsorship)

438. For the moment, section 24 of the Act restricts sponsorship advertising in the following manner:

(1) Subject to the regulations and subsections (2) and (3), a person may display a tobacco product-related brand element in a promotion that is used in the sponsorship of a person, entity, event, activity or permanent facility if the person, entity, event, activity or facility

(a) is associated with young persons or could be construed on reasonable grounds to be appealing to young persons or if young persons are its primary beneficiaries; or

(b) is associated with a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring.

(2) A person may display a tobacco product-related brand element only within the bottom ten per cent of the display surface of any promotional material.

(3) A person may use promotional material that conforms with subsection (2) and that displays tobacco product-related brand elements

(a) in a publication that is provided by mail and addressed to an adult who is identified by name;

(b) in a publication that has an adult readership of not less than eighty-five percent;

(c) in signs or programs available on the site of the event, activity or permanent facility; or

(d) in signs in a place where young persons are not permitted by law.

(4) Where the criteria described in paragraphs (1)(a) and (b) do not apply to a sponsorship, a person may, subject to the regulations, use a tobacco product-related brand element in the promotion of the sponsorship.

439. Until 1998, s. 25 permitted the use of a name associated with tobacco on permanent facilities. However, the new s. 25 (as amended by C-42, 46-47 Eliz. II, 1997-98), stipulates the following:

No person may display a tobacco product-related brand element or the name of a tobacco manufacturer on a permanent facility, as part of the name of the facility or otherwise, if the tobacco product-related brand element or name is thereby associated with a sports or cultural event or activity.

440. As of October 1, 2003, sponsorship advertising will be totally banned, pursuant to an amendment made to the *Tobacco Act* in 1998 (*Act to amend the Tobacco Act*). The new s. 24 will therefore stipulate the following:

No person may display a tobacco product-related brand element or the name of a tobacco manufacturer in a promotion that is used, directly or indirectly, in the sponsorship of a person, entity, event, activity or permanent facility.

441. During the work by the House and the Senate, it became apparent that s. 24 on sponsorship was raising some great concerns on the part of cultural and sports organizations, in particular, the organizers of the Player's Canadian Grand Prix and the Indy race in Vancouver. It was the opinion of these organizations that s. 24 would compromise the hosting of international events in Canada and would have significant social and financial repercussions on the performers and the City of Montreal. The two-year transition period was, in the opinion of many organizations, insufficient.

442. The Minister of Health therefore made a commitment to the Senate to review s. 24, given that the plaintiffs were not interested in continuing to spend more than 60 million dollars per year in sponsorships within the framework allowed by s. 24 of the Act.

443. The *Tobacco Act* (Bill C-71) received royal assent on April 25, 1997.

444. Later, the Canadian social context changed, notably in Quebec, after the National Assembly adopted the *Tobacco Act* on December 17, 1998. This Act prohibits all sponsorship activities as of October 1, 2003, and stipulates the implementation of a transition fund. The international context also changed when the European Economic Community adopted a direction banning the sponsorship of sports and cultural events (including F-1 automobile racing) as of 2006. In November 1998, the U.S. tobacco industry signed an agreement with all fifty (50) States agreeing to restrict its sponsorship activities.
445. On June 3, 1998, the Minister of Health, Allan Rock, tabled, for its first reading, Bill C-42 modifying section 24 of the Act regarding sponsorship advertising, in response to the commitment made to the Senate.
446. The Attorney General of Canada admits that s. 24, in its current wording as well as in that which will go into effect October 1, 2003, constitutes an infringement of the freedom of expression guaranteed by subsection 2(b) of the Charter, but contends that this infringement constitutes a reasonable limit within the framework of section 1.

(1) Rational connection

447. Sponsorship advertising is nothing more than a form of lifestyle advertising:

- Michael J. Waterson:

January 21, 2001 – Questioned by Me. Simon Potter, Q. 78-79:

Q- *And you've mentioned, Mr. Waterson, the gasoline and tires and so on, and that prompts me to ask you the question whether you make a distinction in the role of advertising for those products and the role of sponsorship by, let's say Firestone Tires? Is the role different depending on whether it's advertising or sponsorship?*

...

Q- *Do you make a distinction between the two (2), Mr. Waterson?*

A- ***If you see the word 'Firestone' written on the side of a racing car, then it is simply, in my view, a moving advertisement.*** *It may...it may be the intention of the sponsor to do different things. It's conceivable that sponsorship is viewed differently within people who... within advertising agencies and within major advertisers. But the impression that I always got from talking with these people is that sponsorship and sales promotion and all of the other kinds of advertising is simply regarded in some ways as alternatives. They're different ways of bringing the name ²Firestone² to the attention of the consumer, and it doesn't really matter whether you see it on television, on a poster or on a racing car.*

- D-271 – Health Canada, Analysis of Options for Tobacco Product Promotional Activity Restrictions (pages 72-73-74):

Page 72:

Sponsorship promotion offers distinct advantages over product advertising, since it permits the company's message (and the brand name itself) to be more readily incorporated into the event or activity. Especially significant in this regard is the assessment of the International Events Group (IEG) Sponsorship Report that:

*'sponsorship generally outperforms advertising in its ability to establish qualitative attributes, such as enhancing a consumer's image of a brand, increasing favorability ratings and generating awareness...[sponsorship] can suggest that the brand is sanctioned and approved, and sponsors hope that consumers will transfer the qualities of the event itself to the sponsor. **It provides a positive emotional connection between people and the product that cannot be achieved through traditional advertising.**'*²²³

Pages 73-74:

The goal of event marketing is increased sales. Associating a branded product with an event or activity theme provides the lifestyle linkage by which increased sales are best achieved. Event marketing links recognizable trade marks, brand names and insignia (i.e. tobacco product ²brand-identifiable elements²) with a variety of appealing activities, each selected with a view to positioning the brand before the identified market segments, particularly young adults. Car racing, whitewater rafting, fashion award shows and comedy festivals provide some well-known examples of event marketing by tobacco manufacturers.

*This aspect of event marketing may be an offshoot of the way in which the sponsorship signage and messages become an integral part of the experience of an event. **Further promotion of the event using sponsorship advertising builds on this experience and disseminates the ²lifestyle² images and appeal of the event, linked to the brand name, through conventional advertising venues (billboards, in-store and out-of-home posters etc.).** Because tobacco companies are careful to choose events or activities that will fit well with the existing brand identify or brand name used in other promotional efforts, valuable promotional synergies are possible that increase friendly familiarity and enhance the image of both the corporations and their products.*

- ED-180 "Marketing of Tobacco Products," May 15, 1996, pages 52-53:

***If advertising is a monologue, sponsorship is a dialogue. Advertising is added on and can be screened out. With sponsorship, a company's message is incorporated into the action.** Specific product messages such as ²one-half the calories² are far more effectively communicated through a controllable medium such as advertising. But IEG contends that sponsorship generally outperforms advertising in its ability to establish qualitative attributes such as a enhancing a consumer's image of a brand, increasing favourability ratings and generating awareness. The sponsorship can suggest that the brand is sanctioned or approved, and sponsors hope that consumers will transfer the qualities of the event itself to the sponsor. It provides a positive*

²²³

Excerpt from International Events Group (IEG) "Sponsorship Report," Chicago, May 29, 1995.

emotional connection between people and a product that cannot be achieved through traditional advertising.²²⁴

- ED-47 FDA Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents:

p. 44528-44529:

The effect of sponsored events on the young people who attend or see these events is enormous. Advertising affects young people's opinion of tobacco products, first, by creating attractive and exciting images that can serve as a "badge" or identification, second, by utilizing multiple and prolonged exposure in a variety of media, thereby creating an impression of prevalence and normalcy about tobacco use, and finally, by associating the product with varied positive events and images. The sponsorship of events by tobacco companies uniquely achieves all three objectives. Sponsorship creates an association between the exciting, glamorous or fun event with the sponsoring entity. Whether at the live gate, or on television, young people will repeatedly see and begin to associate the event, which they are enjoying, with the imagery and appeal of the product. All of the attendant concerns of hero worship of the sports figures and glamorization of the product by identification with the event are present, whether there are thousands or hundreds of thousands of young people in attendance. Race car drivers are extremely popular with young people and often are looked up to as heroes. According to one promoter of NASCAR ...

Furthermore, sponsorship events present a prolonged period of time in which to expose the audience, including young people, to the imagery. Sponsorship events do not provide people with a momentary glimpse at the imagery, but from 1 to 2 or 3 hours of constant attractive imagery. The audience has more than enough time to associate the images of the sporting event or the concert with the product.

p. 44533:

Contrary to the comments cited, the FTC asserted, in its comment, that sponsorship is advertising, citing its 1992 consent order involving the Pinkerton Tobacco Co., (Consent Order) C-3364 (1992). The comment also stated that in 1995, the Department of Justice announced consent decrees resolving allegations that Philip Morris, Inc., and the owners of Madison Square Garden in New York City violated the Cigarette Act's ban prohibiting advertising for tobacco on television and other media regulated by FCC through the display of cigarette brand names and logos at live sporting events that were broadcast on television (*United States v. Madison Square Garden, L. P.*, No. 95-2228 (S.D.N.Y., April 7, 1995); *United States v. Philip Morris, Inc.*, No. 95-1077 (D.D.C. June 6, 1995)). The consent decrees prohibit Philip Morris and Madison Square Garden from placing cigarette advertising in places regularly in the camera's focus where they might be seen on television. The agency finds that sponsorship is advertising within the scope of this regulation. The claim by the comments that the Lorillard and Reynolds Tobacco

...

²²⁴

Reference to International Events Group (IEG), "Sponsorship Report," Chicago, May 29, 1995.

The IEG guide states that “[w]hat sponsorship generally accomplishes better [emphasis added] than advertising is establishing qualitative attributes, such as shaping consumers’ image of a brand, increasing favorability ratings, and generating awareness.” In addition, the IEG guide states that sponsorship is more effective than advertising in increasing “propensity to purchase.” This latter description of sponsorship falls within the courts definition of advertising in Public Citizen v. FTC, 869 F.2d at 1554, as “any action to call attention to a product so as to arouse a desire to buy.” The agency finds for all these reasons that sponsorship can be regulated as advertising under the act.

...

FDA concludes that sponsorship of events and sponsored teams and events is an advertising medium that is ineffective in influencing young people’s decision to engage in smoking behavior and tobacco use.

448. Numerous marketing documents drafted by the plaintiffs show that tobacco companies see event sponsorship as a form of “lifestyle” advertising. The association of a cigarette brand with the theme of an event or activity is also attuned with the “lifestyle” of the target market of tobacco companies:

SPONSORSHIP PROGRAM

Overview: The role of sponsorship is simply a means to an end to allow us to advertise.

SPONSORSHIP = ADVERTISING

WHY IS IT CRITICALLY IMPORTANT?

- *Brand advertising restrictions*
- *Sponsorships:*
 - *Reinforce brand strategy*
 - *Provide broadcast brand i.d.*
 - *Focus in-store communication*²²⁵

449. As regards the use of a brand on permanent installations, the connection in the mind of consumers is the same as that of event sponsorship. In effect, this allows the image of the permanent installation in question or the activities held there to be transferred to the product in question. For example, the name “Du Maurier Stadium” allows cigarettes to be associated with sporting events in the minds of consumers.
450. Sections 24 and 25 are also rationally connected to the purpose of the *Tobacco Act*, which is to protect young persons from being incited to use tobacco products.
451. The ban on sponsorship advertising, assimilated into “lifestyle advertising”, is also rationally connected to the purpose of the legislation.

²²⁵

D-192 - Export “A” Inc. – How Do We Build A Success Story, 1997 + Beyond (RJR-705), p. 80150 34961.

(2) Minimal impairment

452. The Attorney General of Canada maintains that sections 24 and 25 of the *Tobacco Act* limit freedom of expression to the least degree possible while succeeding in the purpose of the Act.
453. The ban on “lifestyle” advertising” meets the criterion of minimal impairment. This was the conclusion reached by the Supreme Court in 1995, and it also corresponds with the testimony of the tobacco companies before the court at that time.
454. As revealed in the documents cited in the section on rational connection, sponsorship advertising equals “lifestyle” advertising.
455. The purpose of sponsorship advertising is to create, in the minds of consumers, an association between the sponsored event, its image and the tobacco products.
456. This type of advertising in no way informs consumers regarding the product in question, and therefore has no connection to “information” advertising.
457. Allowing sponsorship advertising would be the same as allowing tobacco companies to indirectly accomplish what they can not do directly:

Moreover, in considering the comparative advantages of partial and full advertising prohibitions, it is also significant that, in countries where governments have instituted partial prohibitions upon tobacco advertising such as those suggested by the appellants, the tobacco companies have developed ingenious tactics to circumvent the restrictions. For example, when France attempted to institute a partial prohibition on tobacco advertising in the 1980s (by prohibiting "lifestyle" tobacco advertising but not informational or brand preference advertising), the tobacco companies devised techniques for associating their product with "lifestyle" images which included placing pictures on the brand name and reproducing those pictures when an advertisement showed the package, and taking out a full-page magazine advertisement and subcontracting three-quarters of the advertisement to Club Med, whose lifestyle advertisements contributed to a lifestyle association for the brand; see Luc Joossens, "Strategy of the Tobacco Industry Concerning Legislation on Tobacco Advertising in some Western European Countries"²²⁶

458. It must be remembered that the ban on “lifestyle” advertising includes all cigarette advertising that would, for example, show sporting, music or party scenes. If sponsorship advertising were permitted, tobacco companies could associate their name and “logo” with such activities and have the same result as with “lifestyle” advertising.

²²⁶

RJR-MacDonald Inc. v. Canada (P.G.) [1995] 3 S.C.R. 199, La Forest J., para.103.

459. The ban on sponsorship advertising meets minimal impairment criteria in the same way that the ban on “lifestyle” advertising does.
460. Thus, sponsorship promotion can therefore never be relegated to an inoffensive level as regards minimal impairment. Parliament was therefore justified in banning it completely.
461. Sponsorship advertising will not be fully banned until October 2003.
462. For the present time, section 24 allows a brand element to be included in the bottom portion of promotional material, not exceeding 10% of the display surface.
463. In addition, such sponsorship advertising is permitted in publications read mainly by adults, in mailings to adults, in locations where the sponsorship activities are held and in places to which young persons under 18 years of age do not have access.
464. To take into account the various conflicting interests in this matter, Parliament decided to defer the total ban of sponsorship advertising for 5 years:

*Some may ask why we have decided on a period of five years. **The five-year transition period provides event organizers with plenty of time and plenty of opportunities to seek alternative sponsors. In our consultations with those organizers, it was clear that if we were determined to eliminate the use of sponsorship as a promotional vehicle for tobacco products, and we are, then they wanted time to make alternative arrangements and they could.** In fact I know that process has already begun. For example, we as a government are very pleased that Air Canada will become the new title sponsor of the Formula One Canadian Grand Prix next year. We believe that the five-year time frame will allow other event organizers to demonstrate to other potential sponsors how valuable an association with their event can be. If this was all we were doing on tobacco control, it would be noteworthy enough. Yet we are actually doing far more and that is why Canada is recognized as a world leader in tobacco control. **Indeed we keep track of the steps that other governments are taking on this issue. I want to tell my hon. colleagues on both sides of this chamber that our approach is consistent with evolving international standards. Let me offer some examples. The European Union recently announced that it is moving in the same direction as we are. It intends to ban tobacco-sponsored promotions by the year 2006. It intends to pursue a transitional strategy on the way to that ban. Australia announced last week that it too will totally prohibit tobacco-sponsored promotions by the year 2006. The United States is moving ahead on actions that will limit the exposure of children to tobacco promotion in ways that are consistent with much that is already in our Tobacco Act.***²²⁷

227

ED-87, Proceedings of the House of Commons regarding Bill C-42 – 2nd reading – September 30, 1998 p. 56.

465. As regards permanent installations, impairment is also minimal, as the Act only limits the use of a brand on sports or cultural facilities. The plaintiffs can still display their corporate name on their factories.

(3) Benefits of the Act as opposed to its harmful effects

466. The Attorney General of Canada maintains that, in view of the nature of the Act and that of the right infringed upon in the present case, the prejudicial effects of limiting the rights of tobacco companies to carry out sponsorship advertising, for commercial purposes, for products that are themselves dangerous and a health risk for consumers, does not override the purpose of the Act.

E Sections 27 and 28 (Displaying brand elements on non-tobacco products)

467. Sections 27 and 28 read as follows:

27. No person shall furnish or promote a tobacco product if any of its brand elements is displayed on a non-tobacco product, other than an accessory, or is used with a service, if the non-tobacco product or service

(a) is associated with young persons or could be construed on reasonable grounds to be appealing to young persons; or

(b) is associated with a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring.

28. (1) Subject to the regulations, a person may sell a tobacco product, or advertise a tobacco product in accordance with section 22, if any of its brand elements is displayed on a non-tobacco product, other than an accessory, or used with a service, if the non-tobacco product or service does not fall within the criteria described in paragraphs 27(a) and (b).

(2) Subject to the regulations, a person may promote a non-tobacco product, other than an accessory, that displays a tobacco product-related brand element, or a service that uses a tobacco product-related brand element, to which section 27 does not apply.

468. Section 27 and 28 therefore concern the use of brands on products other than tobacco products or smoking accessories. Section 27 bans the use of brands on products that could be appealing to young persons or associated with a lifestyle. Section 28 provides for the consequential right to place a brand on a product and to promote it if such product is not covered by the ban in section 27.

(1) Rational connection

469. The Attorney General of Canada maintains that there is a rational connection between the purpose of the Act and the ban, set out in section 27, on placing brand elements on products other than tobacco products.

- D-166, Health Canada, “Analysis of Options for Tobacco Product Promotional Activity Restrictions”, p. 67:

First, most branded merchandising, judging from the type of article on offer, seems intended for youth or young adults as lifestyle accessories or fashion display. Second, some items (e.g. T-shirts, tote bags), when worn or carried as accessories, create a new advertising medium that can enter schools or other locations where tobacco product advertising would not normally be permitted, in effect ²giving the companies the opportunity to turn their customers into a promotional medium². Third, unlike other forms of tobacco product advertising, these items do not display health warning messages, even though the use of the brand/logo stands in for many of the connotative elements found in the product advertising copy. Fourth, by being both ubiquitous and seemingly innocuous in their social contexts, this type of advertisement may achieve greater market penetration than overt product advertising, simply because the marketing intention seems tangential to the merchandise's mundane daily use. The promotional value of branded merchandise is enhanced by its role in providing a comfort level for the presence of cigarette brand names in all social settings. [references omitted]

470. Numerous internal documents from the plaintiffs indicate that the tobacco industry uses commercial strategies such as “marketing” as a type of advertising that allows communication of “seductive impressions” of the brand, increasing its visibility, and thus increasing cigarette sales:

- RF-42 (RBH-1212) Benson & Hedges Fireworks:

p. 7414:

I think that brand visibility could be increased and enhanced. A lot of opportunities could be explored, here are just some ideas.

- *Small signs spread on site to indicate best viewing points.*
- *Big banners on fences and streets around the site.*
- *VIP area “brand identified” and recognizable from outside.*
- *Hostesses and helpers in Benson & Hedges uniforms (with real brand identification).*
- ***Brand identified items given or sold to public (t-shirt, hats, flags, balloons etc.).***
- *Brand identified items offered or sold to all restaurants, bars, stores on or close to the site (umbrellas, matches, ashtrays etc.).*

Other more “creative” ideas:

- *Is it feasible to have **bombs exploding in the shape of the Benson & Hedges name** (I’ve seen heart shapes, so why not letters?).*
- ***Plane flying over location with a long trailing B & H banner.***
- ***Parachutists coming down with gold and black Benson & Hedges parachute and distributing Benson & Hedges “giveaways”***
- *B & H airship flying on site.*

- “D-196 - Sponsorships – Communications Plans” – 1992 – ITL (ITL-176):

p. 13907:

COMMUNICATIONS EVENTS – PLAYER’S LTD.

STRATEGIES

In all support materials, brochures, etc. include where appropriate:

- *Mention of John Player and Sons*
- *Tradition (30 Years)*
- ***Portray image of self expression of freedom and independence and self reliance/independence.***

p. 14002:

MERCHANDISING

Although relatively unknown to our organization the use of merchandising has been an effective tool for various corporations internationally. (Hugo Boss clothing is an extension of its corporate imagery). Merchandising is an inexpensive way of broadening ones scope, into non traditional areas, such as sporting goods stores, bars, automotive centres another areas where the target market would shop. There are two elements to merchandising which are driven by separate types of items:

- 1. Motorsport fans will be driven to buy items from winning teams and home town heroes.***
- 2. The general target will be driven to buy items which position them against the image they wish to have. Fashion items not motorsport will drive these sales.***

471. The Food and Drug Administration (ED-47) described and denounced the use of marketing as follows:

p. 44524:

*In response, the agency concludes that the evidence presents a compelling case to prohibit the sale and distribution of all nontobacco items that are identified with a cigarette or smokeless tobacco product brand name or other identifying characteristic. The evidence establishes that these nontobacco items are readily available to young people and are attractive and appealing to them with as many as 40 to 50 percent of young smokers having at least one item (60 FR 41314 at 41336). **The imagery and the item itself create a badge product for the young person and permit him/her the means to portray identification.** FDA has shown that tobacco advertising plays out over many media, and that any media can effectively carry the advertising message. Moreover, **the agency recognizes that the tobacco industry has exploited loopholes in partial bans of advertising to move its imagery to different media. When advertising has been banned or severely restricted, the attractive imagery can be and has been replicated on nontobacco items that go anywhere, are seen everywhere, and are permanent, durable, and unavoidable.** By transferring the imagery to nontobacco items, the **companies have “thwarted” the attempts to reduce the appeal of tobacco products to children.** In addition, items, unlike advertisements in publications and on billboards, have little informational value. They exist solely to entertain, and to provide a badge that,*

as the Tobacco Institute asserted, allows the wearer to make a statement about his “social group” for all to see. But because tobacco is not a normal consumer product, it should not be treated like frivolity.

p. 44525:

*The [Institute of Medicine] Report pointed out that **the ubiquity of nontobacco items conveys the impression that tobacco use is the norm.** 230 As stated in section VI.D.3.c. of this document, this impression, that tobacco use is widespread and accepted, fosters experimentation with tobacco and smokeless tobacco by young people. This fact led the IOM to recommend that the use of tobacco product logos on nontobacco items be prohibited. 231 The IOM said that this and several other related steps (including requiring the use of the text-only format) were necessary to eliminate those features of advertising that tend to encourage tobacco use by children and youths. Thus, the prohibition on the use of these logos will directly advance FDA’s interest. The IOM’s recommendation provides significant evidence of this fact.*

472. Examples of marketing were also provided to the Court:

- D-11 – T-Shirt The “Bruiser” that includes the Export “A” X
- D-151 – Catalogue of Joe Camel products
- D-152 – Joe Camel cigarette case with Camel T-Shirt

473. Just as there is a connection between advertising and tobacco use, there is a rational connection between banning the placing of tobacco product brands on products other than tobacco products and the purpose of the Act.

(2) **Minimal impairment**

474. The Attorney General of Canada maintains that section 27 and 28 infringe to the least degree possible on the plaintiffs’ freedom of expression.

475. In view of the concern of McLachlin J. in the 1995 decision regarding the “absolute” nature of banning the placing of brands on articles other than tobacco products, the legislator decided, with the *Tobacco Act*, to limit to the least degree possible the practice known as “merchandising” by only banning articles (“non-tobacco products”) that are associated with young persons or a lifestyle.²²⁸

²²⁸ *Tobacco Act*, s. 2, definition of “accessory”.

(3) Benefits of the Act as opposed to its harmful effects

476. The Attorney General of Canada maintains that, in view of the nature of the Act and that of the right infringed upon in the present case, the prejudicial effects of limiting the rights of tobacco companies to carry out sponsorship advertising, for commercial purposes, for products that are themselves dangerous and a health risk to consumers, do not override the purpose of the Act.

F Section 20 (False promotion)

477. Section 20 of the Act reads as follows:

20. No person shall promote a tobacco product by any means, including by means of the packaging, that are false, misleading or deceptive or that are likely to create an erroneous impression about the characteristics, health effects or health hazards of the tobacco product or its emissions.

478. Section 20 infringes on paragraph 2(b), but is justified in view of s. 1.

479. It is interesting to note that, in the United States, the Supreme Court ruled that false promotion is not protected by the first amendment to the constitution, which guarantees freedom of expression (see *Central Hudson Gas & Elec. Corp. v. Public Service Commission of N.Y.*, (1980) 447 U.S. 557, at 566).

480. Several provisions found in other laws are similar to section 20. *The Food and Drugs Act*, R.S.C., 1985, c. F-27, contains the following provisions:

5. (1) No person shall label, package, treat, process, sell or advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.

9. (1) No person shall label, package, treat, process, sell or advertise any drug in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.

20. (1) No person shall label, package, treat, process, sell or advertise any device in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its design, construction, performance, intended use, quantity, character, value, composition, merit or safety.

481. Furthermore, the *Competition Act*, R.S.C., 1985, c. C-34, includes the following section:

52. (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

...

(4) In a prosecution for a contravention of this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into

account in determining whether or not the representation is false or misleading in a material respect.

482. For its part, the *Consumer Protection Act*, R.S.Q., c. P-40.1, indicates the following in sections 219 and 228:

219. No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer.

228. No merchant, manufacturer or advertiser may fail to mention an important fact in any representation made to a consumer.

483. In *R. v. Wholesale Travel Group*, [1991] 3 S.C.R. 154, the provisions of the Competition Act banning false promotion were contested under sections 7 and 11(d) of the Charter.

484. It was alleged that these provisions were unconstitutional, particularly because they created a reverse onus of proof. The Supreme Court rejected this submission. It is appropriate to note the comments by Lamer C.J. regarding the importance of cracking down on false advertising:²²⁹

I am prepared to accept that preventing false/misleading advertisers from benefiting from false/misleading advertising and protecting consumers from the detrimental effects of false/misleading advertising is sufficiently important to warrant overriding constitutionally protected rights and freedoms.

485. In *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232, McLachlin J. conceded, for the Court, that "protect[ing] the public from irresponsible and misleading advertising" (p. 249) was a sufficiently important objective to justify limiting freedom of expression.

486. In a commercial advertising context in which the constitutional value of freedom of expression is based solely on the possibility of informing the consumer, it seems justified for government to ban expression that would mislead the consumer.

487. This ban is all the more justified when it concerns a product for human consumption that has adverse affects on health. Section 20 of the *Tobacco Act* is aimed at such a legitimate objective.

488. It is obvious that the purpose of the provision is valid and satisfies criteria for a balance between the benefits of the Act and its harmful effects.

489. McLachlin J. furthermore noted at page 344 of her judgment in *RJR-MacDonald* that measures such as those provided for in the *Quebec Consumer Protection Act* (including section 219, banning false advertising) constituted a reasonable infringement on freedom of expression.

²²⁹

R. v. Wholesale Travel Group, [1991] 3 S.C.R. 154, at 191.

490. See also decisions on packaging and labelling:

- *RJR-MacDonald v. Attorney General of Canada*, [1995] 3 S.C.R. 199:

La Forest J. at page 321:

In a modern state, labelling of products, and especially products for human consumption, are subject to state regulation as a matter of course.

...

Seen in this way, the mandatory health warnings under s. 9 are no different from unattributed labelling requirements under the Hazardous Products Act, under which manufacturers of hazardous products are required to place unattributed warnings, such as "DANGER" or "POISON", and hazard symbols, such as skull and crossbones on their products; see Consumer Chemicals and Containers Regulations, SOR/88-556. I should add that the issue has ramifications for many other spheres of activity where individuals may in certain prescribed circumstances be required to place danger signs on facilities used by the public or on construction sites, and so on.

- *Regina v. Steinberg's Ltd.*, 80 D.L.R. (3d) 741:

At page 751:

*...that a statute which in its entirety deals with honest labelling has a pith and substance which is the protection of the consumer, and is legislation "in relation to" criminal law. **The categories of crime are not closed**, and the development of new commercial trade practices in recent years requires that these categories be broadened to include what has become known as consumer protection legislation.*

At page 753:

*The Consumer Packaging and Labelling Act has the public purpose of safeguarding the peace and security of consumers (i.e., their peace of mind and their security arising from the knowledge that they are not being fraudulently imposed upon by suppliers **in cases where the consumers' means of knowledge is clearly inferior to that of the supplier**) and of preventing **the commercially immoral acts of false or intentionally misleading labelling and packaging**, and thus, in my opinion, complies squarely with the tests prescribed by Lord Atkin and Rand, J., supra.*

- *R. v. Westfair Foods Ltd.*, 111 Man.R. (2d) 47:

At page 50:

*[13] The **Consumer Packaging and Labelling Act** has two primary purposes. The first purpose is to ensure that any information provided to a consumer on a prepackaged product is not false or misleading in any way. However, there is a second purpose and that is to provide information to consumers so they can make informed choices. That is the mischief which s. 4 is intended to prevent.*

At page 51:

The purpose of this legislation is clearly to arm the consumer with the knowledge necessary to make an informed buying decision about products being offered for sale.

- *R. v. Importations cachères Hahamovitch Inc.*, 500-36-001436-982:

At page 2:

[TRANSLATION]

In effect, protection of public health, as is the case here, justifies federal Parliament enacting standards regarding packaging of food products and, in the event of a contravention, imposing penalties on summary conviction. This makes it a criminal matter of federal jurisdiction and this issue was definitively ruled on by the Supreme Court in R. v. Wetmore (1983) 3 S.C.R. 284.

In other areas, the following decisions are similar: RJR-MacDonald Inc. v. the Attorney General of Canada (1995) 3 S.C.R. 1999 and R. v. Hydro-Québec (1997) 3 S.C.R. 213."

491. Furthermore, note that, in *R. v. Publications Groupe R.R. International Inc.* (1993) R.J.Q. 1269 (C.Q.), the provisions of the *Competition Act* regarding false advertising were deemed valid as regards freedom of expression provided for by the first section of the Charter. The court indicated the following at pages 1277-1278:

[TRANSLATION]

No one can claim that personal fulfillment is attained by cheating and falsehood, by financial consequences such as the impoverishment of those who are unduly exploited or the undue enrichment of those who take advantage of false advertising. Consumers are the losers in false advertising. It in no way helps them in making a consumer selection. The ban on false advertising and its criminalization affirm this fundamental value of honesty and truth.

...

The ban is clearly set forth here and the purpose is clear and so important. We cannot pretend that this ban will have a crippling effect on the existence of freedom of expression commercially. This is not an over-reaction by the legislator and there is truly no other restrictive measure that would respond to this limited problem in such a direct, legitimate and credible way.

The imposition of such a restriction on freedom of expression is justified in a society that claims to be free and democratic. It is an indispensable measure in modern politics in view of the vulnerability of the consumer and the refinement of advertising techniques and messages.

The ban on false representation is such that it infringes to the least degree possible freedom of expression and certainly constitutes a minimal and reasonable impairment of advertising by retailers.

Obviously, the ban on false advertising does not raise a fundamental problem of freedom of thought or freedom of opinion. The case here concerns the freedom to deliberately lie to potential consumers, the right to cheat and

manipulate in order to make profit. Advertising is the doorway to fraud in this manner, as consumers could believe it and the advertising could mislead them or cause them to be misled, discrediting both the economic system and our democracy and depriving the government of an major instrument for deterrence.

G Section 21 (Testimonials and celebrity endorsements)

492. The plaintiffs ITL and RBH maintain that section 21 is unconstitutional on the grounds that it is necessarily incidental to the other provisions they claim to be null in Part IV of the act. Section 21 reads as follows:

(1) No person shall promote a tobacco product by means of a testimonial or an endorsement, however displayed or communicated.

(2) For the purposes of subsection (1), the depiction of a person, character or animal, whether real or fictional, is considered to be a testimonial for, or an endorsement of, the product.

(3) This section does not apply to a trademark that appeared on a tobacco product for sale in Canada on December 2, 1996.

493. Section 21 deals with a very specific topic, that of testimonials in promotion. In the event of other provisions of Part IV being ruled null, the Attorney General of Canada sees no reason why section 21 should be declared null for being necessarily incidental to the other provisions. It can very well be applied independently.

494. Professor P.W. Hogg, in his work *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997), p. 344, describes the rule of severability in the following terms:

The rule which courts have developed is that severance is inappropriate when the remaining good part is “so inextricably bound up with the part declared invalid that what remains cannot independently survive”. [reference omitted]

495. In cases regarding shared jurisdiction, the courts most often found that elements of the law are necessarily incidental. However, as regards cases involving the Charter, severability is the rule applied in the large majority of cases. Professor Hogg states, on pp 345-346:

Severance is far more common in Charter cases than in federalism cases. Although the same test is applied, it is highly unusual to find that an entire statute is struck down under the Charter of Rights. Charter review is not based on the pith and substance of a law, but on the question whether either the “purpose” or the “effect” of the law abridges a Charter right. Under this test, it is usually only a single section or a few sections of a statute that abridge a Charter right, and it is usually beyond argument that the rest of the statute can independently survive. For example, it could hardly be argued that the invalidity of the search and seizure power of the Competition Act entailed the striking down of the entire Act, or that the invalidity of the felony-murder rule entailed the striking down of the entire Criminal Code.

There seems to be only one Charter case in the Supreme Court of Canada where the entire statute was struck down, and that was R. v. Big M Drug Mart (1985), which held that the Lord's Day Act was wholly bad. In every other case, the offending provision was severed from the rest of the statute, usually without argument or discussion. It seems reasonable to conclude that the presumption against severance in federalism cases has been replaced in Charter cases by a presumption in favour of severance. Severance is an important tool of judicial restraint, because it circumscribes the impact of a successful Charter attack on a law. The law that falls is normally only a small portion of the legislative structure, and the rest of the structure remains standing. [references omitted]

496. Section 21 seeks to ensure that tobacco product manufacturers do not associate their products with artists, athletes or other famous personalities, or even fictitious personalities such as Joe Camel. This provision is aimed at avoiding having young persons associate tobacco products with their heroes, such as auto racer Jacques Villeneuve.²³⁰

497. This association between famous personalities of any kind and tobacco products has been denounced by the Food and Drug Administration (ED-47);

p. 44529:

...glamorous event that they enjoy for a prolonged period of time. Often, celebrities participating in these events are wearing clothes and hats bearing the brand name and attractive imagery, and young people come to associate athletes who they admire with tobacco products. The amount of time viewed and the positive association with the event are incalculable as persuasive messages.

p. 44530:

Sponsorship events actively create an association between tobacco and event enthusiasts. People under the age of 18 are still forming attitudes and beliefs about tobacco use, see smoking and smokeless tobacco use as a coping mechanism, a gauge of maturity, a way to enter a new peer group, or as a means to display independence (60 FR 41314 at 41329). This final rule is intended to break the link between tobacco brand-sponsored events and images and use tobacco by young people. In addition, the tobacco industry itself has recognized the vulnerability of young people to advertising featuring sports heroes and other celebrities. In its 1994 Code, the cigarette industry promised that "No sports or celebrity testimonials shall be used or those of others who would have special appeal to persons under 21 years of age." 240 The impact of tobacco's association with the race driver, the car, or the event is no less powerful and no less persuasive.

498. Section 21 respects the minimal impairment rule and that of proportionality.

²³⁰

See I-36 where cowboy personalities appear on Marlboro cigarette packages.

H Section 30 (Retail displays)

499. Section 30 reads as follows:

(1) Subject to the regulations, any person may display, at retail, a tobacco product or an accessory that displays a tobacco product-related brand element.

(2) A retailer of tobacco products may post, in accordance with the regulations, signs at retail that indicate the availability of tobacco products and their price.

500. It is appropriate to note that the legal argument put forth by the plaintiffs is that section 30 is necessarily incidental to the other sections of Part IV and should, as such, be null.

501. Section 30 of the Act allows:

- (a) The display, in a retail establishment, of tobacco products or accessories that display a tobacco product-related brand element;
- (b) A display, in the retail establishment indicating that tobacco products are sold there; and
- (c) An indication of the prices for the tobacco products sold there.

502. Section 30 of the Act deals with retailers, as defined in Section 2. The plaintiffs are not retailers, but rather manufacturers.²³¹

Senator Milne: Seventeen million dollars in illegal sales at retail stores is a fair chunk.

Mr. Parker: If there were any substance to the accusation, I could deal with it. However, we do not sell to minors; we do not sell to adults. We sell through wholesalers. The final sale is not executed by the tobacco company.

503. The plaintiffs have neither interest nor status by which to contest the constitutionality of section 30 and their claim is not supported by fact.

Henderson v. Attorney General of Quebec, 500-05-065031-013,
August 16, 2002, Michel Côté J.:

[TRANSLATION]

60. The same is true as regards this element identifying a situation that could lead the Court to give an abstract opinion, which is not to be done. On this point, the Attorney General states:

'The motion by the plaintiffs is not receivable as it is not founded on any real or immediate difficulty, but constitutes a request for a legal opinion based on hypotheses and conjecture.

²³¹

Testimony by Robert Parker, Chief Executive Officer of the Canadian Tobacco Manufacturers Council (of which the 3 plaintiffs are members) before the Standing Senate Committee on Legal and Constitutional Affairs, April 1, 1997 (ED-70, p. 37).

In effect, no concrete application of Act 99 is being contested in this case, only a hypothetical situation of applying this Act without any factual basis.’ ”

61. *In support of which he cites numerous experts, of which the Court would accept only a few. For example:*

D. GRENIER. La requête en jugement déclaratoire en droit public québécois. Cowansville, Y. Blais, 2^e éd., 1999, pp. 97-98 and

p. 106:

²... in the absence of a real difficulty leading the courts to deny the applicant the interest required to initiate proceedings under the terms of section 453 C.P.C. The function of the courts not being to simply provide legal consultation, hypotheses, conjecture and academic situations that would lead to the motion for declaratory judgement to be rejected. In effect, purely hypothetical situations do not create a real difficulty under section 453 C.P.C. (underlining by the litigant)

... even if the terms of a contract are ambiguous, this ambiguity may well fail to cause any difficulties to the contracting parties. The same is true for the text of a law. Thus, for example, the Consumer Protection Bureau may interpret its incorporating act in a way that is not shared by one or many consumers. This interpretation, erroneous or not, does not in itself create any difficulty. If, however, this interpretation leads to an application, then and only then is a real difficulty created.

Donderi v. A.G. of Quebec, C.S. Montréal, No. 500-05-038492-987, June 26, 1998, Maughan J., pp. 6, 7 and 8:

The jurisprudence has consistently held that no one has the right to invoke the jurisdiction of a competent court to obtain a judgment on the interpretation or application of legislation or on its constitutionality when that person is not either directly affected by the legislation or is not threatened by sanctions for a violation of the legislation. As distasteful as the legislation may be to the individual wishing to bring the matter to Court for a judgment, that is not a reason by itself to seek the Court's assistance.

Therefore, in exercising its discretion as to whether a petitioner has the right to have a genuine problem resolved by way of a declaratory judgment pursuant to Article 453 C.P.C., the Court is of the opinion that the controversy must be of a litigious nature. Article 453 is not to be used to resolve problems which are mainly political in nature....

As a general rule, courts do not issue opinions on hypothetical questions. They render judgments on real disputes. It is the opinion of this Court that as matters now stand Mr. Donderi's interest in the dispute involving his billboard is hypothetical, at best.

Operation Dismantle v. R. [1985] 1 S.C.R. 441, p. 447, 454, 455, 457:

I have concluded that the causal link between the actions of the Canadian government, and the alleged violation of appellants'

rights under the Charter is simply too uncertain, speculative and hypothetical to sustain a cause of action.

The point of this review is not to quarrel with the allegations made by the appellants about the results of cruise missile testing. They are, of course, entitled to their opinion and belief. Rather, I wish to highlight that they are raising matters that, in my opinion, lie in the realm of conjecture, rather than fact.

...

The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. ...

... the preventative function of the declaratory judgment must be based on more than mere hypothetical consequences ... (underlining by the litigant)

Operation Dismantle v. R. [1985] 1 S.C.R. 441, pp. 481, 482 and 486 (Wilson J.):

... as the respondents point out, declaratory relief is only discretionary in the sense that a court may refuse it even if the case for it has been made out ... The Court, therefore, on a motion to strike on the basis that no reasonable cause of action has been disclosed in the statement of claim is not in any sense usurping the discretionary power of the trial court. ... (underlining by the litigant).

Also see *Baron v. Canada* [1993] 1 S.C.R. 416, Sopinka J., at pages 452-453:

Finally, s. 231.3(5) is attacked for allowing the same kind of "wholesale search and seizures" without prior authorization found under the predecessor legislation to violate s. 8 of the Charter.

...

*The difficulty in dealing with this question is that we face it in a factual vacuum since there is no indication that documents were seized in reliance on this provision. We are always loathe to adjudicate constitutional issues in the absence of a factual foundation: *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086; *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, at pp. 361 and 366; *R v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at pp. 762 and 767-68. I think the issue should be left to be resolved until such time as this Court is presented with a situation in which the provision was relied upon to seize documents.*

504. There is a multitude of ways of displaying tobacco products in a retail establishment.
505. During the rebuttal process, the plaintiffs attempted to introduce as evidence, by Ed Ricard, that Health Canada inspectors had destroyed posters, arrows and colour bands. The Attorney General of Canada reiterates his objection regarding this testimony and regarding the filing of exhibits P-149 and P-152.
506. This evidence cannot be introduced during the rebuttal process and contravenes the hearsay rule.

507. The purpose of Section 30 is to allow retailers to indicate the availability of products and their prices. This provision does not allow promotion, in the broad sense, of the products being sold.
508. The matter of knowing whether or not a poster respects section 30 is a question of fact. It cannot be examined in the abstract. There may be cases in which the factual context allows the conclusion that the object or poster in question was not simply indicating the availability or price of products, but promoting in a larger sense. The size of the poster, its location, the design used, the use of other elements to attract attention and the general way in which everything is displayed could be factors in concluding that section 30 has been violated.
509. Young persons are exposed to this promotion at points of sale. For this reason, the limitation on freedom of expression at retail points is justified for the same reasons as the limitations regarding the location provided for under subsection 22(2) of the Act.
510. The plaintiffs allege that application of section 30 by Health Canada inspectors has at times been abused over the last few months.
511. Firstly, the Attorney General of Canada maintains that the evidence in this regard is not receivable, as it constitutes hearsay and was filed in rebuttal rather than as evidence in chief.
512. Secondly, the Court cannot adjudicate in advance on individual or hypothetical cases. It must only interpret the law as a whole. Associated cases regarding application of section 30 must be ruled upon in future litigation, taking into account the context of each case.
513. As noted by McLachlin C.J. in *Sharpe*, it is not because the Act must be interpreted in a constitutional debate that all of its specific application cases must necessarily be ruled upon in advance. In paragraph 32 of the majority opinion, she writes:

The interpretation of the section is a necessary pre-condition to the determination of constitutionality, although it is understood, of course, that courts in future cases may refine the analysis in light of the facts and considerations that emerge with experience.

514. The fact that a law has been applied in an abusive manner does not render it unconstitutional. The manner in which civil servants apply a law does not make it null. In *Little Sisters Book and Art Emporium v. Canada*, [2000] 2 S.C.R. 1120, Binnie J., on behalf of the majority, writes in paragraph 77:

While these complaints have some substance, they address the statutory scheme as operated by officials rather than the statutory scheme itself. [italics in original]

515. He continues in paragraph 133:

I think the Customs legislation is quite capable of being applied in a manner consistent with respect for Charter rights.

516. Exhibits P-168 and P-169 do not have the scope accorded to them by the plaintiffs. It only informs them of the existence of section 30 by providing an example of what the law permits. Health Canada's approach corroborates the testimony of Ms. Ferguson, stating that any party would be advised before proceedings are instituted under the Act.

I Section 31 (Dissemination)

517. The plaintiffs ITL and RBH allege that section 31 infringes freedom of expression. This section reads as follows:

(1) No person shall, on behalf of another person, with or without consideration, publish, broadcast or otherwise disseminate any promotion that is prohibited by this part.

(2) Subsection (1) does not apply to the distribution for sale of an imported publication or the retransmission of radio or television broadcasts that originate outside Canada.

(3) No person in Canada shall, by means of a publication that is published outside Canada, a broadcast that originates outside Canada or any communication other than a publication or broadcast that originates outside Canada, promote any product the promotion of which is regulated under this part, or disseminate promotional material that contains a tobacco product-related brand element in a way that is contrary to this part.

518. Subsection 31(1) states that the provisions regarding promotion apply both to the tobacco industry and to media that publish advertising material on behalf of the industry.

519. As a preliminary point, the Attorney General of Canada maintains that the plaintiffs do not have an interest in contesting subsection 31(3). The plaintiffs are not media and no media is a party in this case. The constitutional rights of others cannot be invoked except in defence against a criminal charge (on this point, see our arguments regarding section 7 of the Charter). As this is a case of declaratory judgment, the plaintiffs cannot invoke the constitutional rights of others. We also refer the Court to *Henderson, supra*.

520. If the plaintiffs had the required interest, the Attorney General of Canada admits that this provision would violate paragraph 2(b) of the Charter. It is, however, justified under section 1, for the same reasons as the provisions of Part IV are justified when applied to manufacturers.

521. Note that in *R. v. Butler*, [1992] 1 S.C.R. 452, the provision of the *Criminal Code* banning publication of obscene material could include both the media and the

person on behalf of whom the material was published, without presenting a constitutional problem. Section 163 of the *Criminal Code* reads:

(1) Every one commits an offence who

(a) makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution or circulation any obscene written matter, picture, model, phonograph record or other thing whatever;

522. Finally, as regards subsection 31(3), the purpose of this section is to forbid manufacturers from circumventing the provisions in Part IV by publishing in newspapers or broadcasts originating outside Canada and distributed in Canada. This provision is only a clarification of the applicability of the provisions in Part IV and is included in the justifying reasons for the various provisions.²³²
523. Furthermore, we must note that the extraterritorial scope of subsection 31(3) is being challenged. This matter will be addressed later in this text.

J Section 18 of the Act (the definition of “promotion”)

524. We must remember that section 19 of the Act bans all “promotion” of tobacco products, with the exception of “information” and “brand preference” advertising contained in section 22. The text of section 19 reads as follows:

No person shall promote a tobacco product or a tobacco product-related brand element except as authorized by this Act or the regulations.

525. Section 18 of the Act defines the scope of the term promotion in the following way:

In this Part, “promotion” means a representation about a product or service by any means, whether directly or indirectly, including any communication of information about a product or service and its price and distribution, that is likely to influence and shape attitudes, beliefs and behaviours about the product or service.

526. The plaintiffs allege that the combined effects of sections 18 and 19 can lead to a ban on a variety of expressions other than commercial.
527. The plaintiffs allege that the Act could result in banning, for example, broadcasts or press releases from people in the industry, presentations to parliamentary committees, and releasing of scientific research results financed by the industry (see the transcript from January 14, 2002, pp. 35-36).
528. We must remember that, when the time comes to rule between two statutory interpretations, it is common to favour that which preserves the constitutional validity of the law (see P.W. Hogg, *Constitutional Law of Canada*, 4th ed.

²³² See also: Constitutional Court - *Order stating that the first paragraph of section 10 of the Law regulating the Restriction of the Use of Tobacco Products does not conflict with the Constitution*, p. 10954 / No. 104 / 19/12/2001 *Official Journal of the Republic of Slovenia*, para. 35.

Toronto: Carswell, 1996, pp. 346-47, 675-76; P. A. Côté, *Interpretation of Legislation in Canada*, 3rd ed. Montréal: Éditions Thémis, 1999, pp. 468-72).

529. It is therefore important to closely examine the scope of the “advertising” ban set forth in sections 18 and 19 of the Act before determining whether or not the latter complies with the Charter. We will see that a correct interpretation of section 19 dispels any doubt regarding its constitutional validity.
530. Subsection 18(1) is written so as to further cover commercial means that are not included in traditional advertising.
531. In this way, Parliament wishes to prevent cigarette manufacturers from using innovative promotional techniques to circumvent the bans set forth in the Act.

Moreover, in considering the comparative advantages of partial and full advertising prohibitions, it is also significant that, in countries where governments have instituted partial prohibitions upon tobacco advertising such as those suggested by the appellants, the tobacco companies have developed ingenious tactics to circumvent the restrictions. For example, when France attempted to institute a partial prohibition on tobacco advertising in the 1980s (by prohibiting "lifestyle" tobacco advertising but not informational or brand preference advertising), the tobacco companies devised techniques for associating their product with "lifestyle" images which included placing pictures on the brand name and reproducing those pictures when an advertisement showed the package, and taking out a full-page magazine advertisement and subcontracting three-quarters of the advertisement to Club Med, whose lifestyle advertisements contributed to a lifestyle association for the brand; see Luc Joossens, "Strategy of the Tobacco Industry Concerning Legislation on Tobacco Advertising in some Western European Countries."²³³

532. The Food and Drug Administration also concluded that the tobacco industry had developed ingenious marketing techniques to circumvent the restrictions or bans put in place in various countries:

*FDA finds support for the need for comprehensive regulation in the experiences of other countries which have enacted and put into place some form of restrictions on the advertising of tobacco. Some comments discussed the experience in other countries in which tobacco advertising has been banned. These comments indicated that **in countries that have enacted restrictions on advertising that were not comprehensive, the industry was able to continue advertising and portraying attractive imagery in media left uncovered by regulations. For example, Canada, Finland, Great Britain, and Australia enacted regulations of tobacco advertising that did not completely ban or restrict all forms of advertising and promotion. In each of those instances, according to the comments, the tobacco industry was able to take advantage of loopholes in the system to continue to advertise to reach their target audience. Thus, in Canada the advertising ban, which did not ban nontobacco items, was accompanied by the increased use of nontobacco items that carried the tobacco brand name as a mechanism for continuing to advertise the tobacco brand and its prior image. In Great Britain, sophisticated***

²³³

RJR-MacDonald Inc. v. Canada (A.G.), [1995] 3 S.C.R. 199, La Forest J., para. 103.

colorful advertisements appeared when the use of human figures in tobacco advertising was banned; in Australia, loopholes in sports sponsorship provisions enabled the industry to continue sports advertising.

Another comment detailed numerous other examples of tobacco companies continuing to advertise effectively in spite of a ban or restrictions on advertising. For example, this comment noted that after **France banned all cigarette advertising in magazines, Philip Morris set up a travel agency and advertised "Marlboro Country Travel" in French magazines** (Thus, although there was no longer any "cigarette advertising," Philip Morris was able to continue using its western, cowboy theme in advertisements for a travel agency). The comment noted further that in **Europe, advertising for cigarettes was replaced by advertisements, using the same imagery, for Camel and Marlboro sports watches and Camel boots. In Malaysia, cigarette companies set up travel agencies called Marlboro, Kent, and Peter Stuyvesant, clothing stores named Camel, jewelry stores named for Benson and Hedges, luxury car dealerships named More, Salem record stores and Salem and More concert and movie promotions to advertise cigarettes in a country that has banned cigarette advertising. FDA finds that these comments provide strong support for the need for the advertising restrictions to be comprehensive and apply to all advertising media to be effective.**²³⁴

533. The counsel for ITL claimed and still claim that the TPCA instituted a total ban on tobacco product advertising products in Canada.
534. The reality was totally different, as explains Me. Simon Potter, counsel for ITL, to M. V. Bottomley, Secretary of State for Health, in England, on January 27, 1993: (exhibit D-56):

At page 19, the Smee Report contends that the TPCA's ad ban was "tight", wide-ranging and largely immediate" (paragraph 63, page 19) This is clearly wrong and this error has a clear effect on the conclusion which follow.

*The Act came into force on January 1, 1989. Its only immediate effect was on Canadian advertising of Canadian tobacco products in Canadian periodicals. It has had and can have no effect on any advertising seen in foreign periodicals, specifically exempted by the Act though that advertising represented a very large percentage of all advertising seen by Canadians in the beginning of 1991. In-store advertising was not set to disappear until January 1, 1993, and that disappearance was postponed two weeks by the Québec Court of Appeal's decision last December that it would be unjust to require the dismantling of such advertising while that Court's judgement on the validity of the Act is pending. **That is, Canadians have seen a good deal of tobacco advertising since the advent of the Act and will, even were the Act valid, continue to see a good deal of overflow advertising.***

page 4:

...1989 and 1990, because of the massive price increases to which Canadian taxing authorities subjected Canadian smokers, market the beginning of a huge influx of smuggled cigarettes into the Canadian market, either American

²³⁴

ED-47 FDA Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, p. 44490.

cigarettes or exported Canadian cigarettes which can still be had much cheaper just across the border (a very short drive for the majority of Canadians). By 1992, it has been estimated that a good 25% of the cigarettes consumed in Canada were cigarettes which had escaped the tax-man; some of this perhaps escaped the statistics used by the Smee Report to measure Canadian consumption. Even if it did not, however, the remarkable increase in price in recent years and the remarkable increase in black market sales of cigarettes in Canada in recent years must throw into doubt the figure plugged into the Smee recession and the conclusions drawn from that regression.

535. The purpose of subsection 18(1) is to cover all methods of communication that correspond to the definition of the term “promotion” in the field of marketing.
536. The term “advertising” necessarily implies a commercial aspect, an important fact to remember when interpreting subsection 18(1). Thus, a communication means used by the tobacco industry could only be subject to subsection 18(1) if it included, directly or indirectly, a certain commercial aspect aimed at consumers.
537. Minister Dingwall explained the situation before the Senate Committee responsible for studying Bill C-71:²³⁵

Growers feared that the bill would unduly interfere in the internal workings of their industry. At report stage, we amended the definition and application clauses of the bill to assure them that it focuses on matters which touch the public rather than the internal workings of industry.

538. The Food and Drug Administration also studied what should or should not be included in the definition of advertising and concluded that there was no reason to adopt a narrower definition of the term “advertising,” but that the term concerned commercial advertising:²³⁶

*The agency carefully considered whether it should attempt to define the term “advertising” more explicitly than it did. **“Advertising” as a term is constantly evolving, as new media and new techniques of marketing emerge.** Although its boundaries are understood (and were provided in the preamble to the 1995 proposed rule), there is no one accepted definition. FTC is the Federal agency with general responsibility for regulating most consumer advertising. Yet neither FTC nor any of its rules define the general term “advertising.” The agency agrees with the approach taken by FTC and continues to believe that the term “advertising” should not be defined any more specifically. Thus, FDA finds that the description of advertising in the preamble to the 1995 proposed rule is appropriate: Labelling and advertising are used throughout this subpart to include all commercial uses of the brand name of a product (alone or in conjunction with other words), logo, symbol, motto, selling message, or any other indicia of product identification similar or identical to that used for any brand of cigarette or smokeless tobacco product. However,*

²³⁵ ED-74 Senate - Standing Committee on Legal and Constitutional Affairs - Meeting 56 - 1997-04-09 - Tobacco Act C-71.

²³⁶ ED-47 FDA Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents pp 44500-44501.

*labeling and advertising would exclude package labels, which would be covered under proposed subpart C. (60 FR 41314 at 41334) The agency also agrees with comments that state that it must provide some context for the application of so open ended a definition. **For example, comments contended that “commercial use” could be interpreted to include such items as trade advertising (communication between manufacturers, wholesalers, distributors, and retailers), shareholder reports, and possibly even communications with the news media. This was not FDA’s intent. This rule is a consumer based regulation; it is not the intention of FDA to include purely business related communications. Thus, noncommercial uses would not be affected.** These would include such uses as unpaid press statements, signs on factories noting locations, business cards, and stockholder reports. While many of these uses would be ordinary and necessary business expenses, they would not be commercial uses in the context of the rule’s restrictions on tobacco advertising affecting minors’ tobacco use.*

539. Distinction should be made between what falls into and does not fall into the category of commercial expression.
540. Paragraph 18(2)(c) illustrates well the intention of the legislator to only include commercial promotion in the definition of the term “promotion”. Based on this section, advertising that is not aimed at consumers is not included in the definition of the term “promotion”:

(2) This Part does not apply to

(c) a promotion by a tobacco grower or a manufacturer that is directed at tobacco growers, manufacturers, persons who distribute tobacco products or retailers but not, either directly or indirectly, at consumers.

541. Paragraphs 18(2)(a) and (b) seek to protect the public by ensuring that the tobacco industry does not disseminate information regarding tobacco or its health effects that would undermine the government’s public health objectives:

Information management is used to foster and sustain doubts about the health risks of tobacco products and tobacco smoke by challenging the scientific findings about adverse health effects. This is accomplished by the production and dissemination of counter-studies and selective critiques that defend the corporate image and shore up smokers’ denial of health concerns. This, in turn, weakens the widespread impetus among established smokers to quit: almost one-half (46%) of Canadian smokers report either thinking about quitting or trying to quit. Constant challenges to and denial of health effects may also undermine health education efforts directed at the potential starter population. In Canada, studies contracted by the tobacco industry have focused on second-hand smoke (ETS) and the alleged economic balance sheet of the tobacco products industry. Information management activity of this type may help retain the existing market, slow the adoption of anti-smoking ordinances, and pave the way for pro-smoking

rationalizations on the part of younger starters without actually targeting youth as a specific market segment.²³⁷

542. It is the context of facts that will determine the essence of the communication in question.
543. Certain criteria permit an analysis of the context of a communication. We must note, however, that the number of criteria is not necessarily exhaustive and that other relevant factors could be added in the future. We must also emphasize that none of these criteria is material in and of itself. They must be examined as a whole, in the light of the general context, to determine if a specific communication can be qualified as “promotion” under the terms of the Act.

1- What is the content of the message in question?

First, the words used in the message must be examined. For example, a tobacco company publishes a text the express purpose of which is to have the *Tobacco Act* amended through the electoral process. A political argument is developed for this purpose in the message. Such observations would lead one to believe that it is not a commercial communication.

2- What is the location of the communication and the medium used?

The medium used, the target audience or the location chosen to communicate the message help in determining the nature of the expression in question. For example, if an industry representative makes presentations in favour of tobacco before a parliamentary committee, one would be inclined to determine that the main aspect of this expression is to participate in political dialogue.

In the same way, if a text were published in a specialized scientific, political, legal or philosophical publication, there would be a tendency to categorize the text in question as non-commercial communication. We must remember, however, that none of the criteria submitted is fully material and that a communication could be considered as commercial promotion even if it is in a specialized publication.

3- What is the form of the communication?

Thus, tone used will be important in determining whether it is an attempt to address consumers (commercial expression) or simply to participate in a societal exchange of ideas (non-commercial expression). It would be more appropriate to consider that the expression falls into a non-commercial category if it is in the form of a detailed and relatively sober discussion. However, if the expression uses colour, illustrations, brief texts and eye-catching titles, such

²³⁷

D-271, Health Canada, *Analysis of Options for Tobacco Product Promotional Activity Restrictions*, p. 53.

argues for the conclusion that it is in reality, a commercial expression in the legal sense.

4- When does the communication take place?

The temporal context in which a communication is issued could, in some cases, be relevant to its classification. For example, if comments were issued in newspapers at a time when legislative changes are planned by the government, one would be more inclined to think that those communications were directed to the audience as voters rather than as consumers. In the same way, comments during an election campaign could be viewed in the same way.

544. By examining the message in the light of these factors and the overall context, the courts should be able to differentiate, over the course of cases, between commercial and non-commercial expression for the purposes of applying subsection 18(1) of the Act. This interpretation dispels any doubt raised by the plaintiffs regarding the constitutional validity of the provision.

545. The second paragraph of section 18 reads as follows:

(2) This Part does not apply to

(a) a literary, dramatic, musical, cinematographic, scientific, educational or artistic work, production or performance that uses or depicts a tobacco product or tobacco product-related brand element, whatever the mode or form of its expression, if no consideration is given directly or indirectly for that use or depiction in the work, production or performance;

(b) a report, commentary or opinion in respect of a tobacco product or a brand of tobacco product if no consideration is given by a manufacturer or retailer, directly or indirectly, for the reference to the tobacco product or brand in that report, commentary or opinion; or

(c) a promotion by a tobacco grower or a manufacturer that is directed at tobacco growers, manufacturers, persons who distribute tobacco products or retailers but not, either directly or indirectly, at consumers.

546. The ban set forth in subsection 18(2) does not target promotion by a third party, unless that party was paid by a manufacturer or retailer, nor does this provision target communication between members of the tobacco industry.

547. The exceptions set forth in subsection 18(2) illustrate that the purpose of the Act is to limit only commercial expression, that which includes a marketing aspect. In other words, the Act bans promotional activities aimed at consumers.

K Subsection 59(c) of the Act (publication of facts relating to the conviction)

548. Subsection 59(c) reads:

59. When the court is sentencing an offender who has been convicted of an offence under this Act, in addition to any other punishment that may be imposed, the court may, having regard to the nature of the offence and the

circumstances surrounding its commission, make an order having any or all of the following effects:... (c) publish, in the manner directed by the court, the facts relating to the commission of the offence;

549. The plaintiffs allege that this provision infringes on freedom of expression. The Attorney General of Canada maintains, on the contrary, that there is no infringement of paragraph 2(b) of the Charter and that, if there is infringement, it is reasonable under section 1.
550. We must first mention that similar provisions are found in many federal and provincial laws:
- *Canada Shipping Act*, R.S.C. 1985, c. S-9, para. 664.1(b) (“publish the facts relating to the conviction”)
 - *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, para. 291(1)(g) (“publish, in the manner directed by the court, the facts relating to the conviction”)
 - *Nuclear Safety and Control Act*, S.C. 1997, c. 9, para. 60(1)(c) (“publish, in the prescribed manner and at the offender's own expense, the facts relating to the conviction”)
 - *Manganese-Based Fuel Additives Act*, S.C. 1997, c. 11, para. 18(1)(c) (“publish, in any manner that the court considers appropriate, the facts relating to the commission of the offence”)
 - *Migratory Birds Convention Act, 1994*, S.C. 1994, c. 22, para. 16(c) (“publish, in any manner the court considers appropriate, the facts relating to the commission of the offence”)
 - *Energy Efficiency Act*, S.C. 1992, c. 36, para. 33(1)(b) (“publish, in any manner the court considers appropriate, the facts relating to the commission of the offence”)
 - *Canada Wildlife Act*, R.S.C. 1985, c. W-9, para. 16(c) (“publish, in any manner that the court considers appropriate, the facts relating to the commission of the offence”)
 - *Oceans Act*, S.C. 1996, c. 31, para. 39.9(c) (“publish, in any manner that the court considers appropriate, the facts relating to the commission of the offence”)
 - *Fisheries Act*, R.S.C. 1985, c. F-14, para. 79.2(c) (“publish, in any manner the court considers appropriate, the facts relating to the commission of the offence”)
 - *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, S.C. 1992, c. 52, para. 22(6)(c) (“publish, in any manner the court considers appropriate, the facts relating to the commission of the offence”)

551. At the provincial level, several laws also include this type of provision:

In Alberta:

- *Environmental Protection and Enhancement Act*, R.S.A. 2000, c. E-12, para. 234(1)(c) (“directing the offender to publish, in the prescribed manner and at the offender's cost, the facts relating to the conviction”)
- *Water Act*, R.S.A. 2000, c. W-3, para. 148 (1)(c) (“directing the offender to publish, in the prescribed manner and at the offender's cost, the facts relating to the conviction”)
- *Wildlife Act*, R.S.A. 2000, c. W-10, para. 97(c) (“to publish the facts relating to that act or omission”)

In British Columbia:

- *Health Act*, R.S.B.C. 1996, c. 179, para. 104.1(1)(g) (“directing the person to publish, in any manner the court considers appropriate, the facts relating to the commission of the offence”)
- *Waste Management Act*, R.S.B.C. 1996, c. 482, para. 56.1(1)(h) (“directing the person to publish, in any manner the court considers appropriate, the facts relating to the commission of the offence”)
- *Water Act*, R.S.B.C. 1996, c. 483, para. 41.1(1)(h) (“directing the person to publish, in any manner the court considers appropriate, the facts relating to the commission of the offence”)
- *Wildlife Act*, R.S.B.C. 1996, c. 488, para. 84.1(1)(h) (“directing the person to publish, in any manner the court considers appropriate, the facts relating to the commission of the offence”)
- *Forest Land Reserve Act*, R.S.B.C. 1996, c. 158, para. 29.92 (1)(c) (“publish, at the person's own cost, the facts relating to the conviction”)
- *Forest Practices Code of British Columbia Act*, R.S.B.C. 1996, c. 159, para. 155(c) (“direct the person to publish, at the person's own cost, the facts relating to the conviction”)

552. The purpose of these provisions, as with paragraph 59(c) of the *Tobacco Act*, is not to undermine freedom of expression, as conviction is already a public fact. By publishing an account of the conviction, the offender is not issuing a statement, but is only undertaking the steps and assuming the expenses related to the publication of the statement of guilt. A judge could not, pursuant to paragraph 59(c), force an offender to admit guilt if the offender does not believe he or she is guilty, nor force the offender to express any other idea.

553. Several of the laws cited above expressly state that, if the offender does not carry out his or her obligation, the minister or another responsible authority may publish the account of the conviction and recover the costs from the offender.

Canadian Environmental Protection Act, 1999, subs. 291(2):

(2) Where an offender fails to comply with an order made under paragraph (1)(g) directing the publication of the facts relating to the offence, the Minister may publish the facts in compliance with the order and recover the costs of publication from the offender.

See also the provisions of the following acts cited above:

- *Nuclear Safety and Control Act*, subs. 65(1)
- *Manganese-Based Additives Act*, subs. 18(2)
- *Energy Efficiency Act*, S.C. 1992, c. 36, subs. 33(3)
- *Fisheries Act*, R.S.C. 1985, c. F-14, subs. 79.2(2)
- *Environmental Protection and Enhancement Act*, (Alberta), subs. 234(2) and (3)
- *Water Act*, (Alberta), subs. 148(2) and (3)
- *Wildlife Act*, (Alberta), subs. 98(2)
- *Health Act*, (BC), subs. 104.1(6)
- *Waste Management Act*, (BC), subs. 56.1(2)
- *Water Act*, (BC), s. 41.1(2)
- *Wildlife Act*, (BC), s. 84.1(2)

554. This interpretation of the Act preserves its constitutional validity and must be given preference over those of the plaintiffs.
555. Even if forcing the offender to undertake steps and assume expenses related to the statement of guilt were to infringe upon paragraph 2(b), this infringement would be justifiable under section 1.
556. The laws cited above present common characteristics: they are, for the most part, of a regulatory nature, regarding the environment or health.

PART V

THE CHALLENGE REGARDING SECTION 7 OF THE CHARTER

557. Section 7 of the Charter reads as follows:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

558. The plaintiffs maintain that various sections of the *Tobacco Act* are incompatible with section 7 of the Charter. The challenges in this matter are of three types.

- 1- Sections 18, 20, 22, 24 and 25 of the *Tobacco Act* infringe upon section 7 of the Charter due to vagueness.
- 2- Sections 58, 59(c) and 59(f) of the Act infringe upon section 7 on the grounds of their overbreadth.
- 3- Sections 19, 20, 22 and 27 do not allow the defence due diligence, and thus infringe upon section 7 of the Charter.

A Introductory remark: Section 7 does not apply to corporate entities

559. The plaintiffs cannot invoke section 7 of the Charter.

560. Case law has established that a corporate entity cannot, in principle, invoke the protection of section 7, as the words stating that “Everyone has the right to life, liberty and security of the person” only applies to human beings.

561. As a corporate entity cannot be subject to imprisonment, it cannot claim that its right to “liberty” is infringed upon by the law.

562. In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, Irwin Toy Ltd., a corporation, filed a motion for declaratory judgment in order to have the provisions of the Quebec *Consumer Protection Act* banning advertising aimed at children ruled unconstitutional, particularly alleging infringement of section 7 of the Charter.

563. The Court refused to apply section 7 on the grounds that it had been invoked by a corporate entity. On behalf of the majority, Lamer and Wilson JJ., as well as Dickson C.J., wrote the following at pages 1002-1004 of a joint opinion:

Imprisonment is clearly one of the penalties envisioned for contravention of, inter alia, ss. 248 and 249 of the Act. A corporation is not, for obvious reasons, subject to imprisonment. By virtue of s. 282 of the Act, directors of corporations are deemed to be parties to offences committed by the corporation and are therefore liable to the penalties listed above. It is, therefore, the directors and representatives of corporations who risk, pursuant to the Act, a restriction of liberty of the kind envisioned in Re B.C. Motor Vehicle Act, [1985] 2 S.C.R.

486. *In the present case, proceedings are brought only against the company and not against any individuals. In the context of physical restriction to liberty, it would be left to officers of a company whose conduct was impugned pursuant to s. 282 of the Act to raise a s. 7 argument in terms of vagueness or imputation of corporate liability to individuals. This circumstance does not arise in the present case.*

In order to put forward a s. 7 argument in a case of this kind where the officers of the corporation are not named as parties to the proceedings, the corporation would have to urge that its own life, liberty or security of the person was being deprived in a manner not in accordance with the principles of fundamental justice. In our opinion, a corporation cannot avail itself of the protection offered by s. 7 of the Charter. First, we would have to conceive of a manner in which a corporation could be deprived of its "life, liberty or security of the person". We have already noted that it is nonsensical to speak of a corporation being put in jail. ...

*That is, read as a whole, it appears to us that this section was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved; only human beings can enjoy these rights. "Everyone" then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings. In this regard, the case of *R. v. Big M Drug Mart Ltd.*, *supra*, is of no application. There are no penal proceedings pending in the case at hand, so the principle articulated in *Big M Drug Mart* is not involved.*

564. In *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, Lamer C.J. (in majority on this point) summarizes the state of case law as follows at page 180:

*In *Irwin Toy Ltd. v. Quebec (Attorney General)*, *supra*, this Court held that only human beings can enjoy the right to life, liberty and security of the person guaranteed by s. 7 of the Charter, and that a corporation was therefore unable to seek a declaration that certain provisions of the Consumer Protection Act infringed s. 7 of the Charter and could not be upheld under s. 1 of the Charter. However, the majority was careful to note that there were no penal proceedings pending in the case and that the principle enunciated in *R. v. Big M Drug Mart Ltd.* was therefore not involved.*

*Finally, in this Court's recent decision in *Dywidag Systems International, Canada Ltd. v. Zutphen Brothers Construction Ltd.*, [1990] 1 S.C.R. 705, Justice Cory (for the Court) referred at p. 709 to the holding in *R. v. Big M Drug Mart Ltd.* as an "exception to this general principle" that a corporation cannot avail itself of the protection offered by s. 7 of the Charter.*

565. Section 7 of the Charter can be invoked exceptionally if the legislative provision being challenged is likely to infringe upon the rights of a physical person and if the corporate entity is itself facing a criminal charge.
566. In fact, the courts allow a constitutional right of a third party to be invoked when the corporate entity is defending itself against a criminal charge, which is not the case before us.

567. In *R. v. Big M. Drug Mart*, [1985] 1 S.C.R. 295, p. 313-14, the Supreme Court allowed a corporate entity facing criminal charges to invoke the freedom of religion of another, even though it is obvious that a company does not, in itself, have freedom of religion. Apart from these very specific exceptions, it is impossible for a corporate entity to invoke section 7 of the Charter.
568. As the plaintiffs are not subject to any criminal proceedings in the case before us, it is obvious that they cannot invoke the protection of section 7 for another person, as in *Big M. Drug Mart*. As a result, section 7 of the Charter is inapplicable in the present case.

B Infringement on “life, liberty and security of the person”

569. If the Court were to find that section 7 applies to the plaintiffs, it must be noted that the provisions being challenged would not contravene section 7.
570. Section 7 includes two elements. The first states that “Everyone has the right to life, liberty and security of the person.” The second states “the right not to be deprived thereof except in accordance with the principles of fundamental justice.”
571. These principles, in and of themselves, cannot render a law null.
572. It is the responsibility of the person at the origin of a challenge based on section 7 of the Charter to show, on one hand, that the state is infringing on life, liberty and security of the person and, on the other hand, that the state, in doing so, is not in compliance with the principles of fundamental justice.

R. v. Beare, [1988] 2 S.C.R. 387, La Forest J. (writing on behalf of the majority), expresses the same idea at page 401:

The analysis of s. 7 of the Charter involves two steps. To trigger its operation there must first be a finding that there has been a deprivation of the right to “life, liberty and security of the person” and, secondly, that that deprivation is contrary to the principles of fundamental justice.

Pearlman v. Manitoba Law Society Judicial Committee, [1991] 2 S.C.R. 869, Iacobucci J., on behalf of the majority, at page 881:

In other words, if no interest in...life, liberty or security of the person is implicated, then the analysis stops there and there is no need to continue on to a consideration of the principles of fundamental justice. Correspondingly, if no principle of fundamental justice is contravened, s. 7 is not violated and there is no need to consider whether there has been a deprivation of life, liberty or security of the person.

573. To be able to conclude that the principles of fundamental justice were not respected, the right to “life, liberty and security” must first have been infringed:

Re. B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, Lamer J., on behalf of the majority, stated at page 501:

In the framework of a purposive analysis, designed to ascertain the purpose of the s. 7 guarantee and "the interests it was meant to protect" (R. v. Big M Drug Mart Ltd., supra), it is clear to me that the interests which are meant to be protected by the words "and the right not to be deprived thereof except in accordance with the principles of fundamental justice" of s. 7 are the life, liberty and security of the person. The principles of fundamental justice, on the other hand, are not a protected interest, but rather a qualifier of the right not to be deprived of life, liberty and security of the person. [our underlining].

574. The plaintiffs are challenging several provisions of the *Tobacco Act* and its regulations under Section 7 of the Charter.
575. Among these provisions, several do not provide for any prison sentence. Furthermore, a fine is the only sanction set forth in the following sections:
- Sections 24 and 25 of the Act, regarding sponsorship (challenged under section 7 of the Charter on the grounds that the bridge provisions modifying the *Tobacco Act* are vague)
 - Sections 58 and 59(f) of the Act (challenged under section 7 of the Charter on the grounds that they are overbroad)
576. A fine does not limit the right to life, liberty or security of the person. Therefore, the sections listed above cannot infringe upon section 7 of the Charter. The analysis must end there, and it should not even be necessary to examine whether these provisions infringe upon the principles of fundamental justice.
577. We will now examine the challenges relating to the principles of fundamental justice set forth in section 7. We will first examine the alleged vagueness of certain provisions, then the alleged overbreadth of sections 58, 59(c) and 59(f) of the Act, and finally the allegations regarding the absence of a due diligence defence in sections 19, 20, 22, 24 and 27.

C. Legislative vagueness

578. The plaintiffs allege that sections 18 (definition of the term "promotion"), 20 (false promotion), 22(3) (advertising "appealing to young persons") and 22(4) ("lifestyle" advertising) of the *Tobacco Act* are vague to the point of infringing upon the "principles of fundamental justice" set forth in section 7.

In a case in which section 7 would be applicable and analysis would include an examination of the "principles of fundamental justice", we affirm that the sections mentioned above are sufficiently clear and constitutional.

579. Clarity of laws is a "principle of fundamental justice" set forth in section 7 of the Charter.
580. The Supreme Court ruled, in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, p. 626, that "The threshold for finding a law vague is relatively high". Gonthier J. noted, on behalf of the Court, at page 627:

Factors to be considered in determining whether a law is too vague include (a) the need for flexibility and the interpretative role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist. [references omitted]

p. 639:

Indeed no higher requirement as to certainty can be imposed on law in our modern State. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be made. Guidance, not direction, of conduct is a more realistic objective.

p. 639-640 :

A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics.

581. The Supreme Court always promotes a reserved approach as regards vagueness.

In *Irwin Toy Ltd. v. Quebec (Attorney General)*, *supra*, it was alleged that sections 248 and 249 of the *Consumer Protection Act* banning commercial advertising aimed at persons under 13 years of age was "unclear and contradictory" and did not provide sufficient indications to allow the courts to determine whether or not the advertising was aimed at children. The majority opinion, written jointly by Dickson C.J. and Lamer and Wilson JJ., states at page 983:

Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary

element, because the standard can never specify all the instances in which it applies.

In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code, supra*, the matter was raised of vagueness in infractions related to prostitution and common bawdy houses. In this regard, Lamer J. notes that "The fact that a particular legislative term is open to varying interpretations by the courts is not fatal" (p. 1157).

In *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, it was claimed that the term "engage in work", used in section 33 of the federal *Public Service Act*, was too vague. Sopinka J. writes for the Court, on pp 96 - 97, that the term "undoubtedly present[s] considerable difficulty in application to a specific situation [...] but difficulty of interpretation cannot be equated with the absence of any intelligible standard".

In *R. v. Finta*, [1994] 1 S.C.R. 701, Cory J., with the support of Gonthier and Major JJ., writes the following regarding the notion of war crimes and crimes against humanity in the *Criminal Code*, at pages 867-868:

In my view, the fact that the entire body of international law is not codified and that reference must be made to opinions of experts and legal writing in interpreting it does not in itself make the legislation vague or uncertain. This material is often helpful in determining the proper interpretations to be given to a statute. Further, the fact that there may be differences of opinion among international law experts does not necessarily make the legislation vague. It is ultimately for the court to determine the interpretation that is to be given to a statute. That questions of law and of fact arise in the interpretation of these provisions and their application in specific circumstances does not render them vague or uncertain.

In *Young v. Young*, [1993] 4 S.C.R. 3, L'Heureux-Dubé J. writes the following regarding the notion of "interests of the child" included in the *Divorce Act*, at page 74:

...it is not necessary that such provisions carry a precise technical meaning or provide certainty as to the result (R. v. Butler, supra; Osborne v. Canada (Treasury Board), supra, and R. v. Nova Scotia Pharmaceutical Society, supra). Rather, the standard requires that the provisions permit the framing of an intelligible legal debate with respect to the objectives contained in the legislation.

In *R. v. Lucas*, [1998] 1 S.C.R. 439, p. 460, Cory J. noted, regarding infractions on grounds of "defamation" set forth in the *Criminal Code*:

While the sections in question may not be perfectly drafted it must be remembered that words and phrases cannot always be measured with scientific precision.

582. To date, only one law has been ruled null by the Supreme Court on grounds of vagueness.

583. In *R. v. Morales*, [1992] 3 S.C.R. 711, the Court ruled a provision of the *Criminal Code* null that allowed a judge to refuse to grant interim release to an accused awaiting trial if doing so was in the "public interest".
584. In 1993 (one year after *Morales*), the Court of Appeal for Ontario ruled, in *R. v. Farinacci*, (1993) 86 C.C.C. (3d) 32, that the expression "public interest" was not null when used in the context of subsection 679(3) of the *Criminal Code*.
585. Section 679(3) allowed preventive detention of an accused appealing a conviction, as long as doing so was in the "public interest". In *Farinacci*, the purpose of section 679(3) allowed the courts to interpret the notion of "public interest" as set forth in section 673(3) of the Code. Arbour J. (then with the Court of Appeal for Ontario) addressed the matter at page 46:

I can find nothing suggesting that "public interest" will be unconstitutionally vague every time it appears in a statute conferring discretion, nor can I find anything to suggest that "public interest" has no workable meaning in the constitutional context governing s. 679 of the Criminal Code.

586. The clarity of a legislative provision is determined by its context.
587. In *Ontario v. Canadian Pacific*, [1995] 2 S.C.R. 1031, the matter was raised of the validity, due to vagueness, of a provincial law that created an offence for having caused degradation "of the natural environment for any use that can be made of it."
588. The Court ruled that it was not necessary to examine the provision in the absolute to judge its constitutional validity. It would draw on the context of the provision in question, pragmatic considerations, case law (pp. 1085-1086) and definitions of the terms provided by outside sources (p. 1081) and found that the provision of the law was sufficiently intelligible.
589. Certain factors may lead the courts to show more flexibility regarding the clarity of terms used. Four factors should be noted.

(1) Purpose of the Act

590. There can be numerous cases in which the legislative purpose does not lend itself to a precise codification.
591. In *Canadian Pacific*, the Court noted the fact that the purpose of the legislation, environmental protection, does not lend itself to a precise codification. Behaviour likely to deteriorate the environment can be varied and, above all, unpredictable. More precise codification would have compromised the purposes of the law (pp. 1070-1072).
592. The codification of "offences tending to corrupt morals" set forth in section 163 et seq. of the *Criminal Code* are good examples of provisions whose broad formulation is necessary due to the type of purpose.

593. The behaviour targeted can be as varied and unpredictable as it is difficult, even impossible, to draft detailed laws that would cover all behaviour that it seeks to prohibit.
594. The *Tobacco Act*, its provisions and regulations deal with a subject that does not lend itself to precise codification, that of marketing, which is constantly evolving.
595. The plaintiffs and other tobacco producers use a multitude of promotional techniques that constantly evolve to increase sales of their products, and have at their disposal considerable financial resources for doing so.
596. Too narrow a codification would be ineffective, as it could be contravened by increasingly subtle promotional techniques.

(2) Regulatory nature of the Act

597. Regulatory legislation must be subject to a less rigorous judicial examination²³⁸ for three reasons.
598. First, a person who chooses to carry out a regulated activity is deemed to also accept certain risks related to the regulation.
599. Second, the aim of regulatory legislation is to protect vulnerable members of a modern society.
600. Third, the social consequences stemming from a conviction under a regulatory law are not as major as those stemming from a criminal conviction.
601. The *Tobacco Act* is a regulatory act. The plaintiff JTI MacDonald furthermore admitted this fact before the Senate Standing Committee on Legal and Constitutional Affairs on April 1, 1997 (see the proceedings of the Senate Standing Committee on Legal and Constitutional Affairs – Issue 52 – Testimony of Mr. Collin Irving - [p. 20 of 45]): "...when it comes to regulatory crimes or regulatory offences -- and I agree that this is one...".

(3) Societal values

602. Whether or not citizens appreciate that particular conduct is subject to legislative sanction is inextricably linked to societal values.
603. In *Canadian Pacific*, this factor played a role in reducing the need for precision, as the law was linked to societal values: environmental protection (p. 1075).
604. The *Tobacco Act* also calls on fundamental societal values: the protection of public health and the protection of young persons from inducements to smoke.

²³⁸ *R. v. Wholesale Travel Group*, [1991] 3 S.C.R. 154, at 227 et seq. and *Canadian Pacific*, at 1077.

605. The plaintiffs are fully aware of the existence of these fundamental values.
606. They have admitted the real and pressing need described in section 4 of the *Tobacco Act*.
607. They admitted before the Court of Appeal that lifestyle advertising could constitute an inducement for young persons to become consumers.
608. They admitted in this case the importance of minimizing exposure of young persons to their advertising.²³⁹

[W]e want to minimize whenever possible the exposure of these ads to underage smokers. Again I reiterate, this is a very important thing for us, we take this very seriously. . . .

To the extent that an underage person sees that image . . . we do everything we can do to minimize that. [our emphasis]

609. Although they continue to deny the existence of a rational connection between tobacco product promotion and use, they have adopted a voluntary code aimed at providing a framework for their promotional activities.
610. Their parent corporations also adopted a voluntary code that provides that tobacco product promotion must not be appealing to young persons.
611. The representative of the Canadian Tobacco Manufacturers Council, Mr. Robert Parker, stated before the Senate Committee on October 29, 1998:²⁴⁰

Given the known and inherent risks of tobacco consumption, the industry agrees that the product as well as its marketing, promotion and sale are legitimate subjects for government regulation. Those risks also justify continuing programs by government to persuade Canadians not to use the product.

612. Being well aware of the existence of these fundamental values, the plaintiffs can evolve in the "area of risk" described in the *Tobacco Act*. The plaintiffs fully understand the issues at hand and have sufficient expertise to guide themselves through what is permitted and what is banned.

(4) The limit of discretionary power in enforcing the Act

613. A law must not be so devoid of precision in its content that a conviction will automatically flow from the decision to prosecute (*Nova Scotia Pharmaceutical, supra*, p. 609).
614. Prosecution undertaken pursuant to the *Tobacco Act* in no way risks automatically resulting in conviction.

²³⁹ Lance Newman: March 14, 2000 (p.m.), pp. 108-109.

²⁴⁰ ED-90 Standing Committee on Health - Bill C-42 - 1998-10-29 p. 48.

D Alleged vagueness of section 20 of the Act (False promotion)

615. Section 20 of the Act reads as follows:

No person shall promote a tobacco product by any means, including by means of the packaging, that are false, misleading or deceptive or that are likely to create an erroneous impression about the characteristics, health effects or health hazards of the tobacco product or its emissions.

616. The plaintiffs allege that this section violates section 7 of the Charter due to its vagueness.

617. Section 20 is not vague in the constitutional sense of the term.

618. Section 20 of the Act is almost identical to subsections 5(1) and 9(1) of the *Food and Drugs Act*, (1985) R.S.C., c. F-27:

5.(1) No person shall label, package, treat, process, sell or advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.

619. These sections have been interpreted on numerous occasions by Canadian courts.

620. In *R. v. Sun Glow Foodservice Ltd*, [1990] B.C.J. No 2517, Lambert J. addressed section 5(1), on behalf of the Court of Appeal of British Columbia:

In my opinion, there were a number of errors in law in the reasons of the trial judge. It was an error to say that the words "in a manner likely to create an erroneous impression" referred to something that was to happen in the future. It was an error to say that the Crown must prove that persons were actually misled.

621. In *R. v. King*, [1988] B.C.J. No 2326, January 27, 1988, a judge of the British Columbia County Court determined that a provision similar to section 20, section 121(1) of the *Unemployment Act*, was not so vague as to infringe upon section 7 of the Charter:

121(1) Every person is guilty of an offence punishable on summary conviction who: (a) in relation to any claim for benefit, makes a statement or representation that he knows to be false or misleading.

622. The words used in section 20 are terms commonly used in legislative texts. The courts have already interpreted and applied them.

E Alleged vagueness of the term "appealing to young persons?"

(subs. 22(3))

623. Subsection 22(3) reads as follows:

Subsection (2) does not apply to lifestyle advertising or advertising that could be construed on reasonable grounds to be appealing to young persons. [our emphasis]

624. The idea of "reasonable grounds" has been applied for decades. The courts have an abundance of case law in this matter and it can in no way be considered vague.

R. v. Bernshaw, [1995] 1 S.C.R. 254, L'Heureux-Dubé J., with the support of Cory and Iacobucci JJ., at pages 304-305:

This Court has previously referred to the standard of "reasonable and probable grounds" as one of "credibly-based probability": Hunter v. Southam Inc., [1984] 2 S.C.R. 145, at p. 167; Baron v. Canada, [1993] 1 S.C.R. 416, at p. 446, and, on another occasion, of "reasonable probability" or "reasonable belief": R. v. Debot, [1989] 2 S.C.R. 1140, at p. 1166 (per Wilson J.)

625. As regards the word "appealing" and the French term "attrayant," although their sense is general, they are common terms that lend themselves to interpretation by the courts.

626. The plaintiffs have all the research and marketing tools for determining if advertising is reasonably appealing to young persons.

627. The voluntary codes adopted by the plaintiffs and their parent corporations also refer to this notion of "appeal" to young people.²⁴¹

F Alleged vagueness of the term "lifestyle advertising" (subs. 22(3) and 22(4))

628. Subsections 22(3) and 22(4) deal with "lifestyle" advertising in the following terms:

22(3) Subsection (2) does not apply to lifestyle advertising or advertising that could be construed on reasonable grounds to be appealing to young persons.

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

"lifestyle advertising" means advertising that associates a product with, or evokes a positive or negative emotion about or image of, a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring.

629. The plaintiffs know what lifestyle advertising is, as it was they who proposed to the Superior Court, to the Court of Appeal and to the Supreme Court to

²⁴¹ See, *inter alia*, D-1.

differentiate between this type of advertising and information or brand-preference advertising:

*The next step in the proportionality analysis is to determine whether the legislative means chosen impair the right or freedom in question as little as possible. **The appellants submit that Parliament has unjustifiably imposed a complete prohibition on tobacco advertising and promotion when it could have imposed a partial prohibition with equal effectiveness. They suggest that Parliament could have instituted a partial prohibition by forbidding "lifestyle" advertising (which seeks to promote an image by associating the consumption of the product with a particular lifestyle) or advertising directed at children, without at the same time prohibiting "brand preference" advertising (which seeks to promote one brand over another based on the colour and design of the package) or "informational" advertising (which seeks to inform the consumer about product content, taste and strength and the availability of different or new brands).***²⁴²

630. In *RJR-MacDonald*, [1993] R.J.Q. 375 (C.A.), Brossard J. of the Court of Appeal of Quebec gave the following definition of "lifestyle" advertising at page 437:

[TRANSLATION]

As regards positive advertising, I would say that, based on the evidence, it is of three types: that which contains primarily information regarding tar, nicotine and carbon dioxide content of the brand in question; that aimed solely at promoting one brand over another using colour, package design and presentation; and finally that which also seeks to promote a brand over another, by creating an image and associating a lifestyle with its use: that is lifestyle advertising.

631. At the Supreme Court, La Forest J., for his part, noted the following facts at page 298:

Mr. P. Hoult, ex-CEO of Imperial, testified at trial that lifestyle advertising is designed to create certain associations in the minds of consumers, and in the case of EXPORT cigarettes, an association with enjoyment, outdoors and youth. Similarly, in "Overview 1988", an internal document prepared by Imperial, it was stated that one of the philosophies governing its marketing activities was to

[s]upport the continued social acceptability of smoking through industry and/or corporate action (e.g. product quality, positive lifestyle advertising, selective field activities and marketing public relations programs).

632. In *Canadian Pacific*, *supra*, Gonthier J. observes, at page 1085, that sources outside the Act (extrinsic evidence) can assist in its interpretation.
633. The concept of "lifestyle" advertising is found in various documents dealing with tobacco product marketing:

²⁴² *RJR-MacDonald Inc. v. Canada (A.G.)* [1995] 3 S.C.R. 199, La Forest J., para. 95.

D-271 Health Canada, Analysis of Options for Tobacco Product Promotional Activity Restrictions:

p. 15:

Nevertheless, the term "lifestyle" may be applied to or encompass any marketing approach or device that conveys through imagery or otherwise connotes in association with a product, "a slice of life". By implication, the 'lifestyle' approach suggests social meaning, or status for the advertised product beyond its physical use by the consumer. Some marketing researchers use the term "transformational" advertising, as distinguished from 'informational' advertising, linking the former to late stages of the product life cycle when the market communication objectives are to differentiate brands (in an established product category), build brand image and maintain brand distinctiveness.⁹ This description of the characteristics and role played by...

p. 16:

In their Voluntary Packaging and Advertising Code, the tobacco manufacturers define "lifestyle" as "the depiction of people in advertising". Nonetheless, promotion derived from "lifestyle" marketing analyses need not be keyed to explicit depictions of people or even exclusively to imagery. Objects, images, suggestive or persuasive slogans and even sounds or colours may have or may convey a "lifestyle" implication relating to the appeal, desires or interests of identifiable social groupings or of how one might feel, be perceived or wish to present oneself in everyday life by using the advertised product. Such elements are associated with a product in order to "position" that product in a way that is expected to promote its purchase by consumers in the targeted segments (For discussion of "lifestyle" aspect of colours in event marketing, see Sections 6.4.1, 6.6 and 7.5.1).

634. The National Cancer Institute of Canada wrote in its report, at page 8:

"Lifestyle" or "image" advertising is one of the primary tactics used to market tobacco. Marketing messages are crafted to show the product in situations depicting independence, virility, fun, and other positive self-image traits. Over time, through multiple exposures, the consumer develops a mental picture or "image" that associates tobacco use with these desirable situations:

As used popularly, lifestyle refers to the varieties of consumer behaviours, as manifest by patterns of choices in fashions, hairstyles, adornments, recreation, sexual preferences, occupational roles, religion, politics, transportation, food, etc. Lifestyle advertising is the association of products and brands with these behaviours and/or traits... Many textbooks on advertising do not use the terminology of "lifestyle advertising", preferring other terminology such as "image advertising" or "transformational advertising", as contrasted with information advertising (Wells et al, 1989). Transformational advertising builds a "product personality and image" in order to "make the experience (of consumption) richer, warmer, and more enjoyable (Wells et al. 1989). Lifestyle portrayals and associations can easily be accomplished by objects and settings, with the people absent and only implied, or if present dominated by props and staging, for example rock tickets on the seat of a motorcycle" (Pollay, 1995).

635. In addition, numerous internal documents from the plaintiffs indicate that the concept of "lifestyle advertising" ("brand imagery") is familiar to them and that they regularly use it.²⁴³
636. The numerous references cited show that the expression "lifestyle advertising" is not vague.
637. It has also been defined on several occasions by the plaintiffs themselves, both in their marketing documents and in presentations to the Court.
638. Even if "lifestyle advertising" is referred to in various terms ("image advertising," "motivation with psychological appeals", "lifestyle advertising" or "transformational advertising"), and even if this concept is applied differently based on context, the fact remains that its definition is sufficiently clear to be able to guide the Court in its decisions.

G Alleged overbreadth of sections 58 and 59(f) of the *Tobacco Act*

639. Sections 58 and 59(f) of the *Tobacco Act* read as follows:

58. If an offender has been convicted of an offence under this Act and the court is satisfied that as a result of the commission of the offence the offender acquired any monetary benefits or that monetary benefits accrued to the offender, the court may order the offender to pay, despite the maximum amount of any fine that may otherwise be imposed under this Act, an additional fine in an amount equal to the court's estimation of the amount of those monetary benefits.

59. When the court is sentencing an offender who has been convicted of an offence under this Act, in addition to any other punishment that may be imposed, the court may, having regard to the nature of the offence and the circumstances surrounding its commission, make an order having any or all of the following effects: ... (f) directing the offender to pay an amount for the purposes of conducting research into any matters relating to tobacco products that the court considers appropriate.

640. The plaintiff Imperial Tobacco claims that sections 58 and 59(f) are "overbroad," and therefore infringe section 7 of the Charter.
641. This theory of "overbreadth," outlined in *R. v. Heywood*, [1994] 3 S.C.R. 761, asserts that the "principles of fundamental justice" guaranteed in section 7 include protection against overbroad legislation.
642. In *R. v. Heywood*, the challenge was against paragraph 179(1)(b) of the *Criminal Code*, which prohibits any person found guilty of sexual assault from loitering in or near a school ground, playground, public park or public bathing area.
643. The majority of the Court, in the judgment drafted by Cory J. (Sopinka, Iacobucci and Major JJ. and Lamer C.J. concurring), ruled that the provision went too far

²⁴³ See Appendix 5 – Tobacco Product Promotion.

to reach its objective, because it targeted too many places, too many people and was for an indeterminate period of time.

644. Gonthier J.'s (dissenting) reasons, to which La Forest, L'Heureux-Dubé and McLachlin JJ. subscribed, allow a totally different conclusion to be reached. By interpreting the provision at issue less severely, and by designating a legislative objective different from that of the majority, the judges concluded that the Act was not overbroad.
645. It is important to note that the dissenting judges did not deem that overbreadth could constitute an independent principle of fundamental justice. Indeed, Gonthier J. wrote in para. 100:
- Cory J., however, suggests that the prohibition created by s. 179(1)(b) is overbroad in terms of the persons, places and time period to which it applies. I express no opinion on the soundness of this analysis of liberty because it is not necessary in this case to decide the issue. The interpretation I advocate eliminates Cory J.'s concern that the prohibition is overbroad. [Our emphasis]*
646. Thus, Gonthier J., with the support of three other judges, did not consider overbreadth a principle of fundamental justice. He simply concluded that, if this principle were to have been recognized, the Act would not have violated it in this case.
647. Since *Heywood*, case law has proven hesitant to confirm the validity of the notion of overbreadth.
648. In *Ontario v. Canadian Pacific Ltd*, [1995] 2 S.C.R. 1031, a provision in the Ontario *Environmental Protection Act* was challenged under section 7.
649. Paragraph 13(1)(a) of the Act prohibited, on penalty of fine or imprisonment, pollution of "the natural environment for any use that can be made of it."
650. It was alleged that this provision was overbroad as well as unacceptably vague.
651. The judges were unanimous in their conclusion that the provision was constitutional. However, two distinct opinions were drafted.
652. Lamer C.J.'s opinion (with the support of Sopinka and Cory JJ.) confirmed the existence of overbreadth as principle of fundamental justice. However, after interpreting the Act, the judges concluded that it was neither vague nor overbroad.
653. Gonthier J. (with the support of La Forest, L'Heureux-Dubé, McLachlin, Iacobucci and Major JJ.) also came to the conclusion that the Act was constitutional. Without recognizing the notion of overbreadth as a principle of fundamental justice protected by section 7, para. 86:

Before concluding, I wish to add a caveat to my overbreadth analysis. My reasons should not be taken to endorse the view that the independent principle of overbreadth, as outlined in Heywood, supra, is available to the appellant in the circumstances of this case. My point is simply that s. 13(1)(a) is clearly not overbroad. Since neither CP nor the respondent were aware of this Court's decision in Heywood, the matter was not argued. I therefore prefer to defer consideration of the Heywood principle to a future case, where it is actually necessary to the result.

654. Although the notion of overbreadth was recognized by the majority (5 judges to 4) in *Heywood*, in *Canadian Pacific*, 6 judges to 3 were not convinced that overbreadth should be recognized as a principle of fundamental justice.

655. In addition, to consider the notion of overbreadth a principle of fundamental justice has been criticized in doctrine:

see J. Ross, "R. v. Heywood: Overbreadth in the Law or in the Judgment?" (1995) 6 *Constitutional Forum* 88;

D. Stuart "Annotation *R. v. Heywood*" (1995) 34 C.R. (4th) 135;

P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto; Carswell, 1997), pp. 1102-1106. Hogg wrote, in particular, that application of the theory under section 7 "raises serious practical and theoretical difficulties, and confers an exceedingly discretionary power of review on the Court" (p. 1103). Further, he adds: "a judge who disapproves of a law will always be able to find that it is overbroad" (p.1104).

656. Courts should use more restraint in the application of this theoretical notion of overbreadth, as Cory J. recognized in *Heywood*, supra, at para. 51:

In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. While the courts have a constitutional duty to ensure that legislation conforms with the Charter, legislatures must have the power to make policy choices.

A court should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective if he or she had been the legislator.

657. The power granted to judges in sections 58 and 59(f) of the *Tobacco Act* to impose additional monetary sanctions in case of violation of a statute is not excessive.

658. Section 58 provides that the judge may impose an additional fine on the offender if the latter has acquired monetary benefits as a result of the commission of the offence; a fine corresponding to the estimated amount of benefits the offender acquired.

659. This provision is reasonable and far from excessive. Section 58 is a tool that Parliament gives judges so that the sentence may be proportional to the offence

committed and to its impact, thus preventing a tobacco manufacturer from benefiting from a statutory violation. Without this provision, a manufacturer could decide to knowingly violate the law, if he estimated that the monetary benefits to be gained from the offence would exceed the penalties set by the legislation.

660. Section 59(*f*) provides that the judge may, in addition to any penalty provided for by law and when the nature and circumstances of the violation justify it, order the offender to pay a sum of money for research on tobacco products.
661. The money would then be used to serve the objectives of the legislation. Thus, a sum of money paid pursuant to this provision would contribute to increase knowledge of tobacco, which could only contribute, in the long term, to reducing the damage caused by this substance. Thus section 59(*f*) acts not only as a deterrent, but also as a preventive measure.
662. The judge must be flexible when pronouncing his sentence in order to ensure that the penalty is well suited to the circumstances.
663. It is rather the lack of flexibility that is likely to cause constitutional problems, as was the case with the imposition, through legislation, of minimum sentences.²⁴⁴
664. The plaintiffs cite no case in which a provision was declared unconstitutional because the sentences provided for did not have a set maximum.
665. In the plaintiffs' opinion, any provision giving the judge leeway in imposing a sentence is constitutionally vulnerable.
666. It is evident that provisions that give the Court leeway cannot be declared unconstitutional on these grounds alone. Paragraph 59(*f*) does not infringe the Charter.

H Absence of a due diligence defence and sections 19, 20, 22, 24 and 27

667. Plaintiffs JTI and RBH claim that sections 19, 20, 22, 24 and 27 of the *Tobacco Act* violate section 7 of the Charter because they do not provide for a due diligence defence. As for Imperial Tobacco, it claims that sections 19, 20, 21, 22, 23, 26, 27 and 31 infringe section 7.
668. The Attorney General of Canada maintains that these sections do not infringe section 7.
669. Since *R. v. Sault Ste-Marie*, [1978] 2 S.C.R. 1299, there is a rule of law according to which public welfare or regulatory offences (as is the case here), are strict liability offences, against which common law due diligence and reasonable mistake of fact defences may be used.

²⁴⁴ See *R. v. Smith*, [1987] 1 S.C.R. 1045.

670. This assumption can be dismissed only if the legislator expressly indicates that he intends to make it an absolute liability offence.
671. Even if an offence seems, at first glance, to have the characteristics of an absolute liability offence, which is not the case here, it must be interpreted as a strict liability offence in order to avoid conflict with the Charter:

R. v. Rube, [1992] 3 S.C.R. 159:

We agree with the Court of Appeal of British Columbia that the wording of the sections [ss. 5(1) and 29 of the Food and Drugs Act, R.S.C. 1970, c. F-27] is open to interpretation and does not explicitly exclude a defence of due diligence. We agree that given the penalties, this is not an offence that could, without offending the Canadian Charter of Rights and Freedoms, be one of absolute liability.

On the presumption that Parliament intends its legislation to conform to the exigencies of the Charter, we are of the view that the section [s. 5(1) of the Act] is one of strict liability and that a defence of due diligence is available to the accused.

672. In response to the plaintiffs who claim that only section 54 expressly provides for a due diligence defence, the Attorney General of Canada instructs that in *R. v. Martin*, *supra*, the Court of Appeal for Ontario concluded that the impugned provision establishes a strict liability offence without regard for the fact that another provision expressly provides for a due diligence defence.
673. In *R. v. Martin*, [1992] 1 S.C.R. 838, the Supreme Court confirmed Court of Appeal for Ontario (1991) 2 O.R. (3d) 16, which ruled that although an offence may have all the characteristics of an absolute liability offence, it must interpret it as a strict liability offence to avoid conflict with the Charter.
674. The *Tobacco Act* targets public welfare and is of a regulatory nature. Offences provided for are strict liability offences.
675. These offences meet the fundamental principle stated by the Law Reform Commission of Canada,²⁴⁵ and La Forest J. adopts them in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at page 511:

A regulatory offence is not primarily concerned with values, but with results. While values necessarily underlie all legal prescriptions, the regulatory offence really gives expression to the view that it is expedient for the protection of society for the orderly use and sharing of society's resources that people act in a prescribed manner in prescribed situations, or that people take prescribed standards of care to avoid risks of injury. The object is to induce compliance with rules for the overall benefit of society.

²⁴⁵

Criminal Responsibility for Group Action, Working Paper 16, 1976, p. 12.

676. Nothing in the *Tobacco Act* points to Parliament's intention to consider the impugned provisions to be absolute liability offences.
677. Similar offences have been qualified as strict liability offences.²⁴⁶
678. In support of their representations, the plaintiffs allege that only section 54 expressly provides for a due diligence defence.
679. This argument is contrary to *R. v. Martin, supra*, where, confirmed by the Supreme Court of Canada, the Court of Appeal for Ontario concluded that the impugned provision established a strict liability offence, despite the existence of another provision expressly providing for due diligence defence.
680. On behalf of the Court of Appeal, Griffith J. concluded, by applying the assumptions established in *Sault Ste-Marie*, that explicit reference to due diligence defence in one section did not convey the intention of the legislator to exclude it in another section.
681. The provisions challenged by the plaintiffs establish strict liability offences that do not infringe section 7 of the Charter.

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Strasser v. Roberge, [1979] 2 S.C.R. 953.
Allard (Ghislain) and Ville de Montreal, [1982] 2 Can. L.R.B.R. 8.

PART VI

SECTION 8 OF THE CHARTER AND PART V OF THE TOBACCO ACT

A Introductory remarks

682. In dealing with the issue of appropriate interpretation of section 8 of the Charter, it is important to recall what Lamer C.J. said in *Michaud v. Quebec (A.G.)*, [1996] 3 S.C.R. 3 (para. 49): "As this Court has repeatedly stressed, the meaning and context of the constitutional guarantees of the Charter will vary according to the relevant context."
683. Furthermore, the Supreme Court regularly adopted the contextual approach to determine the scope of a right guaranteed by the Charter in order to take account of "the regulatory nature of the offence and its place within a larger scheme of public welfare legislation" (*R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, Cory J., p. 226; see in particular *Thomson Newspapers Ltd.*, *supra*; *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627; *Comité paritaire v. Potash*, [1994] 2 S.C.R. 406; *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154; *R. v. Del Zotto*, [1999] 1 S.C.R. 3, the Supreme Court accepted unanimously and without reserve the dissenting opinion of Strayer J. of the Federal Court of Appeal, reported in [1997] 3 F.C. 40; *14371 Can. Inc. v. Quebec (A.G.)*, [1994] 2 S.C.R. 339; *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3).
684. A clear and consistent rule for interpretation may be drawn from this series of judgments: the rights and freedoms guaranteed by the Charter—particularly the protection provided in section 8—do not, within a regulatory framework, necessarily have the same scope as in criminal proceedings. Their application must be adapted in accordance with the fundamental role of regulatory legislation in Canadian society.
685. The *Tobacco Act* is obviously of a regulatory nature. Its objective is clearly defined in s. 4. The fact that it was adopted pursuant to Parliament's jurisdiction in criminal law does not alter its fundamental regulatory nature. Indeed, the considerations relevant to the interpretation of an act in relation to the distribution of jurisdictions are not very useful—and especially not decisive—for the identification of the nature and objective of a legislative scheme in view of a contextual interpretation based on the Charter (see La Forest J.'s comments in *Thomson Newspapers*, at pages 508 to 516).
686. On this subject, refer to *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, where La Forest J. (on behalf of the majority) states, with regard to Parliament's responsibility (p. 291):

Parliament has been accorded plenary power to make criminal law in the widest sense.

687. After all is said and done, jurisdiction in criminal law is not limited to the adoption of "true crime" in the traditional sense of the term, but also applies to the adoption of regulatory legislation. Thus, in *Hydro-Québec*, La Forest J. refers to *R. v. Wholesale Travel Group Inc* (*supra*) and says (p. 302):

That case concerned offences under the Competition Act (formerly the Combines Investigation Act), long held to be constitutionally supportable under Parliament's criminal law power. Cory J. carefully distinguished between the type of offences there in question, which he described as regulatory offences, and "true crimes" such as murder.

688. Refer also to *R. v. Del Zotto*, [1999] 1 S.C.R. 3, where the Supreme Court accepted, unanimously and without reserve, the dissenting opinion of Strayer J. of the Federal Court of Appeal (reported in [1997] 3 F.C. 40), who, with regard to the offences and sentences provided for in the *Income Tax Act* (which provides for a maximum sentence of **five years** in prison by way of indictment), said at page 59:

This is not a typical criminal law but is a law designed to ensure compliance with the self-reporting requirements of the Income Tax Act and was characterized as part of what is really a regulatory scheme by La Forest J. in the passage from Thomson quoted above. As he said in connection with the Combines Investigation Act, such conduct...is made criminal for strictly instrumental reasons.

689. Let us emphasize that the offences provided for in Part VI of the *Tobacco Act* are subject to a fine and, only some of them, to a maximum prison sentence of six months to two years, depending on the offence at issue.

B The Hunter decision

690. In *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, the Supreme Court ruled that the guarantee provided for in s. 8 of the Charter only targets reasonable expectation of privacy and that its purpose is to protect individuals from unjustified state intrusions. Dickson J. (later Chief Justice) stated on behalf of the Court (pp. 159-160):

The guarantee of security from unreasonable search and seizure only protects a reasonable expectation. This limitation on the right guaranteed by s. 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement. [Emphasis in original]

691. He further adds (p.160):

That purpose is, as I have said, to protect individuals from unjustified state intrusions upon their privacy.

692. Still in *Hunter*, Dickson J. set out certain criteria that a search must meet in order to be reasonable and non-abusive. Wilson J. summarizes them, at pages 642 and 643 of *R. v. McKinlay Transport Ltd.*, quoted above:

(a) a system of prior authorization, by an entirely neutral and impartial arbiter who is capable of acting judicially in balancing the interests of the State against those of the individual;

(b) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds, established under oath, to believe that an offence has been committed;

(c) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds to believe that something which will afford evidence of the particular offence under investigation will be recovered;

and

(d) a requirement that the only documents which are authorized to be seized are those which are strictly relevant to the offence under investigation.

693. However, Wilson J. did specify the particular context (criminal or quasi-criminal) in which these criteria were set out (*McKinlay*, p. 643). She insisted on (p. 647) "...the need to take a flexible and purposive approach" and went on to add:

It is consistent with this approach, I believe, to draw a distinction between seizures in the criminal or quasi-criminal context to which the full rigours of the Hunter criteria will apply, and seizures in the administrative or regulatory context to which a lesser standard may apply depending upon the legislative scheme under review.

694. Likewise, in *British Columbia Securities Commission v. Branch*, quoted above, relating to the validity of the authority of securities commissions to compel someone to testify and produce documents, Sopinka and Iacobucci JJ. write on behalf of the Court (p. 35) that:

*It is important to note, however, that these criteria [from Southam] were articulated in the context of an appeal concerning the validity of a section which was, in essence, criminal or quasi-criminal. It is clear that the context within which the alleged violation takes place must be considered, for it is the context which determines the expectation of privacy that is legitimately expected. The following comments of Wilson J. in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, at p. 645, are instructive:*

Since individuals have different expectations of privacy in different contexts and with regard to different kinds of information and documents, it follows that the standard of review of what is "reasonable" in a given context must be flexible if it is to be realistic and meaningful.

*Therefore, it is clear that the standard of reasonableness which prevails in the case of a search and seizure made in the course of enforcement in the criminal context will not usually be the appropriate standard for a determination made in an administrative or regulatory context: per La Forest J. in *Thomson Newspapers*. The greater the departure from the realm of criminal law, the more flexible will be the approach to the standard of reasonableness. The*

application of a less strenuous approach to regulatory or administrative searches and seizures is consistent with a purposive approach to the elaboration of s. 8: Thomson Newspapers.

695. The plaintiffs essentially plead that since the inspection powers provided for in Part V (Enforcement) of the *Tobacco Act* do not scrupulously meet all the requirements of *Hunter*, they therefore infringe s. 8 of the Charter. This claim is wrong because it is based on an interpretation of the Charter which does not take into account the relevant context, i.e. that the Act is essentially regulatory in nature, and particularly the expectation of privacy, which is significantly lower in this case.

C The standard of "reasonableness" within a regulatory context

696. In many judgments subsequent to *Hunter*, the Supreme Court moderated the strictness of the requirements set out in this case to adopt standards which were much more flexible, because of the generally lower, even "considerably lower" (*Potash, supra*, p. 420) expectation of privacy in a regulatory context.
697. It is indisputable that citizens have very different expectations of privacy in different contexts and with regard to different types of information required. That is why Wilson J. concluded, in *McKinlay (supra*, p. 645) that "The standard of review of what is `reasonable` in a given context must be flexible if it is to be realistic and meaningful." Thus, in a context of activities that are regulated, expectations of privacy are considerably lower with regard to the **premises** where this activity is performed and the **documents** the content of which is specifically provided for by law. As emphasized by La Forest J. in *Thomson Newspapers (supra)*, state demands concerning these activities are (p. 518) "a regular and predictable part of doing business" and generally do not concern aspects relating to the individual's identity or lifestyle that the right of privacy particularly seeks to protect. In *Potash (supra*, pp. 420-421), he states:

In a context in which their occupations are extensively regulated by the state, the reasonable expectations of privacy employers may have with respect to documents whose content is specifically provided for by the Act, or the premises where an activity subject to specific standards is conducted, are considerably lower. I made this point in Thomson Newspapers, supra, where I wrote (at p. 507):

It follows that there can only be a relatively low expectation of privacy in respect of premises or documents that are used or produced in the course of activities which, though lawful, are subject to state regulation as a matter of course. In a society in which the need for effective regulation of certain spheres of private activity is recognized and acted upon, state inspection of premises and documents is a routine and expected feature of participation in such activity.

698. It is important to add that expectations of privacy relating to "commercial documents" have often been the subject of review by the Supreme Court as regards the protection provided by s. 8 of the Charter. The Court has repeatedly

stated that expectations of privacy with regard to this type of documents are rather low. In *14371 Can. Inc. v. Québec (A.G)*, *supra*, Cory J. states (p. 377):

There are a number of matters that must be conceded at the outset. The documents seized in this case are commercial in nature. It follows that there cannot be the same privacy interest in those documents that there would be in personal papers. The expectation of privacy in business records is necessarily low. They do not ordinarily contain the type of personal information that lies at the heart of the constitutional protection of privacy. Further, it must be recognized that the state must have the power to regulate business, both for economic reasons and in order to provide protection to the vulnerable individual against private power. This was set out with great cogency by La Forest J. in Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), [1990] 1 S.C.R. 425, at pp. 517 and 518. It follows that since the search in this case was made pursuant to a regulatory statute in the highly regulated field of restaurants and hotels the expectation of privacy must of necessity be diminished.

699. In *R. v. Fitzpatrick*, quoted above, La Forest J. (for the Court) recalled, with regard to this (p. 181):

*In applying a contextual approach under s. 8, this Court has repeatedly emphasized that searches and seizures of documents relating to activity known to be regulated by the state are not subject to the same high standard as searches and seizures in the criminal context. This is because a decreased expectation of privacy exists respecting records that are produced during the ordinary course of business; see in particular my reasons in both Thomson Newspapers, *supra*, at pp. 506-8, and Comité paritaire de l'industrie de la chemise v. Potash, [1994] 2 S.C.R. 406, at pp. 420-421 and 424, as well as those of Wilson J. in R. v. McKinlay Transport Ltd., [1990] 1 S.C.R. 627, at pp. 645-47, L'Heureux-Dubé J. in Comité paritaire, at pp. 443-444, and Sopinka J. in R. v. Plant, [1993] 3 S.C.R. 281, at pp. 291-96. In my view a similar standard should be applied to the use in a regulatory prosecution of records that are statutorily compelled as a condition of participation in the regulatory area. Little expectation of privacy can attach to these documents, since they are produced precisely to be read and relied upon by state officials.*

D Mitigation of the *Hunter* criteria with regard to regulation

700. Given the variable nature of the standard of reasonableness due to lower expectations of privacy in a regulatory context, the Supreme Court has adopted a considerably more flexible position with regard to the *Hunter* criteria.
701. Thus, in *Comité paritaire de l'industrie de la chemise v. Potash*, *supra*, the Court decided that the *Hunter* criteria requiring a system of prior authorization based on the existence of reasonable and probable grounds to believe that an offence has been committed do not apply to administrative and regulatory inspections, such as those provided for in the *Tobacco Act*. This judgment concerned inspections carried out under *An Act Respecting Collective Agreement Decrees*. La Forest J. writes, on behalf of the majority of judges at page 421, that:

It is thus impossible, without further qualification, to apply the strict guarantees set out in Hunter v. Southam Inc., supra, which were developed in a very

different context. The underlying purpose of inspection is to ensure that a regulatory statute is being complied with. It is often accompanied by an information aspect designed to promote the interests of those on whose behalf the statute was enacted. The exercise of powers of inspection does not carry with it the stigmas normally associated with criminal investigations and their consequences are less draconian. While regulatory statutes incidentally provide for offences, they are enacted primarily to encourage compliance. It may be that in the course of inspections those responsible for enforcing a statute will uncover facts that point to a violation, but this possibility does not alter the underlying purpose behind the exercise of the powers of inspection. The same is true when the enforcement is prompted by a complaint. Such a situation is obviously at variance with the routine nature of an inspection. However, a complaint system is often provided for by the legislature itself as it is a practical means not only of checking whether contraventions of the legislation have occurred but also of deterring them.

702. Further, he adds (p. 422):

In view of the important purpose of regulatory legislation, the need for powers of inspection, and the lower expectations of privacy, a proper balance between the interests of society and the rights of individuals does not require, in addition to the legislative authority, a system of prior authorization.

703. La Forest J. also indicated that the fact that inspections at an employer's home could take place does not render the inspections unreasonable within the meaning of section 8 of the Charter. He writes at page 424:

The second paragraph of s. 22(e) of the Act does not specifically identify the place where a visit may be made, except to say that it must be made at a reasonable time. The section simply mentions that the powers may be exercised "even at the place of work" of the employees. Depending on the nature of the industry, it is possible that certain inspections may take place at the home of the employer or of the employees, when it coincides with their workplace. That possibility does not, however, make the inspection powers less reasonable.

704. As for L'Heureux-Dubé J. (Sopinka, Gonthier, McLachlin and Major JJ. concurring), she adds at pages 452-453 that:

For the inspectors to have to obtain a warrant, as in a criminal matter, would require them to have reasonable and probable grounds to believe that an offence against the ACAD had been committed. The very reason the inspectors have been granted powers of inspection is to determine whether an offence has been committed. According to the rules laid down in Hunter v. Southam Inc., a warrant could never be issued in such circumstances. It can thus be seen that, in pragmatic terms, the rule in Hunter v. Southam Inc. must necessarily be inapplicable to administrative inspections in a regulated industrial sector, like those at issue in the present appeal. Those rules simply constitute here "too high a threshold" (Thomson Newspapers, supra, at p. 595 (per L'Heureux-Dubé J.)).

E Validity of the Act's inspection scheme

(1) Statutory provisions

705. The plaintiffs claim that sections 35, 36 and 39 infringe section 8 of the Charter. The Attorney General of Canada maintains that these sections do not infringe section 8. These sections read as follows:

35. (1) For the purpose of ensuring compliance with this Act, an inspector may, subject to section 36, at any reasonable time, enter any place, other than a means of transportation, in which the inspector believes on reasonable grounds

(a) a tobacco product is manufactured, tested, stored, packaged, labelled or sold;

(b) there is anything used in the manufacture, testing, packaging, labelling, promotion or sale of a tobacco product; or

(c) there is any information relating to the manufacture, testing, packaging, labelling, promotion or sale of a tobacco product.

(2) In carrying out an inspection, an inspector may

(a) examine a tobacco product or thing referred to in paragraph (1)(b);

(b) require any person in place to produce for inspection, in the manner and form requested by the inspector, the tobacco product or thing;

(c) open or require any person in the place to open any container or package found in the place that the inspector believes on reasonable grounds contains the tobacco product or thing;

(d) take or require any person in the place to produce a sample of the tobacco product or thing;

(e) conduct any test or analysis or take any measurements; or

(f) require any person found in the place to produce for inspection or copying any written or electronic information that is relevant to the administration or enforcement of this Act.

(3) In carrying out an inspection, an inspector may

(a) use or cause to be used any computer system in the place to examine data contained in or available to the computer system that is relevant to the administration or enforcement of this Act;

(b) reproduce the data in the form of a print-out or other intelligible output and take it for examination or copying; and

(c) use or cause to be used any copying equipment in the place to make copies of any data, record or document.

36. (1) An inspector may not enter a dwelling-place except with the consent of the occupant or under the authority of a warrant issued under subsection (2).

(2) On ex parte application, a justice, as defined in section 2 of the Criminal Code, may issue a warrant authorizing the inspector named in the warrant to enter and inspect a dwelling-place, subject to any conditions specified in the warrant, if the justice is satisfied by information on oath

(a) that the dwelling-place is a place referred to in subsection 35(1);

(b) *that entry to the dwelling-place is necessary for the administration or enforcement of this Act; and*

(c) *that the occupant does not consent to the entry, or that entry has been refused or there are reasonable grounds for believing that it will be refused.*

(3) *An inspector executing the warrant shall not use force unless the inspector is accompanied by a peace officer and the use of force is specifically authorized in the warrant.*

39. (1) *During an inspection under this Act, an inspector may seize any tobacco product or other thing by means of which or in relation to which the inspector believes on reasonable grounds that this Act has been contravened.*

(2) *The inspector may direct that any tobacco product or thing seized be kept or stored in the place where it was seized or that it be removed to another place.*

(3) *Unless authorized by an inspector, no person shall remove, alter or interfere in any way with any tobacco product or other thing seized.*

(2) Absence of factual foundation

706. As preliminary comment, the Attorney General of Canada instructs that the plaintiffs may not invoke, in this case, violations of section 8 of the Charter without factual basis.

707. In *Baron v. Canada*, [1993] 1 S.C.R. 416, relating to the constitutionality of search warrants issued under section 231.3 of the *Income Tax Act*, Sopinka J. writes on behalf of the Court, at pages 452 and 453.

Finally, s. 231.3(5) is attacked for allowing the same kind of "wholesale search and seizures" without prior authorization found under the predecessor legislation to violate s. 8 of the Charter.

...

The difficulty in dealing with this question is that we face it in a factual vacuum since there is no indication that documents were seized in reliance on this provision. We are always loathe to adjudicate constitutional issues in the absence of a factual foundation: Danson v. Ontario (Attorney General), [1990] 2 S.C.R. 1086; Mackay v. Manitoba, [1989] 2 S.C.R. 357 at pp. 361 and 366; R. v. Edwards Books and Art. Ltd., [1986] 2 S.C.R. 713, at pp. 762 and 767-68. I think the issue should be left to be resolved until such time as this Court is presented with a situation in which the provision was relied upon to seize documents.

708. In addition, we claim that the Act does not infringe section 8.

(3) Validity of inspection powers

709. The first step in the analytical approach required by section 8 consists in asking ourselves if the statutory provisions at issue authorize "searches" and "seizures."

710. The Attorney General of Canada recognizes that the authority to inspect premises provided for in sections 35(1) and 36(1) constitutes searches within the meaning of section 8 of the Charter. (See *Comité paritaire de l'industrie de la chemise v. Potash*, [1994] 2 S.C.R. 406, p. 418 (La Forest J.) and p. 440 (L'Heureux-Dubé J.)).
711. The Attorney General of Canada also admits that the powers granted to inspectors under the *Tobacco Act* in sections 35(2), 35(3) and 39 constitutes "seizures." Specifically, these sections authorize inspectors to seize something belonging to the employer without his consent: *R. v. Dyment*, [1988] 2 S.C.R. 417, p. 431 and *Potash, supra*, p. 439 (L'Heureux-Dubé J.).
712. In accordance with the text of section 8 of the Charter, as interpreted by case law, the second step of the analysis is to establish if the powers of search and seizure granted to inspectors by the *Tobacco Act* are abusive with regard to reasonable expectations of privacy.
713. In view of the analysis previously carried out with regard to the scope of s. 8 of the Charter and of the requirements set out in *Hunter* in a regulatory context, we respectfully submit that these provisions do not infringe on s. 8. To repeat L'Heureux-Dubé J.'s statements in *Potash*, with regard to the "pragmatic reality," the traditional criteria in *Hunter*—i.e. the requirement for prior authorization and (subject to s. 39, which already provides for this requirement) the existence of reasonable grounds to believe that an offence has been committed—are simply not applicable in this case. In view of the purpose of the Act, the nature of these powers, the places where it may be exercised and the nature of the information likely to be targeted by these powers, it can be concluded that the provisions at issue are reasonable.
714. In addition, Part V of the Act, entitled "Enforcement," contains guidelines for the "power of inspectors". As La Forest J. stated in *Potash* at page 425:
- What matters, in the end, is that the powers of inspection are sufficiently circumscribed to attain their purpose...*
715. Again, remember that the purpose of the Act is clearly defined in s. 4 and, consequently, it determines the scope of the inspection powers provided for in Part V. In addition, the impugned provisions also contain intrinsic limitations.
716. Thus, subsection 35(1) authorizes the inspector to enter any place (other than a means of transportation or a dwelling-place targeted in s. 36) only when he believes (subjective belief), on reasonable grounds (objective criterion), that on these premises:
- (a) a tobacco product is manufactured, tested, stored, packaged, labelled or sold;

(b) there is anything used in the manufacture, testing, packaging, labelling, promotion or sale of a tobacco product; or

(c) there is any information relating to the manufacture, testing, packaging, labelling, promotion or sale of a tobacco product.

717. Thus there are specific elements, in compliance with the purpose of the Act, that permit the identification of premises targeted by this provision.
718. Subsection 36(1) prohibits such entry into a dwelling-place without the consent of the occupant, unless the inspector obtains *ex parte*, in accordance with subsection 36(2), a warrant authorizing him to enter and inspect the premises. The justice must be satisfied by information on oath, that the elements guaranteeing that this inspection is required for the enforcement of this Act (see paragraphs 36(2)(a), (b) and (c)) are present. It is important to emphasize that authorization or rejection of the warrant remain at the sole discretion of the justice, as subsection 36(2) specifies that the justice "may" issue a warrant. Moreover, the justice issuing the warrant may impose conditions of execution that may limit intrusion and infringement on privacy.
719. It is pertinent to specify that the Act does not authorize the inspector to resort to forced entry to carry out his inspection nor to use force in performing his inspection. The use of force is provided for only in subsection 36(3), i.e. not unless he is accompanied by a peace officer and it is specifically authorized in the warrant issued by the justice under subsection 36(2). However, let us point out that whosoever hinders the inspector's actions is committing an offence and is liable, upon summary conviction, to a maximum fine of \$25,000 (s. 48 of the Act).
720. Subsections 35(2) and (3) provide for the inspector to exercise, within the context of his inspection, certain powers relating to the purpose of the Act and necessary to its enforcement. The inspector may examine, under paragraph (2)(a) only tobacco products or things specifically referred to in paragraph (1)(b)—i.e. things "used in the manufacture, testing, packaging, labelling, promotion or sale of a tobacco product"—or require any person in the place to produce for inspection the tobacco product or thing, in accordance with paragraph (2)(b).
721. In accordance with paragraph (2)(c), his power to open or require any person in the place to open a container or package can only be exercised if he believes on reasonable grounds that they contain the tobacco product or thing. He may also take (or require any person in the place to produce) a sample under paragraph (2)(d) and conduct any test, analysis or take any measurements (paragraph (2)(e)). Finally, he may require for inspection or copying any information that is "relevant to the administration or enforcement of this Act" under paragraph (2)(f).

722. Subsection 35(3) completes the inspection powers by authorizing the inspector to use or cause to be used any computer system to examine data "relevant to the administration or enforcement of this Act," as specified in paragraph (3)(a), or for examination or copying (paragraph (3)(b)).
723. Thus one can see that although the *Hunter* criteria may not apply in full, the Act nonetheless provides guidelines to circumscribe the scope of the inspection powers provided for in ss. 35 and 36, in compliance with its purpose. These guidelines also limit state intrusion to what is rationally useful and necessary to the enforcement of the Act. It is important to recall on this matter what La Forest J. said regarding the inspection powers at issue in *Potash* (p. 425):

It goes without saying that these powers must be exercised in accordance with the purpose of the Act and the inspectors are required to act in complete good faith. It will always be possible to challenge abuses; but that does not alter the validity of the legislative scheme and the balance it strikes between the interests of society and the individual's right to privacy.

724. As for s. 39, which authorizes the inspector, during his inspection, to seize any thing "by means of which or in relation to which the inspector believes on reasonable grounds that this Act has been contravened," it should be said that this is a provision that codifies a common law power based on the doctrine of objects in "plain view." This power is deemed valid in accordance with the Charter: see E. G. Ewaschuck, *Criminal Pleadings and Practice in Canada*, 2nd ed., Canada Law Book, 2002, No.3:3045; *Kami-Mark (Marketing) Inc. v. Quebec (Deputy Minister of Revenue)*, [1997] A.Q. No. 2279 (CAQ); *R. v. 2952-1366 Québec inc.*, CAQ, No. 500-10-000943-975, March 8, 2000. In this last case, the Court (Proulx, Otis, Rochette) stated in this regard (para. 10):

[TRANSLATION]

10. The doctrine of "plain view," established by Common Law, allows the seizure, without a warrant, of apparent evidence if the following three conditions are met:

- *the entry is legal;*
- *the evidence was uncovered inadvertently;*
- *the goods seized can prove the alleged offence.*

725. It is also relevant to point out that this power, even if it had not been expressly provided for in the *Tobacco Act*, would nonetheless have been available to the inspector responsible for the enforcement of this Act, since it was also codified in subsection 489(2) of the *Criminal Code*, which reads as follows:

(2) Every peace officer, and every public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, who is lawfully present in a place pursuant to a warrant or otherwise in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds

(a) has been obtained by the commission of an offence against this or any other Act of Parliament;

(b) has been used in the commission of an offence against this or any other Act of Parliament; or

(c) will afford evidence in respect of an offence against this or any other Act of Parliament.

PART VII

THE CHALLENGE WITH REGARD TO THE PRESUMPTION OF INNOCENCE

A Paragraph 11(d) of the Charter

726. The case law established by the Supreme Court shows that the main principles, such as the principles of a fair trial and of the presumption of innocence, command that the accused not be conscripted against him- or herself before the Crown has established a case to meet.²⁴⁷

727. *R. v. Oakes* [1986] 1 S.C.R. 103 is fundamental to presumption of innocence. Mr. Oakes claimed that section 8 of the *Narcotic Control Act*, R.S.C. (1985), c. N-1, infringed paragraph 11(d) of the Charter. Section 8 stipulates that a person found to be in possession of a narcotic has the burden of proving, by the preponderance of evidence, that the narcotics in his possession are not intended for trafficking. Dickson C.J. writes, at page 119:

The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.

728. Dickson C.J. concluded that at trial, presumption of innocence means that the onus is on the State to present its evidence against the accused before he or she must respond. It is also the State's responsibility to convince the court of the accused's guilt beyond all reasonable doubt and to pursue criminal proceedings in accordance with legal procedures and equity.

729. The Supreme Court has established that a statutory provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact which is an important element of the offence in question infringes paragraph 11(d) of the Charter. In such a case, it would be possible for a conviction to occur despite the existence of a reasonable doubt with regard to an element of the offence (p. 132).

²⁴⁷ See *R. v. P (M.B.)*, [1994] 1 S.C.R. 555, at 577-578 and *Dubois v. The Queen*, [1985] 2 S.C.R. 350.

B Validity of subsection 53(2) of the Act

730. The plaintiff Imperial Tobacco claims that subsection 53(2) of the *Tobacco Act*, in effecting a reversal of the burden of proof, infringes paragraph 11(d) of the Charter. Section 53 reads as follows:

53. (1) No exception, exemption, excuse or qualification prescribed by law is required to be set out or negated, as the case may be, in an information or indictment for an offence under this Act or under section 463, 464 or 465 of the Criminal Code in respect of an offence under this Act.

(2) In a prosecution for an offence referred to in subsection (1), the burden of proving that an exception, exemption, excuse or qualification prescribed by law operates in favour of the accused is on the accused and the prosecutor is not required, except by way of rebuttal, to prove that it does not operate in favour of the accused, whether or not it is set out in the information or indictment.

731. Before dealing directly with the constitutional validity of subsection 53(2), it is important to examine the way it is interpreted. The plaintiff ITL gives it a very broad scope, thus making the provision seem, at first glance, unconstitutional. The plaintiff writes in paragraph 67 of its statement:

Section 19 of the Tobacco Act creates an outright prohibition, subject only to the "authorization" which may be found, subject to regulations, in sections 22 and 24; that is, sections 22 and 24 provide exceptions to the prohibition; section 53 of the Tobacco Act would require a person accused under section 19 to prove that his or her promotion was of a kind authorized by section 22 or 24, without falling into the prohibition of section 22(2).

732. Subsection 53(2) must not be interpreted in this way. The provision does not place the burden of proof on the accused, requiring him to prove that his or her advertising was of a kind permitted (i.e. "information" or "brand-preference"). The burden of proving the elements essential to an offence is on the Crown, and subsection 53(2) does not challenge this principle.

733. To understand the intent of subsection 53(2), it is useful to examine other acts with similar provisions. The *Tobacco Products Control Act* (TPCA) of 1988 included a provision that was almost identical. Thus, section 19(4) provided the following:

19(4) In any prosecution for an offence referred to in subsection (3), the burden of proving that an exception, exemption, excuse or qualification prescribed by law operates in favour of the accused is on the accused and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, excuse or qualification does not operate in favour of the accused, whether or not it is set out in the information or indictment.

734. This section is similar to section 7(2) of the *Narcotic Control Act*, R.S.C. 1970, c. N-1, which, at the time, provided the following:

7(2) In any prosecution under this Act the burden of proving that an exception, exemption, excuse or qualification prescribed by law operates in favour of the accused is on the accused, and the prosecutor is not required, except by way of rebuttal, to prove that the exception, exemption, excuse or qualification does not operate in favour of the accused, whether or not it is set out in the information or indictment.

735. In *R. v. Perka*, [1984] 2 S.C.R. 232, the judges concluded that this provision did not reverse the burden of proof with regard to common law defences such as the defence of necessity. Dickson J. said he was of the opinion that this provision targeted only specific statutory exceptions, such as holding a licence or other special leave to possess narcotics. Dickson J. thus expressed himself at pages 258-259:

The Crown contends that the defence of necessity is an "exception, exemption, excuse or qualification prescribed by law". I find no merit in this contention.

The Narcotic Control Act provides for several statutory exceptions to its broad prohibitions against importation, sale, manufacture, and possession. The offences created by the Act are generally subject to the proviso that the accused not have been acting under the authority of the Act or the regulations thereunder. See sections 3(1) (possession), 5(1) (importation), 6(1) (cultivation). Section 12 of the Act implements this scheme by providing for a set of regulations governing the issuance of licences for, inter alia, the importation, sale, manufacture, or possession of narcotics. One who sells, imports, manufactures or possesses narcotics pursuant to such authority does not commit an offence.

It seems clear that it is to these statutory exceptions that s. 7(2) refers, and not to common law defences such as necessity. One who wishes to plead the possession of a licence or other lawful authority in response to a charge of importation bears, under s. 7(2), the burden of persuading the trier of fact that such licence exists. One who pleads necessity bears no such burden. Section 7(2) does not place a persuasive burden as to the defence of necessity on the accused.

736. Under the *Narcotic Control Act*, the provision reversing the burden of proof only concerned exceptions with regard to licences or other special leave. In *R. v. Synette*, [1989] B.C.J. No. 1786 (B.C.C.A.), an individual was found in possession of a drug called "Talwin." Possession of this drug is a violation of the *Narcotic Control Act*, unless it was obtained by prescription. The individual in question claimed he had purchased the "Talwin" on prescription. The Court deemed that under section 7(2), the onus was on the accused to show he had been given a prescription, which he was unable to do before the trial judge. His conviction was confirmed by the Court of Appeal.
737. The Attorney General of Canada maintains that subsection 53(2) of the *Tobacco Act* should be interpreted the same way. Consequently, if regulations adopted pursuant to the *Tobacco Act* included the possibility of granting exemptions in

the form of licences, certificates or other, thus shielding someone from the application of all or part of said regulations, then the burden of proving the exemption was granted would be on the accused.

738. The *Tobacco Reporting Regulations* require manufacturers to provide to the government a report including, amongst other things, a chemical analysis of the emissions for each of their brands of cigarettes. This report must be submitted annually because the constituents of tobacco plants can vary from year to year. The Regulations also provide for a mechanism whereby a manufacturer may be exempted from certain tests. Indeed, under subsection 14(11) of the Regulations, a manufacturer may test only certain brands if the emissions tested follow a consistent curve, thus allowing the authorities to deduce that the emissions of the brands not tested would follow the same curve. To be exempted, the manufacturer must send a letter to the Minister, who will respond in writing after reviewing its application.
739. Section 53(2) of the Act fits in this context. In the hypothetical situation in which a manufacturer who has obtained an exemption from the Minister is subsequently prosecuted criminally for not producing a complete report on toxic emissions, the burden would be on this manufacturer to prove he was granted an exemption, by producing the letter from the Minister stating this fact. In other words, in the case of judicial proceedings under the *Tobacco Reporting Regulations*, the prosecutor does not have to prove that the manufacturer did not obtain an exemption. The onus is on the manufacturer to show he obtained such an exemption by producing the appropriate document.
740. Thus interpreted, subsection 53(2) of the Act does not infringe paragraph 11(d) of the Charter.
741. In *R. v. Lee's Poultry Ltd.* (1985) 17 C.C.C. (3d) 539 (Ont. C.A.), the validity of a provision almost identical to section 53 of the *Tobacco Act* was challenged, i.e. section 48(3) of the Ontario *Provincial Offences Act*. This section provided the following:
- ...the burden of proving that an authorization, exception, exemption or qualification prescribed by law operates in favour of the defendant is on the defendant.*
742. The Court of Appeal for Ontario judged that the fact that an act compelled the accused to prove he had obtained permission from a regulatory agency to undertake an activity that would otherwise be illegal did not establish a presumption similar to the one at issue in the Supreme Court case, *Oakes*. In the latter case, permission constituted a justification and not an element of the offence. Such provisions were rather a specific exception to a general rule of proof and therefore did not contravene the principles set out in paragraph 11(d) of the Charter. Brooke J., on behalf of the Court of Appeal, rendered the opinion, at page. 543:

In my respectful view, R. v. Oakes, supra, must be distinguished from this case. Unlike the section in question in R. v. Oakes, supra, s. 48(3) does not purport to create a presumption but rather to express in statute form an exception to a general rule of pleading and proof on specific issues in summary conviction type cases. The exception provided for does not depend upon presumption.

743. In *R. v. Schwartz*, [1988] 2 S.C.R. 443, the validity of section 106.7 of the *Criminal Code* was challenged on the grounds that it infringed paragraph 11(d) of the Charter. Section 106.7 read as follows:

106.7 (1) Where, in any proceedings under any of sections 83 to 106.5, any question arises as to whether a person is or was the holder of a firearms acquisition certificate, registration certificate or permit, the onus is on the accused to prove that that person is or was the holder of such firearms acquisition certificate, registration certificate or permit.

(2) In any proceedings under any of sections 83 to 106.5, a document purporting to be a firearms acquisition certificate, registration certificate or permit is evidence of the statements contained therein.

744. McIntyre J., on behalf of the majority of judges of the Court, concluded that this section did not infringe the right to presumption of innocence. It is a section that requires the person accused of possessing a restricted weapon to prove that he holds a registration certificate for the weapon. Section 106.7 does not reverse the burden of proof: it simply provides that a document constitutes evidence, the production of which resolves all doubts in favour of the accused. McIntyre J. writes, at pp. 485-486:

In my view, however, these principles cannot be of assistance to the appellant here. There is no reverse onus imposed upon the accused by s. 106.7(1), despite the words which are employed in the section. The holder of a registration certificate cannot be made subject to a conviction under s. 89(1). He is not required to prove or disprove any element of the offence or for that matter anything related to the offence. At most, he may be required to show by the production of the certificate that s. 89(1) does not apply to him and he is exempt from its provisions.

...

*Although the accused must establish that he falls within the exemption, there is no danger that he could be convicted under s. 89(1), despite the existence of a reasonable doubt as to guilt, because the production of the certificate resolves all doubts in favour of the accused and in the absence of the certificate no defence is possible once possession has been shown. In such a case, where the only relevant evidence is the certificate itself, it cannot be said that the accused could adduce evidence sufficient to raise doubt without at the same time establishing conclusively that the certificate had been issued. The theory behind any licensing system is that when an issue arises as to the possession of a licence, it is the accused who is in the best position to resolve the issue. Otherwise, the issuance of the certificate or licence would serve no useful purpose. Not only is it rationally open to the accused to prove he holds a licence (see *R. v. Shelley*, [1981] 2 S.C.R. 196, at p. 200, per Laskin C.J.), it is the expectation inherent in the system.*

745. All in all, section 53 of the *Tobacco Act* must not be considered a presumption but rather an exception to a rule of evidence that does not infringe paragraph 11(d) of the Charter. In case of doubt in the interpretation of the Act, one must choose the interpretation that renders it compliant with the Charter. In *Sharpe*, quoted above, McLachlin C.J. writes at para. 33:

Much has been written about the interpretation of legislation (see, e.g., R. Sullivan, Statutory Interpretation (1997); R. Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994); P.-A. Côté, The Interpretation of Legislation in Canada (3rd ed. 2000)). However, E. A. Driedger in Construction of Statutes (2nd ed. 1983) best captures the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87, Driedger states: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." ...Supplementing this approach is the presumption that Parliament intended to enact legislation in conformity with the Charter: see Sullivan, Driedger on the Construction of Statutes, supra, at pp. 322-27. If a legislative provision can be read both in a way that is constitutional and in a way that is not, the former reading should be adopted: see Slight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, at p. 1078; R. v. Swain, [1991] 1 S.C.R. 933, at p. 1010; R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, at p. 660; R. v. Lucas, [1998] 1 S.C.R. 439, at para. 66.

746. The Attorney General of Canada maintains that, thus interpreted, subsection 53(2) is valid.

PART VIII

EXTRA-TERRITORIALITY OF SECTION 31(3) OF THE ACT

747. The plaintiff ITL alleges that section 31(3) of the Act is *ultra vires* as it is extra-territorial.
748. The Attorney General of Canada maintains that although section 31(3) is extra-territorial, it is not *ultra vires* since the principle that a legislator does not have the power to make an act extra-territorial does not apply to the federal government.
749. In this regard, Henri Brun and Guy Tremblay wrote the following at pages 568-569 *Droit constitutionnel*, 2nd edition, 1997, Editions Yvon Blais:²⁴⁸

[TRANSLATION]

The Crown has unlimited personal jurisdiction. It can legislate not only with regard to people on Canadian territory, but also with regard to those outside Canada, Canadian citizens or foreign nationals.

This situation results from section 3 of the Statute of Westminster, 1931, which decreed that "the Parliament of a Dominion has full power to make laws having extra-territorial operation." The Extra-territorial Act, 1933, which became section 8(3) of the Interpretation Act, R.S.C. 1985, c. I-21, even renders this jurisdiction retroactive. See Croft v. Dunphy, [1933] C.A. 156; British Coal Corp. v. The Queen, [1935] C.A. 500 and Pan American World Airways v. The Queen, [1979] 2 F.C. 34, 46.

Thus the Crown may enact legislation that claims to apply to people outside Canada, even if they are not Canadian citizens or do not live in Canada. In this way, in British Columbia Electric Ry. Co. v. The Queen, [1946] C.A. 527, a federal tax imposed on non-residents was at issue. Often, extra-territorial jurisdiction is exercised today to decree that certain acts committed outside Canada are offences punishable in Canada: see, for example, section 29 of the Citizenship Act, R.S.C. 1985, c. C-29 and sections 6(2) and 7 of the Criminal Code, R.S.C. 1985, c. C-46. See also the Canadian Human Rights Act, R.S.C. 1985, c. H-6, paragraph 40(5)(c).

The Crown could even make its extra-territorial legislation annexationist. These days, this type of will is mostly manifested in terms of marine space. This is the case, for example, in the federal legislation that entrenched the existence of Canada's territorial waters and that expanded it to 12 nautical miles. See chapter III, on the maritime boundary of Canadian territory. However, it should be noted that the legal situation would be exactly the same if these were not submerged spaces, whether claimed or not by other governments. Canadian legislation that would claim to apply to part of the current territory of the United States, although probably futile, should still be sanctioned by Canadian courts. "In this Court we have nothing to do with the question of whether the Legislature has or has not done what foreign powers may consider a usurpation in a question with them": Mortensen v. Peters, (1906), quoted in K. and L. 3.

²⁴⁸

See also: P. A. Côté, *The Interpretation of Legislation in Canada*, 2nd edition, Cowansville: Yvon Blais, 1990; and Peter Hogg, *Constitutional Law of Canada*, 4th edition, Toronto: Carswell, 1996, at 270-271.

750. In addition, the Supreme Court adjudicated, in *Canada (CDP) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, that a Canadian court has the jurisdiction to adjudicate an offence committed abroad. Bastarache J. (on behalf of the majority of the Supreme Court) writes, at page 670:

*The appellants' second ground of attack is that the contempt order is inapplicable because it seeks to restrain conduct taking place outside of Canada, and, therefore, beyond the territorial jurisdiction of the Federal Court of Canada. This argument is misguided. The violation being impugned here is not the existence of the phone number in the United States without more, but rather the combined effect of that American phone number with the offending messages, and the referral message to that phone number on Liberty Net's old line. The gravamen of the violation of the order is the communication of the offending messages; that communication takes place by virtue of the advertisement on the Canadian phone line and the broadcast of the message on the American phone line. The former element took place "by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament", as provided for under s. 13 of the Human Rights Act. As long as at least part of an offence has taken place in Canada, Canadian courts are competent to exert jurisdiction. As La Forest J. articulates the principle in *Libman v. The Queen*, [1985] 2 S.C.R. 178, at pp. 212-13:*

As I see it, all that is necessary to make an offence subject to the jurisdiction of our courts is that a significant portion of the activities constituting that offence took place in Canada. As it is put by modern academics, it is sufficient that there be a "real and substantial link" between an offence and this country, a test well-known in public and private international law...

*This case does not even test the outer limits of that principle. There was here an advertisement for a message which violated the terms of the order, and that advertisement was made in Canada, on the very phone line where the offending messages had formerly been available, and this advertisement was done with knowledge of that content of those messages and with knowledge that that content violated the terms of the order of *Muldoon J.**

751. Consequently, the fact that section 31(3) prohibits Canadian manufacturers from publishing advertisements in foreign media is not problematic. Thus, even if it was deemed to make the legislation extra-territorial, it does not cause constitutional problems.
752. The plaintiffs claim that the exemption granted by the Act to American and international advertising published in imported magazines necessarily causes the reduction of any benefits envisaged by the government.
753. This argument is not new and was raised as early as 1989 against the TPCA, without being retained by the Supreme Court in 1995:²⁴⁹

Given the fact that foreign tobacco products comprise less than 1 percent of the Canadian market, it is apparent that the exemption has an extremely limited scope.

²⁴⁹

La Forest J., at para. 56.

754. Not only is this argument not supported by the plaintiffs' evidence but their marketing documents show that foreign magazines have no impact whatsoever.
755. Canadians do not like the taste of American cigarettes and the penetration of their advertising is minimal:

*Overflow advertising has been a strategic focus in the C-51 debate, but needs to be put in perspective. There is little evidence that we face any real threat from U.S. brands. Both taste and trademark ownership weigh against this.*²⁵⁰

756. In order to profit from spill-over advertising, RJR considered marketing its Export brand in the United States, so as to benefit from this advertising in Canada:

*Examine the potential for marketing Export in the United States, in order to obtain the benefits of spill-over advertising.*²⁵¹

*One immediate area of potential would be to market the Export brand name in the United States, in order to derive the benefits of spill-over advertising.*²⁵²

²⁵⁰ D-222 - ITL Marketing Plan – 1989 (ITL-431), p. 17531.

²⁵¹ D-226 - (JTI-1678) RJR-MacDonald Inc. Competitive Business Development Strategies for the 1990s – Draft, p. 80108 9861.

²⁵² D-226 - (JTI-1678) RJR-MacDonald Inc. Competitive Business Development Strategies for the 1990s – Draft, p. 80108 9873.

PART IX

VALIDITY OF THE REGULATIONS ADOPTED PURSUANT TO THE ACT

A *Tobacco Products Information Regulations*

757. The *Tobacco Products Information Regulations*, SOR/2000-272 were drafted under the authority of sections 17 and 33 of the *Tobacco Act* by the Governor in Council. As set out in section 42.1 of the Act, these regulations were laid before the House of Commons, which unanimously approved them on June 8, 2000, after having been reviewed by the Standing Committee on Health.
758. These regulations impose on tobacco manufacturers the obligation of placing certain health warnings and other information on their products. These health warnings may, however, be attributed to the Department of Health, contrary to what the TPCA stipulated.
759. The Regulations also stipulate that health warnings shall occupy a greater surface area, namely 50% of the surface of the traditional cigarette package. Moreover, these new messages shall, henceforth, have graphic illustrations and contain concrete statistics and facts intended for consumers.
760. Tobacco products must also identify and quantify six of their distinct toxic emissions (as opposed to three under the previous legislative scheme).
761. The Regulations also stipulate that obligatory messages must be placed on tobacco products containing information on the effects of tobacco on health, as well as advice for smokers who wish to quit smoking.
762. The plaintiffs are contesting the *Tobacco Products Information Regulations* on the following grounds:
- (1) it is *ultra vires* since it is not authorized by the *Tobacco Act*;
 - (2) it constitutes unlawful expropriation; and
 - (3) it is an infringement of their freedom of expression.

(1) Legality of the Regulations

763. In respect of the legality of the regulations, it is relevant to recall the following provisions from the *Tobacco Act*:

PURPOSE

Purpose of Act

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

(a) to protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

(b) to protect young persons and others from inducements to use tobacco products and the consequent dependence on them;

(c) to protect the health of young persons by restricting access to tobacco products; and

(d) to enhance public awareness of the health hazards of using tobacco products.

PART III

LABELLING

Information required on packages

15. (1) No manufacturer or retailer shall sell a tobacco product unless the package containing it displays, in the prescribed form and manner, the information required by the regulations about the product and its emissions, and about the health hazards and health effects arising from the use of the product or from its emissions.

Information required on leaflet

(2) If required by the regulations, every manufacturer or retailer shall provide, in the prescribed form and manner, a leaflet that displays the information required by the regulations about a tobacco product and its emissions and about the health hazards and health effects arising from the use of the product and from its emissions.

Attribution

(3) The information referred to in subsections (1) and (2) may be attributed to a prescribed person or body if the attribution is made in the prescribed manner.

...

Regulations

17. The Governor in Council may make regulations

(a) respecting the information that must appear on packages and in leaflets about tobacco products and their emissions and the health hazards and health effects arising from the use of the products and from their emissions;

(b) prescribing anything that by this Part is to be prescribed; and

(c) generally for carrying out the purposes of this Part.

...

33. The Governor in Council may make regulations

(a) respecting the promotion of tobacco products and tobacco product-related brand elements and the packaging of tobacco products, including the form, manner and conditions of the promotion and packaging, and the promotion of services and non-tobacco products for the purposes of section 28.

764. The specific purpose of the Information Regulations is to inform Canadians from the perspective of the Act. Therefore, the regulatory requirements regarding obligatory health messages, information on the toxic emissions and leaflets, are the subject of a grant of legislative power. The regulatory obligation to include messages to help those smokers wishing to quit arises out of the Act's requirements. The power to inform about the dangers of tobacco shall include the power to inform about how to protect oneself from those dangers.
765. Thus, all of the elements imposed by the Information Regulations arise out of the regulatory powers of the *Tobacco Act*. The fact that messages have to be larger and come with graphic illustrations fits in perfectly with the objective to inform and raise the public's awareness. Logic and common sense tell us that a bigger message with illustrations has a greater chance of attracting attention:

L'HEUREUX-DUBÉ, J.: But there were studies before the other regulations were put in force. The ones that you follow and that are on the packages. There were studies, do I understand it correctly, that indicated that they were in the public interest. So the next logical question if they make it still more visible what is the need for the studies.

I mean, it is evident, if you make it more prominent and more people can see it more clearly on the top of package, to me if those studies decided that it was in the public interest to put those notices, of course, if you make them more visible it is clear it is in the public interest to do that too. What kind of studies do you need for that?²⁵³

*Mr. Potter: As a matter of constitutional and Charter law, senator, it is clear also that lawyers who may complain about an attack on freedom of expression cannot complain about the government putting out more information rather than making less information available to people.*²⁵⁴

766. ITL had even submitted the following before the Supreme Court on November 29, 1994, at the hearing on merit:

Next answer: Can that Government message be made harder, be made more hard hitting and punchy and – the answer is yes, of course, and the Government should perhaps do it if it really had the truth of the strength of its conviction and it can do it by television message, a medium which, by the way, my clients abandoned a fifth of a century ago, in 1972, and they can do it by educating and by public education campaigns and by ministerial statements. Yes, the answer is.

*Indeed for better awareness, doesn't it leap to the mind that what we need is more expression not less?*²⁵⁵

²⁵³ ED-208 Transcript of audiotapes of proceedings — application for a stay — Supreme Court of Canada p. 32.

²⁵⁴ ED-70 Senate — Standing Committee on Legal and Constitutional Affairs — Meeting 52 — 1997-04-01 — *Tobacco Act* C-71 p. 53.

²⁵⁵ ED-209, Mr. Simon Potter, p. 121.

(2) Expropriation

767. Plaintiffs JTI and RBH claim that the requirement to put messages on tobacco products constitutes illegal expropriation. They emphasize the fact that they have received no compensation for this alleged "expropriation," and appear to want to indicate, at paragraphs 54.9(b) and 57.12(b) of their respective statements, that the regulations would be null on this ground.
768. The Attorney General of Canada maintains that this argument has no legal basis. First of all, it is not expropriation because no property has been taken from the plaintiffs. In terms of expropriation, there must have been a transfer of property of some kind in favour of the government. This is not at all the case here. The regulations only impose the mention of certain things on packages. The packages are still wholly owned by the tobacco companies.
769. If we had to address expropriation with the possibility of compensation every time that Parliament imposes putting certain things on products or other objects, the burden would be insurmountable. We need only think of the legislative measures requiring food product and pharmaceutical companies to include the list of ingredients of the product on the package, or the obligation of dangerous product manufacturers to include mentions to this effect on their products. There is no expropriation in these cases and it would be absurd for these companies to demand any compensation whatsoever from the federal government in this regard. Similarly, an individual cannot make a compensation claim against the provincial government by claiming that the law-imposed requirement to put a licence plate on his or her car constitutes "expropriation."
770. Nonetheless, even if the measure under attack in the case at bar were considered to be expropriation, nothing would prohibit the government from doing it. In fact, the federal Parliament has the authority to expropriate, ancillary to a system of rules under its jurisdiction (See P.W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) pp. 711–12).
771. Besides, there is no constitutional obligation to offer compensation for an expropriation (*Ibid*, p. 715).
772. Economic or property rights are not protected under the Charter:

Irwin Toy Limited v. Québec (Attorney General), [1989] 1 S.C.R. 927:

At page 1003:

*The intentional exclusion of property from s. 7, and the substitution therefor of "security of the person" has, in our estimation, a dual effect. First, it leads to a general interference that **economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee.***

Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123:

At pages 1170 and 1171:

In short then I find myself in agreement with the following statement of McIntyre J. in the Reference re Public Service Employee Relations Act (Alb.), supra, at page 412:

It is also to be observed that the Charter, with the possible exception of s. 6(2)(b) (right to earn a livelihood in any province) and s. 6(4), does not concern itself with economic rights."

773. The exercise of regulatory power for purposes of the public interest does not amount to expropriation. The government does not expropriate 50% of the package for its own use, but to promote public health.

Hogg, P.W., *Constitutional Law of Canada*, 4th Edition, Toronto, Carswell, 1997:

At page 714:

*Most forms of regulation impose costs on those who are regulated, and it would be intolerably costly to compensate them. Moreover **much regulation has a redistributive purpose: it is designed to reduce the rights of one group (manufacturers, employers, for example) and increase the rights of another (consumers, employees, for example).** A compensation regime would work at cross-purposes to the purpose of the regulations.*

774. The plaintiffs submitted the argument, without success, before the Supreme Court when the new regulation was introduced in 1993.

RJR-MacDonald Inc. v. Attorney General of Canada – Transcript of audiotapes of proceedings: Mr. Colin K. Irving (notice 403 [C.p.c.] #31):

At page 34:

*The statute authorizes the government to convey information. **It does not authorize the government to expropriate the company's packaging.** That is what they are doing now and in my submission they are doing it without any supporting evidence at all. That is the point.*

775. The plaintiffs provided no evidence of the prejudice sustained by the so-called expropriation, if any, which is expressly denied, and consequently did not establish their right to any compensation whatsoever.

(3) Freedom of expression

(i) Infringement of paragraph 2(b)

776. Plaintiff ITL addresses the issue of the alleged "expropriation" somewhat differently. At paragraphs 142 to 146 of its statement, it claims that the

regulation relative to labels is so intrusive that it deprives tobacco companies of their only remaining method of communicating with their consumers. There is no evidence to support this affirmation.

777. It claims that the effect of the regulation, combined with the effect of the provisions of the *Health Protection and Promotion Act*, interferes with its freedom of expression. In other words, it claims that the vehicle used to communicate with its clients has been expropriated and that this violates its right under paragraph 2(b) of the Charter. The plaintiffs, JTI and RBH, also made similar claims, but do not go into as much detail as ITL.
778. In response to this argument, the Attorney General of Canada maintains the following:
- (1) there is still room on cigarette packages for tobacco companies to communicate with their clients;
 - (2) companies always have the option of inserting a leaflet inside the package. As there is no limit to the number of leaflets that can be inserted into a package, tobacco companies retain another way of communicating additional information; and
 - (3) it is totally false to claim that the package is the only means for tobacco companies to communicate with their consumers. In fact, according to the terms prescribed under the law, tobacco companies may use information advertising or brand-preference advertising to communicate with their clients. The Information Regulations are not an infringement of paragraph 2(b) of the Charter and do not, in any way, restrict the freedom of expression of the plaintiffs.
779. Plaintiff ITL relies on a British Columbia trial court decision, *Pacific Press*, [2000] 5 W.W.R. 219 (S.C.B.C), to conclude that the Information Regulations are an infringement of paragraph 2(b) of the Charter. In this case, the media were obligated to publish different methodological information when the publication of election opinion surveys was deemed contrary to the Charter.
780. We note, however, that it was a question of political expression in the *Pacific Press* case as opposed to a simple labelling of commercial products as it is in this case. The first case is much closer to the core of freedom of expression than the second.
781. Moreover, the primary problematic aspect of the act in this case that it could have prevented the publication of certain surveys. As mentioned by the Court at para. 179 of the decision:

S. 235 not only requires the publication of specified information at the time an election opinion survey is first published. It can also have the effect of

preventing the publication of information respecting such surveys if the required methodological information cannot be published at the same time.

782. It should be pointed out that the plaintiff provided the court with factual evidence explaining how the act infringed upon its freedom of expression.

783. At para. 152-56, the evidence was summarized as follows:

Ms. Graham testified that the election opinion survey scheme effectively prohibited the media from publishing the results of election opinion surveys leaked to members of the media, for example, by political parties or candidates.

In her evidence Ms. Graham contrasted The Vancouver Sun's handling of election opinion survey results during the 1991 provincial election with the 1996 provincial election after the election opinion survey scheme had been enacted. In her evidence she reviewed all of the articles published by The Vancouver Sun and Province that made reference to election opinion surveys during the 1991 and the 1996 provincial election periods.

When The Vancouver Sun intends to publish an election opinion survey its practice is to approach the various parties or leaders, provide them with the results of the survey and ask for a response. Often the party or leader will respond by telling the reporter the results of an election opinion survey sponsored by the party.

During the 1991 election when The Vancouver Sun published the results of an election opinion survey, it regularly published the responses from the parties or leaders about those results. Often these responses referred to the results of polling that had been sponsored by the parties.

During the 1996 election campaign, reporters continued to ask the parties and leaders for their responses to election opinion surveys sponsored by The Vancouver Sun and Province. However they were forced to exclude from their stories all references to the results of election opinion surveys conducted by the parties. The newspapers were not able to obtain the information required by s. 235(1) of the Act and hence were prevented from publishing the information about the parties' poll results.

Ms. Graham further testified that because of the mandatory requirements of s. 235(1) The Vancouver Sun and Province also faced the following additional restrictions on publication:

- 1. The papers could not publish the results of election opinion surveys they obtained from panel discussions conducted by the business council as they had in 1991.*
- 2. The papers could not publish teasers (i.e. the summary of an election opinion survey on Friday stating that further polling results would be published in the Saturday paper).*
- 3. The papers could not work in conjunction with radio stations or television stations where the broadcaster first publishes a summary of the election opinion survey and states "for further results and methodological information see tomorrow's Vancouver Sun or Province.*

The papers could not first publish in British Columbia the results of an election opinion survey which dealt with a "matter of public discussion in relation to the

election" where that survey emanated from either another province or the United States.

784. In this case, the plaintiffs did not provide any factual evidence to the Court to conclude that their freedom of expression was violated by the Information Regulations.

785. Section 9(2) of the TPCA was struck down in 1995 for the following reasons:

Unlike La Forest J., I take the view that s. 9 of the Act, which requires tobacco manufacturers to place an unattributed health warning on tobacco packages, also infringes the right of free expression. As La Forest J. notes in para. 113 this Court has previously held that "freedom of expression necessarily entails the right to say nothing or the right not to say certain things": Slight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, at p. 1080, per Lamer J. (as he then was). Under s. 9(2), tobacco manufacturers are prohibited from displaying on their packages any writing other than the name, brand name, trade mark, and other information required by legislation. The combination of the unattributed health warnings and the prohibition against displaying any other information which would allow tobacco manufacturers to express their own views, constitutes an infringement of the right to free expression guaranteed by s. 2(b) of the Charter.²⁵⁶

786. However, in this present case, the regulations sets out in sections 4(1) and 4(2) that the messages may or may not be attributed to Health Canada.

787. In addition, contrary to what former section 9(2) of the TPCA stipulated, the plaintiffs are free to provide other information to their consumers (including the content of toxic substances and their effects) on the package or on a leaflet placed inside the package. The only restriction is that imposed under section 20 of the Act, that this expression must not be false, misleading or deceptive or likely to create an erroneous impression.

(ii) Justification under section 1

788. We argue that in the event that the Court found an infringement of paragraph 2(b) of the Charter, it would be justified under section 1. As stated by McLachlin J. in the 1995 *RJR-MacDonald* decision, at page 349:

The government is clearly justified in requiring the appellants to place warnings on tobacco packaging. The question is whether it was necessary to prohibit the appellants from attributing the message to the government...

789. Iacobucci J. had indicated the following:

At this juncture, I should like to offer some indication of what sorts of measures would, in my mind, have survived Charter scrutiny. As I have already mentioned, it is clear that health warnings can and should be placed on the packages, but the strictures of the Charter necessitate that they be attributed to their author, in all likelihood Health and Welfare Canada."

²⁵⁶

McLachlin J., at 326–27.

790. Hence, it is wholly legitimate for the government to require the placing of health messages on tobacco products.

(iii) Pressing and substantial objectives

791. The first step in an analysis of section 1 is to review the legislative objective.

792. The Information Regulations share the legislative objective set out in section 4(d) of the Act, namely to "to enhance public awareness of the health hazards of using tobacco products."

793. Numerous studies show that consumers are not fully aware of the detrimental effect of tobacco on health and would like to become more informed on the subject (see Appendix 9).

794. In *Hollis v. Dow Corning Corp.* [1995] 4 S.C.R. 634, at para. 20, the Supreme Court recognized that it is the duty of the manufacturer of a product to warn consumers against any inherent dangers related to their use.

It is well established in Canadian law that a manufacturer of a product has a duty in tort to warn consumers of dangers inherent in the use of its product of which it has knowledge or ought to have knowledge. This principle was enunciated by Laskin J. (as he then was), for the Court, in Lambert v. Lastoplex Chemicals Co., [1972] S.C.R. 569, at p. 574:

Manufacturers owe a duty to consumers of their products to see that there are no defects in manufacture which are likely to give rise to injury in the ordinary course of use. Their duty does not, however, end if the product, although suitable for the purpose for which it is manufactured and marketed, is at the same time dangerous to use; and if they are aware of its dangerous character they cannot, without more, pass the risk of injury to the consumer.

*The duty to warn is a continuing duty, requiring manufacturers to warn not only of dangers known at the time of sale, but also of dangers discovered after the products has been sold and delivered; see Rivtow Marine Ltd. v. Washington Iron Works, [1974] S.C.R. 1189, at p. 1200, per Ritchie J. All warnings must be reasonably communicated, and must clearly describe any specific dangers that arise from the ordinary use of the product; see, for example, *Setrakov Construction Ltd. v. Winder's Storage & Distributors Ltd.* (1981), 11 Sask. R. 286 (C.A.); *Meilleur v. U.N.I.-Crete Canada Ltd.* (1985), 32 C.C.L.T. 126 (H.C. Ont.); *Skelhorn v. Remington Arms Co.* (1989), 69 Alta. L.R. (2d) 298 (C.A.); *McCain Foods Ltd. v. Grand Falls Industries Ltd.* (1991), 116 N.B.R. (2d) 22 (C.A.). [Emphasis added.]*

795. Health warnings on tobacco products expose the dangers arising out of normal product use.

796. As the Supreme Court of Canada wrote in 1984, in the decision with respect to the application for stay of the tobacco companies relative to the previous health messages:

The increased number and revised format of the health messages reflect the strong consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers. Support for these changes has been manifested by hundreds of letters and a number of submissions by public health groups highly critical of the initial regulatory requirements under this legislation as well as a number of Departmental studies indicating their need.

These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits.²⁵⁷

797. The requirement to put health warnings on the packaging of tobacco products to address the imbalance of knowledge between the manufacturer and consumers by warning about the dangers inherent in the product.
798. The nature and scope of the duty to inform vary depending on the danger arising out of the normal use of the product:

The nature and scope of the manufacturer's duty to warn varies with the level of danger entailed by the ordinary use of the product. Where significant dangers are entailed by the ordinary use of the product, it will rarely be sufficient for manufacturers to give general warnings concerning those dangers; the warnings must be sufficiently detailed to give the consumer a full indication of each of the specific dangers arising from the use of the product.

...

*...The courts in this country have long recognized that manufacturers of products that are ingested, consumed or otherwise placed in the body, and thereby have a great capacity to cause injury to consumers, are subject to a correspondingly high standard of care under the law of negligence; see *Shandloff v. City Dairy*, [1936] 4 D.L.R. 712 (Ont. C.A.), at p. 719; *Arendale v. Canada Bread Co.*, [1941] 2 D.L.R. 41 (Ont. C.A.), at p. 41 and 42; *Zeppa v. Coca-Cola Ltd.*, [1955] 5 D.L.R. 187 (Ont. C.A.), at pp. 191-93; *Rae and Rae v. T. Eaton Co. (Maritimes) Ltd.* (1961), 28 D.L.R. (2d) 522 (N.S.S.C.), at p. 535; *Heimler v. Calvert Caterers Ltd.* (1975), 8 O.R. (2d) 1 (C.A.), at p. 2. Given the intimate relationship between medical products and the consumer's body, and the resulting risk created to the consumer, there will almost always be a heavy onus on manufacturers of medical products to provide clear, complete and current information concerning the dangers inherent in the ordinary use of their product.*

*I pause at this point to observe that there is an important to be drawn in this context between the manufacturer's duty to warn and the doctrine of "informed consent" developed by this Court in recent years with respect to the doctor-patient relationship. In *Hopp v. Lepp*, [1980] 2 S.C.R. 192, at pp. 195-96 and*

²⁵⁷

RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, at 352.

210, and Reibl v. Hughes, [1980] 2 S.C.R. 880, at pp. 884-85, this Court decided that physicians have a duty, without being questioned, to disclose to a patient the material risks of a proposed procedure, its gravity, and any special or unusual risks, including risks with a low probability of occurrence.

...

*In my view, the principles underlying the doctrine of "informed consent" are equally, if not more, applicable to the relationship between manufacturers of medical products and consumers than to the doctor-patient relationship. The doctrine of "informed consent" was developed as a judicial attempt to redress the inequality of information that characterizes a doctor-patient relationship.*²⁵⁸

[Emphasis added.]

799. The requirement to place health warnings on tobacco products was validated by the Supreme Court of Canada:

*The government is clearly justified in requiring the appellants to place warnings on tobacco packaging.*²⁵⁹

800. What is the nature and scope of mandatory health warnings on a consumer product that kills 45,000 people a year, leads to addiction and affects the quality of life and life expectancy of those who use it?

801. The plaintiffs argue that consumers are well informed that smoking involves health risks and submit that if the government wants to communicate additional information, it can do so via other means of communication, such as billboards (page 55 of ITL's written submission).

802. This argument is based on two false premises:

- it is unnecessary for packages to have health warnings.
- a general health warning is adequate.

803. The purpose of health warnings is to inform smokers of smoking-related risks, and the use of other means of communication other than the package cannot, obviously, guarantee that this purpose will be achieved.

804. When a product kills 45,000 people a year, it is no longer a matter of knowing that smoking entails health risks. Smokers must know the specific risks to which they are exposed and packaging is the best way to inform them of the risks:

Our research shows that Canadians are generally aware that tobacco is bad for health, but they are not aware of the range and the seriousness of the diseases caused by smoking. In particular, smokers are less likely than non-smokers to think tobacco use is a major health problem. This is one of the fundamental reasons we are pursuing these regulations.

²⁵⁸ *Hollis v. Dow Corning Corp.* [1995] 4 S.C.R. 634, para. 22-5.

²⁵⁹ *RJR-MacDonald Inc. v. Canada (A.G.)*, [1995] 3 S.C.R., 199, McLachlin J., para. 173.

*For example, young people who smoke are notably less likely, at 68%, than non-smoking youth, at 89%, to see tobacco as a major health problem. That is, of young people who are non-smokers, 89% see tobacco use as a major health problem, but of young smokers, only 68% see it as a major health problem. This is the knowledge gap that these regulations are intended to address.*²⁶⁰

805. In *Hollis*, the Supreme Court explained that “where significant dangers are entailed by the ordinary use of the product, it will rarely be sufficient for manufacturers to give general warnings concerning those dangers; the warnings must be sufficiently detailed to give the consumer a full indication of each of the specific dangers arising from the use of the product.”²⁶¹
806. There is no doubt that smoking presents significant dangers, even in the case of 'ordinary' use. Therefore, it is not enough that consumers are aware that it is a product that is dangerous to health; they must have detailed, clear, complete and up-to-date information on the specific dangers, as written by the Supreme Court in *Hollis*.

(iv) Rational connection

807. The second step of the analysis of section 1 is that of rational connection. Is it reasonable to believe that the selected measure is likely to attain the identified objectives?
808. The Supreme Court recognized the existence of a rational connection with the former unattributed health warnings under the TPCA. McLachlin J. wrote the following at para. 158 (with Sopinka and Major, JJ. concurring):
- [P]ackage warnings, attributed or not, may be seen as encouraging people to reduce or cease using tobacco. All this taken together with the admittedly inconclusive scientific evidence is sufficient to establish on a balance of probabilities a link based on the reason between...warnings and tobacco consumption.*
809. La Forest J. (with Cory, L’Heureux-Dubé and Gonthier JJ. concurring), validated the warnings imposed under the TPCA. They believed that they met the rational connection criterion. For their part, Iacobucci and Lamer JJ. agreed with the reasons of La Forest J. with regard to the rational connection (para. 185). The Supreme Court was, therefore, unanimous in concluding that warnings had met the rational connection criterion.
810. The warnings set out in the Information Regulations meet the rational connection criterion.

²⁶⁰ Testimony by Ian Potter, Assistant Deputy Minister, Health Canada, May 30, 2000, before the Standing Committee on Health as part of the Regulations hearings, page 38/496, D-111.

²⁶¹ *Hollis v. Dow Corning Corp.* [1995] 4 S.C.R. 634.

811. The plaintiffs already admitted in the first case that the health messages inform Canadians. Hence, in a interlocutory judgment in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at 353 indicated as follows:

Further, both parties agree that past studies have shown that health warnings on tobacco products packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

(v) Minimal impairment

812. The question at this stage is whether a less intrusive measure is reasonably possible without compromising any the legislative objectives. We note that the validity of the Act will not contested by any alternative measure that is possibly imaginable. As noted by Lamer C.J. on behalf of the majority in *R. v. Chaulk*, [1990] 3 S.C.R. 1303, at 1341:

In my view, the question to be addressed at this stage of the s. 1 inquiry is whether Parliament could reasonably have chosen an alternative means which would have achieved the identified objective as effectively.

Recent judgments of this Court (R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713; Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927; and Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123) indicate that Parliament is not required to search out and to adopt the absolutely least intrusive means of attaining its objective. Furthermore, when assessing the alternative means which were available to Parliament, it is important to consider whether a less intrusive means would achieve the "same" objective or would achieve the same objective as effectively.

813. Therefore, the alternative measures in question must not only be effective, but they must also be perceived as having a potential for effectiveness as high as the measure under inquiry.
814. In this case, the plaintiffs claim that minimal impairment is not respected because there are less intrusive measures. They claim that warnings occupying 50% of the main surface of cigarette packages are not justified since the government could have been content with 35%, which existed under the old Act. They also claim that the use of colour and graphic illustrations could be replaced with a simple text warning as provided for in the old Act.
815. Numerous studies have shown that larger warnings are more likely to attract people's attention and, hence, better inform them of the dangers of tobacco.²⁶²

²⁶²

See Appendix 9.

816. Studies concluded the same thing with regard to the use of colour and graphic illustrations.
817. Furthermore, we would like to point out that the text messages under the old Act had lost their effectiveness over the years. Therefore, consumers grew accustomed to these messages and paid less attention to them than previously (see Appendix 9). Therefore, a new form of presenting messages in order to regain consumers' attention was more justified.
818. It should be recalled that, in its argument before the Supreme Court of Canada in *RJR-MacDonald* (ED-209, p. 121), Mr. Simon Potter even advised the government to use more hard-hitting methods to discourage smokers:

Can that Government message be made harder, be made more hard hitting and punchy and – the answer is yes, of course, and the government should perhaps do it if it had the truth of the strength of its conviction....

819. Given the magnitude and detrimental effects of smoking, the use of larger colour warnings and illustrations is justified.

(vi) Proportional effects

820. The Attorney General of Canada argues that there is proportionality between the provisions regarding placing health messages and the objectives. These provisions, assuming that they violated paragraph 2(b) of the Charter, are therefore justified under section 1.

B Tobacco Reporting Regulations

821. The *Tobacco Reporting Regulations*, SOR/2000-273 were drafted under the authority of sections 17 and 33 of the *Tobacco Act* by the Governor in Council. As set out in section 42.1 of the *Tobacco Act*, these regulations were laid before the House of Commons, which unanimously approved it on June 8, 2000, after having been reviewed by the Standing Committee on Health.
822. These regulations impose on tobacco manufacturers and importers the periodic reporting of sales, manufacturing procedures, toxic emissions of their products as well as their research and promotional activities.
823. It is interesting to note that the *Excise Act*, R.S. 1985, c. E-14 already imposes the obligation to release certain types of information. Therefore, sections 31, 32 and 36-39 of this Act set out the following:

31. Every person who carries on a business subject to excise shall

(a) keep, within the licensed premises in which that business is carried on by him, stock books and other books in a form and manner prescribed by ministerial regulations and retain those books until the expiration of six years from the end of the calendar year in respect of which they are kept or until written permission for their prior disposal is given by the Minister; and

(b) clearly record in the books referred to in paragraph (a), day by day and on the same day on which the circumstance, thing or act to be recorded is done or occurs, such particulars as are required by any ministerial regulation in that behalf.

R.S., 1985, c. E-14, s. 31; 1999, c. 17, s. 144(E).

32. (1) Every person who is a distiller, tobacco manufacturer, cigar manufacturer, bonded manufacturer or brewer shall make and deliver to the collector of the division in which the manufactory or premises of that person is or are situated, an inventory in such form as is prescribed by the Minister of the quantity of the different kinds of raw material, articles and goods in process of manufacture, and manufactured products, and all other materials held or owned by that person at the close of business on the last day of the fiscal period of that person, as determined for the purposes of the Income Tax Act, in each year or at any intermediate time when required by the Minister.

(1.1) Every person who has a licence for a bonding warehouse granted under paragraph 50(1)(c) shall make a monthly return to the collector of the division in which the warehouse is situated of the quantity of manufactured tobacco and cigars delivered to accredited representatives, listing the quantity for each country represented by the accredited representatives.

(1.2) Every person who has a licence for a bonding warehouse granted under paragraph 50(1)(c) shall make and deliver to the collector of the division in which the warehouse is situated an inventory in such form as is prescribed by the Minister of the goods stored in the warehouse at the close of business on the last day of the fiscal period of that person, as determined for the purposes of the Income Tax Act, in each year or at any intermediate time when required by the Minister.

(2) The stock-taking necessary to make up the inventories referred to in subsections (1) and (1.2) shall be done in the manner specified by ministerial regulations.

R.S., 1985, c. E-14, s. 32; R.S., 1985, c. 12 (4th Supp.), s. 56; 1993, c. 25, s. 33; 1999, c. 17, s. 144(E).

36. All returns, unless otherwise provided in this Act, shall be made distinct and separate for each month, and shall relate to the month last preceding the day of making the returns.

R.S., c. E-12, s. 36.

37. Every return with respect to quantities, required to be made by this Act, shall be made to the collector on or before the tenth working day of each month for the month last preceding that day.

R.S., 1985, c. E-14, s. 37; R.S., 1985, c. 12 (4th Supp.), s. 57.

38. (1) Every account or return rendered as provided under this Act shall be made and signed by the person carrying on the business to which it relates, or his agent, and shall also be signed by the foreman, clerk, chief workman or other person employed on the premises where the business is carried on who has personal knowledge of the matters dealt with.

(2) The collector or any superior officer may, at any time after the making of the account or return referred to in subsection (1), require any other person employed on the premises who, in his opinion, is best acquainted with the quantity of material used and goods produced, subject to excise, to testify on oath before him respecting the correctness of the account or return.

R.S., c. E-12, s. 38.

39. Every person who signs an account or statement that is rendered as required under this Act shall certify on the face of that account or statement as follows:

I,, certify that the several accounts included in this return are true according to their purport, and that I have personal knowledge of the matters set out therein.

R.S., 1985, c. E-14, s. 39; R.S., 1985, c. 12 (4th Supp.), s. 58.

824. The information required under the *Tobacco Reporting Regulations* will make it possible to exercise greater control over the toxicity of tobacco products sold in Canada in order to better inform the public. They will also allow for a better understanding of how tobacco products change over the years and how they are marketed.
825. The plaintiffs are contesting the *Tobacco Reporting Regulations* on several fronts.²⁶³

(1) Division of Powers

826. First of all, the plaintiffs allege that the Regulations do not fall under federal criminal law jurisdiction under subsection 91(27) S.C. 1867. However, in the 1995 decision, *La Forest J.* writes the following at page 245 (on behalf of the majority on this point):

It appears, then, that the detrimental health effects of tobacco consumption are both dramatic and substantial. Put bluntly, tobacco kills. Given this fact, can Parliament validly employ the criminal law to prohibit tobacco manufacturers from inducing Canadians to consume these products, and to increase public awareness concerning the hazards of their use? In my view, there is no question that it can.

827. At page 252, he adds the following:

This Court has long recognized that Parliament may validly employ the criminal law power to prohibit or control the manufacture, sale and distribution of products that present a danger to public health, and that Parliament may also validly impose labelling and packaging requirements on dangerous products with a view to protecting public health.

828. This is not a case of Parliament attempting to regulate an industry under the guise of criminal law to meet purposes other than those of criminal law. Therefore, this case is different than the *Margarine Reference*, [1949] S.C.R. 1. In this case, the Court had deemed that Parliament could not use the power granted to it under subsection 91(27) S.C. 1867 to criminalize the sale of margarine. The government alleged that the motive behind the Act was to protect the health of Canadians. After admitting that health protection constituted

²⁶³ See Appendix 10 – *Tobacco Reporting Regulations*.

a valid of objective of criminal law, the Court considered that the Act contested in the case at bar did not fall into this category because nothing indicated that margarine presented a specific health risk. Parliament's true objective at the time appeared to be to protect the dairy industry instead, which is an objective exclusive to provincial jurisdiction. Hence, in the case of the *Tobacco Reporting Regulations*, it is clear that its objective is still the health protection of Canadians. There is no evidence on file to prove that the federal government has an undisclosed reason that would fall under provincial jurisdiction.

829. In this vein, La Forest J. (still on behalf of the majority on this point), notes the following at page 247 of the 1995 *RJR* judgment:

[T]here is no evidence in the present cases that Parliament had an ulterior motive in enacting this legislation, or that it was attempting to intrude unjustifiably upon provincial powers under ss. 92(13) and (16). They thus differ from the Margarine Reference, supra, where the prohibition was not really directed at curtailing a public evil, but was in reality, in pith and in substance, aimed at regulating the dairy industry.

(2) Section 8 of the Charter

830. With regard to the section 8 challenge, the plaintiffs argue that the Regulations, by requiring them to report on their activities, constitute illegal monitoring of their business. In other words, they are asserting the right to market a toxic consumer product in secret. This right does not exist in Canada.
831. We would like to note that the plaintiffs did not present any evidence before the Court allowing them to invoke section 8 of the Charter.
832. Moreover, it is also important to bear in mind the nature of the activity. The tobacco business is a government-regulated activity. Parties to this regulated activity have a reduced expectation of privacy, as seen in the Part V analysis of the *Tobacco Act*.
833. The information required under the *Reporting Regulations* concern only business activities so as not to interfere with an individual's privacy.
834. In *British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3, the issue was whether power granted to a real estate commission to restrict a company from producing its internal records was a violation of section 8. The Court, per Sopinka and Iacobucci JJ., ruled that there was no violation of section 8.
835. After stating that this activity was normally regulated by the state, thus an activity for which there is a lower expectation of privacy, the Court indicated that the demand for the production of documents is "one of the least intrusive" (para. 60) with regard to privacy. The Court quotes in this regard at para. 62 the words of La Forest J. in *Thomson Newspapers* (*supra*):

While such records are not devoid of any privacy interest, it is fair to say that they raise much weaker privacy concerns than personal papers. The ultimate justification for a constitutional guarantee of the right to privacy is our belief, consistent with so many of our legal and political traditions, that it is for the individual to determine the manner in which he or she will order his or her private life. . . . But where the possibility of such intervention is confined to business records and documents, the situation is entirely different. These records and documents do not normally contain information about one's lifestyle, intimate relations or political or religious opinions. They do not, in short, deal with those aspects of individual identity which the right of privacy is intended to protect from the overbearing influence of the state. On the contrary, as already mentioned, it is imperative that the state have power to regulate business and the market both for economic reasons and for the protection of the individual against private power. Given this, state demands concerning the activities and internal operations of business have become a regular and predictable part of doing business. Under these circumstances, I cannot see how there would be a very high expectation of privacy in respect of records and documents in which this information is contained.

836. In *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154, a statutory provision obligating offshore fishermen to issue hail reports and fishing logs of their activities was at issue. Fishermen accused of having exceeded their fish quotas claimed that the entering into evidence of the aforementioned reports violated their right against self-incrimination guaranteed in section 7. The Court concluded that the right against self-incrimination in section 7 had not been violated, and took advantage of the situation to comment on the right of privacy in section 8 (at para. 49-52):

*My conclusion that it is not abusive for the state to prosecute those who overfish, using their own hail reports and fishing logs as evidence of the offence, is strengthened by reference to this Court's jurisprudence on the application of s. 8 of the Charter in the regulatory context. In applying a contextual approach under s. 8, this Court has repeatedly emphasized that searches and seizures of documents relating to activity known to be regulated by the state are not subject to the same high standard as searches and seizures in the criminal context. **This is because a decreased expectation of privacy exists respecting records that are produced during the ordinary course of business...***

...

*My conclusion on this issue is buttressed by the fact that it cannot be said that using the information contained in hail reports and fishing logs is an affront to individual dignity – a fundamental value that underlies so many Charter rights. For these records divulge nothing about the personality of the individual who has created them. **The information recorded is of a purely objective kind, and its relevance is limited entirely to a matter of importance only to the management and conservation of the fisheries.** The information divulges nothing of the state of mind, thoughts, or opinions of the individual who has submitted the records. Their content is in fact even more limited than that of the business records at issue in *Thomson Newspapers*, about which I stated, at pp. 517-18:*

These records and documents do not normally contain information about one's lifestyle, intimate relations or political or religious opinions. They do not, in short, deal with those aspects of individual

identity which the right of privacy is intended to protect from the overbearing influence of the state.

Moreover, the requirement to keep records under the Fisheries Act does not impose any psychological or emotional pressures on the individual, and in this way the state intrusion at issue here contrasts sharply with inquisitorial and police interrogatories and testimonial compulsion. These latter do not arise in the ordinary course of business, usually occur after deliberations of wrongdoing are complete, and place the individual in a heightened state of anxiety since the inquisitorial or investigatory procedures of the state are put into operation. Here, in contrast, there is nothing stressful or invasive about responding to a statutory requirement to make hail reports and fishing logs – a requirement designed to benefit not only those who comply with it, but also society at large.

837. Thus the Regulations do not in any way infringe section 8 of the Charter. In addition, take note that no trade secret revealed by the reports will be revealed to third parties. In fact, section 20 of the *Access to Information Act*, R.S. 1985, c. A-1 provides the following:

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

(a) trade secrets of a third party;

(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

...

(6) The head of a government institution may disclose any record requested under this Act, or any part thereof, that contains information described in paragraph (1)(b), (c) or (d) if that disclosure would be in the public interest as it relates to public health, public safety....

(3) Paragraph 2(b) of the Charter

838. The challenge with regard to paragraph 2(b) of the Charter against the Reporting Regulations can easily be put aside. It should be noted that only the plaintiff ITL invokes this argument. It claims in para. 136 of its statement that "... the reporting regulations impose such an unreasonable and onerous burden on all tobacco manufacturer's activities associated in any manner whatsoever with their commercial expression, as effectively to attach penalties to all expression."
839. ITL has presented no evidence in support of the burden thus alleged.
840. The Attorney General of Canada maintains that there is no infringement on the freedom of expression. The Regulations' purpose is not to restrict expression.

(4) Legality of the Reporting Regulations pursuant to the *Tobacco Act*

841. The plaintiffs claim that the provisions of the Reporting Regulations are illegal because they are not authorized by the *Tobacco Act*.
842. The plaintiffs allege that it is illegal to adopt regulations for the purpose of collecting information that may lead the government to eventually exercise its regulatory powers again. It is appropriate here to refer to certain provisions of the *Tobacco Act*.

PURPOSE

Purpose of the Act

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

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

...

Regulations

7. *The Governor in Council may make regulations*

- (a) establishing standards for tobacco products, including:*
 - (i) prescribing the amounts of substances that may be contained in the product or its emissions, and*
 - (ii) prescribing substances that may not be added to tobacco products;*
- (b) prescribing test methods, including methods to assess conformity with the standards;*
- (c) prescribing information that manufacturers must provide to the Minister about tobacco products and their emissions, including sales data and information on product composition, ingredients, hazardous properties and brand elements;*
- (d) prescribing the means, including electronic, by which the information referred to in paragraph (c) may be communicated to the Minister;*
- (e) generally for carrying out the purposes of this Part.*

...

33. *The Governor in Council may make regulations*

- (a) respecting the promotion of tobacco products and tobacco product-related brand elements and the packaging of tobacco products, including the form, manner and conditions of the promotion and packaging, and the promotion of services and non-tobacco products for the purposes of section 28;*

- (b) *respecting the advertisement of tobacco products for the purposes of subsection 22(2);*
- (c) *respecting the use of tobacco product-related brand elements for the purposes of subsection 24(4);*
- (d) *prescribing the manner in which a tobacco product-related brand element may appear on a permanent facility;*
- (e) *respecting, for the purposes of subsection 26(1), the manner in which a tobacco product-related brand element may appear on an accessory;*
- (f) *respecting the display of tobacco products and accessories at retail;*
- (g) *respecting signs that a retailer may post under subsection 30(2), including the placement of the signs and their number, size and content;*
- (h) *requiring manufacturers to disclose the particulars of their tobacco product-related brand elements and promotional activities;*
- (i) *prescribing anything that by this Part is to be prescribed; and*
- (j) *generally for carrying out the purposes of this Part.*

843. It would seem from the underlined excerpts that the Act has clearly granted the Governor in Council the power to adopt regulations requiring that information be provided with regard to substances that may be contained in tobacco products or their emissions, as well as their promotion and sale. It is true that one of the purposes of the Reporting Regulations is to allow the government to collect information that may eventually permit it to adopt new regulations, which is not inconsistent with the *Tobacco Act*, rather to the contrary.

844. *Fitzpatrick v. The Queen*, [1995] 4 S.C.R. 154 (*supra*) responds to ITL's allegations. A regulation is not *ultra vires* because it helps to obtain information that, one day, perhaps, will be used to establish new regulations or update existing regulations (para. 35):

The requirements under s. 61 of the Fisheries Act that fishers complete hail reports and fishing logs (or "true returns") is an important component of the regulatory regime for fisheries management and conservation established under the Act. The essential purpose of this requirement is not to accumulate information that can later be used against the fishers who supply it. It is not compiled during the course of any investigation into wrongdoing. Instead, the purpose of the self-reporting obligation is to provide fisheries officials with up-to-date information necessary for the effective regulation of the fishery. The establishment of quotas depends on accurate information about the size of catches, as well as about their particular location, and the fishers themselves are in the best position to provide this information. Enforcement of the quotas, in turn, is of benefit to commercial fishers as a group, for it ensures the continuing survival of the fishery and the fair distribution of its profits, which provide commercial fishers with their employment and income.

845. The plaintiffs did not explain in their argument in what way sections 3, 7(b), 9(2), 10, 11(1), 11(2), and 15 to 24 of the *Tobacco Reporting Regulations* are void because they exceed the regulatory powers provided for in the *Tobacco Act*.

846. On the contrary, the Attorney General of Canada maintains that these sections do not exceed the regulatory powers provided for in the *Tobacco Act*.

PART X

CONCLUSION

A Suspension and provisional execution

847. In the event that the Court has to declare certain statutory provisions or regulations void, the Attorney General of Canada maintains that the request for provisional execution of the judgment notwithstanding an appeal from the plaintiffs should be refused.
848. In the first case concerning the validity of the *Tobacco Products Control Act*, Chabot J. of the Supreme Court had refused the plaintiffs' request for provisional application of the judgment notwithstanding an appeal: See *Imperial Tobacco Ltd. v. Canada (A.G.)*, [1991] R.J.Q. 2260 (Quebec S.C.), pp. 2312-13.
849. Similarly, in *Thibaudeau v. Canada*, [1994] 2 F.C. 189 (Fed. C.A.), the Federal Court of Appeal had declared void a provision of the *Income Tax Act* that obligated taxpayers to declare child support in their taxable income. The Court of Appeal had decreed that the statement of nullity was applicable immediately (para. 78). The Supreme Court reversed this statement of immediate applicability of the judgment and ordered that the Act remain applicable pending resolution of the appeal (See *Bulletin of the Supreme Court of Canada*, June 14, 1994, p. 1036 (Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.). Published on Quicklaw [1994] S.C.J. 54.
850. In *Delisle v. Canada (Attorney General)*, [1998] R.J.Q. 2761, at para. 82 and subsequent (Quebec S.C.), the validity of a regulatory provision prohibiting RCMP members from forming a trade union or participating in political activities was at issue. Rochon J. of the Supreme Court had declared the regulation null but had delayed declaration.

B Conclusion

For all these reasons, and those it would please this Court to supplement, the Attorney General of Canada maintains that each of the three actions by the plaintiffs must be dismissed with costs.

Montréal, August 26, 2002

GILBERT SIMARD TREMBLAY

General Partnership
Counsel for the Defence

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APPENDIX 1
TABLE OF GROUNDS FOR CHALLENGING THE
TOBACCO ACT

Sections of the Tobacco Act	Sections of the Act being challenged according to the plaintiffs' latest amended statements			Notes and authorities of the plaintiffs August 1, 2002		
	ITL February 8, 2001	JTI July 17, 2000	RBH July 6, 2000	ITL ¹	JTI ²	RBH ³
7		√	√		8 (para. 2 and 355(b))	
17		√	√		2(b), 7 and 11(d) (para. 2 and 355(a))	2(b) (sec. 2.2.1(e))

¹ ITL does not distinguish between the motives for their challenge of the sections of the *Act* on page 4, sub-paragraph (a): "a statement to the effect that sections 18 – 33, 35, 36, 39, 41, 53, 58, 59(c) and 59(f)...infringe several sections of the Charter, are not justified under the first section and are therefore irrelevant," and in their conclusions: "STATE that sections 18 to 33, 35, 36, 39, 41, 53, 58, 59(c) and 59(f)..., infringe sections 2, 7, 8 and 11(d) of the *Charter*..." In addition, in para. 6.7, it is alleged that sections 7 and 11(d) of the *Charter* are infringed upon, but the sections of the *Act* in question are not specified. Moreover, apart from what is indicated in the table, the following underlined sections of the *Act*, and the grounds for their being challenged, are discussed on the following pages and paragraphs: 18, 19, 20, 22, 25, 26, 27, 30, 31 and 53: para. 3.1; 25: para. 6.2; 26, 27 and 28: para. 6.3; 30: para. 6.4.

² Apart from those indicated in the table, the following underlined sections of the *Act*, and the grounds for their being challenged, are discussed in the following paragraphs: 17: para. 24-28, 323, 324; 18: 5-10; 19: 5-10; 20: 244-253; 22: 11-18, 210-243; 24: 21-23; 25: 20; 27: 11-18, 255-258; 33: 323, 324; 35: 32-36; 36: 32-36; 39: 32-36; 59(c) 32-36.

³ RBH alleges in para. 35(a) that "the advertising restrictions found in the *Tobacco Act*" are contrary to section 2(b), and deals with the sections targeted in these grounds in sections 2.2.1a to f. RBH furthermore alleges in para. 35(b) that "certain provisions of the *Tobacco Act*... are contrary to the principles of fundamental justice, allowing abusive searches or seizures or are contrary to the principles of presumed innocence," contrary to sections 7, 8 and 11(d) They do not identify the sections targeted as the grounds for challenging, relying "on the written arguments presented by the two other claimants" (page 40).

Sections of the Tobacco Act	Sections of the Act being challenged according to the plaintiffs' latest amended statements			Notes and authorities of the plaintiffs August 1, 2002 (Right invoked [section(s) of the Charter and/or other grounds]) / paragraph/page of Notes on which mention is made)		
	ITL February 8, 2001	JTI July 17, 2000	RBH July 6, 2000	ITL ¹	JTI ²	RBH ³
18	√	√	√	2(b) (p. 52) Vagueness (para. 5.2.3.2)	2(b), 7 and 11(d) (para. 2 and 355a) Vagueness (para.41)	2(b) (sec. 2.2.1a)
19	√	√	√	2(b) (p. 52) Vagueness (para. 5.2.3.2)	2(b), 7 and 11(d) (para. 2 and 355a) Vagueness (para. 41)	2(b) (sec. 2.2.1a)
20	√	√	√	2(b) (p. 52) Vagueness (para. 5.2.3.2 and p. 51)	2(b), 7 and 11(d) (para. 2 and 355a) Vagueness (para. 41)	2(b) (sec. 2.2.1e)
21	√			Indivisibility (p. 52)		2(b) (sec. 2.2.1e)
22	√	√	√	2(b) (p.52) Vagueness (para. 5.2.3.2 and p. 51)	2(b), 7 and 11(d) (para. 2 and 355a) Vagueness (para. 41)	Art. 22(1), (2) a, b and c, (3) and (4): 2(b) (sec. 2.2.1b and 2.2.1c)
23	√			Indivisibility (p. 52)		
24	√	√	√	2(b) (para. 6.1 and p. 52)	2(b), 7 and 11(d) (para. 2 and 355a)	2(b) (sec. 2.2.1d)
25	√	√	√	2(b) (para. 6.1 and p. 52)	2(b), 7 and 11(d) (para. 2 and 355a)	2(b) (sec. 2.2.1d)

Sections of the Tobacco Act	Sections of the Act being challenged according to the plaintiffs' latest amended statements			Notes and authorities of the plaintiffs August 1, 2002		
	ITL February 8, 2001	JTI July 17, 2000	RBH July 6, 2000	ITL ¹	JTI ²	RBH ³
26	√			Indivisibility (p. 52)		2(b) (sec. 2.2.1d)
27	√	√	√	2(b) (p. 52)	2(b), 7 and 11(d) (para. 2 and 355a)	2(b) (sec. 2.2.1d)
28	√			2(b) (p. 52)		2(b) (sec. 2.2.1d)
29	√			Indivisibility (p. 52)		
30	√			Indivisibility (p. 52)		
31	√			2(b) (p. 52)		2(b) (sec. 2.2.1a)
31(1)		√	√		2(b), 7 et 11(d) (para. 2 and 355a)	
32	√			Indivisibility (p. 52)		
33	√	√	√	Indivisibility (p. 52)	2(b), 7 and 11(d) (para. 2 and 355a)	2(b) (sec. 2.2.1d and e)
34						
35	√	√	√	8 (para. 6.5)	8 (para. 2 and 355b)	
36	√	√	√	8 (para. 6.5)	8 (para. 2 and 355b)	
39	√	√	√	8 (para. 6.5)	8 (para. 2 and 355b)	
40	√ ^b					

Sections of the Tobacco Act	Sections of the Act being challenged according to the plaintiffs' latest amended statements			Notes and authorities of the plaintiffs August 1, 2002 (Right invoked [section(s) of the Charter and/or other grounds] / paragraph/page of Notes on which mention is made)		
	ITL February 8, 2001	JTI July 17, 2000	RBH July 6, 2000	ITL ¹	JTI ²	RBH ³
41	√			7 (para. 6.6)		
53	√			Unclear		
58	√			7 (para. 6.6)		
59(c)	√	√	√	7 (para. 6.6)	2(b), 7 and 11(d) (para. 2 and 355a)	2(b) (sec. 2.2.1 f)
59(f)	√			7 (para. 6.6)		

REPORTING REGULATIONS

Sections of the Regulations	Sections of the Regulations being challenged based on the latest amended statements by the plaintiffs			Plaintiffs' Notes and authorities August 1, 2002		
	[Right invoked according to conclusions]			[Right invoked ¹]		
	ITL February 8, 2001	JTI July 17, 2000	RBH July 6, 2000	ITL²	JTI³	RBH⁴
The full Regulations	2(b) 8 <i>Ultra vires</i> of Parliament	<i>Ultra vires</i> of Parliament <i>Ultra vires</i> of the enabling statute	<i>Ultra vires</i> of Parliament <i>Ultra vires</i> of the enabling statute	2(b) 8 <i>Ultra vires</i> of Parliament	8, or alternatively <i>Ultra vires</i> of Parliament <i>Ultra vires</i> of the enabling statute	<i>Ultra vires</i> of the enabling statute <i>Ultra vires</i> of Parliament
Ancillary:						
3, 7(b), 9(2), 10, 11(1), 11(2), 15, 16, 17, 18, 19, 20, 21, 22, 23, 24	<i>Ultra vires</i> of the enabling statute			<i>Ultra vires</i> of the enabling statute		

¹ The locations in the notes and authorities of each plaintiff in which mention is made of the grounds for the challenge of the sections in question are included in the footnotes that follow.

² ITL's grounds for challenging, hereafter in bold, are indicated/discussed in the following conclusions/pages/paragraphs: **2b**: 7th conclusion; **8**: page 4, para. 7.2.3, 7th conclusion; **u.v.p.**: page 4, para. 7.2.2, 6th conclusion; **u.v.e.s.**: page 4, para. 7.2.1, 8th conclusion (ancillary conclusion regarding certain specific sections).

³ JTI's grounds for challenging, hereafter in bold, are indicated/discussed in the following paragraphs: **8**: para. 4, 31, 327(b), 339, 355(f), or alternatively **u.v.p.**: para. 4, 31, 327(a), 338, 355(g); **u.v.e.s.**: 327(c), 355(e) (though they adopt ITL's arguments as regards these grounds) (see para. 327(c), JTI's conclusion regards the full Regulations while ITL's conclusion is ancillary and regards certain specific sections).

⁴ RBH's grounds for challenging, hereafter in bold, are indicated/discussed in the following paragraphs: **u.v.e.s.**: para. 35e; **u.v.p.**: 35c.

INFORMATION REGULATIONS

Sections of the Regulations	Sections of the Regulations being challenged based on the latest amended statements by the plaintiffs			Plaintiffs' Notes and authorities August 1, 2002		
	[Right invoked according to conclusions]			[Right invoked ¹]		
	ITL February 8, 2001	JTI July 17, 2000	RBH July 6, 2000	ITL²	JTI³	RBH⁴
The full Regulations	2(b) <i>Ultra vires</i> of the enabling statute	2(b) <i>Ultra vires</i> of the enabling statute Expropriation without compensation	2(b) <i>Ultra vires</i> of the enabling statute Expropriation without compensation	2(b) <i>Ultra vires</i> of the enabling statute Expropriation without compensation	2(b) <i>Ultra vires</i> of the enabling statute Expropriation without compensation	2(b) <i>Ultra vires</i> of the enabling statute Expropriation without compensation

¹ The locations in the notes and authorities of each plaintiff in which mention is made of the grounds for the challenge of the sections in question are included in the footnotes that follow.

² ITL's grounds for challenging, hereafter in bold, are indicated/discussed in the following conclusions/pages/paragraphs: **2b**: page 4, para. 7.1(a), 7.1.1, 3rd conclusion; **u.v.e.s.**: page 4, para. 7.1(b) and 7.1.2 (expropriation without compensation), 5th conclusion, para. 7.1(c) and 7.1.3, 4th conclusion.

³ JTI's grounds for challenging, hereafter in bold, are indicated/discussed in the following paragraphs: **2b**: para. 3, 303, 355(c); **u.v.e.s.**: para. 3, 323 (expropriation without compensation), 325, 355(d) (expropriation without compensation) and 355e.

⁴ RBH's grounds for challenging, hereafter in bold, are indicated/discussed in the following paragraphs: **2b**: para. 35(d); **u.v.e.s.**: para. 35(d) (expropriation without compensation), 35(e).

APPENDIX 2

TOBACCO

The product and its constituents

The product at the heart of the litigation, tobacco, is derived from a plant with the Latin name of *nicotiana tabaccum*. Tobacco is marketed in various forms and sold by the three plaintiffs and other producers (D-62, D-74). Tobacco products are as follows:

- Unprocessed tobacco leaves (D-58)
- Chewing tobacco (D-73)
- Pipe tobacco
- Rolling tobacco (D-66)
- Puffed tobacco (D-59)
- Reconstituted tobacco
- Manufactured cigarettes
- Tobacco stick (D-63)
- Kreteks (D-74)
- Bidis

To this list is added new products that are not yet sold in Canada:

- Eclipse cigarettes (D-76) and Accord Kit cigarettes (D-77), the tobacco of which is heated rather than burned to extract the nicotine.

The main tobacco products in question in this case are manufactured cigarettes and rolling tobacco. The plaintiffs have presented no evidence as regards the physical or chemical characteristics of the cigarettes that they manufacture and sell to more than 6 million Canadians. It is even astonishing that the only representative whose testimony was presented by them was that of Ed Ricard, ITL Marketing Vice-President, a witness with more than 25 years of experience at ITL and who is responsible for marketing the Player's Première cigarette brand (P-29, D-242 and D-243), a cigarette derived from a supposed new technology. Mr. Ricard stated that he was not aware of the physical characteristics of cigarettes in general and Player's Première cigarettes in particular.

As noted by Professor André Castonguay, [TRANSLATION] "the cigarette resembles a veritable chemical plant." There are 2,500 different substances in tobacco that, when burned, "produce more than 4,000 substances." (Surgeon General Report, 1989) (D-113, p. 6).

In addition, the tobacco used by the plaintiffs in manufacturing their various brands of cigarettes, such as Du Maurier, Matinée, Player's, Export A, Craven A, Rothmans and others, contains insecticides and pesticides. This is why Germany and Italy set maximum limits or tolerance levels for pesticide residues permitted in tobacco. Germany and Italy collectively regulate approximately 125 types of pesticides. The United States has established limits for 16 banned pesticides contained in tobacco imported from other countries. In Canada, there is currently no regulation regarding the amount of pesticides and insecticides contained in the tobacco used by the plaintiffs. However, section 7(a) of the *Tobacco Act*, which is being challenged by the plaintiffs, permits the adoption of regulations in this matter.

In a study of 360 brands of Canadian cigarettes, carried out in October 1995, Labstat Inc. – whose president, Bill Rickert, has an excellent reputation – drew the following conclusions:

1.1 General Comments

West Germany and Italy have set maximum permitted limits or tolerances for pesticide residues on tobacco and (or) tobacco products.

For the two countries collectively, about 125 pesticides have been included. Other European countries may also adopt tolerances for tobacco products independently or jointly with Germany and Italy, through the European Economic Community. Although the United States has not established pesticide tolerances for tobacco products, it has set maximum allowable limits for 16 banned, cancelled, suspended, or otherwise prohibited pesticides (the so-called USDA Import List).

Canada is well behind the rest of the world with respect to this issue since, once processed into cigarettes, there is not, nor has there ever been a program for the systematic assessment of pesticide residues in tobacco.

There is not, nor has there ever been a requirement for the reporting of levels of pesticide residues in manufactured cigarette tobaccos, even though it could be argued that pesticides are "additives".

1.6 Loss During Smoking

The most unique factor relating to loss of pesticide residues on tobacco occurs during consumption, where the user either heats the product to 800°C or expectorates most of the product. The phosphate and carbamate insecticides are essentially destroyed during smoking. Available data indicate that 2% or less of presently recommended insecticides are likely to appear in the mainstream smoke. In the case of the chlorinated hydrocarbon insecticides, 5 to 20% of the parent molecule might be expected in the mainstream smoke.

In addition to the active principals contained in pesticides, other substances such as surfactants or solubilizing agents of inert carriers may, if transferred to tobacco smoke, interact with compounds in the diet or undergo conversion to potentially hazardous substances in the tobacco leaf itself, e.g., nitrosation of diethanolamine which is used as a solubilizing agent for maleic hydrazide. Very little is known regarding these potential interactions and the effects, if any, in humans.

1.7 Regulation of Tobacco Pesticide Residues

Agriculture Canada registers pesticides for use in Canada on the basis of an evaluation that considers efficacy, safety of residue levels, safety of application, and environmental impact. Maximum residue limits (MRLs) are established by Health and Welfare Canada and published in the Food and Drugs Act. Division 15, Section B.15.002, of this Act establishes an adulteration limit of 0.1 ppm for all agricultural chemicals in foods except those specifically listed with their MRL in Division 15, Table II. Accordingly residues of pesticides not registered for use in Canada are subject to an MRL of 0.1 ppm.

Agriculture Canada is responsible for ensuring that food commodities, either shipped interprovincially or imported, comply with these MRL's.

Since tobacco is not a food commodity, it does not come under the provisions of the Food and Drugs Act. Commercial brands of Canadian cigarettes have not been investigated in a systematic way for pesticide levels. The present investigation would provide the first comprehensive data base in that regard.

A Historical Survey of Levels of Selected Pesticides in Canadian Cigarette Tobaccos, Labstat Incorporated, October 31, 1995 (ED-192)

Over the years, the plaintiffs have modified the physical and chemical characteristics of Canadian cigarettes without advising consumers. For example, the use of different types of paper or additives, perforation of the paper and ventilated tips modified the content or the number of toxic substances found in mainstream and sidestream cigarette smoke. (D-113, p. 7)

Several brands of Canadian cigarettes are ventilated by means of tiny holes on the filter. In theory, the ventilation results in less mainstream smoke. However, this principle only works in analyses carried out on a smoking machine. In the case of human beings, the behaviour of smokers and the phenomenon of compensation mean that a consumer of light cigarettes takes in as much smoke and as many toxic substances as a smoker of cigarettes with high levels of tar and nicotine. (D-113, p. 13)

Moreover, the tobacco used by the plaintiffs in their products has also been modified over the years. Tobacco producers have, in particular, selected certain parts of the tobacco plant that contain more nicotine in order to retain the same level of nicotine as they previously contained, as Canadian cigarettes are ventilated and contain less tobacco than in the past. (D-113, p. 13)

Historical Study of Nicotine Yields of Canadian Cigarettes in Relation to the Composition and Nicotine Content of Cigarette Tobacco (1968-1995) by W.S. (Bill) Rickert (D-118, p. 2, para. 2.1, 2.2, 5.5.5 and 7):

2.1 Physiological Properties of Nicotine

Nicotine is one of the most powerful of all drugs. Two or three drops placed on the tongue would rapidly kill an adult, and the nicotine content

of one cigar, about 60 mg, would be fatal to a human if injected intravenously. The actions of nicotine in the body are so complex and multitudinous that there are few other psychoactive drugs about which so much is known, though so little understood. Nicotine reaches and can have an effect on every organ in the body.

Nicotine has both peripheral and central effects. It can stimulate. It can sedate. It induces tolerance. Physical as well as psychological effects occur on withdrawal. More importantly, unlike some addictive drugs, it does not impair the capacity to work or to socialize appropriately. Social disapproval is the only contiguous negative consequence and this does not operate all the time.

Some of the effects of nicotine, not necessarily addictive, include: increase in heart rate and blood pressure, release of epinephrine from the adrenal medulla and 11 hydroxycorticosteroids from the adrenal cortex, increase in serum free fatty acids and triglycerides, inhibition of stomach contractions and gastric secretions, delay in the emptying time of the stomach, impairment of pyloric competence with increase in duodenogastric reflux, increase in the activity of the colon, inhibition of appetite, and an effect of reducing body weight by some process over and above the effect on appetite.

Finally, it is possible that the dependence-producing potential of psychoactive drugs is partly due to their pharmacological ability directly or indirectly to influence the hypothalamic reward system. Activity in this system, it seems, is mediated by catecholamine release. Doses of nicotine not only release catecholamines in these areas, but nicotine actually influences hypothalamic electrical self-stimulating behaviour.

2.2 Addictive Properties of Nicotine

Why is cigarette smoking so addictive? The short answer is because the modern cigarette is such a highly efficient device for delivering nicotine to the brain. By inhaling tobacco smoke, the smoker can get nicotine to his brain more rapidly than the heroin addict can get a "buzz" when he shoots heroin into a vein. It takes only 7 seconds for inhaled nicotine to reach the brain compared to 14 seconds for blood to flow from arm to brain. Furthermore, the smoker gets a "shot" of nicotine after each inhaled puff. The number of rapid pharmacological reinforcements is quite staggering. The pack-a-day smoker gets through 7300 cigarettes a year. At 10 puffs per cigarette this means more than 70,000 shots of nicotine to the brain in a year.

Added to this are other factors such as taste, aroma, the social and other nonpharmacological rewards, and the fact that smoking combines a pharmacological effect with a sensorimotor ritual which provides an elaborate network of sensory and motor stimuli to act as substrate for secondary conditioning. It is hardly surprising that cigarette smoking is so addictive.

5.5.5 Conclusions

The nicotine content of cigarette tobacco has been increasing roughly in a linear way since about 1980. This increase is most evident in the lamina fraction but is also noticeable in fractions of midrib and stem. With respect to individual brands of cigarettes, there are impressive differences; the nicotine content of Player's RSFT manufactured by Imperial Tobacco increased rapidly from about 1980 to 1995 compared with Rothmans KSFT manufactured by Rothmans B&H. This suggests

significant differences in cigarette design strategies among Canadian manufacturers which is further emphasized by the recent use of a "brown" component in the manufacture of many Imperial Tobacco brands.

The tobacco which is found in Canadian cigarettes is relatively homogeneous in comparison with the constituents of American cigarettes. This means that most of the brand differentiation must come from cigarette design rather than through the use of a variety of starting materials. Since the distribution of alkaloids among the various fractions is rather similar, in the author's opinion, it would appear that:

The main vehicle for increasing the nicotine content of the tobacco in Canadian cigarettes has been through selection of appropriate leaves (nicotine content varies with leaf position) and genetic manipulation of cultivars. However, if the "brown" fraction represents reconstituted material, the nicotine content of that material would be subject to a far greater control by the manufacturer.

7.0 *Nicotine in Cigarette Tobacco in Relation to Nicotine in Cigarette Smoke*

...

It is extremely important to remember that the amount of tobacco per cigarette actually decreased in this time period. Thus, in order to maintain levels of nicotine per cigarette it was necessary to increase the amount of nicotine per gram.

Furthermore, certain brands of cigarettes and rolling tobacco sold by the plaintiffs ITL and Rothmans Benson and Hedges are identical. In other words, the only difference in these products is the name and packaging; they are in fact identical, a fact of which consumers are not informed. (D-270, D-279)

Canadian cigarettes contain Virginia tobacco, including an amount of reconstituted tobacco from waste produced during the manufacturing process. The manufacturers incorporate one or more additives to this reconstituted tobacco. (D-115, p. 51 et seq., p. 58)

2. *Physical Characterization of Tobacco Sheet*

Because of the possible effects that the physical and structural characteristics of reconstituted cigarette tobacco sheet can have on the combustion process in the formation of cigarette tobacco smoke, a somewhat detailed description of reconstituted tobacco sheets appears warranted. It would be an oversimplification to consider reconstituted tobacco sheets as a generic heading. Reconstituted tobacco sheets differ as widely from each other as Burley tobacco differs from flue-cured and oriental tobaccos. Each of the sheet processes forms its own unique kind of tobacco sheet, with different structural, physical, and chemical characteristics. With the exception of sheets produced by those processes that employ no added ingredients, that is, the all-tobacco sheets, the reconstituted sheets owe their physical structure and tensile properties to non-tobacco adhesive and to the reinforcing fibers that are added. The reinforcing fibers are usually cellulose, although in some instances they may be inorganic or ceramic fibers.

At p. 83:

Little has been published concerning the chemical composition of smoke from reconstituted sheets. The gross condensate, nicotine, and carbonyl levels are reduced. There is strong inferential evidence that the composition of sheet smoke condensate is also qualitatively altered. The chemical and physical make-up of reconstituted sheets can be altered within wide limits as a result of the advanced sheet-forming technology that has been developed in the past 15 years. Reconstituted sheet technology will permit the tobacco scientist and technologist to superimpose structural and compositional variations in the manufacture of reconstituted sheet. These variations could have profound effects upon the composition and the chemical and biological properties of the smoke obtained from cigarettes made of these products.

The papers, filters and ventilated tips in manufactured cigarettes contain all types of chemical products that are added to the substances contained in the tobacco and released during combustion. (D-84, D-85, D-240)

The content of Canadian cigarettes has not been made known to consumers. Yet this information is as useful as the amount of toxic substances contained in mainstream and sidestream cigarette smoke. (D-120)

From 1996 to 1997, the plaintiff ITL produced and promoted, on a national scale, the Players Première cigarette (D-29, D-237), presented as less harmful. However, the comparative analysis of its constituents by Professor André Castonguay shows the following:

[TRANSLATION]

1. *The Player's Première cigarette, presented as less harmful, contains more NNK (highly carcinogenic) than the other brands of Canadian cigarettes (D-113, D-120) (transcript pp. 2888, 2891 and 2893).*
2. *The alleged "unique" filter on Player's Première was in no way innovative, as it has been used in Portugal for 20 years.*
3. *The Player's Première cigarette, allegedly less harmful, contained an amount of harmful chemical substances equal to or greater than the other brands of cigarettes (D-241, appendix Toxicity/Carcinogenicity Assessment Yields of Selected Constituents by Popular or "Innovative" Cigarettes, Labstat Inc., April 30, 1998.).*
4. *From 1999 to 2001, the yield of toxic substances by Player's Première cigarettes varied, as changes were made to the brand. (Q 187-197).*

A study entitled "Toxicity/Carcinogenicity Assessment Report on Yields of Selected Constituents by Popular Brand or 'Innovative' Cigarettes," Labstat Inc., April 30, 1998 (D-241), stated:

- *The so called "less hazardous" cigarette would seem to be the solution to a number of dilemmas. For the smoker who is both strongly attracted or habituated to continued smoking but also desires to reduce the hazard to his or her health, it offers the promise of compromise. For the*

manufacturers, reducing “tar” and nicotine (T/N) has proved an important marketing tool to reach an increasingly health-conscious public and to reduce criticism in the biomedical community, without serious economic loss to interests dependent on tobacco sales. The less hazardous cigarette has been seen, by some, as a compromise between the statutory commitments of the Government to public health (and thus antismoking efforts) on one hand and to agriculture and other economic activity on the other.

- The logic that lower T/N yields equal less harmful smoking seems simple and persuasive. But, as noted in “Tobacco Control: A Blueprint to Protect the Health of Canadians”, there are a number of ways in which this logic may be misleading. First, the measurements of T/N are performed by analyzing smoke drawn by a machine that simulates smoking with a simple and unchanging program. Human smokers and their cigarettes, however, are neither simple nor unchanging. Lowering the T/N of cigarettes typically results in people’s smoking more of them or smoking them differently. Machine yields, as currently published, have little to do with human exposure.
- Second, there is the complexity of the product itself. Tobacco smoke contains several thousand distinct compounds. While the particulate condensate (“tar”) is clearly carcinogenic, and pure nicotine and carbon monoxide both have well-demonstrated effects of the cardiovascular system, the quantities of these components, as now reported, does not give adequate information relevant to the potential toxicity of cigarettes. In particular, the numbers do not take into account the yield of gases formaldehyde, hydrogen cyanide, NOx and others-in cigarette smoke, which may not parallel T/N yields as the cigarette is smoked. This point can be illustrated by a plot of pyridine in relation to yields of nicotine under current standard Canadian conditions (data from a 1995 Labstat report to Health Canada).
- In addition, flavourings are added to tobacco to modify the taste for consumer satisfaction. As a rule these additives are not under the purview of regulations and are held as industrial secrets. It is known that some flavourings designed to offset reduced T/N taste give rise to toxic constituents when burned.
- However, yields of tar, nicotine and CO from the second “unique” brand (Player’s Première) were not significantly different from the other popular Canadian brands which were tested in this project. Consequently, the properties of the filter (described by the manufacturer as “incorporating the dispersion qualities of granular semonlina, a grain product made from wheat, with beads of charcoal, an effective natural filtering agent”) were not sufficient to differentiate this brand from the others.
- The data for the two innovative brands tested in this project establish the upper and lower bounds for phenolic deliveries in this project. Player’s Première (brand 292) was consistently the highest and Eclipse the lowest.
- There is very little difference among the popular brands of Canadian cigarettes which were tested in this project. There is no evidence for a difference in the innovative Canadian brand (Player’s Première) and the highest yielding popular brand in this test set. Yields of bezo[a]pyrene from the cigarette which primarily heats tobacco were very in comparison

with those of typical Canadian tobacco burning cigarettes small (~6% of the average for the 4 Canadian brands).

- *In most cases, yields obtained for Player's Première (brand number 292) were indistinguishable from those produced by the more popular member of the Player's family (i.e. Player's Light (Re) Regular Filter. With respect to Eclipse (brand number 308), deliveries of hydrogen cyanide under standard test conditions are about 10 fold less than the other brands which were tested in this project.*
- *Yields of ammonia from Player's Première (Brand No. 292, the cigarette with the innovative filter) are higher than those observed for the "regular" Player's brand (Brand No. 114). As a group, the traditional tobacco burning cigarettes evaluated in this series, all have very similar yields of mainstream ammonia. Yields for the tobacco heating cigarette are about ¼ of those obtained from the other products.*
- *Yields for compounds classified, as "miscellaneous volatile organics" are all very similar with the exception of Brand number 308 (Eclipse). Yields for brand 292 (Player's Première), described by the manufacturer as giving "reduced irritation" were very similar to those of the other two popular brands which were tested. In most cases, yields obtained for Player's Première were indistinguishable from those produced by the more popular member of the Player's family (i.e. Player's Light Regular Filter)*

As regards alleged light cigarettes, the US Surgeon General issued the following comments in 1981 (D-121):

1. *There is no safe cigarette and no safe level of consumption.*
2. *Smoking cigarettes with lower yields of "tar" and nicotine reduces the risk of lung cancer and, to some extent, improves the smoker's chance for longer life, provided there is no compensatory increase in the amount smoked. However, the benefits are minimal in comparison with giving up cigarettes entirely. The single most effective way to reduce hazards of smoking continues to be that of quitting entirely.*
3. *It is not clear what reductions in risk may occur in the case of diseases other than lung cancer. The evidence in the case of cardiovascular disease is too limited to warrant a conclusion, nor is there enough information on which to base a judgment in the case of chronic obstructive lung disease. In the case of smoking's effects on the foetus and newborn, there is no evidence that changing to a lower "tar" and nicotine cigarette has any effect at all on reducing risk.*
4. *Carbon monoxide has been impugned as a harmful constituent of cigarette smoke. There is no evidence available, however, that permits a determination of changes in the risk of diseases due to variations in carbon monoxide levels.*
5. *Smokers may increase the number of cigarettes they smoke and inhale more deeply when they switch to lower yield cigarettes. Compensatory behaviour may negate any advantage of the lower yield product or even increase the health risk.*
6. *The "tar" and nicotine yields obtained by present testing methods do not correspond to the dosages that the individual smokers receive: in some cases they may seriously underestimate these dosages.*

7. *A final question is unresolved, whether the new cigarettes being produced today introduce new risks through their design, filtering mechanisms, tobacco ingredients, or additives. The chief concern is additives. The Public Health Service has been unable to assess the relative risks of cigarette additives because information was not available from manufacturers as to what these additives are.*

In evaluating the public health significance of the finding of reduced risk of lung cancer, it is important to recognize that the largest component of excess mortality caused by smoking is cardiovascular disease deaths. There is no sufficient evidence to conclude that use of lower "tar" and nicotine cigarettes causes any reduction in this burden. The same is true of the other major diseases caused by cigarette smoking, most notably chronic obstructive lung disease and adverse effects on pregnancy.

As smokers smoke to fill a need for nicotine, they will tend to adjust their smoking habits so as to maintain the dose of nicotine to which they are accustomed:

... In a practical sense, if someone smokes for nicotine, they will obtain whatever amount is necessary to satisfy their need independent of what the smoking machine number happens to be ...

Statement from the Ad Hoc Committee of the President's Cancer Panel to Consider the FTC Test Method for Determining Tar, Nicotine, and Carbon Monoxide Levels in Cigarettes
December 6, 1994, 2:30 p.m.

- A. *The smoking of cigarettes with lower machine-measured yields has a small effect in reducing the risk of cancer caused by smoking, no effect on the risk of cardiovascular disease, and an uncertain effect on the risk of pulmonary disease. A reduction in machine-measured tar yield from 15 mg tar to 1 mg tar does not reduce relative risk from 15 to 1.*
- B. *The FTC test protocol was based on cursory observations of human smoking behaviour. Actual human smoking behaviour is characterized by wide variations in smoking patterns which result in wide variations in tar and nicotine exposure. Smokers who switch to lower tar and nicotine cigarettes frequently change their smoking behaviour which may negate potential health benefits.*
- C. *Accordingly, the committee recommends the following changes to the FTC protocol:*
1. *This system should also measure and publish information on the range of Tar, Nicotine, and Carbon Monoxide yields that most smokers should expect from each cigarette sold in the U.S.*
 2. *This information should be clearly communicated to smokers.*

"Smoking Under Realistic Conditions: Development of Minimum and Maximum Values for Toxic Constituents in Tobacco Smoke," September 30, 1996 (ED-187, pp. 3 and 4).

This is why adoption of a new calculation method was recommended as regards the level of tar, nicotine and carbon monoxide delivered by cigarettes. The

method used in Canada from 1969 to 2000 dated back to the 1930s, hence the need to have new regulations regarding cigarette contents:

... FDA agrees that accurate information about the tar, nicotine, and carbon monoxide delivery from a cigarette to the user would be useful information. FDA is aware of the Federal Trade Commission's (FTC's) recent efforts to develop a system to measure, more accurately than the current test, the tar, nicotine, and carbon monoxide delivered by cigarettes ...

Health Food and Drug Administration, August 28, 1996 (ED-47, p. 44463)

In 1997, the Federal Trade Commission also addressed the matter:

Despite these substantial decreases in machine-measured yields, the Commission has been concerned for some time that the current test method may be misleading to individual consumers who rely on the ratings it produces as indicators of how much tar and nicotine they actually get from their cigarettes. In fact, the current ratings tend to be relatively poor predictors of tar and nicotine exposure. This appears to be due primarily to compensation – the tendency of smokers of lower rated cigarettes to take bigger or more frequent puffs, or otherwise alter their smoking behaviour to get the amount of nicotine they need. Such variations in the way people smoke can have significant effects on the amount of tar, nicotine, and carbon monoxide they get from any particular cigarette. The Commission is concerned that smokers may incorrectly believe, for example, that they will get three times as much tar from a 15 mg. tar cigarette as from a 5 mg. tar cigarette. In fact, if compensation is sufficiently great, it is possible for smokers to get as much tar and nicotine from relatively low rated cigarettes as from higher rated ones. Although these limitations have been present in the system since its initiation in 1967, they have become of substantial concern more recently because of changes in modern cigarette design and a better understanding of the effects of compensatory smoking behaviour.

Some public health agencies have also expressed concerns that new studies may question the basic assumption underlying cigarette testing – that cigarettes with lower machine-measured tar and nicotine ratings are less harmful than ones with higher ratings. For example, in 1997, the National Cancer Institute issued a monograph noting that the apparent mortality risk among current smokers has risen in the last forty to fifty years, even though machine-measured tar and nicotine yields have fallen during the same period. In attempting to understand this fact, the monograph suggested that the increased mortality risk might be due to increases in current smokers' lifetime exposure to cigarette smoke or that the reduced tar levels of modern cigarettes may have less benefit than previously believed. In addition, a number of studies have also found that changes in smoking behaviour and cigarette design appear to have resulted in an increase in a type of cancer that occurs deeper in the lung than the lung cancer traditionally associated with smoking.

Federal Trade Commission, Report to Congress (1997) (ED-46, pp. 3, 4 and 5).

Tobacco and the science of toxicology

As a cigarette is an extremely toxic product, its smoke containing close to 4,000 chemical products, 250 of which cause genetic damage or are toxic and 43 of which are recognized as carcinogens,¹ it lends itself to the Risk Assessment Paradigm² model used in toxicology to describe the risks associated with the use of a toxic product. This model is used to determine if it can continue to be used, in spite of its toxicity or if, by limiting exposure to the product, a level can be reached at which the advantages of its use are greater than the disadvantages of exposure to the product, thus making its use acceptable despite the risks associated with it. Based on this model, the risk is defined by two variables: toxicity and exposure.

As exposure to cigarette smoke is a direct result of smoking, it cannot be reduced. Combined with the second variable, the high toxicity of cigarette smoke, this exercise leads to the irrefutable conclusion that the enormous risk associated with cigarettes cannot be reduced. It is therefore impossible to attain an acceptable level of risk.

As a result, as no benefit can be derived from the use of tobacco,³ the risk associated with its use cannot be justified.

The application of this model to tobacco permits the conclusion that it is a product that has no safe exposure level, and which results in extremely high health risks that can absolutely not be justified in view of the absence of benefits from tobacco use.

Furthermore, the absence of benefits associated with tobacco use has essentially been confirmed by the United States Supreme Court in *Food and Drug Administration et al. v. Brown and Williamson Corp. et al.* 529 U.S. (2000), in which the Court overturned the Food and Drug Administration's "Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents" on the grounds of lack of jurisdiction, as it was not the responsibility of the FDA to regulate a product that, it is well known, should be prohibited in view of the risks associated with its use and in the absence of any health benefit. Madame Justice O'Connor on behalf of the majority, explained:

¹ IARC (International Agency for Research on Cancer). 1986. IARC Monographs on the Evaluation of the Carcinogenic Risk of Chemicals to Humans – Tobacco Smoking, Volume 38, Lyon, France, D-109.

² Risk assessment is used as part of the decision-making process to ensure public protection against unacceptable risks and to allow the use of products whose benefits outweigh the risks associated with their use, SOT (Society of Toxicology). 2000. Risk Assessment: What's it all about? Society of Toxicology, Reston, Virginia in "Toxicology and Tobacco," Leonard Ritter, D-107.

³ "Toxicology and Tobacco," Leonard Ritter, D-107, Q. 251 et seq., p. 2362 et seq.

Viewing the FDCA as a whole, it is evident that one of the Act's core objectives is to ensure that any product regulated by the FDA is "safe" and "effective" for its intended use.

Thus, the Act generally requires the FDA to prevent the marketing of any drug or device where the "potential for inflicting death or physical injury is not offset by the possibility of therapeutic benefit.

*In its rulemaking proceeding, the FDA quite exhaustively documented that "tobacco products are unsafe," "dangerous," and "cause great pain and suffering from illness." 61 Fed. Reg. 44412 (1996). It found that the consumption of tobacco products "presents extraordinary health risks," and that "tobacco use is the single leading cause of preventable death in the United States." *Id.*, at 44398. It stated that "[m]ore than 400,000 people die each year from tobacco-related illnesses, such as cancer, respiratory illnesses, and heart disease, often suffering long and painful deaths," and that "[t]obacco alone kills more people each year in the United States than acquired immunodeficiency syndrome (AIDS), car accidents, alcohol, homicides, illegal drugs, suicides, and fires, combined." *Ibid.* Indeed, the FDA characterized smoking as "a pediatric disease," *id.*, at 44421, because "one out of every three young people who become regular smokers ... will die prematurely as a result," *id.*, at 44399.*

These findings logically imply that, if tobacco products were "devices" under the FDCA, the FDA would be required to remove them from the market. Consider, first, the FDCA's provisions concerning the misbranding of drugs or devices. The Act prohibits "[t]he introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded." 21 U. S. C. §331(a). In light of the FDA's findings, two distinct FDCA provisions would render cigarettes and smokeless tobacco misbranded devices. First, §352(j) deems a drug or device misbranded "[i]f it is dangerous to health when used in the dosage or manner, or with the frequency or duration prescribed, recommended, or suggested in the labeling thereof." The FDA's findings make clear that tobacco products are "dangerous to health" when used in the manner prescribed. Second, a drug or device is misbranded under the Act "[u]nless its labeling bears ... adequate directions for use ... in such manner and form, as are necessary for the protection of users," except where such directions are "not necessary for the protection of the public health." §352(f)(1). Given the FDA's conclusions concerning the health consequences of tobacco use, there are no directions that could adequately protect consumers. That is, there are no directions that could make tobacco products safe for obtaining their intended effects. Thus, were tobacco products within the FDA's jurisdiction, the Act would deem them misbranded devices that could not be introduced into interstate commerce.

Second, the FDCA requires the FDA to place all devices that it regulates into one of three classifications. See §360c(b)(1). ... Given the FDA's findings regarding the health consequences of tobacco use, the agency would have to place cigarettes and smokeless tobacco in Class III because, even after the application of the Act's available controls, they would "presen[t] a potential unreasonable risk of illness or injury." 21 U. S. C. §360c(a)(1)(C). As Class III devices, tobacco products would be subject to the FDCA's premarket approval process. See 21 U. S. C. §360c(a)(1)(C) (1994 ed., Supp. III); 21 U. S. C. §360e; 61 Fed. Reg. 44412 (1996). Under these provisions, the FDA would be prohibited from approving an application for premarket approval without "a showing of reasonable assurance that such device is safe under the conditions of use prescribed, recommended, or suggested on the labeling thereof." 21

U. S. C. §360e(d)(2)(A). In view of the FDA's conclusions regarding the health effects of tobacco use, the agency would have no basis for finding any such reasonable assurance of safety. Thus, once the FDA fulfilled its statutory obligation to classify tobacco products, it could not allow them to be marketed.

The FDCA's misbranding and device classification provisions therefore make evident that, were the FDA to regulate cigarettes and smokeless tobacco, the Act would require the agency to ban them.

Several provisions in the Act require the FDA to determine that the product itself is safe as used by consumers. That is, the product's probable therapeutic benefits must outweigh its risk of harm. See [United States v. Rutherford, 442 U. S., at 555](#) ("[T]he Commissioner generally considers a drug safe when the expected therapeutic gain justifies the risk entailed by its use").

...the FDA must weigh the probable therapeutic benefits of the device to the consumer against the probable risk of injury. Applied to tobacco products, the inquiry is whether their purported benefits—satisfying addiction, stimulation and sedation, and weight control—outweigh the risks to health from their use. To accommodate the FDA's conception of safety, however, one must read "any probable benefit to health" to include the benefit to public health stemming from adult consumers' continued use of tobacco products, even though the reduction of tobacco use is the raison d'être of the regulations. In other words, the FDA is forced to contend that the very evil it seeks to combat is a "benefit to health." This is implausible.

As the FDA has documented in great detail, cigarettes and smokeless tobacco are an unsafe means to obtaining any pharmacological effect.

The FDA, consistent with the FDCA, may clearly regulate many "dangerous" products without banning them. Indeed, virtually every drug or device poses dangers under certain conditions. What the FDA may not do is conclude that a drug or device cannot be used safely for any therapeutic purpose and yet, at the same time, allow that product to remain on the market. Such regulation is incompatible with the FDCA's core objective of ensuring that every drug or device is safe and effective.

Considering the FDCA as a whole, it is clear that Congress intended to exclude tobacco products from the FDA's jurisdiction. A fundamental precept of the FDCA is that any product regulated by the FDA—but not banned—must be safe for its intended use. Various provisions of the Act make clear that this refers to the safety of using the product to obtain its intended effects, not the public health ramifications of alternative administrative actions by the FDA. That is, the FDA must determine that there is a reasonable assurance that the product's therapeutic benefits outweigh the risk of harm to the consumer. According to this standard, the FDA has concluded that, although tobacco products might be effective in delivering certain pharmacological effects, they are "unsafe" and "dangerous" when used for these purposes. Consequently, if tobacco products were within the FDA's jurisdiction, the Act would require the FDA to remove them from the market entirely. But a ban would contradict Congress' clear intent as expressed in its more recent, tobacco-specific legislation. The inescapable conclusion is that there is no room for tobacco products within the FDCA's regulatory scheme. If they cannot be used safely for any therapeutic purpose, and yet they cannot be banned, they simply do not fit.

The agency has amply demonstrated that tobacco use, particularly among children and adolescents, poses perhaps the single most significant threat to public health in the United States. Nonetheless,... an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress.

The United States Supreme Court therefore determined that the absence of any benefit stemming from tobacco use paired with its associated risk was such that the FDA did not have jurisdiction to legislate in the way that they planned, as this would have resulted in the prohibition of the product, while the role of the FDA is to ensure that all non-prohibited products must be safe for the use for which they are intended. The reality of the product is that tobacco therefore does not coincide with the function of the FDA.

This decision leads to the conclusion that, if tobacco products were being placed on the market for the first time today, their marketing and use would be banned.

Furthermore, the toxicology of tobacco products is well known to tobacco companies, specifically ITL, and has been for decades, as indicated in the exhibits.

- D-108, "A Review of the Biological Activity of Smoke," prepared by G. Smith for B.A.T., dated November 1, 1990
- Report #164 "Summary of Ames Tests for Mutagenicity of Smoke Condensates," ITL Montréal, July 2, 1981, D-110C
- Report T-234 "Bioassays of Mainstream and Sidestream Condensate from a Product with Total Sidestream Reduction and from Commercial Cigarettes," B.A.T, February 5, 1992, D-110A, at page i
- Report #165 "Ames Mutagenicity of Mainstream and Sidestream Smoke Condensates," ITL Montréal, May 13, 1981, D-110B
- Report T.153-C "Ames Mutagenic Activity of Mainstream Condensate of Six Commercial Cigarettes for Imperial Tobacco Ltd. (Canada) – Project RIO," B.A.T., October 1984, D-110D
- Report #146 "The Use of the Freiri Slave Smoker to Investigate Changes in Smoking Behaviour," ITL Montréal, March 25, 1975, D-110E
- Imperial Tobacco Ltd., Research Development Division, Montréal, Progress Report, June 1987 – January 1988, D-110H

In addition to demonstrating that tobacco companies have been aware of the high toxicity of their products for decades, these reports confirm the need for continued testing of all constituents of cigarettes and cigarette smoke. This product is constantly evolving; because of its toxicity, its constituents must be

tested and assessed, thus the need for the reporting regulations that permit the government to control what is marketed.

Referring to D-108, "A Review of the Biological Activity of Smoke" by G. Smith, the testimony of Dr. Ritter is most eloquent on this issue, as are the comments of the Court. Mr. Ritter explains, in the following passage, the importance of obtaining the results of scientific research by tobacco companies on a regular basis.

But I think there is an interesting message here, particularly as we go to some of the other sections in the report itself, because it indicates that there is value in carrying out these studies on an ongoing basis.

I mean, what he reports is that these are differences with different products, there are differences with different additives, there are differences in toxicity with different manufacturing constituents in the tobacco products, and what he's saying here is that this review has allowed for a comparison of what those differences mean in terms of the ultimate toxicity of the product. So he really argues, I think, quite convincingly that ongoing studies are useful, because it allows you to compare the impact of changing things.

Q- *All right. How would you ... or can you apply this statement or this conclusion to our present situation here? What is the relevance that, in fact, it allows ... or continuous studies are relevant? I mean, it's a toxicological product, we all know that. So what would be the point of continuing evaluations?*

A- *Well, I think continuing evaluations serve perhaps one (1) or two (2) very clear purposes, and perhaps a number of others as well. Most of our attention really for the last twenty-five (25) or thirty (30) years on the toxicity of tobacco has focused predominantly on cancer and on mutagenicity.*

Now, what if there was a change in the tobacco that was used, or there was a change in the curing process, or there was a change in the part of the plant which was being used to manufacture the tobacco product? Or what if there was a change in the composition of the paper? I can go on and on and on. And what if that change resulted in a profile change that now made a product which was capable of causing cancer also very capable of causing birth defects?

Now, if we didn't have these studies continue on an ongoing basis and if we couldn't evaluate the results of those studies on an ongoing basis, how would we detect a change in the toxicity as a result of the change in the profile of the manufacturing process, so to speak?

Because Smith has provided very nice data which demonstrates that there are changes as a function of these variables, and so we have no way of knowing that there couldn't be other changes that would produce even greater toxicity or produce toxicity in other health end points that we have not yet identified.

Q- *And in order to do that, to monitor that, what information would one need?*

A- *Ongoing studies that really demonstrate or investigate the profile of the tobacco smoke.*

Q- *And those would be? Profile of tobacco smoke would be?*

A- *Well, the sorts of studies that have been described here, but newer studies reflecting some of the newer technology as well.*

Q- *But in order to do those things, what information do you need?*

A- *The ...*

Mr SIMON POTTER:

My Lord, this goes quite beyond what was the subject of the expert's report. I object. There's been no indication in the expert's report as to what kinds of studies would be necessary on an ongoing basis to examine end points, health end points, as Dr. Ritter calls them, which are also not mentioned in the report. The expert is off the point. And we understand the expert's report to be that cigarettes are toxic, using his vernacular. We understood that report, but now we're off the point.

THE COURT:

You have reached your point.

Mr JEAN LECLERC:

Well, with all due respect, My Lord, if I may answer that? In his qualification Dr. Ritter clearly stated that as part of this work in toxicology applying toxicants and chemicals to ... or evaluating those to find out if they can be used by the human population, he referred to pesticides, he referred to drugs, he specifically mentioned on a number of occasions the fact that he was involved in information labelling issues of these products. This relates directly to that part of his qualifications.

In that context, I really feel it is quite relevant to have the opinion of one that has been involved in this type of work and tell us how it is relevant with respect to tobacco smoke in view of the fact that the industry own experts tell us that this product is not stagnant, I mean, it evolves.

THE COURT:

But the answer is obvious.

Mr JEAN LECLERC:

Pardon?

THE COURT:

The answer is obvious.

Conclusion

Cigarettes are not trivial products, even if their presence is familiar to everyone. When cigarettes are smoked, and that is the only use for them, they produce a veritable cocktail of chemical substances that is inhaled by the smoker. As for non-smokers, they involuntarily inhale sidestream smoke that contains more toxic chemical substances than mainstream smoke.

The scientific community has only recently become aware of the toxic substances contained in cigarette smoke. We are no longer speaking simply of tar, nicotine and carbon monoxide, of "light" and "mild" cigarettes, but of polynuclear aromatic hydrocarbons (a carcinogenic substance), benzene (a leukemia causing substance), 4 aminophyllines (a substance causing bladder cancer), formaldehyde (a substance causing cancer of the nasal cavity), mercury (a substance absorbed by tissues and bones of smokers), nickel (a substance causing lung cancer), chromium, lead (a substance that, particularly, affects the nervous system and peripheral nerves), cadmium (a substance causing cancer and itai-itai disease, which is associated with osteoporosis, osteomalacia and tubular changes in the kidneys), and hydrogen cyanide or hydrocyanic acid (a toxic substance).

The plaintiffs have provided no information to consumers on their products, particularly regarding their physical and chemical characteristics and toxicity.

APPENDIX 3

THE HEALTH EFFECTS OF SMOKING

1. Evidence filed in 1989-90 in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, was impressive and showed that tobacco use presents a serious danger to the health of a large number of Canadians.
2. The Supreme Court of Canada ruled at that time, as written by The Honourable Justice LaForest on behalf of the majority:

Overwhelming evidence was introduced at trial that tobacco use is a principal cause of deadly cancers, heart disease and lung disease. In our day and age this conclusion has become almost a truism. Nonetheless, it is instructive to review a small sampling of some of the vast body of medical evidence adduced at trial attesting to the devastating health consequences that arise from tobacco consumption. The expert report of Dr. Anthony B. Miller, for example, contains the following statement, at p. 24 ("Tobacco Use and Cancer" (1989)):

The scientific evidence summarised in this statement shows that tobacco smoking causes lung, oral, larynx, oesophagus, bladder, kidney and pancreas cancer, while oral use of tobacco causes oral cancer. Tobacco use causes 29% of the deaths that occur in Canada from cancer each year, i.e. an estimated excess of 15,300 deaths in 1989. Evidence is accumulating that passive smoking (exposure to environmental tobacco smoke) increases the risk of lung cancer in non-smokers.

... Smoking causes about 30% of all cancer deaths, 30% of all coronary heart disease deaths and about 85% of all chronic bronchitis/emphysema deaths in Canada and United States. In addition, smoking is a major cause of deaths due to aortic aneurysms, peripheral artery disease and fires. There is growing evidence that smoking is also an important cause of deaths due to stroke.

In terms of the scientific evidence available, the causal role of smoking in the major diseases described above is firmly established beyond all reasonable doubt.

... It appears, then, that the detrimental health effects of tobacco consumption are both dramatic and substantial. Put bluntly, tobacco kills.

A. What is known regarding the health effects of smoking

3. Knowledge regarding the role of tobacco use as a cause of illness is relatively recent in the scientific community.
4. Not until 1964 did the Surgeon General of the United States produce a first report indicating a causal link between smoking and lung cancer in the male population. Evidence of such a causal link in the female population, despite

indications in that direction, was not substantial enough to permit conclusions.

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

Report of the Surgeon General 1989, *Reducing the Health Consequences of Smoking: 25 years of progress*, U.S. Department of Health and Human Services, Public Health Service, D -142.

Robitaille, vol. 17 , Q202, pp. 3710-3711:

[TRANSLATION] In the years following this first report, doubt as to the causal relationship between smoking and lung cancer in women dissipated and was replaced by the sad reality that, since 1987, more Canadian women have died of lung cancer than of breast cancer, despite the fact that less than 50% of women smoke.

Robitaille, vol. 17, Q209, pp. 3713-3714.

Robitaille, "*Le tabagisme, la maladie et la mort au Canada*," [Tobacco, Illness and Death in Canada] D-156, p.13 :

[TRANSLATION] Despite scientific evidence, there were no health messages on cigarette packages before 1972. It was only with the adoption of the *Tobacco Products Control Regulations, SOR/89-21* (December 27, 1989), that information regarding the link between lung cancer and tobacco use was communicated to smokers for the first time. The warnings that the government required tobacco manufacturers to place on cigarette packages then read as follows:

11. (1) (a)

- (i) "*Smoking reduces life expectancy*"
- (ii) "*Smoking is the major cause of lung cancer*"
- (iii) "*Smoking is a major cause of heart disease;*" or
- (iv) "*Smoking during pregnancy can harm the baby*"

5. The findings of the last decade are that tobacco still kills, more than ever.
6. At the global level, the World Health Organization reported 3.5 million deaths attributable to smoking in 1998. In the United States, the FDA reported more than 400,000 deaths in 1990.

Robitaille, vol. 17, Q180-181, p. 3690.

U.S. Food and Drug Administration. Regulations restricting the sale and distribution of cigarettes and smokeless tobacco to protect children and adolescents; Final rule. Federal Register 1996 (August 28); 61(168): 44396-45318, ED-47 at p. 44398.

7. In Canada, smoking causes the premature death of more than 45,000 people each year (1996 statistics). This horrific toll is not challenged by the plaintiffs.

Robitaille, vol. 17 , Q181, p. 3690 and p. 3870 line 22.

Source Document, "*Each Year, the Equivalent of a Small City Dies from Tobacco Use*," D-104.

8. Tobacco use remains a principle cause of fatal cancer and heart and lung disease. At the end of the case in 1990, the Supreme Court of Canada determined that the scientific evidence had shown that smoking caused lung cancer, oral cancer, cancer of the larynx, cancer of the oesophagus, bladder cancer, kidney cancer and pancreatic cancer, that oral tobacco use caused oral cancer and that there was an increasing amount of data indicating that tobacco use is also a major cause of death from strokes. In 2002, tobacco use is considered to be a cause of strokes in smokers.

Robitaille, vol. 17, Q262, p. 3748.

9. To this long list must be added cervical cancer, vulvar and breast cancer, colorectal cancer, impotence, emphysema and numerous other health problems. These findings led Dr. Nancy-Michelle Robitaille to conclude that the risks associated with smoking as we know them today are multisystemic, in that they affect all systems, from the skin (wrinkles) to the bones (osteoporosis), and show up in both minor symptoms and in major complications, such as arteriosclerosis and cancer. Individuals are struck at all ages, from *in utero* (smaller babies, children with pulmonary complications, etc.) to old age.

Robitaille, vol. 17, Q257-261, pp. 3742-3748 and Q246, pp.3735-3736.

Report of the Surgeon General 2001, *Women and Smoking*, U.S. Department of Health and Human Services, Public Health Service, D-148:

Two decades have passed since the first Surgeon General's report on women and smoking was published in 1980. That report pointed out the first signs of an epidemic of smoking-related disease among women. This report documents that the epidemic became full-blown.

Cigarette smoking is the leading cause of preventable death in the United States, and women's share of tobacco-related disease has risen dramatically over the past half century. The point is underscored by the 600-percent increase since 1950 in women's death rates for lung cancer, a disease that is primarily attributable to smoking. Lung cancer accounted for only 3 percent of all female cancer deaths in 1950, whereas in 2000 it accounted for an estimated 25 percent. Already in 1987, lung cancer had surpassed breast cancer as the leading cause of cancer death in U.S. women, and in 2000 nearly 27,000 more women died of lung cancer (67,600) than breast cancer (40,800). In fact, more women are estimated to have died of lung cancer in the year 2000 than of cancers of the breast, uterus, and ovary combined. Of course, lung cancer is but one of the many diseases for which risk is greater among smokers than nonsmokers.

Despite these facts, 22.0 percent of U.S. adult women smoked in 1998. Moreover, between 1992 and 1997, the percentage of high school senior girls who reported smoking within the past 30 days

increased from 26.1 percent to 35.2 percent before declining to 29.7 percent in 2000.

Since the first Surgeon General's report on women and smoking in 1980, thousands of studies have expanded both our knowledge of the effects of smoking on women's health and our understanding of the myriad factors that influence smoking initiation, maintenance, and cessation. The need for an updated compendium on women and smoking is great, and this report addresses that need.

Ironically, in the face of the overwhelmingly negative health effects of smoking, tobacco marketing has always used positive imagery and has attempted to capitalize on issues important to women and to exploit the women's movement. The same tobacco brand that for so long featured the slogan "You've come a long way, baby" more recently launched an advertising campaign with the theme "Find your voice." Tobacco advertisements suggest that women who smoke are liberated, sexually attractive, athletic, fun loving, and slim, whereas in reality women who smoke are often nicotine dependent, physically unhealthy, socioeconomically disadvantaged, or depressed. Tobacco companies also have tried to ingratiate themselves with women's causes, providing funding for women's sports, for women's professional organizations, and for anti-domestic violence programs and other issues of salience to women, not to mention providing huge sums in advertising revenues to women's magazines. Perhaps such support has contributed to the fact that women's lung cancer does not have a voice, in contrast to breast cancer, which has such a well-developed and effective advocacy community.

10. Smoking reduces both a person's life expectancy and quality of life. Amongst individuals who smoke at 20 years of age, and who continue to smoke, one in two (50%) will die of a tobacco-related illness and, on average, 15 years younger than a non-smoker.

Robitaille, "Le tabagisme, la maladie et la mort au Canada," D-156.

Robitaille, vol. 17, Q188, p.3700-3701.

B. Addiction

11. Addiction is one of the characteristics that makes smoking a unique risk factor.
12. The Supreme Court wrote in 1995:

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

legislators in this country discovered earlier in the century, the prohibition of a social drug such as tobacco or alcohol leads almost inevitably to an increase in smuggling and crime.

RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, par. 34.

13. In 1988, the United States Surgeon General concluded the following:

Major Conclusions

1. *Cigarettes and other forms of tobacco are addicting.*
2. *Nicotine is the drug in tobacco that causes addiction.*
3. *The pharmacologic and behavioural processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine.*

Report of the Surgeon General 1988, *The Health Consequences of Smoking: Nicotine Addiction*, U.S. Department of Health and Human Services, Public Health Service, D-141, page 9.

14. Had it not been for addiction to tobacco products, the smoking problem would have been very different, as justifiably noted by the Supreme Court in its 1995 decision.
15. Despite the ruling by the Supreme Court and the opinion of the scientific community regarding addiction, the plaintiffs have steadfastly refused to admit the pharmacodependency of nicotine, at the most admitting that some smokers have difficulty in quitting smoking.

Plaintiffs' admissions, para. 12-14.

16. Mr. Colin Irving, counsel for JTI-McDonald, in testimony before the Standing Senate Committee on Legal and Constitutional Affairs to examine Bill C-71, even maintained that telling people that smoking is addictive is a stupid public interest measure, because if people want to quit, they will:

Telling people tobacco is addictive is the most damn fool public policy there could be. You are telling people, "It is really difficult to quit." You should not be telling them that. People quit if they want to quit, and they do by the millions.

(our underlining)

ED-70 The Standing Senate Committee on Legal and Constitutional Affairs, to which Bill C-71 was referred, to regulate the manufacture, sale, labelling and promotion of tobacco products, Issue 52 – Evidence, Ottawa, Tuesday, April 1, 1997.

17. This position by the plaintiffs, which was not corroborated by any evidence, was refuted during the testimony of their expert, Dr. Adrian Wilkinson, categorized during the proceedings as a "psychologist expert in multiple volumes."

18. According to Dr. Wilkinson, nicotine is a drug that meets the objective criteria used to define drug addiction as set forth in the *Diagnostic and Statistical Manual DSM-III-R of the American Psychiatric Association*, which defines it as follows:

The essential feature of this disorder [drug dependence] is a cluster of cognitive, behavioural and physiological symptoms that indicate that the person has impaired control of psychoactive substance use and continues use of the substance despite adverse consequences.

Wilkinson, vol. 4, Q139-155, pp. 758-764.

19. The importance of informing smokers and non-smokers about this particular risk through striking and memorable health messages is even more important as medical treatments available to treat addiction have quite a low success rate (the success rate of the nicotine patch is only 10% and that of Zyban, an antidepressant, is 20% to 25%).

Robitaille, vol. 17, Q213, pp. 3721-3722.

C. Health risks for non-smokers

20. Another reality makes smoking a particular risk: smoking exposes non-smokers to the risk of illness and death.
21. The scientific community now recognizes that passive smoking increases the risk of lung cancer, breast cancer and heart disease in non-smokers and there is an increasing amount of data confirming that sidestream smoke increases the risk of stroke in non-smokers.
22. As announced in the new health messages, cigarettes can be deadly, even for people who don't smoke.

Robitaille, vol. 17, Q263-264, pp. 3748-3749.

Robitaille, "*Le tabagisme, la maladie et la mort au Canada*," D-156.

Source document, "*Idle but Deadly*," D-104.

Research in the present decade has established that involuntary smoking is a cause of disease, including lung cancer, in healthy non smokers, and that the children of parents who smoke have an increased frequency of respiratory infections and symptoms.

Report of the Surgeon General, 1989, *Reducing the Health Consequences of Smoking: 25 years of Progress*, U.S. Department of Health and Human Services, Public Health Service, D-142.

23. Approximately 4.6 million Canadian non-smokers state that they are exposed to sidestream smoke on a daily basis and some 1.6 million children under the age of 12 are regularly exposed to passive tobacco smoke in the home.

Regulatory Impact Analyses Statement, *Tobacco Products Information Regulations*, Canada Gazette, Part II, July 19, 2000, Vol. 134, No. 15, page 1748.

24. It is now known that women who have smoked or been exposed to tobacco smoke when pregnant generally have smaller babies than non-smoking mothers. There is a close relationship between the number of cigarettes that a woman smokes during pregnancy and the deficit in fetal growth.

Source document, "*Cigarettes hurt babies*," D-104.

Robitaille, "*Le tabagisme, la maladie et la mort au Canada*", D-156, p. 21.

Report of the Surgeon General 2001, *Women and Smoking*, U.S. Department of Health and Human Services, Public Health Service, D-148:

Two decades have passed since the first Surgeon General's report on women and smoking was published in 1980. That report pointed out the first signs of an epidemic of smoking-related disease among women. This report documents that the epidemic became full-blown. Cigarette smoking is the leading cause of preventable death in the United States, and women's share of tobacco-related disease has risen dramatically over the past half century. The point is underscored by the 600-percent increase since 1950 in women's death rates for lung cancer, a disease that is primarily attributable to smoking. Lung cancer accounted for only 3 percent of all female cancer deaths in 1950, whereas in 2000 it accounted for an estimated 25 percent. Already in 1987, lung cancer had surpassed breast cancer as the leading cause of cancer death in U.S. women, and in 2000 nearly 27,000 more women died of lung cancer (67,600) than breast cancer (40,800). In fact, more women are estimated to have died of lung cancer in the year 2000 than of cancers of the breast, uterus, and ovary combined. Of course, lung cancer is but one of the many diseases for which risk is greater among smokers than nonsmokers. Despite these facts, 22.0 percent of U.S. adult women smoked in 1998. Moreover, between 1992 and 1997, the percentage of high school senior girls who reported smoking within the past 30 days increased from 26.1 percent to 35.2 percent before declining to 29.7 percent in 2000. Since the first Surgeon General's report on women and smoking in 1980, thousands of studies have expanded both our knowledge of the effects of smoking on women's health and our understanding of the myriad factors that influence smoking initiation, maintenance, and cessation. The need for an updated compendium on women and smoking is great, and this report addresses that need. Ironically, in the face of the overwhelmingly negative health effects of smoking, tobacco marketing has always used positive imagery and has attempted to capitalize on issues important to women and to exploit the women's movement. The same tobacco brand that for so long featured the slogan "You've come a long way, baby" more recently launched an advertising campaign with the theme "Find your voice." Tobacco advertisements suggest that women who smoke are liberated, sexually attractive, athletic, fun loving, and slim, whereas in reality women who smoke are often nicotine dependent, physically unhealthy, socioeconomically disadvantaged, or depressed. Tobacco companies also have tried to ingratiate

themselves with women's causes, providing funding for women's sports, for women's professional organizations, and for anti-domestic violence programs and other issues of salience to women, not to mention providing huge sums in advertising revenues to women's magazines. Perhaps such support has contributed to the fact that women's lung cancer does not have a voice, in contrast to breast cancer, which has such a well-developed and effective advocacy community.

D. The benefits of quitting smoking

25. When a smoker quits, the risk of developing a cigarette-related illness is substantially reduced.
26. For example, while the relative risk (RR) of contracting lung cancer is 15 to 16 times greater for a smoker than for a non-smoker, it is 3 times greater for a former smoker who has quit for 2 to 3 years.

Robitaille, vol. 17, Q195-199, pp. 3705-3708.

Robitaille, "Le tabagisme, la maladie et la mort au Canada," D-156.

Report of the Surgeon General 1990, *The Health Benefits of Smoking Cessation*, U.S. Department of Health and Human Services, Public Health Service, D-143.

27. Medical knowledge regarding the negative effects of tobacco on health has increased since 1989. At that time, we spoke only of the negative effect of tobacco on the health of smokers, while today, we are concerned with that of non-smokers and unborn children.
28. Smoking represents serious problems for public health. This was true in 1989, but is even truer in 2002.

APPENDIX 4

TOBACCO USE

I. Testimony by Mr. Larry Swain

1. Mr. Swain was recognized by the Court as an expert in statistics.
2. Mr. Swain was Assistant Director of the Health Statistics Division of Statistics Canada until October 2001.
3. The mandate of Statistics Canada is to collect, compile, analyze, summarize and publish statistical data.
4. Mr. Swain has more than 30 years of experience in statistics. He has worked not only at Statistics Canada, but also at the Public Service Commission of Canada and the Privy Council Office.¹
5. The expert report by Mr. Swain presents data on tobacco use in Canada from 1985 to 2000.
6. Mr. Swain testified regarding his report on May 3, 2002.²
7. The Statistics Canada publication entitled "*Report on Smoking Prevalence in Canada, 1985 – 1999*"³ is one of the main sources used by Mr. Swain in his report.
8. This publication analyzes and compares eleven surveys carried out by Statistics Canada between 1985 and 1999. Its authors do not, however, address the causality between tobacco use among young people or adults and social, political or economic factors.

¹ D-245: Expert report and curriculum vitae of Larry Swain.

² Volume 32 of the transcripts.

³ D-250.

II. Mr. Swain's main conclusions

Tobacco use in Canada

9. Between the mid 1960s and the mid 1980s, tobacco use decreased substantially in Canada. This decrease affects all age groups of both sexes.⁴
10. Between 1985 and 2000, tobacco use continued to decrease, falling from 35% to 24% (this percentage applies both to occasional smokers and those who smoke on a daily basis).
11. For the same period, daily use of tobacco fell from 30% to 20%, and the number of smokers (regular use) fell from just over 7 million in 1985 to 6 million in 2000.
12. Between 1985 and 2000, tobacco use among men fell from 38% to 26% and from 32% to 23% among women.
13. Between 1985 and 2000, tobacco use decreased among smokers in the age groups of 20 to 24, 25 to 44, 45 to 64 and 65 and over.
14. On the other hand, during this period tobacco use did not diminish among young people aged 15 to 19, although the number of smokers in that age group was lower than in the 1980s. (This is explained by the fact that the 27% rate observed in 1985 is not statistically different than that of 25% for 2000).⁵
15. In reality, between 1985 and 2000, there was an increase in tobacco use amongst young people aged 15 to 19, compared to other age groups:

[...] smoking rates did go down generally, with one exception. Now, the exception is youth. [...] So, if I wanted to make a conclusion about youth smoking, as I did in paragraphs 16 and 17; there was no decline in youth smoking from nineteen eighty-five (1985) to two thousand (2000).⁶

⁴ D-253, figure 1.

⁵ For 1999, see D-258 and its supplements (D-252, D-253, D-255) For the summaries, see D-254 and D-257; for the methodology, see D-256. For 2000, see D-248 and its summary (D-249).

⁶ Transcript of testimony by Larry Swain p. 6632-6634.

Tobacco use in the provinces and territories

16. On average, for the period from 1985 to 2000, Quebec had the highest rate of use, while British Columbia and Ontario had the lowest.
17. Generally, the Atlantic provinces had a rate of use approximately equal to or slightly higher than the national average, while the rate in the Prairies was approximately equal to the national average.⁷

Socio-economic profile of smokers

18. Data from several surveys shows an indirect proportional relationship between tobacco use and socio-economic status.⁸
19. We also see an indirect proportional relationship between tobacco use and education levels for all age groups.
20. The same report also characterizes another socio-economic factor, that of family income.
21. These findings prove the vulnerability of the group that the Act seeks to protect.
22. This target group includes not only young people, but also smokers found in increasing numbers among the less fortunate and less educated.

Tobacco production, sales and use

23. The fall in sales of cigarettes and fine-cut tobacco products in Canada from 1985 to 2000 was interrupted by a sudden increase in sales in 1994, after which sales stabilized in 1999 and then decreased in 2000.
24. This being said, total production of cigarettes and fine-cut tobacco products does not at all reflect these trends for the period from 1991 to 1994.
25. In effect, the production/sales ratio for that period was substantially higher than that of other years, which indicates a production surplus (up to 54% in 1993) compared to sales made in Canada.⁹
26. Mr. Swain explains that the early 1990s were marked by the contraband sale of exported Canadian tobacco products,¹⁰ which could explain why

⁷ See D-251 for 1996-1997 in particular.

⁸ See D-258 and D-251 in particular.

⁹ See D-259.

sales fell by so much in Canada without that trend being reflected in production.

27. As regards data on per capita use (total use divided by population),¹¹ they more or less follow the same curve as that of sales in Canada for that period.
28. From 1985 to 2000, the percentage of smokers smoking 26 cigarettes or more per day decreased, while the percentage of smokers smoking 1 to 10 cigarettes per day increased.¹²
29. Not only are there fewer people smoking, but we also see that smokers are smoking less.¹³ This could explain why per capita use fell by approximately 40% while production and sales for Canada only fell by approximately 30% for the same period.
30. It can be concluded that there is a balance between production, sales and use for the period from 1985 to 2000, despite contraband activities seen around 1993.

III. Additional data provided by Mr. Swain during his testimony

31. During his testimony, Mr. Swain explained the nature of the statistics (Q12-13), their limits (Q14-17) and how they must be read and interpreted (Q29-30).
32. Any statistical analysis is subject to three factors:
 - Data collection (which can be quite complex for many reasons)
 - Data quality (which can vary based on the selected sampling, its size and problems encountered during collection, etc.)
 - The manner in which the data is used (poor use of data, whether intentional or accidental, can alter the conclusions of a study, despite the validity of the data.)

¹⁰ See D-268 and D-269 in particular.

¹¹ See D-260 to D-267 for Statistics Canada population data.

¹² See D-246 for 2001 data.

¹³ See D-258 in particular.

33. To be able to read this statistical data, certain things must be understood.
34. First, the sampling error must be taken into account. This margin of error gives an idea of the reliability of the data. Then, it must be remembered that the data are estimates.
35. It must also be remembered that the data represent a snapshot of the period during which they were collected.
36. Analysis of the data is therefore limited to the years cited; no conclusions can be drawn for other years, nor for years between two years cited:

Throughout this report, analysis is specific to the years cited and no inferences are made about intervening years unless otherwise stated.¹⁴

37. The same thing applies to respondents: individuals interviewed and represented in the data are not necessarily the same from one year to another or from one survey to another.
38. Finally, it must be remembered that the data provided do not alone allow conclusions to be drawn regarding the causes of the trends observed.
39. This is why, in his report, Mr. Swain does not give an opinion on the causes of the trends that he observed, nor on the possible relationship between smoking and social, political or economic factors. In other words, statistics permit observations, not conclusions regarding causality:

... this report did not make any causal statements about the relationship between smoking prevalence and the social, political or economic factors that may affect smoking for either youth or adults.¹⁵

IV. Tobacco product contraband in Canada

Tobacco smuggling is unacceptable: it undermines the Government's health objectives, reduces revenue and involves serious crime.¹⁶

40. The plaintiffs are attempting to use the statistics regarding the use of tobacco products to convince the Court that the TPCA had no positive

¹⁴ Expert report by Larry Swain: D-245, para. 10, p. 2.

¹⁵ Transcription of testimony by Larry Swain, pp.6627-6628.

¹⁶ D-135 – UK Department of Health – Government response to the Health Select Committee's Second Report on the tobacco industry and the health risks of smoking, p. 18.

effect, maintaining, in support of this claim that use among young people had not decreased during the period in which the Act was in force.

41. It must be remembered that many factors influence the use of tobacco products, including price, promotion, health effects, education and bans on use in the workplace.
42. Furthermore, during the period in which the TPCA was in force, the plaintiffs circumvented the advertising ban by using sponsorship advertising.
43. Tobacco product contraband also undermined the government's tax efforts.
44. Cigarette prices affect the level of tobacco use. To limit smoking, governments gradually introduced high taxes on tobacco products during the 1980s and 1990s. These tax increases resulted in decreased use:

- **P-49 Broad Strokes Plan 1992 (ITL-267):**

p. 16330:

PRICE

BACKGROUND

The last ten years have been characterized by successive tax increases, initially on tailor-made cigarettes and more recently on all product categories. This has elevated price to being the most significant dynamic within the Canadian industry.

These tax increases have put downward pressure on industry volume and have caused significant shifts in consumer purchase behaviour both in terms of what they buy and where they buy it. The impact over the last five years is illustrated as follows:

% CONTRIBUTION					
YEAR	INDUSTRY VOLUME	% \bar{U}	T.M.	RYO+ STICKS	D.F./ EXPORT
1986	64.6	-3.7	86	11	2
1987	62.6	-3.1	84	12	3
1988	61.4	-1.9	83	13	4
1989	58.4	-4.7	81	14	5
1990	56.2	-3.8	81	13	6
Forecast 1991	50.8	-9.5	78	15	7

45. Cigarette prices have an impact on use:

- **LN-9 (RJR-1302) 1992 Cigarette Marketing Action Plans:**

p. 80140 4083:

The Tobacco Market – March 1992

Price/taxation will continue to have the largest impact on tobacco usage now and in the future.

U.S. border/slip chandlers will be the largest trial generator for cigarettes due to price and limited distribution

- **LN-33 (RJR-101) Factory made cigarette market usage and attitude study – January 1995:**

p. 80117 6836:

Younger smokers tended to be less motivated by health to have tried quitting in the past than the general smoking population and more motivated by the price of tobacco and cigarettes.

- **D-226 (JTI-1678) RJR – MacDonald Inc. Competitive Business Development Strategies for the 1990s – Draft:**

p. 80108 9827:

*B.02 Overall Market Trend The Canadian tobacco market overall has seen a fairly stable rate of decline in annual consumption since 1982, averaging approximately three percent per year, as shown in Table B-1. **This decline has been due chiefly to changing social attitudes about smoking, increasing government legislation, and taxation levels, as well as consumer migration from cigarettes to fine cut tobacco.** Fine cut tobacco has been showing a steady annual increase in consumption which has been moderating the decline observed in the cigarette market. In fact, a slight positive trend is observed overall in the industry between the years 1987 and 1988.*

p. 80108 9831:

B.02.4 Taxation Aspects

A major factor in the cigarette market decline has been rising taxes, both at the federal and provincial level. Consumers have responded to these increases by decreasing their consumption and thereby exhibiting a high level of price sensitivity. Subsection B.04.1, Price Consciousness, further explores the dynamic between retail price increases and cigarette consumption.

46. However, at the beginning of the 1990s, contraband undermined government efforts, with consumers obtaining tobacco products at lower prices. This contraband resulted in increased use:

- **LN-76 (RJR-96) The Canadian Tobacco Market 1993 :**

p. 80120 8411:

Impact of smuggled product

...

For the first time we have seen an increase in reported consumption.

47. The tobacco industry was aware of the scope of the contraband and of the fact that their products were making their way into the illegal distribution networks:

- **P-49 Broad Strokes Plan 1992 (ITL-267):**

p. 16333:

Growth in sales of Canadian products in alternative retail outlets

*The growing price gap between Canada and the United States will fuel the growth in duty-free and U.S. duty-paid markets as well as the development of a **black market within Canada.***

*As consumers seek out and identify new ways of obtaining less expensive cigarettes, **the onus will be on us to ensure the availability of our brands.***

- **JPB-30 (ITL-442) - Planning document 1996 - Market Strategy and Development - June 1995:**

p. 22290:

EMERGENCE OF A MORE STRATEGICALLY FOCUSED OPPOSITION

While our term success will continue to be determined by how well we satisfy consumer needs, it is now quite apparent that we are competing with a more strategically focused opposition, especially in RBH.

*This company has benefited from the trial generation of **Rothman's longer participation in the smuggling channels.***

• **JPB-5 (ITL-261) Planning Forecast 1993/1994/1995:**

p. 20553:

FROM: Barbara Hartley

TO: Ed Lambert

February 9, 1993

RE: REVISED FORECAST SCENARIOS OF FEBRUARY 2, 193 [sic]

In light of our decision to open up shipments in the duty-free/export channels, I have put together a fine-cut scenario "with smuggling". The numbers are attached.

Should you have any questions, please call me.

p. 20554:

FINE-CUT VOLUMES – BASED ON 1993 FORECAST SCENARIO WITH ITL PARTICIPATING IN SMUGGLING					
	1993	1994	1995	1996	1997
<i>Cigarette Equivalents (Blns)</i>					
<i>Traditional</i>	0.8	0.7	0.7	0.7	0.7
<i>Woodbine</i>	1.9	2.4	2.6	2.8	3.0
<i>Bonus</i>	0.2	0.2	0.2	0.2	0.2
TOTAL	2.9	3.3	3.5	3.7	3.9
<i>Finished Product (Mlns Kgs)</i>					
<i>Traditional</i>	0.8	0.7	0.7	0.7	0.7
<i>Woodbine</i>	1.0	1.3	1.4	1.5	1.7
<i>Bonus</i>	0.2	0.2	0.2	0.2	0.2
TOTAL	2.0	2.2	2.3	2.3	2.6

p. 20593:

FROM: Neil Granitz

TO: B. Bexon

January 28, 1993

RE: FORECAST OUTLOOK

Overview

When comparing the 1992 forecast to actual, there are two forces responsible for creating the variances.

1. **Increased smuggling activity** – If we look at the duty-free/export tailor-made shipment at the time of forecast (August 1992), **the industry was shipping, on average, 628 million cigarettes per month.** (This includes estimates of 75 million per month for RJR Puerto Rico beginning in April). For the last five months of the year, that average rose to 846 million cigarettes per month. On an annual basis, this translates into a yearly volume of 10 billion cigarettes. **Our estimates place the legitimate volume of duty-free products at slightly over 3 billion cigarettes, annually – making the balance illegitimate.** With a greater availability of smuggled product, the volume of domestic TM has been significantly cannibalized.

p. 20190:

Consistent with trends that started before its **extra-ordinary participation in smuggled channels in 1993, the Export trademark** is expected to continue on its long-term decline through 1999.

p. 20293:

In terms of the individual tailor-made share components, ITL should hold at its current 45% share of the DFX market throughout [sic] 1994. In domestic tailor-made, ITL's share will show a downward adjustment this year as the market shares reestablish "normal" trends after the disruptions caused by **the 3 companies' unequal participation in the smuggled market.** Consequently, in 1994 ITL's share of domestic tailor-made will be.

p. 20325:

In terms of the tailor-made industry specifically, our domestic share performance is continuing to follow a long-term growth trend, increasing by 1 percent over the 1993 level of 67.5% to finish 1994 at 68.5%. In that portion of the DFX tailor-made market that remains (a.k.a. the legitimate portion), our share will also increase over the 1993 level. ITL finished 1993 with 45.2% of the DFX tailor-made market. **This was down from our historical share of approximately 55% as a result of our decision not to participate in the smuggled market.** By the end of 1993 however, our share had begun to grow significantly. **In addition to getting back into the smuggled portion of the market,** we had also begun to distribute Player's brands in the U.S. through an agreement with Philip Morris. It is the full availability of all our trademarks in DFX throughout 1994 which will allow us to retain a larger share of this market than we have historically.

p. 20415:

INDUSTRY CONTRIBUTION

(%)

	1991	1992	1993	1994	1995	1996
<i>Smuggled TM</i>	6.6	11.2	20.5	26.8	29.9	31.7
<i>Low weight FC</i>	3.0	3.8	4.3	4.1	3.6	3.3
<i>Raw leaf</i>	---	1.6	0.9	0.4	0.2	0.2
<i>Smuggled FC</i>	3.2	3.3	3.4	3.5	3.6	3.7
<i>Total</i>	12.8	19.9	21.9	34.8	37.3	38.9

- **D-86 ITL-439 Broadstrokes 1994:**

p. 17965:

Our withdrawal from smuggling plummeted our share. RBH benefited for close to three years in the low weight area. Small tobacco companies captured close to one billion sticks of raw leaf in Quebec. Had we competed in these areas in 1992, our volume would have been almost 3.0 bin. sticks and over 5.0 share points higher than our actual year end results.

We are now, finally, fully competing in these areas. We must not allow our history, traditions, values, paradigms to restrict or interfere with our doing the right thing relative to the primary target of all our activities: the smoker.

p. 17968:

We anticipate government reaction to smuggling, particularly since our recent re-entry into the market. The attempt will probably be unsuccessful as companies producing non-domestically offer an easy solution to most rumours about government attempts to curb the activity. We must have contingency plans in place to optimize any government activity in this area. The only real solution remains a rollback. Will government have the guts to undertake such a radical move, particularly at a time when the present government is winding down? A rollback appears unlikely in the short-term.

- **D-88 Market Update TSG Meeting, May 11, 1994:**

p. 202723895:

Following a loss of share in 1992, ITL rebounded by making its major trademarks available in smuggled channels in the second half of 1993.

p. 202723896:

*Although ITL's share in DFX tailor-made was steadily growing to levels similar to those in domestic tailor-made, it still lagged approximately 7 share points behind by early 1994, as a result of **our late re-entry into smuggled channels** and the wide availability the opposition enjoyed as a result.*

- **D-89 Letter from Herter to Brown, June 3, 1993:**

p. 5000281453:

*However, Federal tax increase [sic] here have created a difficult situation for us, and we ask your consideration of the following. As you are aware, smuggled cigarettes (due to exorbitant tax levels) represent nearly 30% of total sales in Canada, and the level is growing. **Although we agreed to support the Federal government's effort to reduce smuggling by limiting our exports to the U.S.A., our competitors did not. Subsequently, we have decided to remove the limits on our exports to regain our share of Canadian smokers.** To do otherwise would place the long-term welfare of our trademarks in the home market at great risk. **Until the smuggling issue is resolved, an increasing volume of our domestic sales in Canada will be exported, then smuggled back for sale here.***

- **D-89 Letter from Herter to Brown, June 10 1993:**

p. 500028145:

1. *Temporary Royalty Rate Reduction.*

*We agree with your suggestion of maintaining the 5% royalty rate on all "genuine" exports of Du Maurier to the US market. **Having regard to the obvious uncertainty surrounding the correctness of the figures for products smuggled back into Canada, we suggest that there should be a royalty rate of 2% on those other volumes.** No doubt you will let me know if you feel that the accuracy around the estimation of the "genuine" exports to the US is such that a lower royalty even than 2% would be appropriate.*

- **D-135 UK Department of Health – Government response to the Health Select Committee's second report on the tobacco industry and the health risks of smoking:**

p. 17-18:

(aaa) Gallaher's stance that they deplore smuggling appears to be contradicted by their advertising, which seems to want to court those doing the smuggling. Gallaher noted in its evidence to us that smuggled tobacco gives children access to tobacco. If they genuinely believe that this and the other problems associated with smuggled tobacco are a "tragedy", they should make sure that all their business practices and those of their advertisers work against the illegal trade rather than encourage it (paragraph 207).

Tobacco smuggling is unacceptable: it undermines the Government's health objectives, reduces revenue and involves serious crime. The Government places great importance on tackling it and on 22 March the Government launched the new tobacco anti-smuggling strategy. This strategy is designed to reverse the trend of tobacco smuggling within three years, and reduce it to below current levels in the longer term.

The Government expects the fullest co-operation of all the tobacco manufacturers in their drive to tackle tobacco smuggling.

V. Tobacco and other drugs: The conclusions of Adrian Wilkinson, expert witness for the plaintiffs

48. One of the expert witnesses for the plaintiffs, Adrian Wilkinson (recognized by the court as an expert psychologist in the use of multiple drugs),¹⁷ submitted a report to the Court, in which he compared the use of various drugs, including tobacco, over a period of 24 years.

49. Mr. Wilkinson concluded that the trends in the area of tobacco use are comparable to those of several other drugs. He therefore deduces that any variation in the use of a product is based on a common cause for all drugs cited.

50. Thus, in Mr. Wilkinson's opinion, advertising would have no effect on tobacco use, as this causality is not present with the other drugs studied.

51. However, Mr. Wilkinson admits that cigarettes create a high level of addiction and that, for young people, they often serve as a "gateway" to the use of other drugs (*gateway theory*).

52. Furthermore, a study produced by the plaintiffs confirms this theory:

Furthermore, there is considerable research that suggests that legal substances such as alcohol and tobacco can lead to illicit drug use (Kandel & Yamaguchi, 1993) and that drug use in general is often correlated with more general forms of deviance (Jessor & Jessor, 1977).¹⁸

53. Mr. Wilkinson also admits that a multitude of factors influence both tobacco use and the use of other drugs.

54. The limitations of his argument are obvious when he admits that he would be opposed to any publicity in favour of heroine use if it were legal.

55. Moreover, several problems were detected in Mr. Wilkinson's methodology during cross-examination, particularly the fact that he had made only one observation per case when analyzing the data based on the Principal Component Analysis method, while the generally recognized directives for this method require at least 10 observations per case.

¹⁷ Testimony of January 16 and 17, 2002, Volume 3, p. 619ss and Volume 4 of the transcripts.

¹⁸ EP-17: Frank J. Ivis & Edward M. Adlaf, *A Comparison of Trends in Drug Use among Students in the USA and Ontario, Canada: 1975-1997*, Drugs: education, prevention and policy, Vol. 6, No. 1, 1999.

56. We can but deplore the fact that Mr. Wilkinson presented his results in such a way that no data were evident regarding the use of each drug studied, while such data vary considerably from one drug to another (for example, from 1% to 2.5% for heroine, but 22% to 35% for tobacco).

VI. Conclusions of Michael John Waterson, expert witness for the plaintiffs

57. Mr. Waterson testified on January 21 and 22, 2002 (volumes 5 and 6 of the transcripts) as an expert in the functions, effects and economics of advertising, p. 849.
58. Mr. Waterson claims that "brand preference" advertising is not aimed at provoking radical changes of behaviour, but rather to increase the market share of a given brand.
59. He also claims that advertising can only increase the market share of products that have existed for some time and the availability of which is well known.
60. Mr. Waterson's report (P-36) includes a table presenting several countries classified according to their rate of tobacco use between 1975 and 2000. The report also indicates countries in which advertising restrictions and bans have been introduced.
61. As this table does not permit him to identify a constant relationship between a decreased rate of tobacco use and bans on advertising, Mr. Waterson claims that such a ban has no effect on use, leading him to conclude that advertising bans are not effective.
62. Cross-examination of Mr. Waterson shed light on the weaknesses of his table, particularly the following:
63. Mr. Waterson only used data regarding manufactured cigarettes while, in some countries, the use of rolling tobacco is high enough to influence the data (p. 932).
64. His report is based on various data, the reliability of which sometimes leaves a lot to be desired. In particular, some data are not comparable: in the case of a phenomenon such as contraband, for example, neglecting to take it into consideration can falsify the data (p. 925 et seq.).
65. In the preparation of his report and table, Mr. Waterson did not take into account the reports from the United States Surgeon General regarding cigarettes (p. 1178).

66. To indicate which of the countries included in table 1 had banned advertising, Mr. Waterson relied on information from the World Health Organization (P-39). Thus, is not familiar with the contents of the bans. Nor does he know whether they are in force or correctly applied, whether they also apply to sponsorship advertising or whether they include distribution of free samples (p. 944 et seq.).
67. Mr. Waterson admits, however, that the reliability of the data used directly influences the reliability of his conclusions (p. 911). He even admits that his report proves nothing (p. 939).
68. In the defendant's opinion, several of Mr. Waterson's statements seriously affect his credibility, as they go against the most elementary logic, without mentioning that they are contradicted by all the evidence, including, in certain regards, by the oral evidence provided by the plaintiffs' other witnesses, as indicated in the following examples:
69. "Lifestyle" advertising is not a particularly effective form of advertising (pp. 882-883): this statement is particularly contradicted by the testimonies of Ed Ricard and Richard Pollay.
70. Addiction to tobacco is only very minor (p.1014): on this matter, see particularly Nancy-Michelle Robitaille (pp. 3718 to 3722) and Adrian Wilkinson (pp. 754-755). Also see D-246, tables 3, 4 and 5, D-247, tables 3 to 8, D-252, tables 4 to 6, D-253 next to the subtitle "*How dependent are smokers*" and D-255, tables 8 to 10.
71. Mr. Waterson considers the concept of "replacement demand" to be ridiculous and does not see how it can be applied to the tobacco market, as it is a "mature market" (p. 1139 et seq.). However the concept of "replacement demand" is generally recognized in the field of marketing:

*The [mature market] theory has been discredited in several ways, that it was inconsistent with all the evidence I've seen, it has the fundamental problem of ignoring the fact that even though sales may be stable, they're still dynamics within the industry, they're still an issue of replacing smokers who are dying or replacing smokers who are quitting. Some smokers will successfully quit. So, there's a need for replacement demand, and as a result, there's a kind of recruiting function going on. So no, I think it's quite misleading to portray the market as stable, and as a result, the advertising of no consequence.*¹⁹

¹⁹ Testimony by R. Pollay, Q379, p. 4274.

72. Andy Hutchings, to whom Mr. Waterson makes reference at p. 115 of his report, states the following in his work entitled *Marketing: A Resource Book*:

During this phase, sales growth will flatten out and any further growth will result from replacement demand or an increase in the total market rather than the brand share.

73. According to basic logic, it is undeniable that new smokers arrive on the market while others leave because they quit or pass away.

74. When asked to provide references for certain aspects of his report, Mr. Waterson responded as follows:

I walked into the Advertising Association library and picked out the first three (3) marketing text books I could find and looked at them all, they all had references to a number of products, a significant number of new products that failed and I simply sent the references off where I could.

(Q170, p. 1139).

75. In addition, articles from Mr. Waterson's own Web site contradict his position that advertising has no effect on market share.

76. For example, certain articles indicate that promotional campaigns for milk in Scotland, tea in England and eggs in Canada resulted in increased total consumption of these products, thus increasing their market share (p. 1160 et seq., p. 1165 et seq. and p. 1168 et seq.).

77. Finally, Mr. Waterson admitted the following:

- Several other factors that he did not take into consideration have a great affect on tobacco use. (p. 937 et seq. and p. 984 et seq.)
- Warnings can influence the choice of consumers to buy or not buy a product. (p. 1135)
- Sponsorship advertising is nothing more or less than "moving advertisement". (p. 876)
- His opinion regarding the effect of advertising on use is far from unanimous. (p. 1003)
- Numerous studies conclude that tobacco advertising encourages smoking in addition to making smoking socially acceptable. (p. 1002)

- He was invited to testify by the plaintiffs because he addresses tobacco advertising from an unusual perspective. (p. 1017).

VII. Conclusions to be drawn from the testimonies of Mr. Wilkinson and Mr. Waterson

78. The plaintiffs, through the intermediary of Mr. Wilkinson and Mr. Waterson, attempt to demonstrate, using essentially statistical data, that tobacco advertising has no effect on use. However, Mr. Swain, expert in statistics, in fact warned against such conclusions. In his opinion, it is not possible to identify the causes of a social phenomenon such as smoking using statistical data. As we stated previously, statistics allow observations, not conclusions as to causality. (p. 6630 et seq.)
79. Whatever the case, the Supreme Court recognized, in its 1995 ruling in *RJR-MacDonald*, that logic and common sense, supported by evidence, permits the conclusion that advertising has an effect on use. And the plaintiffs have presented nothing before the Court that can lead one to believe that the Supreme Court's opinion is not applicable today.

APPENDIX 5

Promoting tobacco products

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Promoting tobacco products

1. Promoting tobacco products has a number of undesirable effects:
 - It influences consumers' and the public's perception of smoking.
 - It tries to alleviate smokers' feelings of guilt.
 - It hides the harmful effects of smoking behind an image of health, vitality and youthfulness.
 - It give tobacco social acceptability.
 - It uses sponsorship advertising to do "lifestyle" advertising.
 - It uses attractive packaging to convey the company's brand image and to sell a deadly product.

1. The content of the plaintiffs' marketing documents clearly confirms the reasoned apprehension of harm test adopted by the Supreme Court in 1995.

2. Promoting the social acceptability of smoking

«[The tobacco companies] also recognize that advertising is critical to maintaining the size of the market because it serves to reinforce the social acceptability of smoking by identifying it with glamour, affluence, youthfulness and vitality».¹

“The advertising ban is but only a part, although a key part, of a long term comprehensive health oriented policy on tobacco and smoking. The long term objective is to bring about a significant decline in smoking and tobacco consumption. An essential tool for meeting this objective is the national program to reduce tobacco use, a joint effort of provincial, territorial, and the federal Governments plus major health organizations. In the short term, the Government's objectives are to strengthen the existing trend against the social acceptability of smoking and to enhance the credibility of the health message.”²

3. The plaintiffs’ marketing documents also reveal their desire to increase or at least maintain the social acceptability of smoking.

- **D-222 ITL Marketing Plan – 1989 (ITL-431):**

p. 17524:

“The following philosophies have effectively governed ITL’s marketing planning and activities. They remain valid.

...

4. Support the continued social acceptability of smoking through industry and/or corporate actions (e.g. product quality, positive lifestyle advertising, selective field activities and marketing public relations programs).”

p. 17536:

“The bottom line has been a further decline in incidence – a decline which, unlike the previous few years, has to be laid squarely at the feet of the social/health environment as opposed to the price situation.

In 1989, it is imperative that we pursue the issues raised in VIKING and determine whether or not there are measures which can be used to alleviate the situation.”

p. 17535:

“VISA and DAY particularly must proceed with a high level of resources and support.”

- **D-97 Letter from Sheehy BAT to Crawford 29 décembre 1986:**

“The BAT objective is and should be to make the whole subject of smoking acceptable to the authorities and to the public at large since this is the real challenge facing the Industry. Not only do I believe that this is the right objective but I also believe that it is an achievable one.”

¹ *RJR MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199, p. 88

² *RJR MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199, p. 35

- **P-119 RJR MacDonald – 1992 Marketing Conference presentation report – August 10, 1992 (RJR-4):**

p. 80119 7132:

“Increasing the social acceptability of smoking is a sound goal.

- *Smoking has become less socially acceptable.*
- *Any new product or packaging ideas that can help with this concern should be of interest.*
- *Potential candidate areas of interest include low/no sidestream, reduced/invisible smoke, pleasant/no odour, and environmentally friendly packaging.”*

- **D-230 (RBH-4162) Project 21, Toronto, June 1995:**

p. 10:

“DESIRED IMAGE CHANGES

The overriding desire is for a proposition which generates greater social acceptability. However, greater social acceptability appeared more a desired end result than an image shift and it was broken down in these sessions into the following components.”

...

“Less harmful... This standard desire among smokers appears driven either by self-interest or by a desire for something which is “better” for others. The concept is described as healthier, less intrusive (less smoke) and, overall, less harmful to the smoker and to others. The opportunity lies in a proposition which communicates a general sense of healthfulness and/or healthy lifestyle.”

8. “Lifestyle” advertising

*“Mr. P. Hoult, ex-CEO of Imperial, testified at trial that lifestyle advertising is designed to create certain associations in the minds of consumers, and in the case of EXPORT cigarettes, an association with enjoyment, outdoors and youth.”*³

*“The appellants submit that Parliament has unjustifiably imposed a complete prohibition on tobacco advertising and promotion when it could have imposed a partial prohibition with equal effectiveness. They suggest that Parliament could have instituted a partial prohibition by forbidding “lifestyle” advertising (which seeks to promote an image by associating the consumption of the product with a particular lifestyle). . .”*⁴

*“Moreover, while purely informational advertising may not increase the total market, lifestyle advertising may, as a matter of common sense, be seen as having a tendency to discourage those who might otherwise cease tobacco use from doing so.”*⁵

*“Concerning positive advertising, I would say, based on the evidence, that it falls into three categories: there is the type which primarily contains information on the relative tar, nicotine and carbon monoxide levels of the brand being advertised; there is the type which is aimed solely at promoting one brand over another based on the effect of the colour, design and appearance of the packaging; and there is the third type which also tries to promote one brand over another but does so by creating an image and associating its consumption with a particular lifestyle (lifestyle advertising).”*⁶

*“Counsel acknowledges, albeit very cautiously, that lifestyle advertising may be an inducement to young people to become smokers; they add, equally cautiously, that if this type of advertising only were banned, they would probably not be in court but, they point out, the Act does not ban only this type of advertising but all advertising of whatever type and kind.”*⁷

9. It is the plaintiffs who pointed out to the courts, during the initial trial, that a distinction should be made between “informational” advertising, “brand” advertising and “lifestyle” advertising.

- **Arguments of ITL in Superior Court:**

« In respect to advertising in particular, measures can be envisaged which would be specifically tailored to deal directly with types of advertising considered problematic and with target groups considered vulnerable.

*For example, **legislation could prohibit “lifestyle” advertising or prohibit people from appearing in advertisements or even limit advertising to pictures of cigarette packages.** It could restrict or prohibit advertising in the*

³ *RJR MacDonald v. Canada (A.G.)*, [1995] 3 S.C. R. 199, La Forest J., para. 91

⁴ *RJR MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199, La Forest J., para. 95

⁵ *RJR MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199, McLachlin J. para. 158

⁶ *P.G.C. c. RJR MacDonald c. Canada*, [1993] R.J.Q. 375, Brossard J.A., p. 437

⁷ *P.G.C. c. RJR MacDonald c. Canada (P.G.)*, [1993] R.J.Q. 375, Brossard J.A., p. 418

media which are seen as more powerful while allowing more freedom in the less psychologically powerful media which have to be purchased (e.g. print). **It could also prohibit any advertising in media aimed at youngsters or of a nature to specifically appeal to youngsters.** Such legislative measures already exist in the Quebec Consumers' Protection Act regarding television advertising aimed at children (see, especially, art. 249) which has been held constitutional by the Supreme Court in *Irwin Toys*. »

- **Imperial Tobacco Limited, Argument and Annexes, 500-09-001297-910, CAQ, vol. 237, p. 48658:**

“Though the TPCA leaves quite untouched the manufacture, sale purchase or consumption of tobacco products, the Canadian ad ban is extremely far reaching if not total and does away with advertising of whatever nature, big or small, pictures or text, lifestyle or not, outdoor or indoor, in publications of whatever readership and without any regard to the content of the advertisement.”

Page 48707:

“Even those most viscerally opposed to tobacco advertising (e.g. Chandler) see the real culprit as lifestyle advertising. This could have been dealt with directly without affecting other advertising (see Annex III) “

Page 48781:

“For example, legislation could prohibit “lifestyle” advertising or prohibit people from appearing in advertisements or even limit advertising to pictures of cigarette packages... It could also prohibit any advertising in media aimed at youngsters or of a nature to specifically appeal to youngsters...”

- **The Argument of the Appellant Imperial Tobacco Limited – Supreme Court of Canada, p. 31-32:**

“112. For example, the government at various times considered or had before it the following alternatives to a full advertising ban, all of which would have had less of an impact on protected rights, and yet chose to impose a complete ban on advertising without any evidence, or without even seeking evidence, that the alternatives would have been less effective:

A ban short of a total ban of Canadian advertising, such as the prohibition of all advertising save those types explicitly permitted.

...

A ban or regulation only of lifestyle advertising (or even of all advertising depicting people)

...

Measures such as those which already exist in Quebec’s Consumer Protection Act (R.S.Q. C. 40.1) to prohibit advertising aimed at children or advertising in media aimed at children.

...

Prohibiting tobacco-related sponsorship of events of particular interest to youngsters.

Measures such as those which already exist with regards to broadcast advertising of alcoholic beverages, designed to allow only that brand-preference advertising

which satisfies a Board that it will not stimulate overall consumption and that it is directed at people over the age of eighteen.

...

Labelling requirements, which Health and Welfare Canada believed to be preferable to an advertising ban.”

13. Promoting a product establishes in the mind of consumers a collection of information, attributes, opinions or beliefs that accumulate to form the brand image.
- D-166 Pollay, Richard, « How cigarette advertising work. Rich imagery and poor information:

Page 3:

“3.3 *Lifestyle Advertising.* As used in marketing and advertising textbooks, “lifestyle” refers to “the pattern of living that reflects how people spend their time, energy, and money” (Wells, et al. p120). It becomes manifest in their activities (work, hobbies, social events, vacations, entertainment, club membership, shopping, sports), interests (family, home, job, community, recreation, fashion, food, media, achievements) and opinions (social issues, politics, business, education, future, culture) (Wells, et al., p138, Table 5.3). **Lifestyle advertising is the association of products and brands with these behaviors and/or traits, or the symbols or those behaviors or traits.**”

15. Promotion uses two paths to persuasion: a central path and a peripheral path.
16. The central path consists in presenting consumers with arguments and a rational structure whose purpose is to inform them and make them think rationally.
17. The peripheral path consists in presenting the product using appealing images, by using, for example, models or attractive landscapes. This type of promotion is designed to elicit an emotional, rather than a rational, response from the consumer.

- **D-223 Comparing Paths to Persuasion - Richard W. Pollay:**

Comparing Paths to Persuasion		
	Information	Imagery
<i>Content</i>	<i>Facts, words, ideas</i>	<i>Pictures, attitudes, feelings</i>
<i>Processing</i>	<i>Analysis Cognitive Processing "Central"</i>	<i>Perception Associative Learning "Peripheral"</i>
<i>Viewer Involvement</i>	<i>High</i>	<i>Low</i>
<i>Effort</i>	<i>High: Effortful Thought</i>	<i>Low: Seen at a glance</i>
<i>Pace of Memory Build/Loss</i>	<i>Fast (if at all)</i>	<i>Slow/Gradual</i>
<i>Barriers to Influence</i>	<i>Perceptual filters Source Credibility Counter-argumentation</i>	<i>Few "automatic"</i>
<i>Popular Understanding</i>	<i>"I'll think about it."</i>	<i>"Seeing is believing"</i>
<i>Bottom Line</i>	<i>"Pictures speak louder than words." "A picture is worth a thousand words."</i>	

19. *In order to be appealing, these images will depict a certain lifestyle, otherwise known as the pattern of living that reflects how people spend their time, energy, and money⁸.*

20. *The purpose of "lifestyle" advertising is to create an association between the products, their trademark and different lifestyles with which consumers will identify.*

- **D-193 (RJR-708) Letter from Éric Blais – v.p. Director Strategic Planning of Harrold & Mirlin – to Ms. Daphne Bykerk, Vice President Marketing RJR-Macdonald Inc., September 16, 1996:**

p. 80154 2472:

"III- Brand advertising

*We are currently exploring various **themes and images which we believe our target will identify with** and view as unique to their world. Based on the discussions at our last meeting, we are looking for **themes and images which are dynamic and vibrant despite the restrictions on lifestyle advertising.**"*

22. *"Lifestyle" advertising is also known as image advertising or transformational advertising.⁹*

23. *The notion of "lifestyle" advertising is not foreign to the promotional techniques of the plaintiffs: it is central to them.*

⁸ D-166 - Pollay, Richard, «How cigarette advertising work. Rich imagery and poor information», ¶13.3

⁹ D-166 - Pollay Richard, «How cigarette advertising work. Rich imagery and poor information», ¶13.4

- **D-222 ITL Marketing Plan – 1989 (ITL-431):**

p. 17538-17539:

“1989 MARKETING OBJECTIVES”

...

“9. Maximize the use of lifestyle/image oriented creative in all remaining media.”

25. “Lifestyle” advertising seeks to reach its target public through the emotion it elicits.

- **D-166 Pollay, Richard, « How cigarette advertising work. Rich imagery and poor information:**

p. 8:

“Marlboro’s “repositioning” from a woman’s cigarette [“Mild as May”] to a man’s smoke provided these packaging specifications, among others:

*“It should be popular in its approach, have strong masculine appeal ... and be modern in its feeling, with no phoney old world symbols of class or quality. Its modernism should be broadly popular – nothing avant-garde, yet nothing condescending. ... Before a Marlboro package design was decided on, more than 120 different additional superogatory designs were created, rendered, and researched. **They were tested for eye movement, for associated characteristics, for emotional impact,** for every attribute within the power of Vienna to define or invent.”*

- **ED-180: Froese, B., Marketing of Tobacco Products:**

p. 36:

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

28. “Lifestyle” advertising is designed to elicit a specific emotional response from the consumer.

29. This emotion is intentional, calculated and measured.

- **RF-37 (RBH-3829) Memo from J. Wilson to J. Feeny re: Print advertising for Viscount 1 Ultra Mild, September 26, 1996**

p. 10596:

“EMOTIONAL COMMUNICATION

- *Target segments indicate packaging should leverage motivations of Well Being and Calming as well as Moderate, Informed, and Considerate.*

- **D-189 (RBH-3804) – Bryan Nykoliation - Canadian Classics FY 96-97**

p. 9563:

“CANADIAN Classics

Avenue #2 – Emotional-based

Current campaign utilizes humour and within communicating Canadian Classics’ core proposition.

Consider to use of different types of emotion to extol Canadian Classics core proposition amongst the consumer target.

- *irony*
- *satire*
- *cynicism*
- *vanity*
- *etc.”*

p. 9685:

“V. *Presentation of the campaigns: Image/print* (60min.)
(110 min.)

A. *For each campaign (consider showing all pieces for ea. at a time)*

1. *PAD; PRIOR TO TALKING: Regarding CC, more than anything, what did the advert want you to believe about the product?*

That is, what is the no. 1 reason they want you to identify as the reason to associate with this product. Be specific.

2. *Round the table on replies to the above.*
3. *General reactions?*
4. ***Probe for rational takeaway & emotional response.***
5. *Describe the key attributes of the product.*
6. *Describe the key attributes of the image/moose.*

B. *Focus on specific executions in each campaign*

1. *Group sort: most appealing to least*
2. *Discuss each, esp. rationale for the sort order.”*

- **D-184 Project Print ads – Topline Report – prepared for RJR MacDonald Inc. May 21st, 1996 (RJR-477)**

p. 80150 2042:

2.00 FINDINGS

1. *The overall impression the group of ads gave was very positive. Almost without exception, consumers noticed the difference between this advertising and the way cigarette advertising has typically been done. They noticed a change not only in style but in the attitude being portrayed. Respondents described this style to be:*

- *"fun"*
- *"modern"*
- *"light-hearted"*
- *"not as serious as other cigarette advertisements"*
- *"daring"*
- *"different, more exciting, not boring"*

The underlying attitude reflected in this series is based on:

- *taking oneself less seriously, being more carefree, and a little daring*
- *projecting a unique character, positive self-esteem, and the ability to make your own choices*

*The move away from real people, "the tough man or beautiful women" helps encourage this new attitude by **focusing on the smoking experience itself in a unique, bold, and guilt-free way.**"*

- **JPB-94 (ITL 785) Presentation of competitive Advertising Analysis (Project Nike):**

p. 25715:

"WHAT WE THINK THEY'RE TRYING TO DO

Discipline: always one message, big logo, outdoorsy.

Focused on American frontier values (cowboy, last free man).

Logo and name are so well established that some executions don't even show human beings.

The ads make the brand look big.

Implicitly communicates independence, self-reliance, inner-confidence, ruggedness, a certain emotional toughness.

Rarely is product shown in the ads. We don't feel they need to show products and have already gone far beyond that.

We think that logo is so strong that it could live on its own, without the cowboy and it would probably still carry Marlboro positioning.

High standards of quality in every execution."

- **D-204 (RJR-306) RJR MacDonald Inc. Export 'A' Brand Positioning – June 24, 1996:**

p. 80153 1136:

“POSITIONING

To smokers 19 to 34 years old, Export 'A' is the real cigarette with the satisfying flavour that lets them express confidence and individuality.

TARGET GROUP:

Smokers 19-34 years old with primary emphasis against 19-24's; 60/40 male/female skew; moderate income and education.

PROMISE:

TANGIBLE BENEFIT: Export 'A' is the real cigarette with the satisfying flavour.

EMOTIONAL BENEFIT: Export 'A' lets them express confidence and individuality.”

11. The plaintiffs do research on the living habits of consumers, their tastes, etc. This research, which has nothing to do with the product promoted, is simply intended to make the product more appealing, more lifestyle.

- **D-236 (RBH-4100) Project Apollo, A Qualitative Study of Opportunities in the YAM Segment – Spring 1999 – Prepared for Rothmans, Benson & Hedges:**

p. 2:

“OBJECTIVES

The overall purpose of Project Apollo was to better understand the young adult market (YAM) and to provide clear insights into how to increase share within the 19 to 24 year old segment. Specific objectives were identified as follows...

Understand YAM smokers in terms of their values, desires, role models and self image including their expression, in short their “spirit”

Assess competitive brand equities and/or weaknesses.

Assess how well current brands echo a young adult spirit.

Identify positioning opportunities for RBH's existing brands and potential new or modified entries.”

p. 3

“THE PROCESS

Each session began with a general discussion surrounding respondents' general attitudes and lifestyles. *Issues ranged from the specific (preferences in beverages, clothing, music, leisure activities) to quite general (the role of work/school, fantasy travel etc.).”*

p. 4

"HIGHLIGHTS & CONCLUSIONS

Project Apollo involved the assessment of a wide range of consumer attitudes, theoretical concepts and specific product innovations not all of which are addressed in this section (see report body for details).

THE YAM SEGMENT

YAM members are in a state of transition from youth to adulthood and they are consciously committed to the process. They want to be ... and be seen as ... and be treated as adults. They are shocked by the economic realities of independence but they want to make and pay their own way.

13. Advertising that conveys an image has a greater impact on young people.

- **D-177 RBH – 1994-95, Business Assessment, October 24-25th, 1994 (RBH-1138):**

p. 3780:

"Judgementally it is believed that imagery plays an important role among the 18-24, is somewhat important among the 25-39 and seems less important among the 40-69."

p. 3861:

"It is essential to make in-roads among younger smokers (18-39) to maximize the imagery benefit of the sponsorship. Importantly, these smokers are more influenced by the imagery as well as representing better switching opportunities."

- **D-178 RJR Macdonald Inc. Export 'A' Franchise Advertising Strategy Recommendations, December 12th, 1995 (RJR-1418):**

p. 80154 2419:

*"Consistent with their overall positive response to marketing-communications, **the 19-24 age group responds best to "advertising" for cigarettes.** – 1985 U&A Study"*

16. The plaintiffs know how to recognize the lifestyle elements in an ad.

- **D-209 (RBH-3818) Belvedere – An Eye on the Past – History of the Cigarette Trade – Mark 1957 to 1996, January 1997**

p. 3:

*"Instant gifts replaced cash giveaways in the promotions game and offered gifts ranging from a bathroom scale to a Ford Mustang (7). **A new advertising campaign was developed using lifestyle imagery that implied that the people***

in the ads did not smoke Belvedere because of Instant Gifts. The tag line of, "Some people smoke Belvedere just because they like them"(8) helped reinforce this notion and was used in various forms until 1972."

Fig.8:

:

p. 6:

"In early 1979, BXM advertising used non-lifestyle executions. They prominently showed the pack with the headline, "The taste comes through" (26) In late summer, the WILD MILD campaign was resurrected for BXM. The ads used a scripted font and different matting from the original and Quebec ads used the term GRISANTE! (a "blue-e" collar term meaning: thrilling, intoxicating, usually associated with speed). (28) Tag lines were, "More flavour than you expect in a mild cigarette. Try them" and "Grisante, une cigarette douce? Bien plus que vous ne le pensez. Essayez-la !" All images were masculine and aggressive including a man on a dirt bike, a male water-skier, cigarette boats, and an Indy-style race car. These ads continued unabated until mild-1982."

Fig. 26:

p. 7:

“1982-1989: Dual Pack / Lifestyle

Midway through 1982 Quebec received dual-pack advertising for the Parent and BXM. Lifestyle ads depicted men windsurfing or sailing catamarans with the bold heading, “Belvedere” and the tag line, “Sensations et douceur” (31) This ad was changed in 1983 to a non-lifestyle execution with the tag line, “Plus que la simple douceur.” (32) Atlantic Canada received a similar treatment with the tag line, “More than just mildness.” (33)

Fig. 31 :

Fig. 32 :

- **D-210 (RBH-2163) RBH – Matinée Trademark 1953-1995, April 16 1996:**

p. 6:

*“In the years immediately following introduction, **the brand made extensive use of lifestyle advertising that depicted couples in elegant settings**⁽⁴⁾. This quickly evolved to a campaign known as “**Matinée Moments**”⁽⁵⁾ featuring couples sharing enjoyable moments in more accessible everyday situations.”*

Fig. 4 :

p. 11-12:

*"The launch campaign was highly compressed. In newspaper they ran a **traditional pack execution**⁽⁴⁰⁾ and in magazines they dropped other Matinée advertising to accommodate **two lifestyle ads**, one showing a woman relaxing on a cottage veranda⁽⁴¹⁾ the other, a woman relaxing in a bathtub⁽⁴²⁾. The buy was deep, but time was too short to establish any brand affinity."*

Fig. 40 :

Fig. 41:

:

- **D-211 (RBH-3910) Rothmans Trade-mark 1957-1997:**

p. 11404:

*“In terms of lifestyle advertising, Rothmans imitated rather than initiated, as competitors such as **Player’s had been using lifestyle advertising to transfer imagery onto their brands for years.** Only in 1983 did the first lifestyle advertisement for Rothmans King Size in 19 years appear, featuring a powerful sailing scene with the tagline, “Rothmans King Size – Really Satisfies” within the Rothmans lozenge⁽⁵³⁾. A later execution launched in 1985 used the same treatment, but replaced the lifestyle shot with an image of a moving Rothmans Porsche car⁽⁵⁴⁾. The fact that this new lifestyle approach was coupled with Rothmans more traditional “World Leader”⁽⁵⁶⁾ approach, most likely diluted the impact of the “Gestalt”. Furthermore, Rothmans communication became more dissonant when the brand continued to degrade Regular length, even after launching a Regular length product of its own⁽⁵⁸⁾.”*

20. Advertising can be lifestyle even without people in it.

- **D-216 Matinée Advertising – 1991 to 1997:**

- **D-217 (ITL-181) Matinée Branded Advertising – Qualitative Research – October 1996:**

p. 19389:

3. IMAGE ORIENTED EXECUTIONS

The four image oriented executions were always presented last to ensure that reactions to the product oriented executions were not influenced by them. The two that follow were most successful in communicating the Matinée positioning attributes.

14A – Bath Scene With Tulips

*Reactions to this execution are largely consistent with previous research. **The bath scene is clearly a feminine one to which women relate.** The soft colours and the tulips are integral to this. Many approve the colour scheme of blue on the wall and in the tub against the brown/beige tones. Together with the sunshine coming in, there is an overall impression of brightness. And, the softness and femininity of the scene is right on track in terms of *Matinée* being perceived as a mild cigarette.*

***This image is also a strong expression of relaxation and self-indulgence to which women relate.** It is an inviting and comfortable scenario where a woman can put aside her busy day to day activities and take time for herself.*

The presence of the pack and the way in which it is displayed on an angle is also endorsed.

Perceived modernity is an area that is less clear cut. Although many were left with an overall impression of modernity, others felt that the style of bathtub along with the use of browns and beiges was somewhat old fashioned. The blue helps offset the concern about the brown tones but a modern-looking bathtub would presumably be more consistent with the objective.”

- **D-218 (ITL-127) Du Maurier Advertising 1988-1997:**



“Brand” advertising:

“[Advertising that seeks] to promote consumption of one brand over another solely by using the effects of colour, packaging and appearance;”¹⁰

- **D-218 (ITL-127) Du Maurier Advertising 1988-1997:**

¹⁰ *P.G.C. c. RJR MacDonald c. Canada (P.G.), [1993] R.J.Q. 375, Brossard J.A., p. 437*



25. The young

“In particular, the following general conclusions can be drawn from these documents: the tobacco companies are concerned about a shrinking tobacco market and recognize that an "advocacy thrust" is necessary to maintain the size of the overall market; the companies understand that, in order to maintain the overall numbers of smokers, they must reassure current smokers and make their product attractive to the young and to non-smokers;”¹¹

“. . . it is also possible to discern from these marketing documents a recognition that tobacco companies must target the young in order to ensure the continued maintenance of the tobacco market at its current size. I find it significant that, in these documents, strategies to attract the young are usually accompanied by extensive discussions concerning the "image" of the product.”

...

That these companies are aware of the need to attract the young is also reinforced

...

Importantly, for some brands, not only do target groups include adolescents as young as 12, but youth aged 12-17 are weighted far more heavily than older age groups.

...

The internal marketing documents introduced at trial strongly suggest that the tobacco companies perceive advertising to be a cornerstone of their strategy to reassure current smokers and expand the market by attracting new smokers, primarily among the young.¹²

26. The young are the future of the tobacco industry.

- **D-166 Pollay, Richard, « How cigarette advertising work. Rich imagery and poor information:**

p. 16:

“Starters, whose brand loyal patronage might be enjoyed for many years to come once they settle on a preferred brand, are therefore seen as a critical success factor.

“I.T.L. has always focused its efforts on new smokers believing that early perceptions tend to stay with them throughout their lives. I.T.L. clearly dominates the young adult market today and stands to prosper as these smokers age and as it maintains its highly favorable youthful preference.” (p. 201825039, File # HT 0344, Box # GU 0200, HC Request #290, 1989)”

¹¹ *RJR MacDonald v. Canada (A.G.), [1995] 3 S.C. R. 199, La Forest J., para. 88*

¹² *RJR MacDonald v. Canada (A.G.), [1995] 3 S.C.R. 199, La Forest J., paras. 91-92*

- **D-170 Strategic Plan 1997-1998, Sales & Marketing (RBH-1134):**

p. 2757:

*“-although **the key 15-19 age group is a must for RBH** there are other bigger volume groups that we cannot ignore”*

- **D-179 Imperial Tobacco Limited - Switching Analysis, August 1991:**

p. 465043210

*“Although switchers of all ages represent opportunity for new business, **targeting young consumers continues to be a strategic importance in terms of future growth** because of their switching behaviour, twice the rate of total smokers.”*

- **D-173 (ITL-574) Competitor analysis – Imperial Tobacco – March 4th, 1994**

p. 18523:

- *“Initiating new sponsorship activities*
- *The Formula One racing program leverages Rothmans International PLC marketing dollar*
- *“Craven A Country Music” and “Belvedere Rock” are **directed at the younger consumer (ITL’s key consumer target)**”*

- **D-174 (RBH 1146) Strategic Plan 1996-1997, Sales and Marketing – October 1995:**

p. 5672:

“IMPERIAL TOBACCO

STRENGTHS

...

- *Owns the 18-24 age segment with 81% of consumers in this segment smoking an Imperial brand.*
- ***Owns the 14-17 age segment** with over 90% of consumers smoking du Maurier or Player’s.”*

- **D-227 (RJR-342) Export Source of Business / Product – Review:**

p. 80090 8826:

“EXPORT SOURCE OF BUSINESS/PRODUCT REVIEW

SOURCE OF BUSINESS

*THERE ARE TWO MAJOR SOURCES OF SMOKERS: **NEW SMOKERS AND BRAND SWITCHERS.**”*

- **D-228 (RJR-1379) Target Store Marketing – Central Region Project:**

p. 80135 2866G:

“SOURCES OF NEWS BUSINESS

- 18 – 24 YEAR OLD POPULATION (**STARTER SMOKERS**)
- NEW CANADIANS
- BRAND SWITCHERS”

5. The initiation to smoking begins in adolescence.

- **D-201 Johnston & Ass. Segmentation - Phase I Focus Group Research, february 1991 (RBH-2234) :**

p. 27365:

“THE ENTER/EXIT SYNDROME

...

Most indicated that they had their first cigarette between the ages of 10-15 and comments suggest that the initial experience may be slightly earlier in Quebec than in Ontario. The first cigarettes were occasionally supplied by an older friend or relative but usually by members of their peer group.”

- **D-171 Marketing Research Debrief – August 1994, An Investigation of factors contribution to the growth of du Maurier (RJR-88):**

p. 80093 9359 – 80093 9360:

“Introduction to Smoking

Circumstances

- *Majority started smoking in a social setting of some kind, but a few first experimented on their own*
- ***Most claimed that they started when they were around 14 to 16 years of age. A few (more often males) started as young as 10***
- *Many grew up in households with parents who smoke. This contributed to easy access*
- *Initially, usage was limited to weekends and when drinking*
- *Few reported difficulty obtaining cigarettes*

Motivation

- *Motivation to try smoking related to one or more of the following factors*

Experimentation

- *curiosity to see what it was about*
- *perceived as something others appear to get pleasure from (like drinking)*

Considered Normal

- *feel that smoking is a normal behaviour for adults (parents) and that they had reached an age when they can start to participate*

<i>Contributes to Self Esteem</i>	- <i>smoking looks cool (mature, sophisticated, in control)</i>
<i>Trying to Fit In</i>	- <i>desire to participate in a group behaviour</i> - <i>share an experience with a close friend</i> - <i>feels socially awkward and smoking gives you something to do with your hands</i>
<i>Coping</i>	- <i>to pass the time / relieve boredom (mentioned by those who started in late teens early twenties)</i> - <i>feeling that it helps deal with stress</i>
Rebellion	- <i>doing something that parents / authority figures wouldn't approve</i> - <i>image with peer group as a renegade, daring, anti-establishment"</i>

- **D-173 (ITL-574) Competitor analysis – Imperial Tobacco – March 4th, 1994:**

p. 18515:

“Why People Smoke

Young Adults/Starters

- *Image*
 - *Rebel*
 - *Adult symbol*
 - *Worldly*
- *Thrill seeking*
- *Peer pressure*
- *Self-confidence*
- *Curiosity / experimentation*
- *Arousal*

Adult Smokers

- *Enjoyment*
- *Relaxation*
- *Oral stimulation*
- *Tactile stimulation*

Addicted Smokers

- *Nicotine addiction*
- *Compulsive or obsessive behaviour"*

- **D-207 (RJR-224) Research Report – A Qualitative Exploration to Reposition Export ‘A’ with Young Smokers (19 to 24) December 1995:**

p. 80154 1531:

"Smoking

Reasons For Starting

Most of the smokers reported first experimenting with tobacco when they were around 14 years of age. *There were a few who started at an even younger age and others who did not try smoking until they were nearly 20. Respondents who did not become smokers until they were around 20 stated that they started for one of the following two reasons:"*

p. 80154 1534:

"Rebellious Toward Authority

The reason for starting to smoke was simply a statement against authority. Specifically, by starting to smoke they were being contrary, thereby demonstrating independence of thought and behaviour.

"I started smoking when my dad wasn't around. I was by myself 24 hours a day. I don't know why I started. It was probably to make my dad mad. Everything I did was to achieve that rebellion. "

"It was a form of rebellion. I was getting into trouble and I was rebelling."

"It felt good to be bad and sneak around behind your parents' back, hiding in alleyways to smoke a cigarette. I hid them under rocks. I wouldn't even take them home. It was fun and something to do. I still don't like smoking in front of my family."

"I started smoking on a holiday when I was 15. I did it to rebel, to be a brat. I was rebelling against my very conservative parents."

21. The young are influenced by their peers. The promotion of tobacco products targets individuals likely to have an influence on the young.

- **D-221 (ITL-317) Project Spur – Preliminary Qualitative Investigation final Report – ITL, May 26 1988:**

p. 16809:

*"To lend strength to the argument put forth above it might be useful to remind ourselves that, particularly in this age group, imagery is not represented in a direct relationship between the brand and the individual smoker. **Imagery must be reinforced by the peer group to gain legitimacy.** A brand's particular imagery becomes relevant only if the peer group sanctions it."*

- **D-175 Export 'A' family – Brand Positioning Statement (RJR-1339) October 5th, 1989 (D-175):**

p. 80118 3931:

*"1. WHO ARE WE TALKING TO (CONT'D)
PSYCHOGRAPHICS*

*Young adults who are currently in the process of shaping who they are and how they want to be perceived, while they believe themselves to be independent, **peer group acceptance is very important to them** and aids in defining who they are. As young adults they look for symbols that will help reinforce their maturity, independence and perceived individuality."*

- **D-201 Johnston & Ass. Segmentation - Phase I Focus Group Research, February 1991 (RBH-2234):**

p. 27365:

"THE ENTER/EXIT SYNDROME

ENTRY

*Recall of cigarette adoption among respondents suggests that **peer pressure and image are/were the key motivational factors**. Respondents acknowledged a desire to look "cool", appear older/more sophisticated and feel part of a group. This motivation appears to have been strong since most indicated that the first experience was highly negative (physical reaction) and that the gradual process of becoming a smoker took two or more years.*

***Most indicated that they had their first cigarette between the ages of 10-15** and comments suggest that the initial experience may be slightly earlier in Quebec than in Ontario. The first cigarettes were occasionally supplied by an older friend or relative but usually by members of their peer group."*

- **D-171 Marketing Research Debrief – August 1994, An Investigation of factors contribution to the growth of du Maurier (RJR-88):**

p. 80093 9359 – 80093 9360:

"Overall Conclusion and Recommendation

When young consumers first experiment with smoking they are prone to select a brand which they perceive as having an image which is:

"mainstream, youthful"

- **D-205 (RJR-418) RJR MacDonald Inc. Export 'A' 1997 Marketing Communications Plan, October 16, 1996:**

p. 80151 0574:

"4.5 Sponsorship Strategies

The role of sponsorship is to support the brand's positioning by connecting with activities which reflect the expression of confidence and individuality represented by the brand.

In order to communicate Export 'A's association with individual sponsorships the minimum amount possible will be allocated to sponsorship operations in order to retain the maximum amount for working media.

All spending will be aligned relative to regional priorities.

Sponsorship will also be used to create a presence for the brand amongst "Influencers" in the category."

- **D-206 Marketing Research Report – An Evaluation of Alternative Advertising Campaigns for Export 'A', April 1996:**

p. 80150 3545 / 80150 3456:

"Go Your Own Way

***This campaign establishes the Export "A" Light smoker as an individual who is independent-minded, unconventional and rebellious.** These are qualities which the target audience judge to be reflective of the mindset of young adults, such as themselves.*

*The most serious potential risk with this campaign is that this perspective is not a mainstream positioning. There is a danger that the product and user imagery will entrench the brand as an alternative to popular brands. **For new smokers, fitting in is an important consideration.** Consequently, these new smokers gravitate to brand alternatives they consider to be popular with their peer group."*

28. In industry documents, various terms are used to refer to the young.

Young Adult Market:

- **D-236 (RBH-4100) Project Apollo, A Qualitative Study of Opportunities in the YAM Segment – Spring 1999 – Prepared for Rothmans, Benson & Hedges:**

p. 4:

"HIGHLIGHTS & CONCLUSIONS

Project Apollo involved the assessment of a wide range of consumer attitudes, theoretical concepts and specific product innovations not all of which are addressed in this section (see report body for details).

THE YAM SEGMENT

***YAM members are in a state of transition from youth to adulthood and they are consciously committed to the process.** They want to be ... and be seen as ... and be treated as adults. They are shocked by the economic realities of independence but they want to make and pay their own way."*

New smokers:

- **D-226 (JTI-1678) RJR MacDonald Inc.:**

p. 80108 9826:

"New smokers are critical to continued growth in the market, and therefore RJR-MI must concentrate its efforts on the 18 to 24 year-old market, which strongly favours convenience type outlets, and the ten milligram and above portion of the tar spectrum."

Young smokers:

- **D-193 (RJR-708) Lettre de Éric Blais – v.p. Director Strategic Planning de Harrold & Mirlin – à Mme Daphne Bykerk, Vice President Marketing RJR-Macdonald Inc., September 16, 1996:**

p. 80154 2470

I- Communicating the positioning in Québec

*Findings from the qualitative positioning research conducted last May suggested that, although there are clear differences in terms of Export 'A's brand perceptions between English Canada and Québec, there are consistent core elements of the brand equity in both markets. **These core elements and the desire to appeal to young smokers** led to the positioning of Export 'A' as the real cigarette with the satisfying flavour that lets them express confidence and individuality."*

The key 15-19 age group:

- **D-170 Strategic Plan 1997-1998, Sales & Marketing (RBH-1134):**

p. 2757:

*"-although **the key 15-19 age group is a must for RBH** there are other bigger volume groups that we cannot ignore"*

Starter smokers:

- **D-228 (RJR-1379) – Target Store Marketing – Central Region Project:**

p. 80135 2866G:

"Sources of New Business

*0 18 – 24 Year Old Population (**Starter Smokers**)*

0 New Canadians

0 Brand Switchers"

Entry smokers:

- **D-177 RBH – 1994-95, Business Assessment, October 24-25th, 1994 (RBH-1138):**

p. 3781:

"Implications

- *It is important to further our knowledge of:*
- *The switching gates(why and when they switch)*
- *The rationale for choosing such and such brand by age group by region*

- The **entry smokers' segment** to better understand their expectation therefore predict their future choice of brand"

5. The plaintiffs are marketing brands of cigarettes that exploit the psychology of adolescents by associating the product with appealing images that convey independence, vitality, masculinity and rebellion.

- **D-172 Project Plus/Minus - May 7, 1982 (AG-217):**

Study highlights:

"STUDY HIGHLIGHTS

1) *Juvenile dabblings with smoking take place mostly for reasons of seeking to people forbidden fruit, plus **an element of rebelliousness.**"*

- **D-182 Export Family Strategy document, March 22, 1982:**

p. 80005 7299:

*"It is hypothesized that very young starter smokers choose Export "A" because it provides them with an instant badge of masculinity, **appeals to their rebellious nature** and establishes their position amongst their peers. As they mature, they gain more confidence through experience (moved from the educational environment into the work force) acquire other symbols of their masculinity (cars, clothing, etc.) and strive for social and peer group acceptance."*

p. 80005 7302:

"The Export U & A Study clearly shows that the parent brand is the entry brand in which new smokers enter the cigarette category (See Exhibit X).

Since we cannot direct our media or our creative to starter smokers, the optimal target group is young adult smokers between the ages of 18-24. It is judgementally felt that this is the age group when brand family loyalties start to solidify. If the Export Family can satisfy their psychological needs at this time, we are in a stronger position to retain them through their future years.

The high penetration of Export "A", Export "A" Mild/Light in the male 18-24 year old sector indicates that both full-flavour and lighter strength line extensions have appeal to this target group.

*The key influencing factor to initial brand selection amongst new smokers appears to be conformity to what their friends smoke. (See Exhibit X). While Export "A" appears to be chosen as a first brand based on this key influencing factor, **we must strive for peer group acceptability throughout the maturing process, for all the Export brands.**"*

- **D-183 (RJR-721) Export 'A' – 1997 Communications Plan, September 9th, 1996 – RJR MacDonald:**

p. 80153 1139:

"Target Group Definition

Smokers 19 to 34 years old with a primary emphasis on 19-24's, 60/40 male/female skew, moderate income and education.

*Young adults who are currently in the process of shaping who they are and how they want to be perceived. While they believe they are independent, peer group acceptance is still important to them and aids in defining who they are. **As young adults, they look for symbols that will help reinforce their maturity, independence and perceived individuality.***

*Core motivations for smoking centre around two distinct areas: **rebelliousness**; "I do what I want, I make my own choices, no one tells me what to do" and a way to fit in; "it's cool/grown up to smoke, it's a statement of my class/status/sense of quality. **Export 'A' smokers are more likely to fall in the "rebelliousness" camp.***

- **D-204 (RJR-306) RJR MacDonald Inc. Export 'A' Brand Positioning – June 24, 1996:**

p. 80153 1131:

"PSYCHOGRAPHICS:

*Young adults who are currently in the process of shaping who they are and how they want to be perceived. While they believe themselves to be independent, peer group acceptance is still important to them and aids in defining who they are. **As young adults they look for symbols that will help reinforce their maturity, independence and perceived individuality.***

*Core motivations for smoking seem to centre around two distinct areas: **rebelliousness** – "I do what I want"; "I make my own choices"; "no one tells me what to do"; "I'm tough, I can handle it" – and way to fit in/aspirational: "it's cool/grown up to smoke"; it's a statement of my class/status/sense of quality.*

Export 'A' users, and to a lesser degree Player's smokers, appear to fall in the "rebelliousness" camp, while du Maurier smokers clearly fall into that of "way to fit in/aspirational" They consider themselves to be "real" people, not trendy and flashy but down to earth, enjoying life's simple pleasure: a night out with friends at a local bar, escaping outdoors on the weekends."

- **D-206 Marketing Research Report – An Evaluation of Alternative Advertising Campaigns for Export 'A', April 1996:**

p. 80150 3535:

"Go Your Own Way (Fais a ta tete) [sic]

These executions encourage the smoker to defy the rules and pressures of society and do what they really want to do. Smoking Export 'A' Light is promoted as being associated with other defiant pleasures. The focus here appeals to one's sense of individualism pleasures. The focus here appeals to one's sense of individualism and maybe even rebellious nature."

- **RF-75 (RBH-4125) Development of new product ideas for Project 20:**

“Rebel with a Cause

Clearly, there is an opportunity to appeal to the defiant nature of young smokers today who gather together in “smoking pits” at schools or smoking sections at bars.

A cigarette brand that portrays an “in your face” attitude as in the Rebel idea where consumers can light up a fake dollar bill (the cigarette paper) and carry a black and silver box that has a hologram appeals to this target’s expression of defiance.

Participants also developed an idea to address the black and white warning labels. One idea was to work with these labels by creating brand names that respond to individual warning statements, for example, the product name of So What responds to the “Smoking Can Kill You” warning. Here, committed smokers buck the system and do what they most want to do: smoke.

Some suggested that these “rebel” product ideas have attention-getting aromas such as hashish, marijuana or clove. In order to raise interest, these products would only be offered through the “black market” thus making their acquisition more desirable than that of a regular box of cigarettes. Ideas like this would appeal to the “cool”, “trendy”, nature of our target.”

12. The plaintiffs, through the promotion of their products, seek to alleviate the feelings of guilt in young smokers.

- **D-178 RJR Macdonald inc. Export ‘A’ Franchise Advertising Strategy Recommendations, December 12th, 1995 (RJR-1418):**

p. 80154 2428:

"Strategy #4: Nobody tells an Export "A" smoker what to do	
For people who smoke when everyone tells them not to. Who are their own people, guided by their own internal motivations and who go against the trends...	Export "A" Light lets them enhance the pleasure in their lives.
<p>Rationale:</p> <p>This approach helps smokers deal with the social pressures against smoking and helps them rationalize their decision. Smokers like to smoke yet they hate being smokers. They are caught between the internal motivations to smoke and the external pressure no to.</p> <p>It capitalizes on the target's sense of being independent-minded and their high level of confidence to position Export "A" smokers as their own people who aren't influenced by others. This is particularly meaningful for our target since many they feel that having listened to the previous generation has not necessarily helped them. It also reflects one of Dr. Shore's individuality attitude statement: "It's a free country – get off my back!"</p>	

D-184 Project Print ads – Topline Report – prepared for RJR MacDonald Inc. May 21st, 1996 (RJR-477):

p. 80150 2042:

"2.00 FINDINGS

1. The overall impression the group of ads gave was very positive. Almost without exception, consumers noticed the difference between this advertising and the way cigarette advertising has typically been done. They noticed a change not only in style but in the attitude being portrayed. Respondents described this style to be:

- "fun"
- "modern"
- "light-hearted"
- "not as serious as other cigarette advertisements"
- "daring"
- "different, more exciting, not boring"

The underlying attitude reflected in this series is based on:

- taking oneself less seriously, being more carefree, and a little daring
- projecting a unique character, positive self-esteem, and the ability to make your own choices

The move away from real people, "the tough man or beautiful women" helps encourage this new attitude by **focusing on the smoking experience itself in a unique, bold, and guilt-free way.**"

23. The plaintiffs target the young by associating their brands with images that are appealing to this clientele.

- **D-191B Canadian Cigarette Brand Images – 1990s**

“CANADIAN CIGARETTE BRAND IMAGES – 1990S <i>from industry document descriptions of brand image, brand position, brand personality, brand character, etc.</i>			
Players	Export A	Can. Classics	Belvedere
<i>Independence</i>	<i>Independent</i>	<i>Independent</i>	<i>Young, youthful</i>
<i>Freedom</i>	<i>Individuality</i>	<i>Strong, proud</i>	<i>Cool, hip</i>
<i>Self-confidence</i>	<i>Confidence</i>	<i>Sociable</i>	<i>Sociable</i>
<i>Self-reliance</i>	<i>Adventurous</i>	<i>Adventurous</i>	<i>Active</i>
<i>Youthful</i>	<i>Exciting</i>	<i>Excitement</i>	<i>Energetic</i>
<i>Modern</i>	<i>Up-to-date</i>	<i>Young</i>	<i>Fun</i>
<i>Masculine</i>	<i>Masculinity</i>	<i>Outdoorsy</i>	<i>Unpretentious</i>
	<i>Virility</i>	<i>Natural</i>	<i>Down-to-earth</i>
	<i>Rebellious</i>		<i>Not rebel</i>

25. The promotion of the Player’s cigarette plays on these attributes.

- **D-196 Sponsorships – Communications Plans – 1992 – ITL (ITL-176)**

p. 13870:

“1992 Marketing Plans

Players Trademark

Key Changes to Plan

Positioning Strategies

*Reflect masculinity in a manner that differentiates the trademark from Export through youthful, self expression of **freedom** and **independence** and **self reliance**, inner **confidence**.”*

- **D-198 Sponsorships – Communications Plans – 1994 – ITL (ITL-178)**

p. 14439:

“PLAYER’S LTD.

OBJECTIVE:

*To communicate that Player’s Ltd. has a tradition and heritage of being primarily associated with popular masculine activities through an expression of **youthfulness**, **freedom**, **independence** and **self-confidence** relevant to young males.*

TARGET GROUP: - Males 18-25”

p. 14440:

"PLAYER'S LTD.

CREATIVE STRATEGIES:

Direct Player's Ltd. imagery communications towards the Company's involvement in the Indy Car World Series:

MASCULINITY

YOUTHFULNESS

FREEDOM

INDEPENDENCE

TRADITION"

- **D-197 1993 Communications Plans – ITL (ITL-179):**

p. 14654:

"In image terms, racing leans heavily in the direction of being masculine, youthful, exciting, and connoting independence. It doesn't convey affluence in the way some other activities did, and was unpretentious.

These qualities make racing a nearly ideal match with Player's"

29. The promotion of Export 'A' cigarettes is based on these same attributes, which the young find appealing.

- **D-193 (RJR-708) Letter from Éric Blais – v.p. Director Strategic Planning of Harrold & Mirlin – to Ms. Daphne Bykerk, Vice President Marketing RJR-Macdonald Inc., September 16, 1996:**

p. 80154 2470:

*"I- **Communicating the positioning in Québec***

*Findings from the qualitative positioning research conducted last May suggested that, although there are clear differences in terms of Export 'A's brand perceptions between English Canada and Québec, there are consistent core elements of the brand equity in both markets. These core elements and the **desire to appeal to young smokers** led to the positioning of Export 'A' as the real cigarette with the satisfying flavour that lets them express confidence and individuality."*

31. Belvedere exploits the same attributes that are considered appealing.

- **D-177 RBH – 1994-95, Business Assessment, October 24-25th, 1994 (RBH-1138)**

p. 3928:

"b. Sponsorship Provides

Belvedere Ltd. Rock provides an association with a cultural tradition, Rock'n Roll music, that epitomizes youth, fun cool, hip and leading edge trends

Rock music has been the voice of the younger generation for decades, talking with them, to them and for them

Rock provides unlimited opportunities for brand imagery, association and direct contact with our target audience in a uniquely Canadian format"

p. 3929:

"Concert tours provide a good opportunity for critical mass exposure,"

- **RF-22 (RBH-1130) 95/96 Marketing Plans:**

p. 2071:

"MARKETING STRATEGY

BASIC STANCE

Belvedere is the young, fun and sociable brand that offers smooth, full flavoured smoking satisfaction to contemporary young men and women.

TONE & MANNER

I am active, energetic and enjoy socializing with others but I am not a leader. Unpretentious and down-to-earth, I follow the trends but don't want to be labelled. Part of the young crown, I'm not rebellious but resist being told who I am and what I want."

- **D-190 MRD Library Qualitative Research Report for Rothman's Benson & Hedges re Belvedere Rock Sponsorship, April 1993 (RBH-2018):**

p. 11032:

"The image evoked by the sponsorship that will also accrue to Belvedere Ltd. is very positive. Not only is the sponsor noted for its size, the sponsor will enjoy the benefit of being perceived to be "upbeat", "trendy" and "knowing what young people want". While the sponsorship would obviously appeal to youth, there is no evidence that it would skew to one sex over another. In fact, several respondents indicated the concert itself would likely be an activity where mixed groups of friends would attend.

In every group there was considerable debate about a cigarette company sponsoring rock concerts. On the con side were those who felt that the sponsorship would suggest that cigarette companies were trying to coerce youth into taking up smoking.

"... because they are going to be into the same lifestyles and habits as we are into. We all want to quit smoking but we're hooked."

A majority of respondents did not agree with this viewpoint and could see no harm with the sponsorship, only good:

"A lot of kids don't look at who sponsors things as much as adults – as long as they will enjoy it and it will be appealing to them."

35. The plaintiffs' marketing documents deal in great detail with the psychological profile of adolescents.

- **D-90 Tracking Study 1988 (ITL-230):**

p. 16176:

"FOREWORD

THE 1988 TRACKING STUDY is the second of a planned series of research studies into the lifestyles and value systems of young men and women in the 13 to 24 age range. A benchmark was established in 1987 against which changes or trends will be identified.

The purpose of the research is to provide marketers and policymakers with an enriched understanding of the mores and motives of this important emerging adult segment which can be applied to better decision making in regard to products and programs designed to compete for brand share. To this end, a custom section which focusses exclusively on smokers aged 18 years or older is provided."

- **JPB-54 (ITL-329) Generation Y:**

p. 21879:

***"GENERATION Y (WHY?)
13-19 YEARS OLD***

TWO CATEGORIES

- A. *"BE-BOP":*** *Street tough and deeply cynical kids who are determined to take care of themselves no matter how screwed the world gets.*
- B. *"ALTERNATIVE":*** *Criticism of adult society:*
- *The world is screwed up*
 - *The environment is screwed up*
 - *Everything is screwed up*
 - *So persuade us that there is any hope*
 - *It is almost impossible to be idealistic*
 - *First native inhabitants of the "Global Village"*
 - *Vast ecological problems*
 - *Global instability*
 - *Teens today (have and) do worry about aids, violence and the environment.*
 - *They are realistic and pragmatic:*
 - *Primary goals is to survive.*
 - *They dream of becoming plumbers, mechanics, nurses, etc.*
 - *Jobs that fill basic needs, jobs for people with a no-nonsense approach.*
 - *Their rebellion takes passive forms:*
 - *smoking over exercise*
 - *fast food*
 - *body piercing*

- They are forced to grow up too fast – Little adults with responsibilities: grocery shop meal preparation, doing laundry, caring for younger siblings.”

- **D-170 Strategic Plan 1997-1998, Sales & Marketing (RBH-1134):**

p. 2938:

- *“In the mid-90’s, Boomers are all in their 30’s and 40’s and their children are pre to late teens*
- ***mid-90’s the baby boom echo kids are entering the reckless/experimentation years***
- *tobacco should attract a larger number of new customers than during the period when the baby busters entered their experimentation age, could see a 28% increase in the number of starter smokers over the next 15 years (D. Foot, Boom, Bust, Echo)”*

- **JPB-5 (ITL-261) Planning forecast 1993/1994/1995:**

p. 20215:

“The lessened negativity around smoking is evident among young smokers especially. Those people in Generation X (18-30 years old) and Generation Y (13-19 years old) have and are growing up in a time of unprecedented social problems. Issues such as high crime rates, divorce, AIDS and poor education are much higher on these peoples’ agenda than is smoking. They simply have more important things to worry about. Additionally, these people are not terribly idealistic or positive about the world in which they live or their future. Given this outlook, the positive benefits of smoking outweigh the negative, helping to create an environment in which smoking is becoming less of an evil than it used to be (or indeed than it ma still be for their parent’s generation).”

- **D-90 Tracking Study 1988 CRY-30 ITL-230:**

p. 16176:

“FOREWORD

*THE 1988 TRACKING STUDY is the second of a planned series of research studies into the **lifestyles and value systems of young men and women in the 13 to 24 age range**. A benchmark was established in 1987 against which changes or trends will be identified.*

The purpose of the research is to provide marketers and policymakers with an enriched understanding of the mores and motives of this important emerging adult segment which can be applied to better decision making in regard to products and programs designed to compete for brand share. To this end, a custom section which focusses exclusively on smokers aged 18 years or older is provided.”

p. 16210:

“3.5 T.G.I.F. Group

This is the largest single group accounting for 24 percent of 13 to 24 year olds. T.G.I.F. people are fun seekers and they live for the moment. This is the most self-indulgent group. They are more likely to support sexual freedom, they enjoy partying and are the only group to actively support smoking.

Achievement and leadership are less important for this segment as are moral and societal issues.

Typical of their attitudes and values are:

Marijuana and hashish are not that dangerous.

Working is only a means to an end – the ability to enjoy the weekend.

The drinking age should be lowered.

Sex before marriage is no big deal.

Cigarette smoking is socially acceptable.

The T.G.I.F. group is average in terms of television viewing. They enjoy heavy rock and heavy metal music and are more likely than other groups to spend six hours or more each day listening to the radio. **They are the most likely group to read Penthouse and Playboy**, they enjoy going to rock concerts (80%) and watching wrestling on television (77%). Museums and art galleries have little appeal for this group.”

p. 16241:

“By segment, **smokers cluster in the gregarious T.G.I.F. group**, considerably less so in that described as Tomorrow’s Leaders and the Quiet Conformers group.”

- **D-91 3N 1990 CRY-36 ITL-555:**

p. 1:

“FOREWORD

Background And Objectives

3N 1990 is the fourth of a series of research studies into the lifestyle and value systems of 13 to 24 year old Canadians. The first wave was conducted in 1987 among 15 to 24 year olds. In 1988, the sample was expanded to include 13 and 14 year olds. It has been repeated annually since then.

The purpose of the research is to provide marketers and policymakers with an enriched understanding of the mores and motives of this important group of emerging adults. The results can be applied to better decision making for products, programmes and services designed to compete for brand share. To this end, a custom section which focusses exclusively on smokers aged 18 years or older is provided.”

p. 34:

“**SECTION 3: LIFESTYLE/VALUES SEGMENTS PROFILES**

T.G.I.F.

Despite a slight increase this year, the T.G.I.F. group remains the largest of the lifestyle segments, although its overall importance has lessened over time.

These people are perhaps the most overtly self indulgent of all the youth segments. They put a lot of emphasis on fun and are quite willing to spend for it. They enjoy partying, and entertainment vehicles both in and away from home e.g. stereos, walkmen, rock concerts, professional sports events. The high discretionary income of the T.G.I.F.ers allows them to “spend for today” and it is not surprising that there is very little spending among this group on products for the future like investments, or financial products in general.

In keeping with their “live for today” attitude, T.G.I.F.ers are not following the tide of anti-smoking, anti-drug sentiment, and do not regard these substances with as much concern as do many of their peers. This is not to say they are “pro” drug, but their tolerance and acceptance is above average.

The T.G.I.F. group is less focussed generally, and less affected by social issues and concerns. They are the least patriotic of all segments, and less involved in their community.

Typical of their attitudes and values are:

Marijuana and hashish are not that dangerous.

Working is only a means to an end – the ability to enjoy the weekend.

Sex before marriage is no big deal.

Cigarette smoking is socially acceptable.

Sometimes I spend my money foolishly.

It is not important to be involved in community affairs.

Spiritual values are not more important than material things.

The majority of the T.G.I.F. group is male (63%) and slightly under-represented in Quebec. They are also older i.e. 17 plus, as their lifestyle requires both money and transportation means.

In terms of music preference, the T.G.I.F. segment rates highest on heavy rock and is most likely to steer clear of easy listening and classical type music.”

“5.2 Types Of Music Listened To Regularly – By Age

Many of the more popular music types listened to by 13-24 years olds tend to be more or less mainstream – Light Rock (61%), Pop (50%), Easy Listening (39%) music. However, both Rap (48%) and Heavy Rock (42%) also enjoy a fair sized audience within this age group, and to a lesser extent, so does House Music (21%).

The biggest dichotomy of music tastes tends to occur among older and younger youth on several specific music types:

Light rock, listening music, rap, country/western and rockabilly, punk rock, rhythm and blues and straight blues.

Generally speaking, younger teens i.e. 13-17 tend to gravitate towards the rap and punk rock music types more than older youth 18 plus. Likewise, the younger groups are less inclined toward the music preferred by older youth as evidenced by the relatively low incidence of easy listening and light rock type music. They more firmly reject the fringe music such as country and western, rockabilly, and blues type music preferred more by the older groups.

Conversely, older youth (although less rigid in their music preferences) steer clear of the rap and heavy rock type music preferred by the younger group.

All other music types, although displaying small variances among the different age groups more or less have followings which reflect the average for the population as a whole.”

- **D-93 (ITL-551) 3N 1991 CRY-38:**

p. 1:

“FOREWORD

Background And Objectives

3N 1990 is the fourth of a series of research studies into the lifestyle and value systems of 13 to 24 year old Canadians. The first wave was conducted in 1987 among 15 to 24 year olds. In 1988, the sample was expanded to include 13 and 14 year olds. It has been repeated annually since then.

The purpose of the research is to provide marketers and policymakers with an enriched understanding of the mores and motives of this important group of emerging adults. The results can be applied to better decision making for products, programmes and services designed to compete for brand share. To this end, a custom section which focusses exclusively on smokers aged 18 years or older is provided.”

- **D-94 (ITL-548) 3N 1992 CRY-41:**

p. 18278:

“YOUTH TARGET 1992 is the sixth of a series of research studies into the lifestyle and value systems of 13 to 24 year old Canadians. The first wave was conducted in 1987 among 15 to 24 year olds. In 1988, the sample was expanded to include 13 and 14 year olds. It has been repeated annually since then.

The purpose of this research is to provide marketers and policy-makers with an enriched understanding of the mores and motives of this important group of emerging adults. The results can be applied to better decision making for products, programs and services directed at youth.”

25. Advertising that could be appealing to the young

“The large sums these companies spend on advertising allow them to employ the most advanced advertising and social psychology techniques to convince potential buyers to buy their products.”¹³

26. The plaintiffs have a whole arsenal of marketing research tools they use to determine whether an ad, a design or another promotional tool is likely to be appealing to the young.

- **D-208 (ITL-788) Armada ITL – 1998 Project Nike – April 1999 Analysis of Competitive Advertising in the Tobacco Category:**

p. 25965:

“Objectives of this document

An analysis of 1998 competitive tobacco advertising in the Canadian market:

1. *To gain an understanding of the competitive environment in the context of ITL’s portfolio competitive set.*
2. *To deduce from competitive advertising:*
 - ***Whom their advertising is trying to appeal to?***
 - *How are they talking to this set of the target segment?*
 - *What is the main message they are trying to communicate (relating back to the attributes of ITL)?*
 - *What are key opportunities or implications that ITL can leverage to further gain a competitive edge?”*

- **D-174 (RBH 1146) Strategic Plan 1996-1997, Sales and Marketing – October 1995:**

p. 5741:

“3.4 TARGET – WHO IT COMMUNICATES TO

Subsequently, the participants felt that Rothmans was attempting to reach a younger target than its established brands are currently reaching.

“Young people would be attracted to this package.”

“Kids would buy it cause it looks cool ... it looks spray painted.”

*“The colours, the Plus, the design – the design is different than any other pack out there. **This all suggests it is for a younger age group.**”*

¹³ *RJR MacDonald v. Canada (A.G.), [1995] 3 S.C.R. 199, La Forest J., para. 76*

- **D-171 Marketing Research Debrief – August 1994, An Investigation of factors contribution to the growth of du Maurier (RJR-88):**

p. 80093 9376:

"2) The two mainstream alternatives – **Player's and Export "A" have imagery which ties them to an older generation**, consequently, they are less able to fit the role of becoming the brand of a new generation, thereby creating a void that duMaurier was able to fill."

- **D-190 MRD Library Qualitative Research Report for Rothman's Benson & Hedges re Belvedere Rock Sponsorship, April 1993 (RBH-2018):**

p. 11029:

"EXECUTIVE SUMMARY

*Sponsorship of a number of activities in support of Canadian Rock talent by Belvedere Ltd. was enthusiastically received by respondents. **Not only was the sponsorship seen as big, it conveyed an image of a Canadian company that wanted to appeal to youth.***

p. 11032:

*"The image evoked by the sponsorship that will also accrue to Belvedere Ltd. is very positive. Not only is the sponsor noted for its size, the sponsor will enjoy the benefit of being perceived to be "upbeat", "trendy" and "knowing what young people want". **While the sponsorship would obviously appeal to youth**, there is no evidence that it would skew to one sex over another. In fact, several respondents indicated the concert itself would likely be an activity where mixed groups of friends would attend.*

In every group there was considerable debate about a cigarette company sponsoring rock concerts. On the con side were those who felt that the sponsorship would suggest that cigarette companies were trying to coerce youth into taking up smoking.

"... because they are going to be into the same lifestyles and habits as we are into. We all want to quit smoking but we're hooked."

A majority of respondents did not agree with this viewpoint and could see no harm with the sponsorship, only good:

"A lot of kids don't look at who sponsors things as much as adults – as long as they will enjoy it and it will be appealing to them."

p. 11040:

*"Export was not expected to be a backer of the event since **the image of Export cigarettes is so far out of sync with an event that appeals to teens:***

"It's an old man's brand."

"That green packaged would be the last [one to sponsor it] because that's the strongest one and people try to stay away from it."

Players would be the most likely sponsor according to a majority of respondents:

"That's the one that's most likely to sponsor it because that's what you see all the kids smoking in Player's Smooth."

"It's so big it would make sense if they sponsored it."

- **D-184 Project Print ads – Topline Report – prepared for RJR MacDonald Inc. May 21st, 1996 (RJR-477):**

p. 80150 2044:

3. Respondents believed certain executions were more likely than others to appeal to the younger set, i.e. those under the aged of 19. Generally speaking, ads that identified with "adventure or sex" were said to more likely appeal to the teen and even pre-teen segment. Specific executions mentioned were: *Exciting, Extra-curricular, Explicit and Ex-rated.*

- "school kids might see it as an after school activity"
- **"appeals to younger age groups, even as low as 8 to 15"**
- "too much for the younger generation"
- "bungy jumping itself is geared toward the younger generation"

More men than women concerned that a few of the ads might be a public relation issue. **While all groups spontaneously (without prompting) raised concerns that certain ads in the series might appeal to the under 19 segment,** such opinions among men came up much sooner in the discussion than they did with the women's groups.

The vast majority of respondents did not believe that the ads' probable appeal to the younger set was intentional on the part of the advertiser."

p. 80150 2050:

3.00 CONCLUSIONS

1. The new series strongly supports the new brand character... modern, bold, unique and attention-seeking.
2. An updated, positive message is successfully getting across... the brand is more (and less) than what consumer thinks... it has more appeal, but less of the old image most can't live with in the same quality cigarette.
3. The series will successfully appeal to a wide cross-action... much wider than ever before...it will also appeal to those younger than 19 years of age."

- **RF-75 (RBH-4125) Development of new product ideas for Project 20:**

p. 4:

"Rebel with a Cause

Clearly, there is an opportunity to appeal to the defiant nature of young smokers today who gather together in "smoking pits" at schools or smoking sections at bars.

A cigarette brand that portrays an "in your face" attitude as in the Rebel idea where consumers can light up a fake dollar bill (the cigarette paper) and carry a black and silver box that has a hologram appeals to this target's expression of defiance.

Participants also developed an idea to address the black and white warning labels. One idea was to work with these labels by creating brand names that respond to individual warning statements, for example, the product name of So What responds to the "Smoking Can Kill You" warning. Here, committed smokers buck the system and do what they most want to do: smoke.

Some suggested that these "rebel" product ideas have attention-getting aromas such as hashish, marijuana or clove. In order to raise interest, these products would only be offered through the "black market" thus making their acquisition more desirable than that of a regular box of cigarettes. Ideas like this would appeal to the "cool", "trendy" nature of our target."

- **JPB-94 (ITL 785) Presentation of competitive Advertising Analysis (Project Nike):**

p. 25695:

"EXPORT "A" SMOOTH

Headline:	Either you like it or you don't Question de goût
Visual:	Electric guitar vs. classic guitar. Great outdoors vs. crowded urban night scene. Chess game vs. pool table
Signature:	None
Target group:	Adults 19-34
Positioning:	Cigarettes for self-confident people with a rebellious side.
Note:	Campaign appears aimed at Rothman's smokers leaving the brand for lack of Smooth option.

WHAT WE THINK THEY'RE TRYING TO DO

Message not easy to understand.

Showing opposites situations sends different messages and not that much about product.

Visual elements (guitars, pool table, etc.) are interesting and appealing to a young target group."

- **D-1 Cigarette advertising Code of Canadian Tobacco Manufacturers:**

1964 : Rule 7 :

No cigarette advertisement shall use as endorsers athletes or celebrities in the entertainment world and other persons **whose major appeal is to children or adolescents under the age of 18 years.**

1972: Rule 12:

*No advertising shall use as endorsers athletes or celebrities in the entertainment world and other persons **whose major appeal is to children or adolescents under the age of 18 years.***

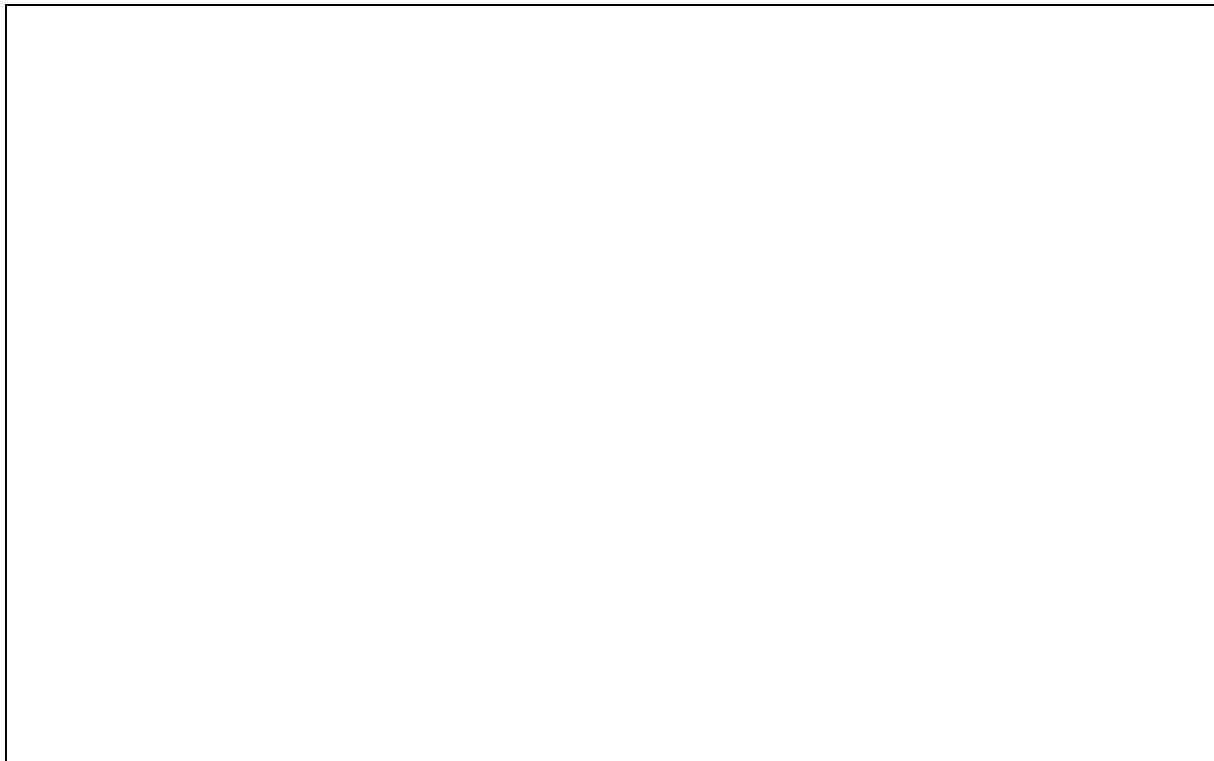
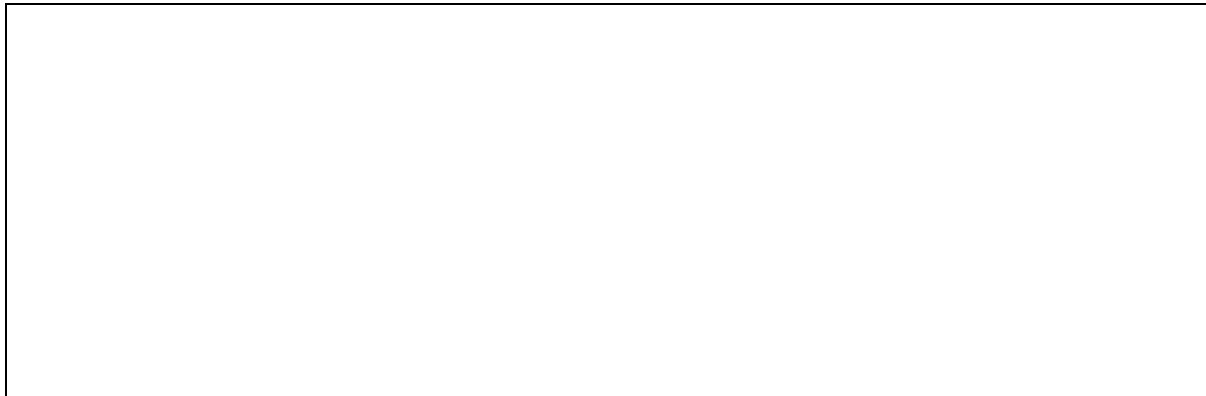
- **D-2 Canadian Code of advertising standards May 1999 revision:**

“s. 13

Advertising to Minors

Products prohibited from sale to minors must not be advertised in such a way as to appeal particularly to persons under legal age, and people featured in advertisements for such products must be, and clearly seen to be, adults under the law.

- **D-10 RJR-1262 et RJR-1263 :**



- **D-20 «Either you like it or you don't »:**

- **D-21 RJR-476 An investigation of the perceived age group appropriateness of ads for Smooth & Export A:**

p. 80150 186:

“ 1.2 Research Objectives

*The primary objective of this research was to determine whether or not any of the executions which comprise the advertising campaigns for Smooth or Export « A » present **visual images which would judged by the general public as intentionally or inadvertently attempting to attract young people (i.e. less than 19 years of age).**”*

80150 1889:

Electric Guitar vs. Acoustic Guitar

By the time respondents were shown the guitar ad (which has already appeared in market), they were undoubtedly preconditioned to evaluating cigarette advertising in terms of its potential to attract (either intentionally or inadvertently) individuals who are underage. As a result, some would immediately address their comments to this particular issue.

Approximately three quarters of the Montréal respondents judged this ad to be clearly targeting younger consumers, whereas the remaining smokers stated that the ad would be appropriate for anyone, since music has universal appeal.”

80150 1890 :

“Nonetheless, even those respondents who interpreted this execution as including older smokers into its target group, conceded that the appeal of the advertising would start at a relatively young age.

“The electric guitar is for 14 to 16 year olds because it is a cool looking image.”

“For me, that is for kids, even down to age 15, because of the electric guitar.”

“It’s aiming at young people with the rock guitar.”

“I see different ages, but the rock guitar goes down to 14.”

“I would say (it is targeted at) 17 to 50 (year olds).””

80150 1891:

“When specifically asked if the advertiser was intentionally targeting a young audience, a majority of smokers agreed that the advertiser was not attempting to attract underage smokers. The question was then posed as to whether or not the ad might inadvertently appeal to young people. At this point, a majority (about 6 in 10) conceded that this was a possibility.”

12. Smokers

“Second, even if this Court were to accept the appellants' brand loyalty argument, the appellants have not adequately addressed the further problem that even commercials targeted solely at brand loyalty may also serve as inducements for smokers not to quit. The government's concern with the health effects of tobacco can quite reasonably extend not only to potential smokers who are considering starting, but also to current smokers who would prefer to quit but cannot.”¹⁴

“It is, therefore, clear from this report that a central aspect of the "advocacy thrust" suggested in Project Viking is advertising. It is difficult to see how companies could "reassure" smokers that they are not "social pariahs" or "stroke" them merely by reducing the price or content of their products. To reassure smokers effectively, it is also necessary to convince them that smoking is socially acceptable or even admirable. Advertising is a proven and effective method for achieving this result.”¹⁵

«[Regarding "light" cigarettes], they submit no evidence that such products are actually healthier, nor logically could they, since the evidence appears to point the other direction: such products are no safer than high tar products and serve mainly to induce smokers who might otherwise quit to keep smoking "lighter" brands;¹⁶

13. The majority of smokers have feelings of guilt and consider stopping smoking. Promoting tobacco products is designed to eliminate or at least alleviate these feelings of guilt by various means:

- Promotion of so-called milder cigarettes;
 - Promotion of light cigarettes;
 - Promotion of cigarettes “without additives”;
 - Promotion of “100% natural” cigarettes;
- **D-201 Johnston & Ass. Segmentation - Phase I Focus Group Research, February 1991 (RBH-2234):**

p. 27343:

“Sensitivity to personal health risk generates a range of responses including attempts to quit, consumption rationing and moves (real or perceived) to a lower T & N count. Among those who move “down” some are aware of a specific T & N count but many are not, relying more on nomenclature.”

p. 27356:

“Many smokers recognize and frequently resent the guilt they feel as smokers. This guilt appears driven by both internal (health concerns) and

¹⁴ *RJR MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199, La Forest J., para. 84

¹⁵ *RJR MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199, La Forest J., para. 90

¹⁶ *RJR MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199, La Forest J., para. 108

external (social and financial) pressures. Their resentment of their own feelings of guilt appears generated in some cases by their inability to give up smoking and in many cases by a reluctance to give up the benefits or pleasures which they experience from cigarettes."

- **D-213 Johnston & Associates – Project Linebacker Qualitative Research – Calgary – Vancouver, July 1994 (RBH-2051):**

p. 27777:

*"Most had switched to their current brand as part of a deliberate, if occasionally unsatisfying moved down the T & N ladder. While by no means the only reason, lower T&N was the most frequently cited switching motivator... "wanted less tar, less strong, less cough, lighter, lower nicotine, **healthier**, cut down, part of weaning process"."*

p. 27779:

*"A low tar product was, however, viewed as less harsh (inoffensive if unsatisfying) and, above all, **healthier/less harmful**. Low tar's image does skew more modern and several see the profile as smart... low tar smokers were occasionally described as "intelligent; thinkers"."*

- **D-230 (RBH-4162) Project 21, Toronto, June 1995:**

p. 10:

"DESIRED IMAGE CHANGES

The overriding desire is for a proposition which generates greater social acceptability. However, greater social acceptability appeared more a desired end result than an image shift and it was broken down in these sessions into the following components."

...

Less harmful...** This standard desire among smokers appears driven either by self-interest or by a desire for something which is "better" for others. **The concept is described as healthier, less intrusive (less smoke) and, overall, less harmful to the smoker and to others. The opportunity lies in a proposition which communicates a general sense of healthfulness and/or a healthy lifestyle."

8. The reasons why smokers want to stop smoking are essentially related to issues of health, cost and social pressure. The tobacco companies have responded by marketing so-called light cigarettes, which would be perceived by consumers as healthier.

- **D-232 (RBH-4182) OONA IV, Qualitative Research Calgary – July 1995:**

p. 6:

*“Oona women do appear motivated to escape the anger or embarrassment resulting from anti-smoking pressure. Anger aside, the descriptions of their sense of “embarrassment” provide important clues to their desires...i.e. **product propositions and packages which provide antidotes to those feelings.***

*The negative feelings were describes as...“guilty, conspicuous, humiliated, second-class, feeling like a leper, like an outcast”. **Direct antidotes, therefore, would be Oona propositions designed to make the smoker feel “carefree, discreet, confident, first-class, feeling healthy, feeling sociable”..”***

- **LN-33 (RJR-101) Factory made cigarette market usage and attitude study – January 1995:**

p. 80117 6699:

“In the past approximately 80% of smokers claimed to have tried quitting but currently only 25% are actively trying to exit the market. Younger smokers are less likely than others to have tried in the past or to be currently trying to quit smoking.

“For those who have tried to quit in the past, health concerns was the key motivator for quitting with price and social pressure being relatively less important.

For those currently trying to quit smoking, health concerns is overwhelmingly the key motivation for quitting.”

11. RJR-MacDonald marketed the Vantage cigarette based on these studies.

- **D-203 RJR Macdonald Vantage Strategic Recommendation, March 20, 1997 (RJR-1338):**

p. 80151 5031:

“iii) HISTORICAL CONSUMER PERCEPTIONS & ATTITUDES

***D** **Key switching motivators include low tar/nic content, less health risk**, want to quit, variety/change, less harm/ same satisfaction. Vantage smokers came to brand due to low tar/nic., smooth taste, good draw for mild cigarette.”*

p. 80151 5037:

“1996 STRATEGIC OPTIONS

Concepts

*Vantage. **The smart choice for the concerned smoker.***

You enjoy smoking but don't feel good about the fact that you smoke. Vantage's lower tar makes you feel a little better about smoking, while it's unique full flavour gives you all the satisfaction you want in a cigarette.

Findings

- **Plays well to “conflicted smokers.”**
- *Wrong for those who’d rather not think about it now that they’ve moved to low tar.*
- *Reasonable concern suggests a “selective, particular, modern smoker.”*
- *Appropriate product description*
- *Apologetic attitude*
- *Controversial in terms of relevance*

Vantage. **The responsible way to smoke.**

You respect others, yourself and the environment around you. You need a cigarette that lets you enjoy smoking without conflicting the things you believe in. Vantage – low in tar and with a unique full flavour – fits in with you the way you feel.

- *Denial that responsibility is associated with smoking.*
- *Too ideological.*
- *Connected with enjoying smoking*
- *Appropriate product description*
- *Inappropriate attitude”*

13. The Viscount cigarette, marketed by Rothmans, Benson & Hedges, targets smokers who want a healthier product.

- **D-177 RBH – 1994-95, Business Assessment, October 24-25th, 1994 (RBH-1138):**

p. 3990:

“Low Tar Smoker

*The prime motivation in smoking a low tar cigarette appears health related. These smokers appear more conscious and aware of T&N counts than others and **a low tar product is viewed as part of or as an alternative to cutting down for health reasons.**” (Toronto/Calgary March 1992)*

“Low tar smokers appear driven by the desire for a safer, healthier product rather than by any unique aversion to the taste or hit of a stronger cigarette.” (Toronto/Calgary April 1993)”

p. 3991:

*“B&H launched Viscount in 1968 with positioning as “the mildest cigarette in the Canadian market, for health conscious smokers” (1987 Brand :Plan). It appears **that mildness was the relevant communicator at the time of the Trademarks true positioning, that of being for health conscious smokers.** In 1980 the Trademark had begun its current downward trend, on judgement behind i) better marketed competitive entries, ii) the introduction of new Trademark packaging (basically current packaging), and iii) the use of “the mildest” claim in advertising. **It appears neither one of these Trademark directions where successful moves and that a return to the original health aspirational/image positioning would***

be more relevant, appealing and gender neutral (and distinct versus segment leader, Matinee Extra Mild)."

- **RF-37 (RBH-3829) Memo from J. Wilson to J. Feeny re: Print advertising for Viscount 1 Ultra Mild, September 26, 1996:**

p. 10592:

"Target Audience

- *Demographics*
 - *The primary target female, 35+, educated, non-labour force, income \$40k+.*
 - *The secondary target skews female with male relevance, 25-39, educated, white/grey collar, income \$40k+.*
- **Psychographics**
 - ***The target audience is healthier/guilt driven. At this time of year, they are moving into "New Year's resolution" time, and so are beginning to rethink their brand choice. By moving to the lowest brand available, they off-set some of the guilt factor.***
 - ***They enjoy smoking, and are not committed to cutting out all the pleasures in life, but want to enjoy their vices in a moderate way based on an informed choice reflecting an attitude of smoking "smarter".***

- **RF-33 (RBH-1129) Marketing Plans 94/95:**

p. 1942:

"APPENDIX: MARKETING STRATEGY

VISCOUNT EXTRA MILD

BASIC STANCE

*Viscount Extra Mild stands for low tar combined with equal or superior taste, relative to directly competing brands, for **today's health conscious smoking consumers.**"*

p. 1943:

"APPENDIX: VISCOUNT EXTRA MILD MARKETING STRATEGY Cont'd...

Rationale

Research suggests "the move down in T&N is fundamentally health related" as opposed to an aversion to the taste or hit of a stronger cigarette. Consumers see..."

8. Du Maurier's Ultra Light cigarette, marketed by Imperial Tobacco Limited, targets smokers who believe that light cigarettes are healthier.

- **D-214 Document from F.Y. Caya to: Distribution ITL April 22, 1991 re: Du Maurier Ultra Light:**

p. 24080:

*“Overall, due to the sensitivity and awareness about the “health” issues surrounding smokers, **they believe that a move down the scale to a lower tar and nicotine cigarette will be healthier.** They, therefore, understand that in going lighter and lighter with its mainstream brand, du Maurier is keeping in touch with its consumers. It is seen as a natural progression – one that they will follow.”*

10. The same applies to the Medallion cigarette marketed by Imperial Tobacco Limited.

- **D-215 A Review of ITL Brand Strategies, November 1998 – Prepared for: Imperial Tobacco (ITL-231)**

p. 20154:

“MEDALLION – 1989

OVERALL POSITIONING OBJECTIVE

*The objective for Medallion is to **associate the brand with the lowest recognized level of mildness (Ultra-Mildness) and “safety”**, with as little sacrifice or trade-off on image elements.”*

...

STRATEGIES

Positioning

Reinforce Medallion’s lowest tar, “safest” perception.”

p. 20137:

“5.6 Medallion

This Ultra Low entry has no relevance to 18-24 year old smokers, nor is it likely to have in the foreseeable future. They have not regressed to this tar level by any stretch of the imagination.

*The Medallion strategy may wish to recognize that there are at least two types of 1 mg smokers. One group is on a deliberate schedule heading toward quitting via the cutting down on strength route. It will probably be successful through the recognition of lack of taste and satisfaction and therefore any point to smoking at this level. **The other group is one which wants to quit but cannot, and feels guilty about this. It chooses the lowest tar option available because it is the least bad for it** (in line with the Medallion strategy). Were it possible to deliver a modicum of taste at 1 mg, as the competitor Accord apparently has achieved, there may be some gratitude expressed by this unhappy group.”*

- **D-222 ITL Marketing Plan – 1989 (ITL-431):**

p. 17609:

“MEDALLION – 1989

In light of impending communications restrictions and with Bill C-51 allowing an opportunity for “free” re-design, Medallion’s package and symbol will be examined in the context of its strategic position.

The objective of any design change will be to reinforce its lowest tar, “safest” perception. Further, perceptions should shift in terms of modernity and youthfulness.”

p. 17610:

“STRATEGIES

Positioning

Reinforce Medallion’s lowest tar, “safest” perception.”

13. Ads for light cigarettes normally appear in January of each year, when smokers make a resolution to quit smoking.

- **D-212 Memo from Nanci Bodi – Marketing Manager, Vantage to All Head Office Employees, January 28, 1997 (RJR-1311):**

p. 80151 2578:

“To: All Head Office Employees

Date: January 28, 1997

Subject: Vantage Newspaper Advertising Campaign

LATE BREAKING NEWS ITEM! VANTAGE NEWSPAPER

ADVERTISING TO HIT THIS THURSDAY, JANUARY 30TH!

On January 30th and February 6th, a bold new Vantage advertisement will appear in widely circulated newspapers across Ontario. Titled “It’s never too late for another resolution...”, this advertisement invites smokers to “switch to the satisfaction of low tar Vantage”.

This new advertisement is timely given that it appeals mainly to high tar smokers to consider Vantage if they plan to trade down their tar level as a New Year’s resolution. Smokers are assured that Vantage delivers satisfaction in a complete range of low tar cigarettes (to suit their individual tar level preference).”

15. The marketing research tools the plaintiffs have enable them to determine whether an ad is false or misleading.

- **D-189 (RBH-3804) – Bryan Nykoliation - Canadian Classics FY 96-97:**

p. 9671 :

“3. Pure Canadian Classics :

- *Some panelists that « pure » was reflective of the northern part of Canada, the untouched and pristine part. They heralded this supporting slogan as evidence that the cigarettes would not have been sprayed with chemicals and would really be made in Canada.*

“Pure means the Northern part of Canada, clean, pristine, Northern Canada, clear tobacco with no pollution in it, not sprayed down and manufactured.”

“They are trying to guarantee that it is old, and made in Canada.”

- **Several panelists rejected this slogan citing that the word “pure” simply did not go well with cigarettes. Some felt that the word pure was misleading and dishonest. At least one panelists though that it would make the cigarette milder, and “wouldn’t cause such a head rush.”**

“Dishonest ... trying to make people believe that smoking isn’t as bad as the other ones. Like saying more protective.”

“Pure just doesn’t work with smoking. It is a trick.”

- **D-236 (RBH-4100) Project Apollo, A Qualitative Study of Opportunities in the YAM Segment – Spring 1999 – Prepared for Rothmans, Benson & Hedges:**

p. 10:

“100% Canadian Tobacco” is a distinct positive.

- *Like the name “Canadian Classics”, the 100%...” phrase suggests a product which is likely to be somewhat higher quality and better tasting than others. A Canadian product specifically suggests a more natural, cleaner taste. However, the key benefit is its ability to distance perceptions of the product from those associated with American tobacco.*
- *In this case, the brand emerges with a minor competitive advantage over those (e.g. duMaurier) who may be vaguely linked with American cigarettes. DuMaurier’s product is acknowledged as “good” but its “Virginia” tobacco designation on the package suggests more American than Canadian linkage.*
- ***The phrase does contribute to a synergism which, along with the name, the scene, the moose and the additive copy suggests a more natural, more healthful image.”***

p. 11:

- ***“The “additive-free/without additives” proposition does not suggest a healthy cigarette. Instead, it suggests a less harmful one. This distinction appears significant since a small minority saw the claim as lacking credibility (“all cigarettes are bad”) while a majority saw it as a process statement (“they don’t add anything else”) and a statement of competitive advantage (“it’s less harmful than the others”).***
- ***An “additive-free” proposition has taste as well as health implications. Most assumed a cigarette without additives would have a cleaner, purer, more***

tobacco taste which would be more obvious to the consumer because the taste would not be “cluttered” with other chemicals.

- *There was consistent preference for the phrase “additive-free” over the phrase “without additives”. The key issue is the word “free” which suggests a more positive and more healthful positioning.”*

10. Women

11. The tobacco industry targets women by marketing brands of cigarettes associated with a lifestyle that is appealing to women, a lifestyle that conveys vitality, youth and health.

The example of Matinée:

- **D-196 Sponsorships – Communications Plans – 1992 – ITL (ITL-176) :**

p. 13874:

"1993 MARKETING PLANS

MATINEE TRADEMARK – KEY CHANGES TO PLAN

POSITIONING STRATEGIES

- *Relaxation, youth fitness and self indulgence expressed in female fashion will be the key elements in the trademarks lifestyle position."*

2. The general public

“Cigarette advertising cannot be created so that it is only effective for brand switching. The ads are developed (and researched) to insure that they are maximally effective against targeted segments. Nonsmokers in those segments (e.g., young males) have similar motivations and concerns, and there is no way to lower a “magic curtain” around them in order to shield them from the enticement of such advertising.”¹⁷

3. The marketing initiatives of the tobacco industry also target the general population.

- **D-200 (RJR-682) RJR-Macdonald Inc. Inter-office Correspondence to Patrick Mispolet from Nancy Marcus, March 25, 1996:**

p. 80151 3320:

“The Export ‘A’ Inc. Skins Game

Background

The Skins Game has become one of the top televised golf events in Canada over its three year existence (see appendix). The event gives Export ‘A’ Inc. an unparalleled opportunity to “own” five hours of weekend television and represents a leveragable advertising opportunity in the two to three month window leading up to the event.”

...

Executorial Considerations

- ***pre-promote the event as widely as possible for as long as possible prior to the actual event;***
- ***target the general population (Adults 18-49) with the advertising, not just the golfing target;***
- ***leverage the appeal and high profile of the world’s top golfers;***
- ***create positive association between the event and the brand by way of advertising and in store trade presence.”***

- **D-186 Briefing document for Export ‘A’ Inc., September 9th, 1983 (RJR-695):**

p. 80093 6416:

“3. *Who are we after?*

Primary

The masses. We want everyone to notice the Export “A” Inc. logo. The communication programs need to be tasteful to avoid backlash from anti-smoking groups which then create negative press.

Secondary

To have the local sports person want to participate or attend the event.”

¹⁷ *RJR MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199, La Forest J., quoting Joel Cohen, para. 92

- **D-185 A New Sponsorship property for Export 'A' Inc Brief "Plugged The Edge" (RJR-663):**

p. 80133 7791:

"3. *Who are we after ?*

Primary *The majority of the 18 to 24 years old crowd. The property chosen must be of interest to 18 and older versus a venue that could be interpreted as 18 and younger due to the sensitivity of our business. The communication program will need to be tasteful to avoid backlash from anti-smoking groups.*

Secondary *The masses. We want everyone to notice the Export "A" Inc. logo and involvement in this event."*

- **RF-10 (RBH-1221) – Benson & Hedges Fireworks Sponsorship – Letter from Kidstuff Twelve to Design Unlimited, July 19,1995:**

p. 7691:

"Starting on Monday July 24th through Friday, July 28th a portion of the MCDONALD'S TELEVISION TWELVE'S KIDSTUFF daily news breaks will promote the Benson & Hedges SYMPHONY OF FIRE and our enter to win contest. In addition to the above contest airtime, from Monday, August 7th through Wednesday, August 9th the KIDSTUFF News breaks will feature our contest winners enjoying their barge tour as well as encourage viewers to come by the KIDSTUFF Van at the Grand Finale.

p. 7647:

"KIDSTUFF airs three times daily, Monday through Saturday of every week, airing twice daily between 7 – 9:30AM and once between 3 – 5:00PM; on Saturdays all three segments air between 7AM – 11:00AM. The KIDSTUFF spots are 60 seconds in length during which the SYMPHONY OF FIRE Barge Tour and ticket promotion will be included."

- **RF-42 (RBH-1212) Benson & Hedges Fireworks:**

p. 7412:

"1. THE FIREWORKS

The firework shows are very spectacular and the combination with music make them quite artistic and set them far apart from « normal firework displays ».

*The fireworks appeal is very broad. Attendance at shows in each of the 3 cities is high. Even though it is a First Class show, **it's also a family event which attracts both sexes equally and all classes of ages.**"*

p. 7413:

"3. BRAND EXPOSURE

In my opinion, brand exposure on-site is not predominant enough. The existing signage does not immerse the public in a real "Benson & Hedges" bath. People not only should know they are at the Benson & Hedges (they already do), they should see it and feel it.

Everything we do on the site we should ask ourselves “what does it do for the brand?”

p. 7414:

« I think that brand visibility could be increased and enhanced. A lot of opportunities could be explored, here are just some ideas.

- Small signs spread on site to indicate best viewing points.
- Big banners on fences and streets around the site.
- VIP area “brand identified” and recognizable from outside.
- Hostesses and helpers in Benson & Hedges uniforms (with real brand identification).
- **Brand identified items given or sold to public (t-shirt, hats, flags, balloons etc.).**
- Brand identified items offered or sold to all restaurants, bars, stores on or close to the site (umbrellas, matches, ashtrays etc.).

Other more “creative” ideas:

- Is it feasible to have **bombs exploding in the shape of the Benson & Hedges name** (I’ve seen heart shapes, so why not letters?).
- Plane flying over location with a long trailing B & H banner.
- Parachutists coming down with gold and black Benson & Hedges parachute and distributing Benson & Hedges “giveaways”
- B & H airship flying on site.”

p. 7415-7416:

“6. BRAND FIT

There is a very good fit between Benson & Hedges and the event :

- The firework shows are top quality and classy which fits exactly the Benson & Hedges promise as brand. The combination with music makes them artistic and very elegant (such as B & H brand).
- Benson & Hedges Firework shows are unique and really differentiate us from competitive events like tennis, golf, jazz.
- The competition aspect adds an international and prestigious connotation (such as B & H brand).
- **Fireworks also have a magical image and some romantic and emotional appeal, that surely touches our target.**
- **By presenting a “family-event” we certainly reach them too and all the characteristics of the shows fit the Benson & Hedges brand.”**

9. Brand loyalty

10. Smokers are extremely loyal to their brand of cigarette, hence the importance of gaining their loyalty as early as possible.

- **D-166 Pollay, Richard, « How cigarette advertising work. Rich imagery and poor information»:**

p. 16

As starters, whose brand loyal patronage might be enjoyed for many years to come once they settle on a preferred brand, are therefore seen as a critical success factor.

I.T.L. has always focused its efforts on new smokers believing that early perceptions tend to stay with them throughout their lives. I.T.L. clearly dominates the young adult market today and stands to prosper as these smokers age and as it maintains its highly favorable youthful preference. (p. 201825039, File # HT 0344, Box # GU 0200, HC Request #290, 1989)

- **D-175 Export 'A' family – Brand Positioning Statement (RJR-1339) October 5th, 1989 (D-175):**

p. 80118 3930:

"RATIONALE

The younger segment represents the most critical source of business to maintain volume and grow share in a declining market. They're recent smokers and show a greater propensity to switch than the older segment. Export has shown an ability to attract this younger group since 1987 to present (exhibit XI, XII)"

p. 80118 3934:

"In order to make further inroads into the younger segment, we must continue to project an image that is consistent with the needs and values of today's younger smokers. This positioning leverages the heritage inherent in."

p. 80118 3935

"V. HOW DO WE ACCOMPLISH THIS?"

- *Sponsorship*
- *Target store marketing*
- *Creative/:P.O.S.*
- *Packaging"*

- **D-176 Trademark Strategies and projects – 1995 – Market Strategy and development (ITL-441):**

p. 18110:

“CONSUMER NEEDS

Marketing activities have historically been and continue to be targeted at younger smokers due to their greater propensity to change brands.”

- **RF-44 (RBH 1137) - 1993/94 Business Review:**

p. 3642:

“II- KEY LEARNING/INDICATED ACTIONS

1. Craven needs to fix its Regular Length business. A strong regular length business is key to attracting younger users and ensuring a healthy future franchise.”

- **P-49 Broad Strokes Plan 1992 (ITL-267):**

“Under 25-year olds continue to show the highest level of potential as a target for all of our activities. The model that sees young customers acquiring their preferences and staying with them as they age is increasingly valid. If there were only one spending target, this would be it.”

- **LN-33 (RJR-101) Factory made cigarette market usage and attitude study – January 1995:**

p. 80117 6730:

“BRAND LOYALTY AND COMMITMENT

...

The Conversion Model indicates that smokers, in general, are extremely brand loyal. Only 3% are considered convertible or extremely vulnerable to brand switching while a further 18% are classed as having shallow commitment or are moderately vulnerable to brand switching. The remainder have a fair or high degree of commitment to their regular brand. Despite major changes in the tobacco market over the past few years with increasing taxation, resulting in “black market” sales and then the more recent tax roll-back, there has been little change in real commitment to regular brand over this time frame.”

- **D-202 Marketing Research Department Report, RJR Macdonald Inc. Smoking Buying Habits Study - February 1990 (RJR-6):**

p.80128 5861:

“a) The Support System segment, which comprises 1/3 of the market in general and the Modern/Active lifestyle cluster in particular, may be easily persuaded to try a different brand with clever counter displays or point of sale promotions (pricing and point of sale advertising). The experimental nature of the

*Support System segment, the largest of all the segments attitudinally, lends itself to this proposition. Convenience/ variety/ gas bar, the most favoured outlet type for cigarette purchase by this group, lends itself quite well to these two types of stimuli and should be the focus of programs targeted to them. They also tend to be heavy smokers resulting in maximum return on promotional dollars. **Given their younger age skew, this group has the lowest level of brand loyalty but it is essential that they be targeted during this formative brand loyalty stage.** It should be noted that this group is slightly more likely to be made up of king size smokers, driven by higher than average agreement that smoking is sophisticated. This may indicate strong potential to develop king size formats in particular.”*

- **D-178 RJR Macdonald Inc. Export ‘A’ Franchise Advertising Strategy Recommendations, December 12th, 1995 (RJR-1418):**

p. 80154 2410:

“1.0 Source of volume:

At a time when brand loyalty is eroding, brands are being “commoditized” and consumers look for the value of retailer brands, loyalty to cigarette brands remains very strong.

Most cigarette purchases are automatic and smokers claim that they seldom even see other brands. There are few products which are purchased or consumed as frequently as cigarettes. This constant repetition generates virtually unprecedented loyalty in this product category. Focus Groups, December 1995.

Only a small percentage of smokers can be encouraged to switch brand.

Only 3% of all smokers are considered “convertable”, 18% are classed as having a “shallow commitment”.

The proportion of consumers vulnerable to loss is about equal across the three brands (Export 23%, Player’s 17%, duMaurier 24%) – 1995 U&A Study

Younger smokers between the ages of 19-24 are more likely to switch as they are still experimenting with brands, have low brand loyalty and are generally more predisposed than older consumers to adopt new products and buy on impulse.”

- **LN-78 (RJR-367) Above and Beyond the Vantage Challenge – presented to RJR MacDonald – prepared by the Gaylord Group Ltd. – May 20, 1997:**

p. 80151 5203:

“ESTABLISHING THE KEY RESULTS AREAS: A STRATEGIC OVERVIEW

Smokers exhibit extremely high levels of brand loyalty. Present government regulations are strict with respect to tobacco advertising and sponsorship of arts and sports. With the federal tobacco law being amended, tobacco companies are actively searching for innovative ways to market their products.”

20. The notion of switching encompasses not only smokers who change brands but also new smokers and those who quit smoking.

21. The plaintiffs' argument that they are not interested in new smokers, the vast majority of whom are adolescents, is contradicted by their marketing documents.

- **D-179 Imperial Tobacco Limited - Switching Analysis, August 1991:**

p. 465043162:

"Switching behaviour is more prominent among younger smokers since they are at a stage where they experiment with different brands before they make their choice. With a switching rate twice as big as total smoker's, smokers under the age of 25 represent a moving market of 4% in consumer share, a target of primary importance in order to ensure future success. So far, ITL is the only company that has managed to increase its share of switchers-in not only among smokers under 25, but also among all age groups, resulting in increasing market share."

p. 465043166:

"1) HOW IS SWITCHING EVOLVING:

Switching in general

When we talk about a switcher we are talking about someone who has been smoking his usual brand for less than 12 months. This definition includes starters (did not smoke before) and smokers that had no regular or particular previous brand.

The annual switching rate among total smokers in 1990 is at 10%, back to its level of 1973-1975. This implies that of all smokers, 10% of them switched brands in 1990."

p. 465043210:

"Although switchers of all ages represent opportunity for new business, targeting young consumers continues to be a strategic importance in terms of future growth because of their switching behaviour, twice the rate of total smokers."

23. Sponsorship advertising

24. Sponsorship advertising is another form of “lifestyle” advertising.

- **D-192 Export ‘A’ Inc. – How Do We Build A Success Story, 1997 + Beyond (RJR-705):**

p. 80150 3496:

“SPONSORSHIP PROGRAM

Overview: The role of sponsorship is simply a means to an end to allow us to advertise.

SPONSORSHIP = ADVERTISING

WHY IS IT CRITICALLY IMPORTANT?

- *Brand advertising restrictions*
 - *Sponsorships:*
 - *Reinforce brand strategy*
 - *Provide broadcast brand i.d.*
 - *Focus in-store communication”*
- **JPB-44 (ITL-65) 1997 Communications Plans – Matinee and ITL Secondary Brands and related projects:**

p. 23484:

“BRANDED

Utilize branded advertising for as long as it will be legally permitted to help increase the popularity, the awareness of the trademark as well as the Pegasus. Branded advertising will be focussing on product attributes.

SPONSORSHIP

Utilize sponsorship advertising in markets where brand is not permitted. It will be focused on self-indulgence and relaxation attributes as well as communicating involvement in fashion (Note that the “waterfall” ad will be used for the 1997 Matinée Fashion Foundation campaign).”

- **D-183 (RJR-721) Export ‘A’ – 1997 Communications Plan, September 9th, 1996 – RJR MacDonald:**

p. 80153 1145:

“4. Sponsorship Strategies

Objectives

To leverage Export “A” positioning and ability to advertise effectively through association with selected events/activities.”

- **D-210 (RBH-2163) RBH – Matinée Trademark 1953-1995, April 16 1996:**

p. 5:

*“There is great consistency in the marketing tactics used over the last 20 years. Consistency is the logical outcome of a belief structure held by Imperial Tobacco. These beliefs are threefold. The first is that a brand’s image is – in part – derived from its inherent product characteristics. As such, while you can rejuvenate it, you can’t change it. The second is that **familiarity is everything**. Imperial believes that smokers aren’t looking for variety ; rather, they are searching for a consistent image that makes a statement about them as people. **The role of advertising is to build familiarity.***

The third belief is that brand preference is driven by visibility, and that visibility is best achieved by a combination of advertising and merchandising. The role of sponsorship is a logical extension: it provides the advertising platform.”

9. Sponsorship advertising, which the plaintiffs are using to circumvent the restrictions on traditional advertising, is designed to convey the “image” that the companies want to associate with a brand.

- **D-196 Sponsorships – Communications Plans – 1992 – ITL (ITL-176):**

p. 13835:

*“In terms of understanding, it is very clear that **while the event itself is a communications vehicle, the true value is the amount of targeted imagery communications which surround the event. It gives us the legitimate excuse to promote.**”*

- **D-193 (RJR-708) Lettre de Éric Blais – v.p. Director Strategic Planning de Harrold & Mirlin – à Mme Daphne Bykerk, Vice President Marketing RJR-Macdonald Inc., September 16, 1996:**

p. 80154 2472:

“IV- Associative marketing

*Associative marketing allows us to associate the brand with images which we are prevented from using in brand advertising. In other words, **the actual sponsorship is simply the price we pay in order to feature a particular image in our advertising.** Although there are many additional benefits to traditional sponsorship programmes such as promotional extensions, our primary concern is with the image advertising potential around the sponsorship. We are attempting to alter a brand’s image and, in our view, this is best achieved through advertising which we control.”*

- **D-195 RBH Strategic Plan – 1994-95. Sales & Marketing, October 1993 (RBH-1144):**

p. 5371:

"Sponsorship

*Image defining/enhancing activities
which clearly speak to and support
the brand's positioning."*

p. 5381:

"SPONSORSHIP

Use sponsorships as a means to establish and build upon lifestyle image associations through targeted selection, strong promotional programmes and professional execution, all of which reflect the desired character and image."

p. 5425:

"If Craven does not have a sponsorship in place in 1993, it will have no means of communicating image to consumers."

- **P-49 Broad Strokes Plan 1992 (ITL-267):**

p. 16352:

*"Although traditional brand/trademark imagery will disappear in-store at the end of next year, sponsorship communication opportunities will remain. These sponsorship ads can not be located in tobacco sections, so we will have to move signs, however **their existence does enable lifestyle messages via sponsorship involvement to continue.**"*

p. 16357:

*"This is a radical shift in the communications efforts. Historically, sponsorship was viewed as an adjunct to the marketing effort. By the end of 1991, when in-store regulations come into effect, **sponsorship will be the only means by which we can communicate precise imagery messages to our consumers.** As a result of sponsorship's increased importance as a marketing tool, we have seen tremendous increases in the level of sponsorship activity and in the dollars allocated to the area."*

p. 16358:

"The dollars spent in event acquisition have provided the Player's and du Maurier trademark with wide-ranging sponsorship involvement. We now need to communicate this involvement in a way which reinforces trademark imagery. When sponsorship was an add-on to the communications effort, event advertising was sufficient to promote our involvement. Given today's regulatory environment, it is essential that we use our involvement in a different way – to reinforce key trademark image attributes. Player's with it's racing portfolio in particular, and du

*Maurier with the arts, golf and equestrian events do provide the **opportunity to make lifestyle messages through sponsored vehicles.** Matinée will soon be in a similar position.*

We have already begun the transition from event advertising to more image based advertising. We still need to fully exploit the communications value inherent in our sponsorship involvement. Until further regulatory change, this is the means by which we will replace traditional brand/trademark image advertising.”

p. 16359:

“STRATEGIC IMPLICATIONS

As traditional lifestyle advertising wanes, sponsorship creative can be used to reinforce trademark imagery:

As we shift to more image based communications, we should ensure we have the appropriate creative expressions. We do have message which already reflect more lifestyle imagery than has historically been the case. More refinement in this area is required.”

p. 16360:

“Communication innovations are important to pursue, however impact on costs need to be closely examined:

We have examined data base marketing as an innovative communications tool. This device uses sponsorship activity as a means by which we continue to make lifestyle-reinforcing statements. It appears to be very effective and risks being very expensive.”

p. 16362:

“PRIORITIZATION OF RESOURCES

1. *Activities that result in price/value launch communication programs.*
2. *Activities that begin the process of re-allocating sponsorship dollars by reducing fixed event costs to increase media flexibility.*
3. *Activities that maximize **the use of lifestyle/imagery sponsorship creative.***

● **D-196 Sponsorships – Communications Plans – 1992 – ITL (ITL-176):**

p. 13870:

“SPONSORSHIP

- *Player’s sponsorship activities should reinforce the full expression of the trademark’s imagery position and have relevance among the target market.*
- *Emphasis should be placed on racing activities for Player’s.*

- *Activities that begin the process of re-allocating sponsorship dollars by reducing fixed event costs to increase media flexibility should be initiated.*
- *Opportunities to utilize image advertising in Sponsorship communication should be exploited.”*

p. 13874:

“SPONSORSHIP

All Matinee sponsorship communications should articulate the specific elements of Matinee’s imagery position.”

- **D-194 Craven A Ltd. 1995 Review – August 1995 (RBH-3761):**

p. 8592:

CANADIAN SPONSORSHIP REGULATIONS			
TABLE 8			
	<i>PRE-CTMC (1927-1971)</i>	<i>CTMC (1972-1988)</i>	<i>TPCA (1989-___)</i>
<i>Brand Advertising Restrictions</i>	<i>None.</i>	<i>No television/radio or celebrity endorsement. Ad spend indexed to 1971.</i>	<i>No brand advertising.</i>
<i>Role of Sponsorship</i>	<i>Sponsorship promotes local sales initiatives</i>	<i>Sponsorship circumvents spending, celebrity and broadcast restrictions</i>	<i>Companies only allowed to promote event sponsorships.</i>
<i>Competitive Response</i>	<i>Limited investment.</i>	<i>Investment made in stadium signage and broadcast events.</i>	<i>Investment made in broadcast programming and image (non-event) communication.</i>

p. 8593:

CANADIAN SPONSORSHIP REGULATIONS	
TABLE 8	
<i>Table 8 summarizes the effect of increased advertising restrictions on the importance and use of sponsorship.</i>	
<i>Observations:</i>	
1.	<i>Initially (1927-71) sponsorship played a relatively small promotional role. Investment was limited and events were used primarily to support local sales efforts.</i>
2.	<i>With advertising self-regulation (1972-88) sponsorship took on increasing importance. ITCO increased investment in stadium signage and nationally broadcast events to augment print and out of home advertising.</i>
3.	<i>Today (1988-) sponsorship is the only means whereby company trademarks can be exposed to the public. The image of the activity and the broadcast exposure received in large part determine trademark awareness. ITCO event inventories are being streamlined and investment is being made in broadcast programming and broad scale image communication."</i>

• **D-170 Strategic Plan 1997-1998, Sales & Marketing (RBH-1134):**

p. 2754:

"CONSUMER COMMUNICATION

Utilize brand/sponsorship advertising and all merchandising vehicles effectively to reinforce the desired image and created visibility/awareness behind key trademarks."

p. 2831:

- **"Increase English sponsorship relevance, intrusiveness and magnitude of lifestyle communication by:**
 - i) *Fine tuning of the core nature of sponsorship and reducing the cost of the radio program at the same time*
 - ii) *Increasing the high profile perception of sponsorship by maintaining strategic 19-34 imagery delivery through primary visual media."*

• **D-205 (RJR-418) RJR MacDonald Inc. Export 'A' 1997 Marketing Communications Plan, October 16, 1996:**

p. 80151 0574:

"4.5 Sponsorship Strategies

The role of sponsorship is to support the brand's positioning by connecting with activities which reflect the expression of confidence and individuality represented by the brand.

In order to communicate Export 'A's association with individual sponsorships the minimum amount possible will be allocated to sponsorship operations in order to retain the maximum amount for working media.

All spending will be aligned relative to regional priorities.

Sponsorship will also be used to create a presence for the brand amongst "Influencers" in the category.

3. Through sponsorship and the testimonials of celebrities, the plaintiffs associate their cigarette brands with the role models of young people.

- **D-171 Marketing Research Debrief – August 1994, An Investigation of factors contribution to the growth of du Maurier (RJR-88):**

p. 80093 9368:

"Auto Racing

Association with Player's is strong

Speed and excitement suggests a young, adventurous audience

Skews male both in terms of imagery and interest"

- **D-180 Consumer Research Library – presented to Imperial Tobacco Ltd – May 8th 1990 (ITL-131):**

p. 13242:

*"If a cigarette brand wants to use such sponsorships to increase the modernity of its image, it must pay particular attention **to the interests of the young public.**"*

p. 13279:

*"- sponsorships (help the brand's image of being a good corporate citizen more than the image of modernity; **sponsorship of events young people attend, music, leisure activities...**);"*

- **D-196 Sponsorships – Communications Plans – 1992 – ITL (ITL-176):**

p. 14029 :

«ÉQUIPE AUTOSPORT PLAYER'S LTÉE/LTD. RACING TEAM

STRATEGY #3

EXPLOIT THE ESTABLISHED VILLENEUVE NAME IN ALL FORMS OF THE MEDIA. CONTINUE TO EXPLOIT THE MANY BROADCAST OPPORTUNITIES.

- *Television schedule*

Promotional/Commercial spots

- *60 second moment – "Salute the great moments in racing of the legendary Gilles Villeneuve".*

“Who is it rejuvenate the Villeneuve legacy and following the next generation”

p. 14031:

« ÉQUIPE AUTOSPORT PLAYER’S LTÉE/LTD. RACING TEAM

STRATEGY #4

DEVELOP PROMOTIONAL PROGRAMS DIRECTED AT THE PLAYER’S LD. TARGET MARKET.

- *Life size cut-outs of Villeneuve/Bourbonnais.*
Arrange promotions with National Chains (Tim Horton’s, The Keg, Den For Men, Canadian Tire, etc.)
These promotions would be directed at local markets such as Vancouver, Toronto, and Halifax.
- *The prize package would include:*
 - *Personally meeting both the Drivers and Team.*
 - *Accreditation / Hotel / Transportation / Clothing.*
 - *Opportunity to participate with the Team in the Pits.*
 - *Eligible for the Grand Prize to attend the final race in Monterey, California on October 3^d.”*

11. Sponsorship advertising is designed to be published and broadcast year-round, regardless of the length of the event with which it is associated.

- **D-177 RBH – 1994-95, Business Assessment, October 24-25th, 1994 (RBH-1138):**

p. 3928:

“1994/95 BUSINESS ASSESSMENT – BELVEDERE

SPONSORSHIP

Objectives

1. *Increase the awareness of Belvedere Ltd. Rock and its image with target consumers.*
2. *Continuity of presence throughout the fiscal year in Belvedere’s major markets (Quebec, Atlantic & Thunder Bay)*
3. *Greater local media coverage of sponsorship events and promotions*
4. ***Maximize sponsorship exposure and imagery in locations and social situations frequented by target consumers”***

p. 3933:

*“Belvedere must **solidify its year round program elements** to realize the full potential of the sponsorship’s imagery and exposure opportunities.”*

- **D-196 Sponsorships – Communications Plans – 1992 – ITL (ITL-176):**

p. 14032:

“ÉQUIPE AUTOSPORT PLAYER’S LTÉE/LTD. RACING TEAM

WHY MOTORSPORT FOR PLAYER’S LTD. ?

4. *Television exposure – Fifteen (15) races of which three will be live. TSN and RDS will broadcast these races in Canada and ESPN in the United States. The television package helps expand the period of exposure across Canada. Player’s Ltd. will also have promotional / commercial bumper inventories.”*

- **D-193 (RJR-708) Letter from Éric Blais – v.p. Director Strategic Planning of Harrold & Mirlin – to Ms. Daphne Bykerk, Vice President Marketing RJR-Macdonald Inc., September 16, 1996:**

p. 80154 2472:

*“The plan is to identify approximately twelve events, festivals and celebrations in Québec which are attractive to our target. The mix should be representative of the various regions of the province and deliver a year round presence for the brand. **The ideal event offers a strong advertising image to support the brand promise**, costs the least to acquire and involves the minimum coordination with the organization responsible for the event.”*

- **D-195 RBH Strategic Plan – 1994-95. Sales & Marketing, October 1993 (RBH-1144):**

p. 5439:

1. *Appeal to younger consumers than current franchise.*
2. *Reflect desired brand character and enhance image.*
3. *Provide major market presence in line with business development.*
4. **Broadscale appeal.**
5. *Focus spending on consumer exposure vs. event production.*
6. *Generate broad scale media support and in-store impact.*
7. **Provide year round support.**
8. *Provide support in major urban centres.*
9. *Allow sales to build trade relations.*

CRAVEN ‘A’

SPONSORSHIP CRITERIA 10. *Event should be fielded in 1992/93 due to TPCA pressures.*

- **D-177 RBH – 1994-95, Business Assessment, October 24-25th, 1994 (RBH-1138):**

p. 3839:

Rothmans Sponsorship Criteria

		Formula	Film	Horse
		One		Racing
1.	<i>Appeals to younger adults vs the current franchise</i>	.	.	x
2.	<i>Reflects the desired brand character and enhances image</i>	.	.	"

3.	<i>Provides major market presence in line with business development</i>	"	.	"
4.	<i>Broad appeal against target group</i>	.	.	"
5.	<i>Focus on spending on consumer exposure vs event production</i>	x	.	"
6.	<i>Generates extensive media support and in-store impact</i>	.	x	.
7.	<i>Provide year round support</i>	.	.	X
8.	<i>Provide support in major urban centres</i>	"	.	X
9.	<i>Does not go head to head against direct competition</i>	x	.	.
10.	<i>Allows sales to build trade relations</i>	.	.	.
11.	<i>Does not compete against ourselves</i>	"	"	.
12.	<i>Not a secondary play</i>	"	.	.

- . *Delivers*
- " *Partially Delivers*
- x *Does Not Deliver"*

- **RF-33 (RBH-1129) Marketing Plans 94/95:**

p. 1821:

"Film – Proposed Sponsorship – Montreal

*The film concept will consist of two core elements: The Film Festival involvement, that will legitimize the Rothmans brand in film and a continuity program, the key component of our film association, that will be capable of providing **extensive reach and year round extendibility.**"*

p. 1823:

*"The strategic alliance with Canada's largest theatre chain will provide Rothmans the opportunity to gain valuable advertising presence through the **execution of promotions year round.**"*

p. 1824:

"ROTHMANS TRADEMARK

Activity #2 – Film

Objective

Develop the detailed plan for film with focus on younger audience."

- **JPB-29 (ITL-66) Communication Plans 1996:**

p. 23805:

"1996 OBJECTIVES (con't)

7. Develop a communications plan which continues to expand the exposure for Player's Ltd throughout the calendar year

- *The Player's Ltd racing program is well suited for continuous coverage in most forms of media and the following items will key this success"*

- **D-181 Autosport Player's Ltée racing Study (ITL-62):**

p. 11849:

"BENEFITS (cont'd)

- *Doubles period of brand marketing activity*
- *Facilitates increase in television schedule and coverage*
- *Has significant long term potential for Player's Ltd.*
- *Is the right sponsorship at the right time"*

- **D-205 (RJR-418) RJR MacDonald Inc. Export 'A' 1997 Marketing Communications Plan, October 16, 1996:**

p. 80151 0575:

"Festivals & Celebrations

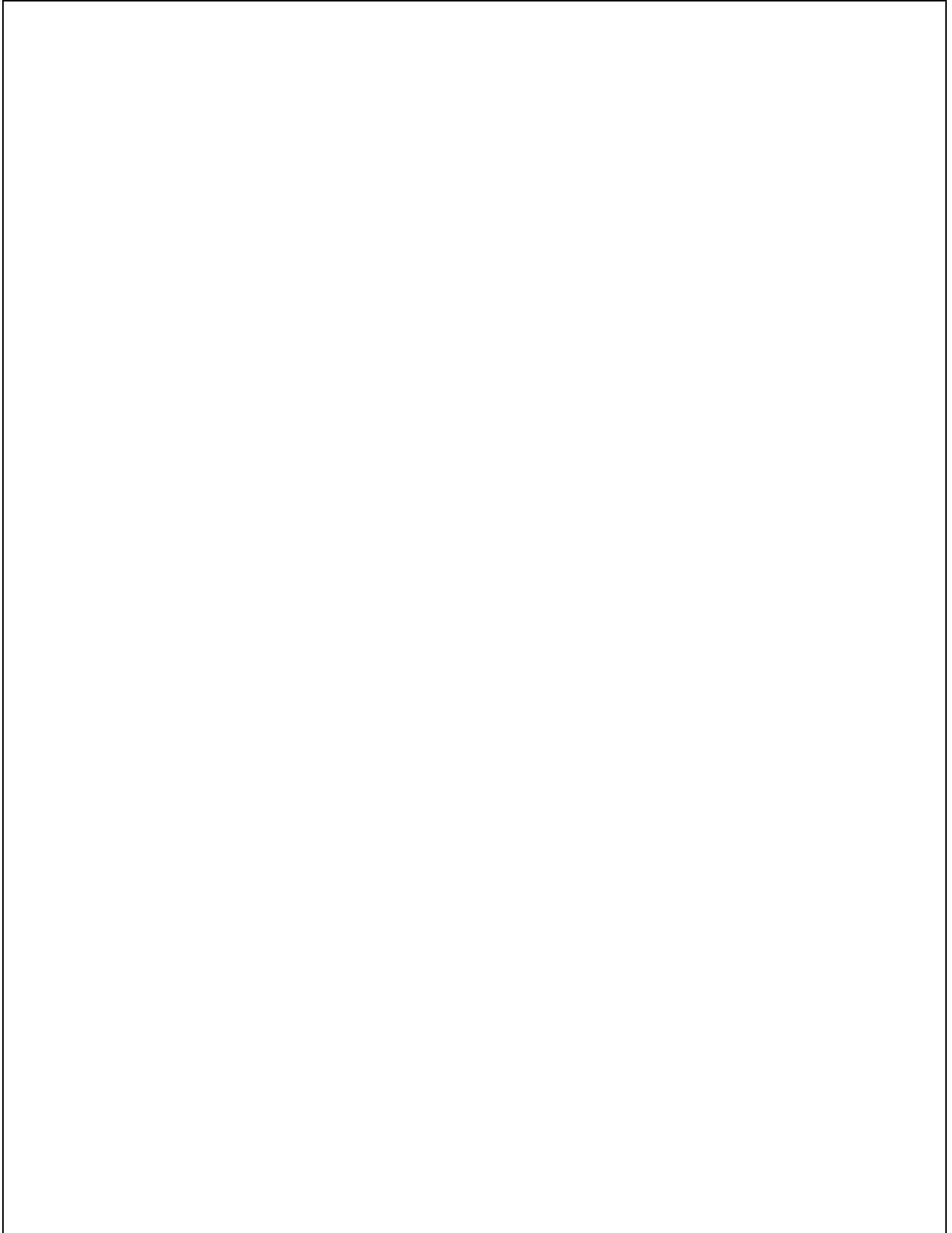
*Sponsorship of approx. 16 festivals, competitions and celebrations throughout the province. Each event is strongly linked to the community, has a distinct "Québécois flavour" and offers **associations with sports/lifestyle** which are consistent with the brand positioning. **These events will be advertised throughout the year using outdoor posters in key markets.**"*

6. Sponsorship advertising, which is disseminated everywhere, reaches the entire population, which contradicts the plaintiffs' claims that it targets only smokers.

- **D-100:**



- **D-101:**



- **D-102:**



- **D-103:**

11. Spending on sponsorship goes primarily to advertising and secondarily to the event itself.

- **D-195 RBH Strategic Plan – 1994-95. Sales & Marketing, October 1993 (RBH-1144):**

p. 5381:

“SPONSORSHIP

- *Focus spending against maximum consumer exposure as opposed to event production.”*

- **P-49 Broad Strokes Plan 1992 (ITL-267):**

p. 16360:

“Ideally, the majority of our spending, about 65%, should be allocated to media and about 35% to event costs. Today, the split is about 20% vs 80%. It is understood the target may not be attainable in 1992. However, we do need to begin the process to maximize our communication opportunities in the future.”

- **D-198 Sponsorships – Communications Plans – 1994 – ITL (ITL-178):**

p. 14435:

“1994 COMMUNICATIONS PLAN

OVERALL OBJECTIVE:

To reach our target consumers with messages through the advertising media as effectively and efficiently as possible.

SPECIFIC OBJECTIVE:

- *To communicate relevant sponsorship imagery to its target group – national versus local.*

- **To maintain year-round presence of this imagery on a national basis.**
 - To date no one has been able to measure the impact (numerically) on the effect of loss of media on awareness figures.
 - Too many variables – i.e. time
 - Attempt will be made to understand impact of decisions.
- To maximize impact with available budget.
- A secondary objective is to promote ticket sales for the events.”

- **D-205 (RJR-418) RJR MacDonald Inc. Export ‘A’ 1997 Marketing Communications Plan, October 16, 1996:**

p. 80151 0574:

“4.5 Sponsorship Strategies

The role of sponsorship is to support the brand’s positioning by connecting with activities which reflect the expression of confidence and individuality represented by the brand.

In order to communicate Export ‘A’s association with individual sponsorships the minimum amount possible will be allocated to sponsorship operations in order to retain the maximum amount for working media.

All spending will be aligned relative to regional priorities.

Sponsorship will also be used to create a presence for the brand amongst “Influencers” in the category.”

9. The plaintiffs are using sponsorship as an excuse to do radio and television advertising.

- **D-192 Export ‘A’ Inc. – How Do We Build A Success Story, 1997 + Beyond (RJR-705):**

p. 80150 3496:

“SPONSORSHIP PROGRAM

Overview: The role of sponsorship is simply a means to an end to allow us to advertise.

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WHY IS IT CRITICALLY IMPORTANT?

- Brand advertising restrictions
- Sponsorships:
 - Reinforce brand strategy
 - **Provide broadcast brand i.d.**
 - Focus in-store communication”

- **D-196 Sponsorships – Communications Plans – 1992 – ITL (ITL-176):**

p. 13907:

“COMMUNICATIONS EVENTS – PLAYER’S LTD.

STRATEGIES

- *Pursue alternate television coverage, live where possible, incorporating the brand characteristics and imagery.*
- *Review event costs and re-channel to communications. Eliminate those activities that do not enhance the imagery.*
- *If television coverage is live and Series based, investigate the opportunity for highly targeted, image commercials on Player’s Ltd. Racing.”*

p. 13913:

“COMMUNICATIONS EVENTS – MATINEE LTD.

STRATEGIES

In television, where appropriate, introduce brand characteristics and imagery.”

- **D-177 RBH – 1994-95, Business Assessment, October 24-25th, 1994 (RBH-1138):**

p. 2040:

“ROTHMANS – MARKETING PLAN

ii) **Film Program**

To re-establish Rothmans image among younger smokers. Key markets, in priority are Toronto, Montreal and Vancouver with a secondary media based national promotional component. Event promotion and media spending will be media based against mainstream Male/Female population 18+.

ACTION STEPS:

- *Legitimize event umbrella (Rothmans Ltd. Film)*
 - *Montreal/Toronto/Vancouver events*
 - *Canadian Film Centre*
- *Promote event umbrella using youthful film imagery*
- *Broadcast film imagery via movie related programming targeted at youthful smokers eg: Movie Television”*

p. 2081:

“SPONSORSHIP

ACTION STEPS

Develop a media program for Quebec and the Maritimes to deliver on-going image and awareness to 18-24 target consumers through the use of mediums such as MusiquePlus and Radiomutuel."

- **RF-51 (RBH-1138) Belvedere Rock Event Post-Evaluation – May 31, 1996:**

p. 10380:

"Media Program/Exploitation

*An extensive media program was assembled to provide maximum impact to Belvedere Rock through a number of channels. Please refer to the Auger Babeux Post-Mortem for a detailed description and discussion of the media channels exploited. **As summarized in this post-mortem, the combined reach/frequencies for the campaign ranged from 96.6% reach with a 50.1 frequency for Moncton to 99.2% reach with a 96.9 frequency for Quebec City. I believe that this campaign was effective and well executed, especially when supplemented by the Print and POS campaigns and in consideration of the missing TV Component."***

p. 10381:

"1. Television

Television was chosen to form part of the total communication mix for this program. Its role was to provide the perception of mass, total reach and credibility for the Belvedere Rock program.

A high quality and potentially effective spot was produced and aired for approximately four days before the decision was made by Senior Management to stop airing the ad in light of the charged political environmental and media scrutiny at that time. The total media investment was not lost due to the replacement of the Belvedere ad with a spot from Rothmans F1."

p. 10397:

"Media :

- *In terms of media coverage, we are very excited with the results. Despite the television flights being cut, the additional radio air time, combined with the Belvedere Rock creative plastered on buses all over the streets of Quebec and the Maritimes, the newspapers cleverly positioned full-page 4-colour ads ensured solid media coverage to our target audience and played an important role in our objective, in raising both awareness and excitement. »*

CONCLUSION :

- ***The Belvedere Rock Spring Tour was successful in the building of a sponsor image which is consistent with Belvedere Rock's target key personality attributes : cool, hip, young and edgy."***

p. 10399:

*"In terms of the television creative/production, while the concept as well as the execution were approved by the Client, **RBH Management later feared that the targeted audience may have seemed borderline in terms of legal guidelines (age), therefore the spot was removed from the air in all markets.** Despite*

television production not being planned for the Fall Tour, Agency will of course take note of the comments supplied by RBH Management for further reference.”

p. 10449:

“ON SITE EXPOSURE

*This is a huge venue to cover, with multiple railings on different balcony levels that requires significant manpower to complete P.O. S. placement. Three staff members were provided in addition to Paul Jewer and Steve Pulver who did a great job dressing the venue. Roll Banners were used extensively on railings and bar fronts. We also had Four LED signs strategically placed in the bar and we also had 2 (4x4) Backlights signs that were hanging in the front of the stage in order to achieve a maximum of exposure. Over 100 double-sided easels and 150 posters were placed throughout the Club, walls and washrooms. **I am pleased to say that none of these were left over after the event.** To compliment all of the above, we also had the use of approximately 20 T.V.s that had our logo all night!*

Staff were provided with T-shirts and caps for the evening (20 bar tenders, door staff, etc...)”

- **D-200 (RJR-682) RJR-Macdonald Inc. Inter-office Correspondence to Patrick Mispolet from Nancy Marcus, March 25, 1996:**

p. 80151 3320:

“The Export ‘A’ Inc. Skins Game

Background

*The Skins Game has become one of the top televised golf events in Canada over its three year existence (see appendix). **The event gives Export ‘A’ Inc. an unparalleled opportunity to “own” five hours of weekend television and represents a leveragable advertising opportunity in the two to three month window leading up to the event.***

...

Executorial Considerations

- **pre-promote the event as widely as possible for as long as possible prior to the actual event;**
- **target the general population** (Adults 18-49) with the advertising, not just the golfing target;
- **leverage the appeal and high profile of the world’s top golfers;**
- **create positive association between the event and the brand by way of advertising and in store trade presence.”**

- **JPB-29 (ITL-66) Communication Plans 1996:**

p. 23835:

“Controlling Television

There is no magic to controlling television, the concept is quite simple and based on being in control of what the audience sees.

As on outline let me review what a team sponsor might expect of a car running in 6th place. IndyCar will make all efforts to cover each team twice, once when they announce the race and once when the race is on. Clearly if you are not part of the lead group your coverage is limited. However with control of television one can guarantee oneself the following.

➤ Promotional Bumpers by Network prior to race	4 minutes
➤ Show Opening Segment	1 minute
➤ Commercial Bumpers	1 minute
➤ Leader Boards	1 minute
➤ In show Segments	2 minutes
➤ Pit Action with dedicated cameraman	2 minutes
➤ Post Race Interviews with driver	2 minutes

	13 minutes

This then will quadruple your coverage on the air.”

8. Sponsorship advertising gives the brand exposure and maximizes its visibility.

- **D-192 Export ‘A’ Inc. – How Do We Build A Success Story, 1997 + Beyond (RJR-705):**

p. 80150 3496:

“SPONSORSHIP PROGRAM

Overview: The role of sponsorship is simply a means to an end to allow us to advertise.

SPONSORSHIP = ADVERTISING

WHY IS IT CRITICALLY IMPORTANT?

- Brand advertising restrictions
- Sponsorships:
 - Reinforce brand strategy
 - Provide broadcast brand i.d.
 - Focus in-store communication”

- **D-177 RBH – 1994-95, Business Assessment, October 24-25th, 1994 (RBH-1138):**

p. 3928:

“1994/95 BUSINESS ASSESSMENT – BELVEDERE

SPONSORSHIP

Objectives

1. Increase the awareness of Belvedere Ltd. Rock and its image with target consumers.

2. *Continuity of presence throughout the fiscal year in Belvedere's major markets (Quebec, Atlantic & Thunder Bay)*
3. *Greater local media coverage of sponsorship events and promotions*
4. ***Maximize sponsorship exposure and imagery in locations and social situations frequented by target consumers***

- **RF-33 (RBH-1129) Marketing Plans 94/95:**

p. 1865 :

"IMAGE OF SPONSORSHIP ACTIVITY ITSELF (ROCK MUSIC) AND ADVERTISING CREATIVE DEVELOPED FOR IT ARE "RIGHT ON" WITH 18-24 TARGET. VERY GOOD RESULTS WITH ROCK TOUR MATERIALS (3,000 POSTERS DISTRIBUTED/STOLEN AT CONCERTS)."

p. 1874:

"2. WITH RESPECT TO OUR ROCK SPONSORSHIP, WE MUST:

- A) *ACHIEVE CONTINUITY OF "PRESENCE" THROUGHOUT THE FISCAL YEAR.*
- B) *DO JOINT PROGRAMS WITH OTHER PRODUCTS/BRANDS, IN ORDER TO BENEFIT FROM THEIR BRAND IMAGE AND FINANCIAL RESOURCES.*
- C) *INCREASE OUR EXPOSURE OUTSIDE OF THE CIGARETTE STORE ENVIRONMENT."*

17. The plaintiffs have even considered creating their own events.

- **D-192 Export 'A' Inc. – How Do We Build A Success Story, 1997 + Beyond (RJR-705):**

p. 80150 3513:

*"As we move strategically beyond sponsorship, we believe **we can create ownable branded properties** that link more closely to our target group and cut across all broad sports interests. These properties will inherently give us branded communication opportunities."*

- **D-183 (RJR-721) Export 'A' – 1997 Communications Plan, September 9th, 1996 – RJR MacDonald:**

p. 80153 1146:

"4. Sponsorship Strategies (Cont'd)

Selection Criteria

- *Strengthen brand image and positioning*
- *Ability to effectively communicate association through brand imagery*

- *Fit/relevance with primary target audience (19-24 yrs. old, 60/40 Male/Female)*
- *Fit/relevance with secondary target group (25-34)*
- **Ability to “own” event/activity**
- *Affordable*
- *Provides seasonal continuity*
- *Appropriate for tobacco”*

9. Charitable events can also be used to promote the brand and its image.

10. ITL wants in particular to give the Matinée brand an image that conveys altruism and, to this end, intends to publicize its charitable activities.

- **D-196 Sponsorships – Communications Plans – 1992 – ITL (ITL-176):**

p. 13913:

“COMMUNICATIONS EVENTS – MATINEE LTD.

STRATEGIES

Develop associate programs which will benefit the altruistic value.”

p. 13914:

*“In 1992, we will be converting the ladies tennis to Matinee Ltd. The demographic match here, while slightly too much male orientated, it is much more consistent. Efforts will be taken (i.e. ladies day) to encourage the female target. In this case, and because of the altruistic interests of Matinee, communications should include the amounts of money which go back into the development of Tennis in Canada. It could also be discussed with Tennis Canada that a portion of ticket sales (say \$1.00) could be directed to a designated charity – i.e. **Home for battered women**, etc.”*

- **D-177 RBH – 1994-95, Business Assessment, October 24-25th, 1994 (RBH-1138):**

p. 3994:

“Developmental Work

- *Currently evaluating a “Child Card” program*

Concept

- ***Packages would contain an insert displaying a full colour photo/description of a small child who has been reported missing along with a 1-800 phone number to call if you have seen this child... All with a Viscount brand image to it***

- *Viscount seems the ideal Trademark to leverage this given:*
 - *Female skewed*
 - *Small volumes (safer from government perspective)*
 - *Cost effective way to reach current (packs) as well as target smokers (Dbase)*
- *Details will be presented as part of the 95/96 Marketing Plan”*

- **JPB-44 (ITL-65) 1997 Communications Plans – Matinee and ITL Secondary Brands and related projects:**

p. 23551:

“Cause Marketing

- *Social Marketing for business is a methodology for influencing knowledge, attitudes and behaviour of target groups for social benefit and business advantage. It must be connected to corporate mission and values.*
- ***It’s an additional marketing opportunity to efficiently communicate with our consumers, through the activities of its operating companies, the corporate mission and characteristics with the objective of improving their perception on the trademark in long-term.”***

3. Packaging

« How bad could it be in a nice pack like that? »¹⁸

4. Packaging is a promotional tool that is essential to the tobacco industry.
 5. “Show me what you’re smoking and I’ll tell you who you are!”: the package is a badge product.
- **D-166: Pollay, Richard, « How cigarette advertising work. Rich imagery and poor information»:**

p. 10:

“... after the promotional activities have given a brand and identity and meaning, with research to insure that this identify is indeed meaningful to a target consumer segment, the targeted consumer and others can easily acquire this "meaning" and display this to both themselves (reflexive) and others (expressive). The corporate documents reveal that this brand imagery plays a dual role: (1) providing the individual with a sense of self and (2) providing an identity when seen by others.

*In the cigarette category brand image is everything. **The brand of cigarettes a person smokes is their identity.** Cigarettes tell others who they are as a person. There is a strong emotional connection to the brand, the image it projects about the smoker, not only to themselves but to others. (RBH-003911, 1996, p.2)”*

- **D-224 (RJR-66) Marketing Research Debrief – Evaluation of the opportunity for American Brands in Canada, Prepared for RJR MacDonald, February 1995:**

p. 80094 8708:

“Badging

*In many categories, consumers are attracted to brands that communicate imagery they see as reflecting some aspect of their own personality. To serve as a badge, a product / brand must be something which the consumer feels he / she wants to utilize as a statement about themselves. **The decline in social acceptability of smoking in Canada has significantly impacted on the desire of smokers to use their brand of cigarettes as a badge.** The negative “badge” associated with being a smoker overwhelms any positive imagery conveyed by a particular brand.*

The exception to this would be those smokers in segments which are more comfortable with smoking in their peer group.”

¹⁸ D-235 (JTI-1677) Research Export – Exploration of various design parameters Re: Export ‘A’ Pack re-design prepared for RJR MacDonald, June 1991, p. 80161 5818

8. Packaging, like advertising, is designed to alleviate smokers' feelings of guilt.

- **D-235 (JTI-1677) Research Report – Exploration of various Design Parameters Re : Export 'A' Pack re-design prepared for RJR MacDonald, June 1991**

p. 80161 5809 :

*“Feelings of social rejection prompted some smokers to suggest that **the ideal cigarette design would make a contribution to alleviating their feelings of guilt.**”*

p. 80161 5818 :

“Feelings of social rejection prompted some smokers to suggest that the ideal cigarette design would make a contribution to alleviating their feelings of guilt. Suggested solutions varied from innocuous designs, to light and healthy designs, to designs which would contribute prestige to smoking.

“I like the idea of [conveying] quality, because everybody at my work is a non-smoker. I tell them it's the quality of life, not the quantity of life. That's my argument. I want the quality aspect shown.”

*“You'd think; **“How bad could it be in a nice pack like that?”** Somehow it doesn't seem so harmful.” “*

10. Apart from information that is required by regulation to appear on the package, the package does not provide any information concerning the product that is useful to the consumer. It is used instead to convey an image or values.

- **D-235 (JTI-1677) Research Report – Exploration of various Design Parameters Re : Export 'A' Pack re-design prepared for RJR MacDonald, June 1991:**

p. 80161 5810:

“The primary attributes conveyed by cigarette packaging are : gender appropriateness ; socio-economic appropriateness ; and strength.”

p. 80161 5830:

*“Besides strength, **package design can make an inferential statement that, in relative terms, the brand is a more clean and healthy alternative.** The amount and distribution of white space makes a major contribution in this regard. The Player's Light and Extra Light designs are described as conveying a more clean and healthy look. Although they have as much white space the same imagery is not communicated by Number 7, Rothmans or Mark Ten.”*

12. Merchandising

13. Merchandizing means using merchandise or other goods to display trademarks or logos of tobacco products.

14. The purpose of merchandising is to give the brand image maximum exposure: repetition is the key to persuasion.

- **LN-62 (RJR-837):**

80154 0983:

"EXPORT 'A' REPOSITIONING: BRANDED MATCHES PROGRAM

OBJECTIVE: *To extend brand imagery and further maximize new packaging awareness at retain during the Export 'A' launch period.*

STRATEGY: *Develop a cost effective and time efficient mechanism to maximize the new pack design awareness while communicating "Fresh New Look, Same Satisfying Taste" message.*

Utilize the Eddy Match Retail Advertising Program as a turn key operation to replace industry low end matches with quality customize branded matches and automatically distributed to over 30,000 tobacco retail accounts.

PROGRAM: * *8000 cases of matches (2500 matchbooks / case) distributed to retail via wholesalers.*

* *In-market starting March 1st for a 4 to 6 week retail presence.*

* *Premium quality matches (20 per book), pack graphics on exterior of matchbook and printed message inside, decorated tray and overwrap.*

* *4 cases per rep on a national basis (10,000 matchbooks) will be aside for their distribution, these caddies (tray) will feature a Export 'A' customize header card.*

DISTRIBUTION: *2100cs West, 2550cs Central, 2825cs Quebec, 425cs Atlantic, 50cs Bar Program*

BUDGET: *\$150M*

EXPECTED RESULTS: *200MM matchbooks, up to 400mm impressions against smokers."*

- **D-166 Pollay, Richard, « How cigarette advertising work. Rich imagery and poor information»:**

p. 12 ¶5.4:

Disposable lighters are excellent communication vehicles. A lighter is like a mini walking billboard that the consumers look at each time they light a cigarette. A disposable lighter will also change hands 3 to 4 times during its life span. Therefore, for each lighter sold we reach 3 to 4 consumers and we send them a message 20-25 times a day. Quite a nice piece of communication that fulfill consumers= needs and allow us to make some money as well.@ (ITL-214, AMemo dated Sept. 4/96,@p.1-2)"

- **D-196 Sponsorships – Communications Plans – 1992 – ITL (ITL-176):**

p. 13907:

“COMMUNICATIONS EVENTS – PLAYER’S LTD.

STRATEGIES

In all support materials, brochures, etc. include where appropriate:

- *Mention of John Player and Sons*
- *Tradition (30 Years)*
- ***Portray image of self expression of freedom and independence and self reliance/independence.”***

p. 14002:

“MERCHANDISING

*Although relatively unknown to our organization the use of merchandising has been an effective tool for various corporations internationally. (Hugo Boss clothing is an extension of its corporate imagery). **Merchandising is an inexpensive way of broadening ones scope, into non traditional areas, such as sporting goods stores, bars, automotive centres another areas where the target market would shop.** There are two elements to merchandising which are driven by separate types of items:*

1. *Motorsport fans will be driven to buy items from winning teams and home town heroes.*
2. *The general target will be driven to buy items which position them against the image they wish to have. Fashion items not motorsport will drive these sales.”*

- **RF-45 (RBH-1128) Marketing Plans 93/94:**

p. 1554:

“RATIONALE

- ***Merchandising is a key element to influence consumers purchase patterns by keeping brand awareness top of mind and enhancing image.***

- *TPCA regulations make merchandising one of the critical marketing tools left.*

- **D-170 Strategic Plan 1997-1998, Sales & Marketing (RBH-1134):**

p. 2754:

"CONSUMER COMMUNICATION

- *Utilize brand/sponsorship advertising and all merchandising vehicles effectively to reinforce the desired image and created visibility/awareness behind key trademarks."*

- **RF-42 (RBH-1212) Benson & Hedges Fireworks:**

p. 7414:

« I think that brand visibility could be increased and enhanced. A lot of opportunities could be explored, here are just some ideas.

- *Small signs spread on site to indicate best viewing points.*
- *Big banners on fences and streets around the site.*
- *VIP area "brand identified" and recognizable from outside.*
- *Hostesses and helpers in Benson & Hedges uniforms (with real brand identification).*
- ***Brand identified items given or sold to public (t-shirt, hats, flags, balloons etc.).***
- *Brand identified items offered or sold to all restaurants, bars, stores on or close to the site (umbrellas, matches, ashtrays etc.).*

Other more "creative" ideas:

- *Is it feasible to have **bombs exploding in the shape of the Benson & Hedges name** (I've seen heart shapes, so why not letters?).*
- *Plane flying over location with a long trailing B & H banner.*
- *Parachutists coming down with gold and black Benson & Hedges parachute and distributing Benson & Hedges "giveaways"*
- *B & H airship flying on site."*

8. Magazines and newspapers

9. The plaintiffs are creating or helping to create magazines that are used to disseminate their ads.

- **D-192 Export 'A' Inc. – How Do We Build A Success Story, 1997 + Beyond (RJR-705):**

p. 80150 3516:

“SPORTS ACHIEVERS MAGAZINE:

Create a branded sports magazine that covers all areas of sports achievements that is fully sponsored and available at newstand and via subscription either quarterly or monthly. It would feature a broad range of sports interests and could evolve or be targetted at more youthful sports.

- *sample cover and table contents (boards)*
- *self-funding via advertising*
- *builds an exclusive export “A” database*
- *further development of “A” list*
- *proprietary communication and merchandising vehicle*
- *also executable as a proprietary tv show or feature”*

11. Movies

12. In order to circumvent the TPCA, the plaintiffs came up with the idea of promoting tobacco in movies.

- **D-226 (JTI-1678) RJR MacDonald Inc. Competitive Business Development Strategies for the 1990s – Draft:**

p. 80108 9819:

*“As well, the pressures of the TPCA advertising restrictions will present opportunities for companies who can successfully exploit promotional vehicles which are not “advertising” as defined under the TPCA. An example of this would be **the promotion of “lifestyle” imagery by the use of cigarettes in movies.**”*

p. 80108 9861:

*“Seek and exploit innovative promotional opportunities not covered by the TPCA, such as the **conveyance of lifestyle imagery through the use of cigarettes in movies**, and direct marketing of sweepstakes style vacation resort thematic promotions based on Export’s “escapist” brand image.”*

14. Foreign publications

15. In their 1989 arguments, the plaintiffs claimed that the TPCA was illogical by allowing tobacco advertising in foreign publications.
16. This was a false argument because Canadians in fact do not like the taste of American cigarettes, not to mention the fact that the degree of penetration of the Canadian market by American brands from the United States is minimal. The plaintiffs therefore knew that there was no factual basis to their argument, but they did not hesitate to make it to the courts and they are still making it today.

- **D-222 ITL Marketing Plan – 1989 (ITL-431):**

p. 17531:

“Overflow advertising has been a strategic focus in the C-51 debate, but needs to be put in perspective. There is little evidence that we face any real threat from U.S. brands. Both taste and trademark ownership weight against this.”

- **D-226 (JTI-1678) RJR MacDonald Inc. Competitive Business Development Strategies for the 1990s – Draft:**

p. 80108 9861 :

“Examine the potential for marketing Export in the United States, in order to obtain the benefits of spill-over advertising.”

p. 80108 9873 :

“One immediate area of potential would be to market the Export brand name in the United States, in order to derive the benefits of spill-over advertising.”

–

APPENDIX 6-A

MEASURES TO REDUCE TOBACCO USE: AN INTERNATIONAL PERSPECTIVE

1. The past 15 years has brought about a mobilization of the world's largest public health institutions and international organizations devoted to health protection.

World Health Organization

2. Back in 1986, the World Health Organization¹ (WHO) was deeply concerned by the tobacco use problem, and it adopted its WHA39.14 resolution in May 1986, which set out the following:

2. CALLS for a global public health approach and action now to combat the tobacco pandemic;

...

4. URGES those Member States which have not yet done so to implement smoking control strategies; these, as a minimum, should contain the following:

(1) measures to ensure that non-smokers receive effective protection, to which they are entitled, from involuntary exposure to tobacco smoke, in enclosed public places, restaurants, transport, and places of work and entertainment;

(2) ... the use of tobacco so as to protect children and young people from becoming addicted;

(3) measures to ensure that a good example is set in all health-related premises and by all health personnel;

(4) measures leading to the progressive elimination of those socioeconomic, behavioural, and other incentives which maintain and promote the use of tobacco;

¹ The World Health Organization was established in 1948 as a specialized agency of the United Nations serving as the directing and coordinating authority for international health matters and public health. One of WHO's constitutional functions is to provide objective and reliable information and advice in the field of human health, a responsibility that it fulfils in part through its extensive program of publications.

The Organization seeks through its publications to support national health strategies and address the most pressing public health concerns of populations around the world. To respond to the needs of Member States at all levels of development, WHO publishes practical manuals, handbooks and training material for specific categories of health workers; internationally applicable guidelines and standards; reviews and analyses of health policies, programs and research; and state-of-the-art consensus reports that offer technical advice and recommendations for decision-makers. These books are closely tied to the Organization's priority activities, encompassing disease prevention and control, the development of equitable health systems based on primary health care, and health promotion for individuals and communities. Progress towards better health for all also demands the global dissemination and exchange of information that draws on the knowledge and experience of all WHO Member countries and the collaboration of world leaders in public health and the biomedical sciences.

To ensure the widest possible availability of authoritative information and guidance on health matters, WHO secures the broad international distribution of its publications and encourages their translation and adaptation. By helping to promote and protect health and prevent and control disease throughout the world, WHO's books contribute to achieving the Organization's principal objective—the attainment by all people of the highest possible level of health, in ED-32 "Guidelines for controlling and monitoring the tobacco epidemic," World Health Organization, Geneva, 1998.

- (5) *prominent health warnings, which might include the statement that tobacco is addictive, on cigarette packets, and containers of all types of tobacco products;*
 - (6) *the establishment of programmes of education and public information on tobacco and health issues, including smoking cessation programmes, with active involvement of the health professions and the media;*
 - (7) *monitoring of trends in smoking and other forms of tobacco use, tobacco-related diseases, and effectiveness of national smoking control action;*
 - (8) *the promotion of viable economic alternatives to tobacco production, trade and taxation;*
 - (9) *the establishment of a national focal point to stimulate, support and coordinate all of the above activities.*²
3. Seeing the progress resulting from the application of these measures, yet fully aware of the complexity of the problem, WHO worked on the implementation of global and multi-sectorial tobacco control strategies and on the development of an International Framework Convention on Tobacco Control involving the participation of other United Nations organizations, permitting optimal use of resources and integrated and comprehensive action.^{3 4 5 6 7 8 9}
4. Hence, WHO describes the objective of its approach as follows:

2. Objectives

The overall objective of the current project is to intensify national and international efforts to control the global tobacco epidemic through the development of an International Framework Convention for Tobacco Control in response to requests by Member States, also reflected in the World Health Assembly Resolution WHA49.17 (25 May 1996).

*Part of the framework convention strategy is to encourage Member States to move progressively towards the adoption of comprehensive tobacco control policies and also to deal with aspects of tobacco control that transcend national boundaries.*¹⁰

² ED-44/ED-45 World Health Assembly Resolution WHA39.14, May 14, 1986.

³ ED-42 World Health Assembly Resolution WHA43.16, "Tobacco or health," May 17, 1990.

⁴ ED-39 World Health Assembly Resolution WHA45.20, "Multisectoral collaboration on WHO's programme on 'tobacco or health'," May 13, 1992.

⁵ ED-40 World Health Assembly Resolution WHA48.11, "An international strategy for tobacco control," May 12, 1995.

⁶ ED-34/ED-35 World Health Assembly Resolution WHA49.16, "Tobacco-or-health programme," May 25, 1996.

⁷ ED-30/ED-31 World Health Assembly Resolution WHA52.18, "Towards a WHO framework convention on tobacco control," May 24, 1999.

⁸ ED-28/ED-29 World Health Assembly Resolution WHA53.16, "Framework convention on tobacco control," May 20, 2000.

⁹ ED-25 World Health Assembly Resolution WHA54.18, "Transparency in tobacco control," May 22, 2001.

¹⁰ ED-36/ED-33 World Health Assembly Resolution WHA49.17, "International Framework Convention for Tobacco Control," May 25, 1996.

5. This Framework Convention considers the adoption of both price and tax measures as well as other measures targeting passive smoking, regulation of contents of tobacco products, regulation of tobacco-product disclosures, packaging and labelling, education, training and public awareness, as well as advertising, promotion and sponsorship, in respect of which the following is set out:

(a) prohibiting all forms of direct and indirect tobacco advertising, promotion and sponsorship targeted at persons under the age of 18;

(b) imposing strict restrictions on all forms of direct and indirect tobacco advertising, promotion and sponsorship targeted at persons 18 years of age and older, including incentives such as gifts, coupons, rebates, competitions and frequent-purchaser programmes, with the aim of reducing the appeal of tobacco products to all segments of society;

(c) requiring that tobacco companies disclose all expenditures on advertising and promotion and make those figures available to the public;

(d) adopting national measures and imposing appropriate regulatory restrictions to ensure that tobacco advertising, promotion and sponsorship does not promote a tobacco product by any means that are false, misleading or deceptive or that are likely to create an erroneous impression about its characteristics, health effects, hazards or emissions;

(e) adopting measures and imposing appropriate regulatory restrictions in order to progressively phase out tobacco sponsorship of sporting and cultural events;

(f) adopting national measures and cooperating in order to phase out cross-border advertising, promotion and sponsorship, including, inter alia, tobacco advertising, promotion and sponsorship on cable and satellite television, the Internet, newspapers, magazines and other printed media.¹¹
(p. 5)

These measures were later completed and explained.¹²

6. This WHO approach relies on the support of numerous Member States,^{13 14} including African^{15 16} and Southwest Asian countries that pass a Declaration in October 2001, stating the following:

Resolve to

- *Support the objectives of the Framework Convention on Tobacco Control (FCTC), which are currently being negotiated by the nations of the world, under the auspices of the World Health Organization;*

¹¹ ED-26 World Health Organization, Intergovernmental Negotiating Body on the WHO Framework Convention on Tobacco Control, Second session, "Chair's text of a framework convention on tobacco control," January 9, 2001.

¹² ED-24 World Health Organization Intergovernmental Negotiating Body on the WHO Framework Convention on Tobacco Control. Fourth Session Provisional Agenda for WHO Framework Convention on Tobacco Control. "Co-chairs' working papers: final revisions," A/FCTC/INB4/2(a), January 24, 2002.

¹³ ED-7 WHO South-East region moves forward on the first public health treaty on tobacco control, Press release, April 11, 2001.

¹⁴ ED-5 Pacific Islands-Healthy Islands Sydney Statement on Tobacco Control, October 12-13, 2001.

¹⁵ ED-8 Johannesburg Declaration on the Framework Convention on Tobacco Control, March 14, 2001.

¹⁶ ED-6 Algiers Declaration on the Framework Convention on Tobacco Control, October 4, 2001.

Recommend that,

the FCTC, in its final form, should contain:

(A) Public health measures, for tobacco control that include:

- *Strengthening of educational programmes to enhance community awareness of the hazards of tobacco consumption and the benefits of tobacco cessation;*
- *Protection of non-smokers from hazardous exposure to passive smoking;*
- *A ban on all forms of tobacco advertising (direct and indirect/surrogate), and promotion;*
- *Prohibition of sale of tobacco products and materials to persons below the age of 18 years, and*
- *Regulation of tobacco product packaging and labelling to ensure adequate health warnings and disclosure of toxic constituents.*

(B) Financial measures for tobacco control that include:

- *Price and tax-based mechanisms for reducing tobacco consumption, by progressively raising the purchase price of tobacco products;*
- *Elimination of all forms of subsidy for growth and manufacture of tobacco, and*
- *Support for activities related to the economic transition of persons engaged in tobacco agriculture or manufacture into alternative occupations.*

(C) Global support mechanisms for tobacco control that include:

- *The creation of a multilateral global fund which will assist the developing countries in undertaking activities in accordance with the objectives of the FCTC;*
- *International scientific cooperation, especially to provide technical assistance to the developing countries and for facilitating surveillance of the dimensions, determinants and consequences of tobacco consumption and for strengthening tobacco control programmes;*
- *International legal and administrative cooperation to curb illicit trade of tobacco products and raw tobacco materials, as well as to curb trans-border advertising of tobacco products; and*
- *Strengthening the role of WHO in carrying forth the mandate of the Framework Convention on Tobacco Control.*¹⁷

7. In 1996, WHO reported on the global smoking situation and published "The Tobacco Epidemic: A Global Public Health Emergency".¹⁸ In it, WHO underlines the necessity of adopting legislative and regulatory measures in order to arrive at a comprehensive tobacco control policy, particularly with regard to the following elements:

Many elements of an effective comprehensive tobacco control policy will eventually involve some form of legislative action, whether in the form of adopting or amending laws, regulations or government decrees. These include:

- *protection for children from becoming addicted to tobacco;*
- *effective protection from involuntary exposure to tobacco smoke;*
- *prominent health warnings on tobacco product packaging;*
- *progressive elimination of tobacco advertising;*

¹⁷ ED-4 Thimphu Declaration on the Framework Convention on Tobacco Control, October 30-31, 2001.

¹⁸ ED-37 WHO/World Health Organization, "The Tobacco Epidemic: A Global Public Health Emergency. First Global Report on Tobacco," May 23, 1996.

- the use of financial measures, such as higher tobacco taxes, to discourage tobacco consumption. (p. 24)

8. WHO makes the following statements with respect to two of the nine recommended strategies in its Resolution WHA39.16:

TOBACCO CONTROL MEASURES

Prominent health warnings on tobacco product packaging

In the early 1990s, about 80 countries required health warnings to appear on packages of tobacco products. However, in most countries the warnings are small, inconspicuous and provide little information about the many serious health consequences of tobacco use. Evaluation studies have found such warnings to be ineffective.

By the mid-1990s, however, a number of countries had adopted much more stringent warning systems, involving direct statements of health hazards, multiple messages, as well as large and prominent message display. Such warnings are now required in a number of countries including Australia, Canada, Iceland, Norway, Singapore, South Africa and Thailand. Greatly enhanced effectiveness has been found with legislated health warning systems that have the following characteristics:

- 10) multiple warnings, with each appearing in approximately equal proportion on packages of tobacco products;*
- 11) warnings on all kinds of tobacco products, with the text appropriate to each product;*
- 12) strong, uncompromising messages in the text of each warning, such as ²Smoking harms your family², ²Smoking causes cancer², ²Cigarettes are addictive², ²Smoking causes heart disease² and ²Tobacco smoke causes fatal lung disease in non-smokers²;*
- 13) display in black-on-white or white-on-black format, occupying 20% or more of the largest surfaces of packages of tobacco products.*

Progressive elimination of tobacco advertising

A number of countries have successfully passed laws to ban all or nearly all forms of tobacco advertising as part of comprehensive tobacco control measures. Frequently, however, further legislative action has been necessary to tighten the restrictions on advertising as bans on tobacco advertising are frequently circumvented by the use of indirect advertising and other means. A 1976 French law apparently banned tobacco advertising. However, tobacco advertisements were simply replaced by advertisements for matches and lighters bearing the names, trademarks and logos of tobacco products. A 1991 revision of the law much more explicitly banned all direct and indirect forms of tobacco advertising, with only limited and explicit exceptions at points of purchase. Other countries have had similar experiences of revising legislation before arriving at a satisfactory ban on tobacco advertising.

It has been reported that as of 1990, 27 countries had total or near-total bans on advertising. Since then, however, the number has declined to 18. While Australia and Kuwait recently implemented bans on tobacco advertising, tobacco advertising bans that had been in place became inoperative in Canada and the newly independent states of Central and Eastern Europe. However,

Canada and many Central and East European countries are considering draft legislation to re-establish bans on tobacco advertising.

Experience with partial bans on tobacco advertising has shown them to be less effective than first envisioned. For example, tobacco advertisements were banned from radio and television in the United States in the early 1970s, but later analysis showed that total tobacco advertising volume and expenditure continued to increase. Advertising placements were simply transferred to other media. (p. 27)

9. And WHO concludes as follows:

WHO has recommended that all Member States implement comprehensive tobacco control policies and programmes that include at least the following components:

- *continuous monitoring of the tobacco epidemic;*
- *protection for children from becoming addicted to tobacco;*
- *effective protection from involuntary exposure to tobacco smoke;*
- *effective programmes of health promotion, health education and smoking cessation;*
- *prominent health warnings on tobacco product packaging;*
- *progressive elimination of tobacco advertising;*
- *the use of financial measures, such as higher tobacco taxes, to discourage tobacco consumption.*

There is an urgent need for all countries to take action now to implement tobacco control policies and programmes based on these principles. Only when they do so will significant progress be made in combatting what has become a truly global epidemic. (p. 35)

10. For the purpose of facilitating and expediting the implementation of this comprehensive, multisectorial tobacco control policy, WHO published "Guidelines for Controlling and Monitoring the Tobacco Epidemic" two years later, in 1998.¹⁹ Based on increased knowledge of the issue, it reiterates and reinforces the elements of such a policy:

The following elements, derived from World Health Assembly resolutions and recommendations from other international and intergovernmental bodies, should be part of comprehensive national tobacco control programmes. (They are in no particular order of priority.)

1. *Establishment and maintenance of an active national focal point to stimulate, support and coordinate tobacco control activities.*
2. *Establishment of an adequately financed and staffed national coordinating organization on tobacco and health issues.*
3. *Monitoring of trends in smoking and other forms of tobacco use, tobacco-related diseases and effectiveness of national smoking control action.*
4. *Effective promotion and education programmes aimed at smoking prevention and cessation of smoking.*

¹⁹ ED-32 Guidelines for controlling and monitoring the tobacco epidemic, World Health Organization, Geneva, 1998.

5. *Effective protection from involuntary exposure to tobacco smoke in transit vehicles, public places and workplaces.*
6. *Health care institutions that are smoke-free, and health care workers who set a good example by not smoking, and through their own training, and counselling and advocacy activities, emphasize the benefits of a smoke-free life.*
7. *Tobacco taxes that increase faster than price and income growth.*
8. *A portion of tobacco taxes used to finance tobacco control measures and to sponsor sports and cultural events.*
9. *A ban on all forms of tobacco advertising, promotion and sponsorship.*
10. *A legal requirement for strong, varied warnings on cigarette packages.*
11. *Restriction of access to tobacco products, including a prohibition on sale of tobacco products to young people.*
12. *Effective and widely available support of cessation of smoking.*
13. *Limitations on the levels of tar and nicotine permitted in manufactured cigarettes.*
14. *Mandatory reporting of toxic constituent levels in the smoke of manufactured tobacco products;*
15. *Strategies to provide economic alternatives to tobacco agricultural workers. (p. 10)*

11. WHO elaborates on the necessity of adopting legislative and regulatory measures for the purpose of making the recommended measures more effective in the following manner:

Legislative measures

A number of World Health Assembly resolutions call for comprehensive tobacco control measures. Many analysts have concluded that, ultimately, the most effective action on these kinds of measures will require the creation of legislation (see Box 5). Countries have been specifically counselled against accepting voluntary regulation of advertising and package labelling from the tobacco industry. Resolution WHA43.16 specifically urges consideration of legislative, rather than voluntary, controls on tobacco advertising. (p. 20)

Box 5. Key legislative measures needed for comprehensive tobacco control

Legislation is critical to comprehensive tobacco control. The range of legislative measures is necessarily broad, given the number of things which must be done in order to achieve effective control of the tobacco epidemic. The necessary measures are such that it can be best to take the position followed by many governments when dealing with other drugs and have a single piece of legislation giving broad regulatory control over all aspects of tobacco manufacturing, importation, marketing and use. Alternatively, it may be necessary to pass several different laws. In any case, the relevant laws can give authority for the following:

. The accessibility of tobacco products should reflect the gravity of harm associated with their use. This effort should include:

- *a taxation law that reduces affordability;*
- *an end to tobacco sales in health care, educational and athletics facilities;*
- *an end to tobacco sales in vending machines and from self-service displays;*
- *the effective elimination of tobacco sales and distribution to children.*

- . *There should be full and free consent among users and potential users of tobacco products. This would entail the following:*
 - *an end to all direct and indirect forms of tobacco advertising because tobacco advertising is inherently misleading;*
 - *an end to the misleading messages conveyed on tobacco labelling and packaging;*
 - *prominent, detailed and frequently updated health information on (and possibly in) tobacco packaging and at point of sale;*
 - *full public disclosure of all product toxins and additives;*
 - *mandated public health education efforts, including efforts to educate the public about the role of the tobacco industry;*
 - *guaranteed assistance to those who wish to cease using tobacco products, and assistance for tobacco users seeking compensation for their harm.*
- . *There should be protection for the health, rights and well-being of those who do not use tobacco products. This should include:*
 - *a guarantee of smoke-free public spaces, workplaces and public transit;*
 - *guaranteed and simplified methods of redress for those harmed by environmental harm caused by tobacco products.*
- . *The legislation should control the product itself. It should include:*
 - *the ability to ban specified categories of any nicotine delivery products;*
 - *control over allowable levels of toxic ingredients found in tobacco products;*
 - *the ability to require modification in tobacco products. (p. 21)*

12. Lastly, the WHO points out the following:

The following are key points to remember when preparing plans of action for comprehensive tobacco control:

- . *Establish a national tobacco control policy and organization.*
- . *Implement a national programme with the following key components:*
 - *health education, including assistance with cessation;*
 - *legislation to ban sales of tobacco products to children and direct and indirect advertising of tobacco products; prominent health warnings on tobacco products; guarantee of smoke-free public spaces, workplaces and public transit; legislation to establish control and require reporting of levels of toxic ingredients found in tobacco products;*
 - *tax and price policies, including making tobacco products less affordable by increasing taxes above the rate of inflation, and earmarking a portion of tobacco taxes to fund health promotion activities and sponsor sports and cultural events.*
- . *Develop human, financial and structural resources with long-term sustainability to support tobacco control.*
- . *Where possible, monitor and evaluate tobacco control programmes. (p. 25)*

13. Beyond the development of a comprehensive, multisectorial tobacco control policy, the international community must also deal with the interference of the tobacco

industry to undermine its efforts. A committee of experts mandated by WHO²⁰—which reviewed tobacco company internal documents made public under the US Master Settlement—found that:

The documents reveal that tobacco companies viewed WHO as one of their leading enemies, and that they saw themselves in a battle against WHO.

According to one major company's master plan to fight threats to the industry, "WHO's impact and influence is indisputable," and the company must "contain, neutralize, [and] reorient" WHO's tobacco control initiatives. The documents show that tobacco companies fought WHO's tobacco control agenda by, among other things, staging events to divert attention from the public health issues raised by tobacco use, attempting to reduce budgets for the scientific and policy activities carried out by WHO, pitting other UN agencies against WHO, seeking to convince developing countries that WHO's tobacco control program was a "First World" agenda carried out at the expense of the developing world, distorting the results of important scientific studies on tobacco, and discrediting WHO as an institution.

The tobacco company documents reviewed by the committee of experts reveal that tobacco companies have focused significant resources on undermining WHO tobacco control activities and have used a wide range of tactics to achieve their goal.

- *Establishing inappropriate relationships with WHO staff to influence policy*
- *Wielding financial power to influence WHO policy*
- *Using other UN agencies to influence or resist WHO tobacco control*
- *Discrediting WHO or WHO officials to undermine WHO's effectiveness*
- *Influencing WHO decision making through surrogates*
- *Distorting WHO research*
- *Media events (pp. 1-4)*

14. The foregoing shows the two-pronged fight against tobacco: on the one hand, adopting comprehensive measures to reduce tobacco use; and on another, compensating for the industry's efforts in order to counter those approaches. In the words of the authors of the committee of experts report:

At the most fundamental level, this inquiry confirms that tobacco use is unlike other threats to global health. Infectious diseases do not employ multinational public relations firms. There are no front groups to promote the spread of cholera. Mosquitoes have no lobbyists. The evidence presented here suggests that tobacco is a case unto itself, and that reversing its burden on global health will be not only about understanding addiction and curing disease, but, just as importantly, about overcoming a determined and powerful industry. (p. 244)

United Nations

15. Because of the multisectorial approach recommended by WHO, the United Nations asked for support and coordinated efforts with its international organizations and agencies in order to develop tobacco control policies and implement the WHO

²⁰ 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.

Framework Convention and thus, created the "United Nations Ad Hoc Inter-Agency Task Force on Tobacco Control."^{21 22 23 24 25 26 27}

Its members include the World Bank, the International Monetary Fund, the World Trade Organization as well as 15 United Nations organizations, namely:

Annex

List of collaborating organizations

Department of Economic and Social Affairs of the United Nations Secretariat

Food and Agriculture Organization of the United Nations (FAO)

International Civil Aviation Organization (ICAO)

International Labour Organization (ILO)

International Monetary Fund (IMF)

United Nations Children's Fund (UNICEF)

United Nations Conference on Trade and Development (UNCTAD)

United Nations Development Fund for Women (UNIFEM)

United Nations Development Programme (UNDP)

United Nations Educational, Scientific and Cultural Organization (UNESCO)

United Nations Environment Programme (UNEP)

United Nations Fund for International Partnerships (UNFIP)

United Nations International Drug Control Programme (UNDCP)

United Nations Population Fund (UNFPA)

World Bank

World Health Organization (WHO)

World Intellectual Property Organization (WIPO)

*World Trade Organization.*²⁸

16. In 1997, in the progress report leading up to the creation of this Task Force, the Secretary-General of the United Nations made note of the progress made worldwide at the time:

²¹ ED-23 United Nations Economic and Social Council Resolution 1993/79 "Multisectoral collaboration on tobacco or health" July 7-30, 1993.

²² ED-21 United Nations Economic and Social Council Resolution 1994/97 "Multisectoral collaboration on tobacco or health," July 29, 1994.

²³ ED-19 United Nations Economic and Social Council Resolution 1995/62 "Tobacco or health," July 28, 1995.

²⁴ ED-13 United Nations Economic and Social Council Resolution 1999/56 "Tobacco or health," July 30, 1999.

²⁵ ED-22 United Nations Economic and Social Council, Report of the Secretary-General E/1994/83 "Progress made in the implementation of multisectoral collaboration on tobacco or health," June 27-July 29, 1994.

²⁶ ED-20 United Nations Economic and Social Council, Report of the Secretary-General E/1995/67 "Progress made in the implementation of multisectoral collaboration on tobacco or health," June 26-July 28, 1995.

²⁷ ED-14 United Nations, Note by the Secretariat E/1999/114 "Tobacco or health," July 29, 1999.

²⁸ ED-10 United Nations – Economic and Social Council – Ad Hoc Inter-Agency Task Force on Tobacco Control – Report of the Secretary-General, May 21, 2000.

50. Over the two-year period under review, a number of important events have contributed to a significant change in the international tobacco control situation, the most important of which is growing public awareness of the public health risks associated with tobacco consumption, which has led Governments, especially in the advanced countries, to adopt stronger legislation on tobacco production, processing, marketing and use, especially in public places.

51. A turning point was reached recently in the international struggle to control the operations of the biggest tobacco multinationals, when a number of major tobacco transnationals—some of which have recently admitted that tobacco is addictive and causes cancer and heart disease—met with anti-smoking groups and officials of the Government of the United States of America to discuss the terms of a settlement on a very large number of liabilities. According to reliable press sources, those multinationals are willing to accept government regulation, and would be prepared to pay as much as \$300 billion over the next 25 years in the form of a fund under which smokers could seek compensation.

52. So too, newly industrialized countries and countries with economies in transition have become more sensitized to the dangers of tobacco, and in many of them the media are actively promoting the adoption of stricter legislation. Moreover, the statistical evidence points to a growing pandemic of health risks related to tobacco consumption, as multinational tobacco companies seek to expand their markets in countries of the developing world to compensate for the loss of traditional markets in the developed countries.²⁹
(p. 12)

17. At its second session, the Task Force reported on the work of its members, especially that of WHO and the World Bank:

*The recent WHO conference on “Advancing knowledge on regulating tobacco products” held in Oslo 9-11 February 2000 brought together public health experts, regulators and policy-makers to define core public health goals and areas of research needed to consolidate the scientific basis of tobacco product regulation. During this conference it was generally agreed that transnational approaches are vital; that there is no “safe cigarette”; that the addictiveness of nicotine and the toxicity of tobacco products provides the rationale for a regulatory framework, and that the provision of consumer information plays a fundamental role in product regulation strategies. It was also observed that the FTC/ISO methods currently in use are not intended to measure the biological or epidemiological impact of tobacco products, but rather measure the performance of tobacco products. **Moreover, it was stressed that regulatory agencies should be prepared to evaluate and to respond to changes in tobacco product design, and to assess their health impact.** It was recommended that a WHO group of experts be convened to guide international policy development with regards to the regulation of tobacco products.*

The World Bank’s work on tobacco control is being conducted in close partnership with WHO’s Tobacco Free Initiative, and with other organizations, including the US Centers for Disease Control and Prevention Office of Smoking and Health, the IMF, the UN Foundation, FAO and other organizations. Given

²⁹ ED-18 United Nations Economic and Social Council, Report of the Secretary-General E/1997/62 “Progress made in the implementation of multisectoral collaboration on tobacco or health,” June 30 - July 25, 1997.

*the World Bank's comparative advantage in economics and policy dialogue, the Bank's efforts are focused on the economics of tobacco control, including taxation, the economic and social impact of tobacco control measures, including the impact on the poor, and the cost-effectiveness of interventions. **The following is a partial list of the World Bank's tobacco-related work:***

- ***Disseminating the messages and recommendations in "Curbing the Epidemic" through the World Wide Web, television-public service announcement, print translations into 11 languages, journal articles, and presentations at regional and country meetings.***
- *Discussions with economists at the Bank and IMF to get their help in carrying the dialogue at country level.*
- *Analyses of the economics of tobacco are underway in Estonia, Latvia, Indonesia, Turkey, Poland, China, and are planned in South Africa, Sri Lanka, Zimbabwe, Venezuela (to be funded by the Pan American Health Organization of WHO), and India (to be Funded by the South East Asian Regional Office of WHO).*
- *Model terms of reference have been prepared to help guide the work, and for others to use who wish to carry out similar work.*
- *A tool kit is under preparation that will provide detailed guidance and assistance to researchers/analysts wishing to conduct economic analysis in their own country.*
- *Analytic work on the links between poverty and tobacco, using rich household data sets for several countries, will commence soon.*
- *Thus far, 12 Bank-funded projects in 11 countries have included tobacco control activities, and several more are currently under preparation.³⁰ (p. 2)*

18. At its third session, the Task Force reported on the development of its approaches and specifically noted the following with respect to the need to regulate tobacco products:

*One of the major outcomes of the tobacco litigation in the USA is that companies now have a reason to compete on health grounds or alleged health grounds. **Tobacco companies are stepping up their research and development into new products, and will start making health claims or quasihealth claims as they try to develop some of these new products.***

..., the Director-General of WHO, Dr. Brundtland appointed a scientific advisory committee on tobacco product regulation, which held its first meeting in October 2000. The committee is composed of international and national experts. The committee's work focuses on product modification, disclosure of contents, measurement of contents, nicotine regulation, and the communication of risk that comes out of looking at data on tar and nicotine levels. The committee's work will be closely aligned with the European Union in its implementation of the new directive on product regulation, which is currently being discussed in Brussels.³¹ (p. 12)

19. At its last session up to the date hereof, the Task Force elaborated on the issue of regulating tobacco products:

³⁰ ED-11 United Nations Ad Hoc Inter-Agency Task Force on Tobacco Control — Report of the Second Session — India Room FAO Rome, March 7, 2000.

³¹ ED-9 United Nations Ad Hoc Inter-Agency Task Force on Tobacco Control — Report of the Third Session — Global Videoconference, December 8, 2000.

Dr. da Silva e Costa described the importance of product regulation. Any product of the society needs to be regulated to protect people from risks of harm, facilitate commercial trade and marketing and contribute to the evolution of better products. The context of tobacco regulation is different because it is very harmful and practically unregulated.

Tobacco is excluded from consumer protection laws; for example, there is no disclosure of the contents of the cigarette product, also, there is little information about the ingredients delivered from tobacco smoke. Product regulation needs to address these issues. The approach of tobacco regulation is very different from country to country and there should be a framework policy that addresses different components of tobacco product regulation.

In response to the problem, WHO has created a Scientific Advisory Committee on Tobacco Product Regulation (SACTOB) to collect inputs and information from the main experts in the area of product regulation. The committee is composed of 20 international and national experts on product regulation, smoking cessation and policy making; the committee tries to have a regional and gender balance among its components. Three meetings have been held to date and a fourth will take place in Oslo, Norway from 4-6 February 2002.

The expected outcomes from the committee should provide Member States with scientifically sound recommendations in product regulation, policies at country/regional level (regulatory agencies, litigation, laboratory structure, regulatory framework), programmatic recommendations (not to mention "mild" and "light", cigarette package labeling with ingredients) and discussions on the standards to adopt (ISO adoption of WHO standard). WHO launched a monograph on Advancing Knowledge on Regulatory Tobacco Products during its last World Health Assembly, which reported on the outcomes of the first meeting of SACTOB. Another activity of the committee involves discussions and issuing of recommendations on national/international reports and laws that address product regulation issues (The Institute of Medicine [USA] report, EU Directive, National Cancer Institute [USA] report on tar and nicotine).

Also, the committee invites various tobacco companies of the region to receive an update on their efforts to reduce the production of harm caused by tobacco products. It is important to note that this invitation should not reflect any partnership, collaboration or dialogue between WHO and the tobacco industry.³² (p. 12)

20. The foregoing shows the wide range of the various subjects and aspects studied by the international community in the development of public health and tobacco control measures.

U.S. Food and Drug Administration

21. In 1996, the U.S. Food and Drug Administration (FDA) adopted the "Regulations restricting the sale and distribution of cigarettes and smokeless tobacco to protect children and adolescents"³³ concurrently with the development of the Framework

³² ED-3 United Nations Ad Hoc Inter-Agency Task Force on Tobacco Control – Report of the Fourth Session – Kobe, Japan, December 5, 2001.

³³ ED-47 U.S. Food and Drug Administration. Regulations restricting the sale and distribution of cigarettes and smokeless tobacco to protect children and adolescents. Final Rule. Federal Register, Vol. 61, No. 168, August 28, 1996, 44396-45318.

Convention and the work of the Task Force. Among the public health measures recommended, the following advertising restrictions on tobacco companies were listed as essential:

VI. Advertising

B. The Need for Advertising Restrictions

*In the preamble to the proposed 1995 rule, FDA tentatively asserted that a preponderance of the quantitative and qualitative studies of cigarette advertising suggested: (1) **A causal relationship between tobacco advertising and tobacco use by young people**, and (2) **a positive effect of stringent advertising measures on smoking rates and on youth tobacco use.***

*In arriving at this tentative finding, FDA relied heavily on the National Academy of Sciences Institute of Medicine's (IOM's) Report entitled *Growing Up Tobacco Free, Preventing Nicotine Addiction in Children and Youths*, Washington, DC 1994 (the IOM Report) and the Department of Health and Human Services' (DHHS') Center for Disease Control and Prevention's (CDC's) Report entitled *Preventing Tobacco Use Among Young People, A Report of the Surgeon General* (1994) (1994 SGR). **Both indicated that advertising was an important factor in young people's tobacco use, and that restrictions on advertising must be part of any meaningful approach to reducing smoking and smokeless tobacco use among young people.** In addition, FDA was careful to note that industry statements and actions and examples of youth oriented advertising and marketing campaigns lent support to the agency's findings.*

Many studies have demonstrated that young people are aware of, respond favorably to, and are influenced by cigarette advertising. (p. 44475)

FDA agrees that none of these studies individually is sufficient to: (1) Establish that advertising has an effect of directly causing minors to use tobacco products; (2) determine directionality – that is, did advertising cause the observed effect, or are smokers more observant of advertising (the Klitzner, Aitken, et al., and Alexander studies attempted to control for this effect); or (3) define terms or disprove the influence of peer pressure in smoking behavior. (p. 44476)

FDA recognizes that advertising may not be the most important factor in a child's decision to smoke; however, the studies cited by the agency establish that it is a substantial, contributing, and therefore material, factor. (p. 44476)

FDA's review and consideration of the comments received has led the agency to conclude that advertising plays a material role in the decision by those under 18 to use tobacco products. (p. 44466)

22. FDA explains the appeal and impact that advertising has on young people:

1. Advertising and Young People

a. Function of advertising. Advertisers use a mix of advertising and promotional vehicles to call attention to the product they are selling – to describe its properties, to convey its superiority over other products, and in some cases to give it an allure above and beyond the qualities of the product itself. (A red convertible can be a mode of transportation; it can also tell people a lot about who you are, or who you think you are or want to be).

Advertising creates a matrix of attributes for a product or product category and beliefs about the product and its possessor. It can serve to convey images that are recalled later when an event prompts the consumer to think about a purchase. Consumers, as a general rule, overestimate the effect that advertising has on the market in general, but they routinely underestimate its effect upon them and their own purchasing choices. (p. 44466-44467)

Every presentation can add to and build upon the imagery and appeal created for a product category or a particular brand. Print advertising, direct mail, and outdoor advertising help to create an image of the brand (and sometimes an image of the brand's user) and provide information about price, taste, relative safety, and product developments for current or prospective users. (p. 44467)

Imagery also enhances the ability of advertising to communicate more quickly in low involvement situations and in quick exposure contexts. (p. 44467)

23. FDA also focuses on the tobacco companies' argument that their "mature market" theory and their spending of several billions of dollars in advertising do not increase the market size, but simply maintain their market share. FDA also finds that such an argument is illogical and that the empirical evidence demonstrates the opposite:

In the preamble to the 1995 proposed rule, FDA stated that perhaps the most compelling piece of evidence supporting restrictions was that these products were among the most heavily advertised and widely promoted products in America. The agency cited the most recent Federal Trade Commission (FTC) figures of overall expenditures for 1993, that indicated that over \$6.1 billion had been spent by the cigarette and smokeless tobacco industries to promote their products in diverse media. These include magazines, newspapers, outdoor advertising, point of purchase, direct mail, in-store, dissemination of nontobacco items with brand identification, and sponsorship of cultural and sporting events. (p. 44475)

In addition to logic, there is empirical evidence that advertising can expand demand in a so-called mature market and in fact has done so in the cigarette market before. (p. 44495)

24. FDA findings are the result of a stringent review of all literature available at the time on the subject it addressed, including the judgement handed down in RJR-MacDonald 1995:

... FDA relied on the research and expert opinion of consumer psychologists, business and marketing experts, economists and social science researchers as well as medical experts. Moreover, FDA has relied on two outstanding reports issued in the past few years that specifically addressed the issue of young people's use of tobacco—the 1994 SGR (U.S. Surgeon General Report) and the IOM (the National Academy of Sciences Institute of Medicine's) Report.

Both commented extensively on the role that advertising plays in young people's smoking behavior and use of smokeless tobacco and both recommended strongly that a comprehensive plan to attack the problem of youth tobacco use include stringent advertising restrictions.

Moreover, of the 15 members of the IOM committee, 7 were experts in the fields of behavioral sciences, including psychology, psychiatry and public policy, anthropology, and economics. Similarly, the contributing authors to the 1994 SGR included experts in economics, social research, marketing, and business administration. Finally, the comments submitted include additional empirical evidence, the expert opinion of the American Psychological Association, 155 and the words of the tobacco industry itself, all of which are referred to in this document. (p. 44487)

Considered together, these studies offer a compelling argument for the mediated relationship of cigarette advertising and adolescent smoking. (p. 44488)

*FDA does not find the decision of the Canadian court to be contrary to its findings. **The Canadian court did recognize that image or lifestyle advertising can affect overall consumption.*** (p. 44483)

25. Based on a body of opinion from various sources and consisting of various forms, FDA arrived at the conclusion that advertising influenced young people and that intervention was appropriate:

*In point of fact, tobacco advertising has an effect on young people's tobacco use behavior if it affects initiation, maintenance, or attempts at quitting. **The evidence that FDA has gathered in this proceeding establishes that cigarette and smokeless tobacco advertising does have such an effect.** While not all the evidence in the record supports this conclusion, **there is more than adequate evidence**, that when considered together, supports a conclusion that advertising, with the knowledge of the industry, does affect the smoking behavior and tobacco use of people under the age of 18. This behavior includes the decision whether to start using cigarettes or smokeless tobacco, whether to continue using or to increase ones consumption, when and where it is proper to use tobacco, and whether to quit. This evidence includes:*

*Expert opinion
Advertising Theory
Studies and Surveys
Empirical Studies
Anecdotal Evidence, and Various
Advertising Campaigns Successful with
Young People
Industry Statements
Consensus Reports (p. 44488 et seq.)*

26. In reference to the theme of the necessity for comprehensive measures to maximize effectiveness, FDA added the following:

FDA has concluded that restrictions on advertising and promotion are necessary to reduce the appeal of tobacco products to young people. Such restrictions will protect the access restrictions that the agency is adopting

*from being undermined and thereby the health of young people. **To be effective, these restrictions must be comprehensive, that is, they must apply to the many types of media currently used in a coordinated way to advertise cigarettes and smokeless tobacco.*** (p. 44489 ss)

FDA concludes that sponsorship of events and sponsored teams and events is an advertising medium that is effective in influencing young people's decision to engage in smoking behavior and tobacco use. (p. 44533)

*...FDA has attempted to tailor its advertising restrictions as narrowly as possible consistent with its purpose of reducing young people's attraction to and use of tobacco. Thus, rather than banning all advertising, the proposed regulations retain the **informational function of advertising** by permitting text-only advertising while removing color and imagery from those advertisements to which young people are unavoidably exposed.* (p. 44469)

27. FDA is not the only body to find that there is a link between tobacco advertising and tobacco product use. In 1991, authors Andrews & Frank³⁴ concluded the following:

The results of the study indicate that there is a significant relationship between advertising and cigarette consumption across studies, independent of study design factors (p. 96).

28. Similarly, the report "Effect of tobacco advertising on tobacco consumption: a discussion reviewing the evidence – Economics & Operational Research Division – Department of Health, 1992" therefore concluded its statistical analysis on the link between advertising and the use of tobacco products:

ii year-to-year variations in advertising expenditure within countries:

*... Some studies have found that advertising has a statistically significant effect on consumption; others, including our own study, have not. There are several possible reasons for failure to find a statistically significant effect of advertising, including data imperfections and the inherent difficulty of identifying the separate effect of advertising when this is only one of many potential influences on smoking behaviour. **Taken together, however, the studies point to a more decisive result.** Because the studies differ in specification and data, a range of results is always to be expected. If, however, advertising genuinely has no effect on consumption, it would also be expected that the numbers of studies reporting positive and negative results would be much the same; in other words, some studies would show that advertising increases consumption, but others that advertising reduces consumption. In practice this symmetry is not observed: **the great majority of results point in the same direction – towards a positive impact.** The balance of evidence thus supports the conclusion that advertising does have a positive effect on consumption.*

iii advertising bans in other countries:

³⁴ D-150 "The Determinants of Cigarette Consumption: A Meta-Analysis" 1991.

... effect on smoking may be due to these additional measures. The impact of advertising bans has been assessed in four countries – Norway, Finland, Canada and New Zealand. Though there are qualifications (for example, the bans in Canada and New Zealand are relatively recent and so may not yet have had their full impact), the current evidence available on these four countries indicates a significant effect. In each case the banning of advertising was followed by a fall in smoking on a scale which cannot reasonably be attributed to other factors.

World Bank

29. In light of the foregoing, it is not surprising that the World Bank, in its report entitled "Curbing the Epidemic: Governments and the Economics of Tobacco,"³⁵ makes the following findings and recommendations:

Measures to reduce the demand for tobacco

Nonprice measures to reduce demand

Beyond raising the price, governments have also employed a range of other effective measures. These include comprehensive bans on advertising and promotion of tobacco; information measures such as mass media counter-advertising, prominent health warning labels, the publication and dissemination of research findings on the health consequences of smoking as well as restrictions on smoking in work and public places.

This report provides evidence that each of these measures can reduce the demand for cigarettes. For example, "information shocks," such as the publication of research studies with significant new information on the health effects of smoking, reduce demand. Their effect appears to be greatest when a population has relatively little general awareness of the health risks. Comprehensive bans on advertising and promotion can reduce demand by around 7 percent, according to econometric studies in high-income countries. Smoking restrictions clearly benefit nonsmokers, and there is also some evidence that restrictions can reduce the prevalence of smoking.

Models developed for this report suggest that, employed as a package, such nonprice measures used globally could persuade some 23 million smokers alive in 1995 to quit and avert the tobacco-attributable deaths of 5 million of them. As with the estimates for tax increases, these are conservative estimates. (p. 7)

The report has two recommendations:

*1. Where **governments** decide to take strong action to curb the tobacco epidemic, **a multi-pronged 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***

³⁵ ED-16 World Bank, Development in practice. "Curbing the Epidemic: Governments and the Economics of Tobacco," 1999.

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 UN 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. (p. 10)

Nonprice measures to reduce demand: consumer information, bans on advertising and promotion, and smoking restrictions

There is extensive evidence from the high-income countries **that the provision of information to adult consumers about the addictive nature of tobacco and its burden of fatal and disabling diseases can help to reduce their consumption** of cigarettes. In this section, we review what is known about the effectiveness of a range of types of such information, including publicized research into the health consequences of smoking; **warnings on cigarette packs** and on advertisements; and counter-advertising. We shall also summarize what is known about the effects of the tobacco advertising and promotion activities, and what happens when these activities are banned. Because the different types of information are often available to consumers concurrently, **it is difficult to disaggregate their individual effects**, but the growing body of research and experience in high-income countries suggests that each can have a significant impact. Importantly, the impact appears to vary across different social groups. In general, young people appear to be less responsive to information about the health effects of tobacco than older adults, and more educated people respond more quickly to new information than those with no or minimal education. An awareness of these differences is useful for policymakers when planning a mix of interventions that is tailored to the particular needs of their own country. (p. 45)

Warning labels

Even in countries where consumers have had reasonable access to information about the health effects of smoking, the evidence suggests that there are widespread misperceptions about these effects, due, in part, to cigarette packaging and labeling. For example, in the past two decades, many manufacturers have labeled certain classes of cigarette as "low tar" and "low nicotine."

Many smokers in high-income countries believe that these brands are safer than other cigarettes, although the research literature concludes that no cigarettes are safe. Studies suggest that many consumers are confused about the constituents of tobacco smoke, and that packaging fails to give them adequate information about the products they are buying. Since the early 1960s a growing number of governments have required cigarette

manufacturers to print health warnings on their products. By 1991, 77 countries required such warnings, although very few of these countries insisted on strong warnings with rotating messages, such as the one illustrated in Figure 4.3. A study from Turkey suggests that health warnings caused consumption there to fall by about 8 percent over six years. In South Africa, when serious warning labels were introduced in 1994, there was a significant fall in consumption. More than half (58 percent) of smokers questioned for that study said they were motivated by the warning labels to quit or reduce their smoking. However, one key weakness of warning labels is that they will not reach some poorer individuals, particularly children and adolescents, in low-income countries. Among such consumers, it is common to buy cigarettes singly rather than in packs. It has sometimes been argued that, in the more informed populations where smoking has been widespread for many decades, smoking prevalence is unlikely to fall much lower than it has already as a result of cigarette pack warning labels. However, evidence from Australia, Canada, and Poland suggests that such labels can still be effective, provided that they are large, prominent, and contain hard-hitting and specific factual information. In Poland in the late 1990s, new warning labels that occupy 30 percent of each of the two largest sides on the cigarette pack have been found to be strongly linked with smokers' decisions to quit or cut down their smoking. Among Polish male smokers, 3 percent said they had quit following the introduction of the labels; an additional 16 percent said they had tried quitting, and a further 14 percent said they understood the health effects of smoking better because of the warnings. Among women, the effects were similar. In Australia, warning labels were strengthened in 1995. The impact appears to have been greater in inducing smokers to quit than when the older, less strongly worded labels were used. 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 packs. (p. 47)

The impact of advertising bans

When governments ban tobacco advertising in one medium, such as television, the industry can substitute advertising in other media with little or no effect on overall marketing expenditures. Accordingly, studies that have examined the effect of partial cigarette advertising bans have found little or no effect on smoking. However, where there are multiple restrictions on advertising in all media and on promotional activities, there are relatively few alternative outlets for the industry. Since 1972, most high-income countries have introduced stronger restrictions across more media and on various forms of sponsorship. A recent study of 22 high-income countries based on data from 1970 to 1992 concluded that comprehensive bans on cigarette advertising and promotion can reduce smoking, but more limited partial bans have little or no effect. If the most comprehensive restrictions were in place, the study concluded, tobacco consumption would fall by more than 6 percent in high-income countries. Modeling based on these estimates suggests that the European Union's ban on advertising (see Box 4.2) could reduce cigarette consumption within the European Union by nearly 7 percent. Another study of 100 countries compared consumption trends over time in those with relatively complete bans on advertising and promotion and those with no such bans. In the countries with nearly complete bans, the downward trend in consumption was much steeper (Figure 4.4). It is important to note that, in this study, other factors may also have contributed to the decline in consumption in some countries.

Beyond the economic literature, meanwhile, there are other types of research, such as surveys of children's recall of advertising messages, that conclude that advertising and promotion do indeed affect demand for cigarettes and attract new recruits. Children's attention is attracted by such advertising, and they remember its messages. There is also growing evidence that the industry is directing increasing shares of its advertising and promotion activity toward markets where there is judged to be growth or potential for growth, including some youth markets and specific minority groups among whom smoking has until recently been uncommon. This noneconomic body of research may be of particular interest to policymakers concerned about smoking trends within specific groups in the population. (p. 50)

Box 4.2 THE EUROPEAN UNION'S BAN ON TOBACCO ADVERTISING AND PROMOTION

In 1989, as part of a wider initiative against cancer, the European Commission proposed a directive to restrict the advertising of tobacco products in the press and by means of billboards and posters. The European Parliament amended the Commission's proposal in 1990 and voted for an advertising ban.

The Commission observed that it could only secure agreement for a partial ban at the time, but added that a new proposal for a total ban might be made, depending on progress achieved by individual member states. In June 1991 the Commission introduced a modified proposal for a directive on tobacco.

In the period between 1992 and 1996 no progress was made in implementing the proposal because of opposition from at least three member states, Germany, the Netherlands, and the United Kingdom. However, opposition in the United Kingdom collapsed in 1997, when the Labour Party won the general election, with a manifesto commitment to introduce a tobacco advertising ban. The text of the proposed directive was finally adopted by the Commission in June 1998. **The directive stipulates that all direct and indirect advertising (including sponsorship) of tobacco products will be banned within the European Union, with full and final enforcement of all provisions by October 26.** Its key points are as follows:

- **All member states** of the European Union must introduce national legislation not later than **30 July 2001**.
- **All advertisements in the print media must cease within one further year.**
- **Sponsorship** (with the exception of events or activities organized at a **global level**) **must cease within two further years.**
- **Tobacco sponsorship of world events**, such as **Formula One motor racing**, may continue for a further three years, **but must end by 1 October 2006**. During this period of phaseout, there must be a reduction in overall sponsorship support as well as voluntary restraint on tobacco publicity surrounding these events.
- **Product information is allowed at points of sale.**
- **Tobacco trade publications may carry tobacco advertising.**
- Third-country publications, not intended specifically for the European Union market, are not affected by the ban.

This directive is now under implementation.

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. (p. 82)

U.S. Surgeon General Reports

30. Perhaps more than any other organization or work on the issue of public health measures to stem tobacco use, the U.S. Surgeon General Reports are an authority on the health consequences resulting from tobacco use, and are published according to a U.S. Act of Congress every 16 to 18 months.³⁶

31. In his 1988³⁷ report, the Surgeon General concluded the following:

- *Cigarettes and other forms of tobacco are addicting.*
- *Nicotine is the drug in tobacco that causes addiction.*
- ***The pharmacologic and behavioral processes that determine tobacco addiction are similar to those that determine addiction to drugs such as heroin and cocaine. (foreward)***

32. In the same report, the Surgeon General recommended, among other things, the following:

Public information campaigns should be developed to increase community awareness of the addictive nature of tobacco use. A health warning on

³⁶ Testimony of Ronald M. Davis, Q. 300, p. 3300, Q. 315, p. 3308.

³⁷ D-141 1988 Surgeon General's Report "The Health Consequences of Smoking: Nicotine Addiction".

addiction should be rotated with the other warnings now required on cigarette and smokeless tobacco packages and advertisements. Prevention of tobacco use should be included along with prevention of illicit drug use in comprehensive school health education curricula. Many children and adolescents who are experimenting with cigarettes and other forms of tobacco state that they do not intend to use tobacco in later years. They are unaware of, or underestimate, the strength of tobacco addiction. Because this addiction almost always begins during childhood or adolescence, children need to be warned as early as possible, and repeatedly warned through their teenage years, about the dangers of exposing themselves to nicotine. (p. vi)

33. In his 1989 report, the Surgeon General found that progress had been made since the first report twenty-five years before that, in 1964, but also pointed out the enormous amount of work that remained in order to curb the problem of tobacco use.³⁸

34. The 1992 Report of the Surgeon General³⁹ looked at the situation in the Americas in particular. A few of the findings and recommended measures ensuing from this review were as follows:

5. Commitment to surveillance of tobacco-related factors – such as prevalence of smoking; morbidity and mortality; knowledge, attitudes, and practices; tobacco consumption and production; and taxation and legislation – is crucial to the development of a systematic program for prevention and control of tobacco use. (p. 10)

Advertising restrictions are generally associated with declines in consumption and, hence, are an important component of tobacco-control programs.

2. The need is now recognized, and work is under way, for developing a comprehensive, systematic approach to the surveillance of tobacco-related factors in the Americas, including the prevalence of smoking; smoking-associated morbidity and mortality; knowledge, attitudes, and practices with regard to tobacco use; tobacco production and consumption; and taxation and legislation. (p. 13)

35. This Report of the Surgeon General was prepared jointly with the Pan American Health Organization, which published its own report⁴⁰ and made the following findings and recommendations:

Introduction

This document is comprised of individual reports on smoking and health for nations, territories, and other political entities in the Region of the Americas. The purpose of this Report was to compile available information on tobacco use, tobacco-related disease, and tobacco-use prevention and control efforts for each of these political entities as of late 1990. It is intended to accompany the 1992 Report of the U.S. Surgeon General, entitled Smoking and Health in

³⁸ D-142 1989 Surgeon General's Report "Reducing the Health Consequences of Smoking: 25 Years of Progress".

³⁹ D-144 1992 Surgeon General's Report "Smoking and Health in the Americas".

⁴⁰ ED-48 Pan American Health Organization "Tobacco or Health: Status in the Americas," 1992.

the Americas, that was prepared by the U.S. Department of Health and Human Services (USDHHS) in collaboration with the Pan American Health Organization (PAHO). Because so much material is available on smoking and health in the United States (more than 60,000 articles and 22 previous Reports of the U.S. Surgeon General on tobacco and health), this Report focuses on Canada, Latin America, and the Caribbean. Most of the information contained in this publication cannot be found in any other single source.

Thus, it is increasingly important that the nations of the Americas understand the historical, economic, political, and public health aspects of tobacco use and tobacco production. This understanding will facilitate planning for control measures needed to alleviate the impending burden of smoking-related diseases. (p. 12)

Summary and Recommendations

This Status Report has collected information from hundreds of individuals and documents that has never appeared before in a single publication. (p. 19)

This Report will serve as a baseline data source, particularly for Latin American and Caribbean nations as they address the complex issues involved in preventing and controlling tobacco use. (p. 19)

The Region of the Americas can use the information presented in this Status Report and the 1992 Report of the U.S. Surgeon General to build an international coalition against what may be the most important public health issue of the 1990s. Based on information in this Report, recommendations for action are as follows:

- 1. Data collection on behavior, attitudes, knowledge, and beliefs associated with tobacco use should be improved and standardized. These data should be published regularly and used to help support changes in public opinion and political action against tobacco use.*
- 2. Data on mortality and morbidity would be improved, collected, and analyzed systematically in nations of the Americas to understand and communicate fully the current and future burden of smoking-related diseases. Without such data, policy makers and the public will not appreciate health burden of tobacco use.*
- 3. Efforts to divert economic and human resources away from dependence on tobacco production and manufacture should be supported, even though short-term costs for this diversion may be appreciable.*
- 4. **Policies and legislation that prohibit smoking in public places, advertising and promotion of tobacco products, and access to tobacco by young persons should be strengthened and enforced. These actions serve to decrease the social acceptability of smoking and are essential to changing individual behavior.***
- 5. Ad valorem taxes on cigarettes should be increased substantially and periodically as a means of decreasing consumption.*
- 6. Public health agencies should increase monetary and personnel resources dedicated to the prevention and control of tobacco use. Increasing the stature of tobacco control efforts is essential to changing individual behavior and preventing chronic diseases associated with tobacco use. (p. 20)*

Country collaborators are listed below:

United States of America

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36. The 1994 Surgeon General's report⁴¹ focused specifically on the problem of tobacco use among young people. The conclusions and recommendations included the following:

Chapter 5. Tobacco Advertising and Promotional Activities

1. Young people continue to be a strategically important market for the tobacco industry.

2. Young people are currently exposed to cigarette messages through print media (including outdoor billboards) and through promotional activities, such as sponsorship of sporting events and public entertainment, point-of-sale displays, and distribution of specialty items.

3. Cigarette advertising uses images rather than information to portray the attractiveness and function of smoking. Human models and cartoon characters in cigarette advertising convey **independence, healthfulness, adventure-seeking, and youthful activities—themes correlated with psychosocial factors that appeal to young people**

4. Cigarette advertisements capitalize on the disparity between an ideal and actual self-image and imply that smoking may close the gap.

5. Cigarette advertising appears to affect young people's perceptions of the pervasiveness, image, and function of smoking. Since **misperceptions in these areas constitute psychosocial risk factors for the initiation of smoking, cigarette advertising appears to increase young people's risk of smoking.**

Chapter 6. Efforts to Prevent Tobacco Use Among Young People

1. Most of the American public strongly favor policies that might prevent tobacco use among young people. These policies include tobacco education in the schools, **restrictions on tobacco advertising and promotions**, a complete ban on smoking by anyone on school grounds, prohibition of the sale of tobacco products to minors, and earmarked tax increases on tobacco products.

⁴¹ D-145 1994 Surgeon General's Report "Preventing Tobacco Use Among Young People".

2. *School-based smoking-prevention programs that identify social influences to smoke and teach skills to resist those influences have demonstrated consistent and significant reductions in adolescent smoking prevalence, and program effects have lasted one to three years. Programs to prevent smokeless tobacco use that are based on the same model have also demonstrated modest reductions in the initiation of smokeless tobacco use.*

3. *The effectiveness of school-based smoking-prevention programs appears to be enhanced and sustained by comprehensive school health education and by community-wide programs that involve parents, mass media, community organizations, or other elements of an adolescent's social environment.*

4. *Smoking-cessation programs tend to have low success rates. Recruiting and retaining adolescents in formal cessation programs are difficult.*

5. *Illegal sales of tobacco products are common. Active enforcement of age-at-sale policies by public officials and community members appears necessary to prevent minors' access to tobacco.*

6. *Econometric and other studies indicate that increases in the real price of cigarettes significantly reduce cigarette smoking; young people are at least as responsive as adults to such price changes. Maintaining higher real prices of cigarettes depends on further tax increases to offset the effects of inflation.*
(p. 10)

37. In 2000, the Surgeon General confirmed that several of the previously identified public health measures had proven to be effective in preventing tobacco use among youth and in helping tobacco users quit smoking. The report⁴² makes the following findings and recommendations:

Major Conclusions

1. *Efforts to prevent the onset or continuance of tobacco use face the pervasive, countervailing influence of tobacco promotion by the tobacco industry, a promotion that takes place despite overwhelming evidence of adverse health effects from tobacco use.*
2. *The available approaches to reducing tobacco use—educational, clinical, regulatory, economic, and social—differ substantially in their techniques and in the metric by which success can be measured. A hierarchy of effectiveness is difficult to construct.*
3. *Approaches with the largest span of impact (economic, regulatory, and social) are likely to have the greatest long-term, population impact. Those with a smaller span of impact (educational and clinical) are of greater importance in helping individuals resist or abandon the use of tobacco.*
4. *Each of the modalities reviewed provides evidence of effectiveness:*
 - *Educational strategies, conducted in conjunction with community—and media-based activities, can postpone or prevent smoking onset in 20 to 40 percent of adolescents.*
 - *Pharmacologic treatment of nicotine addiction, combined with behavioral support, will enable 20 to 25 percent of users to remain abstinent at one year posttreatment. Even less intense measures,*

⁴² D-147 2000 Surgeon General's Report "Reducing Tobacco Use".

such as physicians advising their patients to quit smoking, can produce cessation proportions of 5 to 10 percent.

- **Regulation of advertising and promotion, particularly that directed at young people, is very likely to reduce both prevalence and uptake of smoking.**
 - Clean air regulations and restriction of minors' access to tobacco products contribute to a changing social norm with regard to smoking and may influence prevalence directly.
 - An optimal level of excise taxation on tobacco products will reduce the prevalence of smoking, the consumption of tobacco, and the long-term health consequences of tobacco use.
5. The impact of these various efforts, as measured with a variety of techniques, is likely to be underestimated because of the synergistic effect of these modalities. The potential for combined effects underscores the need for comprehensive approaches.
 6. State tobacco control programs, funded by excise taxes on tobacco products and settlements with the tobacco industry, have produced early, encouraging evidence of the efficacy of the comprehensive approach to reducing tobacco use. (p. 6)

38. In its document, *Public Health at a Glance*,⁴³ the World Bank best summarized the previously discussed public health measures that form an integral part of a comprehensive, multisectoral tobacco control policy:

Cost Effective Interventions to reduce death and disease caused by tobacco use
Measures to reduce demand for tobacco products are highly cost effective – very high on the list of public health “best buys”

Objective: Reduce tobacco use, to reduce death and disease caused by tobacco use.		
Interventions	Beneficiaries/Target Groups	Process Indicators
Higher taxes on cigarettes and other tobacco products	smokers potential smokers (especially youth)	✓ price of cigarettes/bidis etc (adjust for inflation) ✓ tax as % of final sales price
Non-price measures		
Bans/restrictions on smoking in public and work places: schools, health facilities, public transport, restaurants, cinemas etc.	non-smokers protected from second-hand smoke	✓ smoke-free public spaces and places
Comprehensive bans on advertising and promotion of all tobacco products, logos and brand names ¹	smokers and potential smokers (especially youth) societal attitudes to smoking	✓ laws, regulations, extent to which respected/enforced
Better consumer information: counter-advertising, media coverage, research findings	smokers and potential smokers societal attitudes to smoking	✓ knowledge of health risks, attitudes to smoking
Large, direct warning labels on cigarette boxes and other tobacco products	smokers	✓ % of box surface covered by label, message, color/font specifications
Help for smokers who wish to quit, including increased access to Nicotine Replacement (NRT) and other cessation therapies	smokers	✓ number of ex-smokers
Impact / surveillance Indicators for tobacco use (from survey data):		
adult smoking prevalence: % of people 15 and older who use any tobacco product at least once a day (daily/regular smoker) or occasionally, % who have ever smoked		
intensity: average number of cigarettes (and other tobacco products) smoked/used daily		
quit behavior: % who used to smoke, but currently do not smoke at all		
youth use: % of young people who currently use any tobacco product (defined as having used a tobacco product on one or more days during the past 30 days),		
initiation age: age at which current and ex-smokers first started to smoke at least one cigarette a day		
Note: A Global Youth Tobacco Survey is being implemented in many countries with support from WHO and CDC. See: http://www.cdc.gov/tobacco/global/GYTS.htm (CDC website).		

⁴³ ED-1 World Bank - Public Health at a Glance, March 2002.

Health warnings on cigarette packages should be large (cover at least 30% of the surface area), clear (e.g., black on white), in local languages, and have a set of specific required messages that change periodically. Information on the adverse health impact of tobacco use and the benefits of quitting should be widely disseminated.

The tobacco industry argues that **advertising and promotion** affects market share and not overall prevalence levels, but countries that have implemented comprehensive bans on all advertising and promotion have reduced tobacco use much more quickly and to lower levels than other countries. Partial bans are not effective – if only a partial ban is politically feasible, then there is a very strong case for mandating counteradvertising.

Conclusion

39. The foregoing clearly shows that there is an overall, worldwide consensus for the adoption of multisectoral tobacco control measures. Throughout the years, the development of intervention measures has been reworked and clarified, in light of the increased knowledge from, including others, the tobacco industry itself.
40. With regard to public health, epidemiology, human behaviour or social sciences, no one can lay claim to the truth. Conclusions leading to interventions are based on a body of opinions leaning in the same direction. In this case, this body of opinion is eloquent and there is no such eloquent body leaning in the opposite direction. The plaintiffs filed no positive evidence to the contrary.
41. As stressed by the U.S. Surgeon General, other public health care specialists must intervene to develop policies regulating the sale and distribution of tobacco products:

We as citizens, in concert with our elected officials, civic leaders, and public health officers, should establish appropriate public policies for how tobacco products are sold and distributed in our society. With the evidence that tobacco is addicting, is it appropriate for tobacco products to be sold through vending machines, which are easily accessible to children? Is it appropriate for free samples of tobacco products to be sent through the mail or distributed on public property, where verification of age is difficult if not impossible? (p. vi)⁴⁴

42. The identification of tobacco control measures such as those in this case are not taken lightly but pursuant to intervention models routinely used by public health, preventive medicine and epidemiology specialists, whose roles include preventing and controlling the environmental factors that can negatively influence public health,^{45 46} in this case, tobacco:

Preventive Medicine specialists use a model of disease control that points out how they can intervene to interrupt the transmission of a disease; the model includes four (4) elements which, as applied to tobacco, include: the agent i.e.

⁴⁴ D-141 – 1988 Surgeon General's Report "The Health Consequences of Smoking: Nicotine Addiction," p. vi.

⁴⁵ D-136 The American Board of Preventive Medicine, Booklet of Information, Revised March 2001.

⁴⁶ D-137 "What is Preventive Medicine," printed Powerpoint presentation.

tobacco, the vector which transmits the agent i.e. the tobacco companies, the host i.e. the smoker and the environment surrounding each, part of which is tobacco advertising and promotion. Applying this model can lead to the identification of possible interventions at all of these levels, i.e. try and inoculate the potential host by reaching the kids before they become tobacco users, address the agent tobacco and regulate it as other consumer goods are regulated, address the vector and control what advertising agencies are allowed to do and address the environment in regard to tobacco advertising (Q. 327, p. 3317; Q. 328, p. 3320).^{47 48}

43. The intervention methods identified and recommended by the international community and those adopted by Canadian Parliament, including advertising restrictions, are in keeping with the parameters of these intervention models:

Tobacco is the most preventable cause of death in our society, including both in Canada and the United States; hence, the implication of Preventive Medicine specialists such as Dr. Davis to attempt to control or prevent it and in doing so the need for such specialists to look at the environment in which the agent, host and vector operate; where advertising and promotion of tobacco is ubiquitous in the United States to the tune of 8 billion dollars a year and reaches children, that's a very important environmental factor which has to be looked at and if a link is shown between that environmental influence and smoking by the population and by kids, measures must be taken to remedy that, i.e. public health officials and preventive medicine specialists have to interrupt these factors (advertising and promotion) that are impairing the health and causing the premature death of people (Q. 1, p. 3415 to Q. 5, p. 3417).⁴⁹ (Our emphasis.)

⁴⁷ Examination of Ronald M. Davis (Q. 327, p. 3317; Q. 328, p. 3320); Summary of examination of Ronald M. Davis, p. 3.

⁴⁸ ED-12 United Nations Ad Hoc Interagency Task Force on Tobacco Control – Report of the First Session – Maurice Pate Conference Room, UNICEF, New York, U.S.A., September 29-30, 1999, p. 3 “In an attempt to understand the pathological chain of events leading to the diseases such as malaria, the scientific community immediately turns to an analysis of the disease vector i.e. the mosquito. Likewise, in understanding the chain of events leading to tobacco-related diseases, vector analysis must also be pursued. In this case however, the disease vector is the tobacco industry.”

⁴⁹ Summary of examination of Ronald M. Davis, p. 4 (Q. 1, p. 3415 to Q. 5, p. 3417 of the examination).

APPENDIX 6 - B

FOREIGN LEGISLATION

The *Tobacco Act* is part of a global regulatory trend with regard to tobacco products (D-126, D-127 and D-128).

Foreign legislation in industrialized countries (G-8, European Union) is quickly evolving in light of a growing body of opinion and studies on the ravages of tobacco use and measures to be taken to stop this plague.

A review of the legislation and regulation concerning tobacco in 23 democratic states, free and democratic societies, to use Cory J.'s expression in *Lucas* (*R. v Lucas*, [1998] 1 S.C.R. 439)¹ over a period of 20 years shows that tobacco regulations are getting progressively but consistently and irreversibly broader and tougher (expert evidence from Yves-Marie Morissette, D-123, D-124 and update, D-133).

This evolution has manifested itself on many levels, with regard to the type of measures application scheme, the type and scope of measures taken and their legislative and regulatory framework.

The evolution of the type and scope of measures taken is in fact an expansion, from simple to complex, of the area of application of regulations with regard to advertisement of tobacco products characterized by the following steps:

1. regulation of conventional advertising in major media, i.e. television, radio, cinema and newspapers;
2. restrictions with regard to content of permitted advertising;
3. prohibition of direct advertising, with certain exceptions;
4. prohibition of indirect advertising, i.e. brand sharing, brand stretching, use of brand elements,² a prohibition which was first introduced in French legislation in 1991;
5. extension of the prohibition to certain forms of market promotions that seemed to take advantage of loopholes, such as, for example, testimonials of famous people, examples of which have been found in Austrian law since 1995. In fact, Professor Morissette makes an interesting comparison of

¹ Testimony of Yves-Marie Morissette, Q. 72, p. 3025 et seq.

² Testimony of Yves-Marie Morissette, Q. 151, p. 3054.

Canadian and Austrian provisions with regard to this type of advertising prohibition:

[Translation]

«The Canadian legislation, well, it's section 21, paragraph 2 or subsection 2:

For the purposes of subsection (1), the depiction of a person, character or animal, whether real or fictional, is considered to be a testimonial for, or an endorsement of, the product.

In Austrian law, it's paragraph 11.2.6:

Advertising for tobacco products by means of the representation of persons in the process of smoking or inviting others to smoke who are less than thirty (30) years old or may be considered by the consumer to be less than thirty (30) years old, as well as advertising by representation of leading sport personalities or references to such personalities by illustration or name, including drawings, caricatures, et cetera, et cetera.

...there is here an element of information on the legislative style. Personally, I find, at first glance, that the text of the Canadian legislation is less debatable than the text of the Austrian legislation. The Austrian act says *leading personalities*.³

(our emphasis)

6. extension of the prohibition of sponsorship, with exceptions;

The same type of evolution is also present with regard to the issue of warnings on cigarette packs and of their packaging, where extension has been characterized by the following steps:

1. the conventional warning, i.e. "tobacco use may be harmful to your health;"
2. the appearance of several warnings following the principle of warnings on a rotational basis;
3. an increase in the number of warnings (as in Sweden, where there are fifteen (15));
4. the addition of pictograms and, as in Brazil, of pictures or visual representations that occupy one whole side of the product (D-134);
5. a juxtaposition with pictures from external sources of information:

³Testimony of Yves-Marie Morissette, Q.155 et seq., p. 3056 et seq.

[Translation]

In Canadian legislation or in regulation, it's literature, ... In the European directive in effect, the requirement to give the Internet address of an organization which helps people who use tobacco products to quit and so on.⁴

In addition, although this extension of the regulation does not happen at the same speed around the world, the evolutionary trend described above is no less clear or unidirectional:

[Translation]

The evolution of legislation is neither simultaneous nor consistent. i.e. some are ahead of others with regard to the steps I listed a few minutes ago, ... But it can be said, I believe that is a unidirectional evolution and, as far as I could judge, it is irreversible, i.e. there is no moving back to a previous position. It continues to move in the same direction.⁵

(our emphasis)

In the course of this evolution, we can see that the application scheme of the legislation and regulation goes from general permission with restrictions to a general prohibition scheme with specific permissions, as provided for in Canadian legislation.

Finally, certain countries such as the United Kingdom and Netherlands, where regulations pertaining to advertising of tobacco products stemmed from a consensual scheme (self-regulation by the tobacco manufacturers themselves), have now moved straight to a mandatory scheme (legislation and regulation), or a little more gradually, such as in Australia.

In the case of the United Kingdom, this change came about following the observation that the consensual or voluntary scheme simply did not work. The reasons leading to this observation are indicated in "Government Response to the Health Select Committee's Second Report on the Tobacco Industry and the Health Risks of Smoking," D-135:

(p) The evidence we have reviewed from the advertising agencies leads us to conclude that, once more, voluntary agreements have served the industry well and the public badly. Regulations have been seen as hurdles to be overcome or side-stepped; legislation banning advertising as a challenge, a policy to be systematically undermined by any means possible. We recommend that any future regulation of marketing should be statutory, and overseen by an independent and powerful regulatory body which has the consumer's interest at heart, such as the Tobacco Regulatory Authority which we propose below...(p.9)

⁴ Testimony of Yves-Marie Morissette, Q. 167, p. 3060.

⁵ Testimony of Yves-Marie Morissette, Q. 169 et seq., p. 3061 et seq.

The Government welcomes the Committee's support for the legislative route to ban tobacco advertising. In the light of the European Court of Justice's decision to amend Directive 98/43/EEC, we are preparing primary legislation to fulfil our manifesto commitment to ban tobacco advertising. (p. 10)

(ss) We believe the Government is right to keep its distance from the tobacco industry which has, in our view, been the main beneficiary of the regime of voluntary agreements." (p. 16)⁶

The Canadian legislative approach is in keeping with currently existing global parameters with regard to regulation of advertising of tobacco products. Some Canadian initiatives are being followed, such as, for example, the colour warnings with pictures.

Canada is not alone in this matter. In fact, it is part of a leading group of countries with regard to regulation of tobacco products, with others that have adopted complete and comprehensive legislation like Canada's, such as, for example, Australia, Belgium, Netherlands and Denmark, with the United Kingdom,^{7 8} the European Union,^{9 10} (including approximately 15 member countries) and Ireland¹¹ whose legislation and regulation are about to be put in force.

⁶ Government Response to the Health Select Committee's Second Report on the Tobacco Industry and the Health Risks of Smoking, Presented to Parliament by the Secretary of State for Health By Command of Her Majesty, Department of Health, October 2000, D-135.

⁷ Tobacco Advertising and Promotion Bill, D-132/ED-50 ("adopted by the House of Commons, it is in the review phase, between the second and third readings, and the Committee's report should be tabled on March 1st. Thus we are at a very advanced stage in the development process of this act" [translation], testimony of Yves-Marie Morissette, Q. 87, p. 3034).

⁸ Tobacco Disclosure Bill, as introduced in the House of Commons on 18th January 2002, ED-51.

⁹ European Parliament and Council Directive 2001/37/EC of June 5, 2001, relating to the harmonization of legislative, regulatory and administrative provisions of member states with regard to manufacture, presentation and sale of tobacco products, D-130 "...new enacted...probably in force," testimony of Yves-Marie Morissette, Q. 87, p. 3035).

¹⁰ European Parliament and Council Draft Directive 2001/0119 (COD) with regard to the harmonization of legislative, regulatory and administrative provisions of the member states with regard to advertising and sponsorship in favour of tobacco products, D-129.

¹¹ Public Health (Tobacco) Act, 2001, D-131 ([Translation]"...which was also tabled and which, according to the agenda of the Irish Parliament is between 2nd and 3rd reading." Testimony of Yves-Marie Morissette, Q. 87, p. 3034).

APPENDIX 7

BACKGROUND ON THE *TOBACCO ACT*

Introductory remarks

It is fitting here to describe the roles and responsibilities of the various authorities involved in the enactment of the *Tobacco Act*, because there must be no confusion relative to the Department of Health, the Governor in Council, the House of Commons and its committees and the Upper House (the Senate) and its committees.

What is at issue in this case is not the decision by Health Department officials, but rather the work done by the legislator, i.e., the Canadian Parliament, composed of the House of Commons and the Upper House called the Senate:

Section 17 of the *Constitution Act, 1867*:

IV. LEGISLATIVE POWER

Constitution of Parliament of Canada

17. There shall be One Parliament for Canada, consisting of the Queen, an Upper House styled the Senate, and the House of Commons.

Reference: Authority of Parliament in Relation to the Upper House,
[1980] 1 S.C.R. 54:

The Senate has a vital role as an institution forming part of the federal system created by the Act. (p. 66)

A primary purpose of the creation of the Senate, as a part of the federal legislative process, was, therefore, to afford protection to the various sectional interests in Canada in relation to the enactment of federal legislation. (p. 67)

The power to enact federal legislation was given to the Queen by and with the advice and consent of the Senate and the House of Commons. Thus the body which had been created as a means of protecting sectional and provincial interests was made a participant in this legislative process. (p. 68)

Role of the Department of Health

It is because of the public health problem caused by smoking that the Department of Health has proposed several programs to protect Canadians from the harmful effects of tobacco.

The powers and duties of the Department of Health are listed in section 4 of the *Department of Health Act* – S.C. 1996, c. 8:

4. (1) The powers, duties and functions of the Minister extend to and include all matter over which Parliament has jurisdiction relating to the promotion and preservation of the health of the people of Canada not by law assigned to any other department, board or agency of the Government of Canada.

Particulars

(2) Without restricting the generality of subsection (1), the Minister's powers, duties and functions relating to health include the following matters:

- (a) the administration of such Acts of Parliament and of orders or regulations of the Government of Canada as are not by law assigned to any other department of the Government of Canada or any minister of that Government relating in any way to the health of the people of Canada;
- (a.1) the promotion and preservation of the physical, mental and social well-being of the people of Canada;
- (b) the protection of the people of Canada against risks to health and the spreading of disease;
- (c) investigation and research into public health, including the monitoring of diseases;
- (d) the establishment and control of safety standards and safety information requirements for consumer products and of safety information requirements for products intended for use in the workplace;
- (e) ...
- (h) subject to the *Statistics Act*, the collection, analysis, interpretation, publication and distribution of information relating to public health; and
- (i) cooperation with provincial authorities with a view to the coordination of efforts made or proposed for preserving and improving public health.

[emphasis added]

Information and education

Since the publication in 1969 of the “Report of the Standing Committee on Health, Welfare and Social Affairs on Tobacco and Cigarette Smoking” (*RJR-MacDonald*, [1995] 3 S.C.R. 199, pp. 249, 250, 278), the Department of Health has initiated several programs for informing Canadians of the harmful effects of cigarettes.

As the members of the Standing Committee on Health emphasized in 1969:

While it is clear that cigarette sales cannot be banned at this time, it is equally clear that the production, distribution and sale of cigarettes should no longer be considered in the same light as the production, distribution and sale of other products. (*RJR-MacDonald* – 1995, p. 249)

Over the years, the Department of Health has presented a whole array of educational programs:

- 1983 – Canada, Health and Welfare Canada. Canadian Initiatives in Smoking and Health.
ED-199 (RJR-MacDonald – 1995, p. 250)
- 1985 – Canada, Health and Welfare Canada. Federal and Provincial Agreement for Working on the Development and Implementation of a National Program to Reduce Tobacco Use.
ED-198 (RJR-MacDonald – 1995, p. 251)
- 1987 – Canada, Health and Welfare Canada. National Program to Reduce Tobacco Use. “Directional paper of the national program to reduce tobacco use in Canada.” Appendix to the National Program to Reduce Tobacco Use: Orientation Manuals & Historical Perspective.
ED-198 (RJR-MacDonald 1995, p. 25)
- 1989 – National Program to Reduce Tobacco Use: Orientation Manuals and Historical Perspective.
ED-197
ED-198 (RJR-MacDonald 1995, p. 25)
- 1995 – Health Canada, Tobacco Demand Reduction Strategy: Year One Review and Update. January 1995.
ED-191
- 1995 – Health Canada, Tobacco Control – Blueprint to Protect the Health of Canadians.
ED-189
- 1998 – Health Canada – Evaluation of the tobacco demand reduction strategy, Final report.
ED-162
- 1999 – New Directions for Tobacco Control in Canada – A National Strategy.
ED-159
- 1999 – Report on Tobacco Control – Health Canada
ED-139
- 2001 – The National Strategy: Moving Forward. 2001 Federal, Provincial, Territorial Progress Report on Tobacco Control.
ED-122

- 2001 – Press release: Government announces a comprehensive strategy to discourage smoking.

ED-120

Work done by Health Canada

Ms. Ferguson held the position of General Director, Health Policies and Information, at Health Canada from 1991 to 1997 and coordinated the development of the tobacco control policy. She testified before the Court on June 11 and 12, 2002, (Volumes 35 and 36 of the transcripts) to explain the work carried out by Health Canada with regard to its tobacco control policy.

In particular, the following documents, which are cited later on, were produced during her testimony:

- P-123 Ms. Judy Ferguson's personal notes for the hearing
- D-274 Tobacco Control: A Blueprint to Protect the Health of Canadians
- D-271 Analysis of Options for Tobacco Product Promotion Activity Restrictions

The smoking problem as perceived by Health Canada prior to the coming into force of the *Tobacco Act* (pp. 4-5 of P-123)

Health Canada's view of the smoking problem hinges on three points:

1. The product and its emissions (Q20-25)

- The product itself (tobacco) is toxic and creates dependency; it contains many dangerous chemical products including known carcinogens.
- Smoking is the leading cause of a series of diseases that could be avoided, such as heart disease, cerebrovascular accidents, respiratory illnesses and cancer.
- Smoking is the leading cause of premature death; between 40,000 and 45,000 Canadians die every year as a result of smoking.
- Second-hand smoke has numerous harmful health effects; it is linked in particular to heart disease, sudden infant death syndrome and respiratory illnesses.
- The costs associated with smoking are estimated at 15 billion dollars a year in lost productivity and 3.5 billion dollars a year in health care.
- On average, smokers begin smoking between the age of 14 and a half years and 15; 14% of children between ages 10 and 14 smoke.

- Roughly 300,000 young people start smoking every year. They believe they will not become addicted, but will likely have a difficult time quitting.
- About half of addicted smokers will die from a smoking-related ailment.

2. Access to tobacco products (Q25)

There is widespread sale of tobacco products in thousands of retail outlets and minors can obtain them fairly easily, whether through older friends or from retailers who do not abide by the law.

3. The factors that are an incentive to use tobacco (Q25)

Price may be considered an inducement factor. That was the case before 1994, during the years when smuggling was prevalent and consumers had widespread access to purchasing cheaper cigarettes sold illegally.

Advertising also constitutes a powerful means of encouraging the use of tobacco products:

- advertising is pervasive and invasive; it can be found on billboards, walls, in kiosks, on buses, etc.;
- it provides a positive image of smoking and conveys messages that appeal to young people;
- it reinforces smokers' behaviour and discourages them from abandoning their consumption habits;
- it conveys the impression that smoking is a pleasant, socially acceptable and more widespread activity than it actually is;
- advertising suggests that the smoker can derive advantages or benefits from smoking.

In the period that preceded the coming into force of the *Tobacco Act*, we saw a considerable quantity of sponsorship ads.

It is necessary to bear in mind that young people are particularly vulnerable to advertising.

Health Canada's approach to tobacco control (p. 5 of P-123, Q26)

The approach advocated in tobacco control is a **comprehensive approach** because smoking is influenced by several factors at the same time. In this comprehensive approach, different measures can be implemented simultaneously: increase in the tobacco product taxation rate, education, awareness and prevention campaigns, cessation assistance programs, the enactment of legislation, etc. Applied individually, each of these measures is ineffective and this is why it is necessary to favour comprehensive solutions.

The impact of the Supreme Court's decision (p. 6 of P-123, Q27-30)

This decision is of considerable interest for the following reasons:

- it created a regulatory vacuum that allowed tobacco companies to advertise without restriction (the result of which contradicts health messages and causes a potential increase in consumption, especially among young people);
- it confirmed the importance of the purpose of the TPCA, namely, to protect the health of Canadians, an objective that was deemed valid enough to limit the tobacco companies' freedom of expression;
- it envisaged alternative solutions that the Court could consider reasonable, such as prohibiting "lifestyle" advertising and advertising aimed at young people, while allowing "information" or "brand-preference" advertising.
 - a)

The Supreme Court's judgement was rendered on September 21, 1995. The Minister of Health decided to consult Canadians on the legislative directions aimed at filling the regulatory vacuum created by the Supreme Court's decision. Health Canada officials then studied the legislative options that might enable the department to achieve its public health objectives. (ED-274).

The tobacco control policy development process (p. 7 of P-123, Q31-32)

The development of the tobacco control policy was based on the four following points:

1. The issue: tobacco poses a problem such as the ease with which it can be obtained. The inducement to consume and the regulatory vacuum created by the Supreme Court's decision are also problems.
2. The reasons warranting intervention: the health of Canadians and the social costs smoking creates (morbidity and mortality rates, loss of productivity, etc.).
3. The solutions contemplated: regulating the product, limiting its accessibility, reducing demand, educating citizens and informing them of the health risks of smoking.
4. The measures selected: the measures selected by the Minister were legislation, regulation and the administration of the Act.

The Blueprint (D-274, pp. 8-9 of P-123)

Health Canada decided to explain its policy development process to Canadians and to consult them by using a public document entitled "Tobacco Control: A Blueprint to Protect the Health of Canadians" (D-274).

This blueprint informed Canadians about the problems with smoking, described the health objectives pursued by Health Canada and set out the intended legislative directions. (Q32-33)

Since the product could not be prohibited (there are more than 6 million smokers), the emphasis was placed on reducing the demand (by regulating the product, its promotion and how it is sold). There was an obvious need for a comprehensive approach to attack a set of factors that have a bearing on smoking (place maximum restrictions on advertising and counterbalancing the positive messages with health warnings). (Q34)

Consultation is an integral part of the democratic process, as the Supreme Court emphasized in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at pages 256, 257, para. 68:

Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas" (*Saumur v. City of Quebec*, *supra*, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.

Canadians want to have their say on the matters that concern them or that concern their country. Public consultations are useful to help the government learn its citizens' opinions and to see whether the government is on the right track. This process also enables it to gather new ideas, benefit from a variety of opinions and obtain a more accurate view of Canadians' values and priorities. (Q33)

The tobacco consultation process lasted several months and many respondents participated who had differing opinions: provincial governments, municipal administrations, tobacco manufacturers, retailers, health agencies, artistic and sport associations, educational institutions, unions, etc. Health Canada received approximately 3,000 responses, of which close to 85 were detailed briefs, and held bilateral consultations with roughly thirty groups. (Q35)
(ED-188: Blueprint submissions).

As Ms. Ferguson explained, the task of Health Canada officials consisted of reviewing the responses and suggestions received from citizens, reviewing the studies done by foreign organizations and developing different legislative solutions taking into account the guidance from the Supreme Court and the legislative objectives pursued.

Research (pp. 9-10 of P-123, Q36-38)

Scientific research has allowed us to learn more about a plethora of smoking-related factors. What is known about this issue is based on a vast array of international research studies. A dozen studies were also commissioned by Health Canada, which wanted to know the prevailing domestic situation regarding questions like the marketing and promotion of tobacco products, access to those products, the effectiveness of voluntary

codes, the content of the product, the factors that motivate people to start smoking and about smoking itself.

The research confirmed the need to adopt a comprehensive approach to tobacco control (the factors that lead to tobacco consumption are complex, multifaceted, multidimensional and interrelated). Furthermore, the level of knowledge expanded Health Canada's thinking on certain aspects of tobacco product regulation, smoking and its causes.

"Analysis of Options for Tobacco Product Promotion Activity Restrictions" (D-271, pp. 10-15 of P-123)

In the document entitled "Analysis of Options for Tobacco Product Promotion Activity Restrictions," submitted as D-271 (Q39-44), Health Canada deals with **tobacco product promotion activities (TPPA)** and the options it considered for restricting these activities. In the judgement on the TPCA, the Court criticized the government for not having documented the options it had envisaged. This document describes and sets out the Health Canada position (Q41).

The objectives of this document are the following: (s.1, p. 1 of D-271, p. 11 of P-123):

- to explain Health Canada's approach concerning the regulation of tobacco product promotion and marketing activities;
- to document the options considered.

The analysis of the options covers several aspects of smoking (pp. 11-12 of P-123), the following in particular:

Information on tobacco products and the use of tobacco (s.1, p. 1 of D-271):

- In spite of its harmful effect on public health, tobacco is a highly accessible, legal product;
- Science has not yet established to what extent humans can be exposed to tobacco smoke without risk;
- Tobacco causes a very strong dependency;
- Generally speaking, smokers start smoking in pre-teen years or in adolescence;
- Tobacco promotion is pervasive;
- Tobacco represents a significant source of taxation revenue.

Legislative and public health objectives (p. 5 and 8 of D-271):

Protect the health of Canadians from the harmful effects of smoking:

- Reduce tobacco consumption;
- Raise the cessation rate;

The principles applicable to the development of the options (p. 9 of D-271):

Analysis of social science studies and reports (s. 3.1 of D-271)

- The limitations of social science research:

Three principles apply to the analysis of available studies and reports. First, reliance on empirical findings is restricted by their limited availability and interpretability, in view of the methodological limitations of social science in a complex area like the measurement of the influence, impact and effectiveness of persuasive communications. Because scientific experiments are not possible (and would not be ethical) and empirical data are often not available, reason and logic must be relied upon to analyze the issues and to apply the guidance of the Supreme Court of Canada.

- The information received must be conservatively assessed:

Second, available information is conservatively assessed, to avoid going beyond what can reasonably be inferred from the available studies. The approach adopted is multifactorial and qualitative, not deterministic or quantitative. The consistency of available scientific studies is considered.

- The sources consulted:

The two major sources of relevant findings and studies are the existing public record at the time of writing, including the syntheses of social science findings provided by published reports from the United States (such as that of the Office of the Surgeon General, the National Research Council's Institute of Medicine and the Food & Drug Administration) and by the analytical topic reports prepared under contract for Health Canada, that have been made public. In addition, to the extent feasible, the results of some recent studies that appeared in the academic literature after the publication of the major policy syntheses, or which came to Health Canada's attention through the consultation process on the 1995 Blueprint, are also included.

- The conclusion of the analysis is summarized in this way:

It follows, therefore, from the above considerations, that tailored legislation that allows sufficient latitude for informational or brand preference advertising for the purpose of communicating with consumers, but which prohibits lifestyle promotional activities, and limits the spillover impact of any permissible tobacco promotional activities on to children and adolescents (youth), can serve to reduce inducements to use tobacco products while allowing tobacco companies to communicate with consumers. (p. 11)

The options for restricting the promotion of tobacco products (s. 7, p. 77 of D271, Q55-66):

Option 1: A voluntary packaging and advertising code

Advantages: No obligations or expenses related to its implementation.

Drawbacks:

- Applies only to the signing parties (the three main tobacco manufacturers); they can stop adhering to the Code at any time (as RBH did in 1986-1987);
- Does not contribute to reaching the health objectives (the Code neither prevents nor significantly reduces the impact of tobacco product promotion on young people);
- The industry's objective (sell a greater quantity of a product harmful to health) is fundamentally incompatible with the government's objective (reduce the consumption of that product);
- The Code is not enforceable (no sanction has been provided for in the event of transgression).

It has been shown in the past that voluntary codes serve the industry well but serve the public poorly. Indeed, there is very often failure to comply with voluntary codes.

Option 2: Negotiate a voluntary code with the tobacco industry (p. 81 of D-271) (Q63)

Advantages: The same as for option 1 (no obligation to apply it or to enforce it).

Drawbacks: The same as for option 1 (the government's health objectives being incompatible with the mercantile objectives of the tobacco industry).

Option 3: Total ban on all forms of tobacco product promotion (p. 82 of D-271) (Q64)

Advantages: In harmony with the health objectives.

Drawbacks: Contrary to the guidance provided by the Supreme Court.

Option 4: Partial ban (comprehensive legislation combined with limited prohibitions) (p. 83 of D-271) (Q65)

In this case, eight or nine options are possible.

The Health Canada document also proposes some options for regulating event promotion (sponsorship advertising):

- Allow only sponsorship advertising (p. 94 of D-271)
- Totally ban tobacco product brand elements in sponsorship advertising (p. 95 of D-271)
- Restrict sponsorship advertising (limited requirements):

- impose proportionality restrictions on brand elements in sponsorship advertisements (p. 96 of D-271)
- impose the placing of mandatory health messages in sponsorship advertisements and on other promotional items (p. 97 of D-271)
- regulate the marketing of sponsored events (p. 99 of D-271)
- Contemplate other possible restrictions (p. 101 of D-271) :
 - slow the growth in marketing sponsored events
 - limit the audience targeted by sponsorship advertising
 - engage in counter-marketing
 - abolish the policy and the funding (p. 102 of D-271)

The preferred option is described in this way (p. 104 of D-271) (p. 15 of P-123, Q66) :

A legislative package to restrict TPPA by effectively reducing its appeal and extent of pervasiveness would have to be comprehensive in scope. This would respond to the emerging marketing and social science information which acknowledges that multi-dimensional marketing strategies have an aggregate impact. **All the major means available for promoting tobacco products must be addressed by legislation, including advertising that depicts the product or package, advertising by means of tobacco-linked sponsorship promotions and other types of promotion which enhance the visibility, prominence and appeal of tobacco products**, such as the use of expanded product displays at retail as a form of promotion. All regulations would be crafted, on the basis of research, to ensure that TPPA which is not limited to information or brand preference as distinct from lifestyle, or which is youth-oriented, is prohibited or restricted in venue.

The Health Canada document also contains summaries of a few international experiments (p. 111 of D-271) and a bibliography of 115 reference works used in preparing the analysis (p. 121 of D-271).

Besides Ms. Ferguson, a team of 10 to 12 people worked on the Health Canada tobacco control policy from beginning to end of the process (Q69).

This team even continued its activities after the Act was tabled in December 1996 because the Minister had to be prepared to testify before the Standing Committee on Health and before the Senate Committee. It was still possible that some amendments might be made to the Act, which is why the options had to be continually reviewed (Q70).

Cross-examination of Ms. Judy Ferguson (June 12)

On cross-examination, Ms. Ferguson had the opportunity to clarify Health Canada's reasons for certain choices.

Ms. Ferguson first explained that, at Health Canada, they took for granted that the Supreme Court had upheld the existence of a link between advertising and consumption, which is why it was not deemed necessary to re-establish that link (Q523, p. 7329).

Ms. Ferguson also explained why the expression "could be construed on reasonable grounds to be appealing to young persons" had been used rather than the expression "advertising aimed at young people". It was to take into account the distinction between the intent (real or apparent) of the advertising and its impact: many people who are not targeted by an advertisement are nevertheless exposed to and influenced by it. Covering only the intent would therefore be ineffective (Q265 et seq., p. 7257 et seq. and Q596, p. 7357).

Ms. Ferguson specified that, in the thinking of Health Canada, lawsuits are a last resort (Q546, p. 7336).

Ms. Ferguson adds that her team reviewed hundreds of examples of advertisements that are "informational" without necessarily containing "lifestyle elements" (Q357, p. 7283). She also indicated that she could not imagine, in light of all the research conducted by the tobacco companies, in light of the admirable innovation they demonstrate and in light of the financial resources at their disposal, that they would be incapable of producing advertising that complies with the legislation (Q548-551, pp. 7337-7339).

Regarding the prior approval of advertisements, Ms. Ferguson explained that, to her knowledge, the proposal had never been seriously submitted by the industry. Furthermore, considering that the constitutionality of the Act had been challenged, Health Canada was of the opinion that it was not up to the Minister but up to the Court to interpret the Act (Q558, p. 7341). At any rate, there remains an inherent difficulty in the prior approval process in the sense that an advertisement's legality depends on several factors: the location where it is placed, how it is disseminated, the size of the population of young people in the area where it is displayed, etc. (Q602, p. 7358).

The plaintiffs allege bad faith

The plaintiffs allege that Health Canada officials showed bad faith. Yet, there is not an ounce of proof of this. Health Canada officials disclosed all the studies that were conducted or consulted. No study was undisclosed and all the legislative options were set out.

It is worth stressing here that, at the time of the first case, all the studies the government had in its possession had been given to the plaintiffs. Once again, no study remained undisclosed.

Moreover, in the judgement he rendered in *Imperial Tobacco Ltd. v. Canada*, 1991 R.J.Q. 2260, the Honourable Judge Chabot did not refer to a study that may have remained undisclosed, but rather to a mysterious third option that the officials were recommending (see p. 2311). It emerges, from the document in question, i.e. RJR-53 now marked P-158, that this third option is very clearly revealed:

RELEVANT FACTORS:

A third option would not actually ban tobacco advertising, but may have the effect of reducing tobacco advertising to very low levels.-----

1. Increase the required size of the health warning, from 20% to 50% of the total advertising space. For packages, increase the warning size from 20% to 50% of the largest display panel.
2. The warning would not be attributed to the Minister of National Health and Welfare.
3. The proposal for a compliance board would be dropped.
4. Alter the required rotating health warning to a shorter but more effective list of warnings.

The following are suggested:

- a. ADDICTION: Tobacco is habit-forming.
- b. HARMS OTHERS: Tobacco smoke causes lung cancer and other diseases in nonsmokers.
- c. DEATH: Smoking kills.
- d. HEART DISEASE: Smoking causes heart disease.
- e. LUNG CANCER: Nine out of ten victims die within five years.
- f. POISONS: Tobacco smoke contains over 60 toxic chemicals.
- g. DEATH: Many smokers die young.
- h. SUDDEN DEATH: Smoking can cause heart attacks.
- i. FATAL DISEASES: Smoking causes cancer, heart disease, emphysema and stillbirths.
- j. HARMS CHILDREN: Tobacco smoke causes illness in children.
- k. FATAL LUNG DISEASES: Bronchitis, emphysema and lung cancer are caused by tobacco smoke.
- l. BLOOD CLOTS: Smoking is a major risk factor for blood vessel diseases.

Tobacco causes more death and illness than any other single product. Use of strong warnings taking up 50% of advertising on display space is a well-justified public health measure.

A recent Ontario Court of Appeal decision concerning contraceptive pills makes it clear that all manufacturers have a duty to warn consumers of the hazards of use of a product and to warn in such a way as to ensure that the message will be received and understood. Attribution of the warning to the manufacturer and not the Minister is consistent with current practice under the *Food and Drugs Act* and the *Hazardous Products Act*.

U.S. market research strongly supports the proposed shape of the health warning, while market research from several countries supports the use of a series of strong, simple, short warnings to be used in rotation. Market research from the United Kingdom specifically supports warning c. Warnings similarly worded to proposed warnings a, d,

g, i and k are currently in use in the United States, the United Kingdom or the Republic of Ireland.

This proposal may effectively discourage tobacco companies from advertising, promotion and sponsorship for fear of depressing sales even more than they would by refraining from advertising. Health Protection and Promotion resources required for this option are the same as for the two options presented for banning advertising.

ADVANTAGES:

1. There is no risk of the proposal being challenged as a violation of the Charter of Rights.
2. No need for new resources for Customs inspections is foreseen.
3. Consumers will receive strong, clear factual information about the hazards of tobacco products.
4. Tobacco advertising for Canadian tobacco products will be greatly reduced, if not eliminated altogether.
5. Complaints that the Minister has effectively banned tobacco advertising can be deflected by pointing out the Minister only required that packaging and advertising include strong, clear information about the hazards of tobacco products.

DISADVANTAGES:

1. It is not known that tobacco companies will withdraw all advertisements under this proposal. It seems likely, however, that they will greatly reduce their advertising, and perhaps eliminate it altogether.
2. Tobacco advertisements will continue to appear in foreign publications circulating in Canada.
3. While this measure should receive widespread support, some health interests will likely continue to call for a total ban on tobacco advertising.

RECOMMENDED ACTION:

You may wish to indicate whether you would prefer to ban tobacco advertising as outlined in either Option 1 or Option 2 of the attached briefing note, or to proceed with the third option outlined here which would have the effect of greatly discouraging tobacco advertising. -----

(the areas marked ----- reflect confidentiality exception erasures)

It is easy to see that the plaintiffs' claim that this third option had been concealed was unfounded since this option had been disclosed to both the plaintiffs and the courts. What is more, it had not even been submitted to the Minister of Health.

In the first case, the plaintiffs complained that the Attorney General may not have disclosed all the options studied. Yet, in the present case, the plaintiffs charge the Attorney General with having submitted to this Court all the legislative options examined by Health Canada officials, including all their drafts (marked as D-271, D-272 and D-273 (a) to (g)). This argument is futile and unfounded.

The work in Parliament

The process of democratically consulting Canadians continued in the House of Commons and the Senate.

See:

- Appendix A: "Chronological Excerpts of Parliamentary Business," which contains excerpts from ED-52 to ED-103
- ED-80 and ED-81: Lists of briefs submitted to Senate committees (33 briefs) and to the House of Commons (44 briefs)
- Appendix B: "List of witnesses heard by various Parliamentary committees"

It is important to recall that the decision to pass the *Tobacco Act* was not made by Health Canada officials but rather by the Parliament of Canada. To do so, it had to take into consideration varied and opposing interests.

Guidance from the Supreme Court was followed

The plaintiffs are trying to convince this Court, without any supporting evidence, that Parliament pursued a colourable purpose in enacting the *Tobacco Act*, namely that of reintroducing a total advertising ban, thereby circumventing the guidance provided by the Supreme Court.

That argument is totally unfounded since, throughout the work by the House of Commons and the Senate, Parliament kept the Supreme Court's ruling at the centre of its concerns.

Reference was made to the Supreme Court judgement on many occasions during House business:

The Minister of Health:

Mr. Dingwall: ... Great care has been taken to ensure the measures contained in this legislation reflect the guidance provided by the Supreme Court of Canada and respect the charter of rights and freedoms.

...

Contrary to what the tobacco industry may suggest, the Supreme Court of Canada recognized a link between certain forms of tobacco advertising and consumption. In particular the court stated that lifestyle advertising may as a matter of common sense be seen as having a tendency to discourage those who would otherwise cease tobacco use from doing so.

The court identifies options which would be a reasonable impairment of the right of free expression, namely: a partial ban on advertising which would allow product information and brand preference advertising; a ban on lifestyle advertising; measures to prohibit advertising aimed at children and adolescents; and attributed health messages on tobacco product packaging. These are precisely the measures that are incorporated in this bill. These clarifications are important because they set the context for the

comprehensive and integrated set of measures that are contained in the legislation before us.

This legislation is a product of a deliberate and thoughtful process. We have taken the guidance of the Supreme Court of Canada. We have studied the results of the research conducted by and on behalf of Health Canada as well as the extensive body of international data on tobacco promotion and tobacco use... [emphasis added]

ED-55, p. 7-8

(See also ED-59, p. 4)

Hon. David Dingwall (Minister of Health): ... We also considered research undertaken by Health Canada and a significant and increasing international body of research. We consulted and worked closely through the drafting process with the Department of Justice to ensure our proposals reflect the decision of the Supreme Court of Canada. The justice minister has already expressed his confidence that Bill C-71 respects the Supreme Court ruling and the Charter of Rights and Freedoms.

...

This responds to the decision of the Supreme Court, which recognized the validity and importance of the government's objective, but stated that tobacco companies should be allowed to communicate with consumers of their product.

...

In conclusion, Bill C-71 has been very carefully drafted, taking into account the decision of the Supreme Court of Canada. Its goal is to achieve all that a law favouring health could hope to achieve while preserving rights protected by the Charter of Rights and Freedoms. [emphasis added]

ED-56, pp. 4-5

Mr. Dingwall: If I may, Mr. Chairman, to my colleague, they will be able to put their name on the product. If they weren't allowed that, we would be in violation both of trademark and of the Charter of Rights and Freedoms because the product is not deemed to be an illegal product. That's the balance here.

ED-56, pp. 10-11

Ms. Judy Ferguson:

Ms. Ferguson: The Supreme Court set out some fairly clear directions, some parameters within which the government could act. We have looked at those provisions and we feel the legislation has been crafted – we've taken a lot of care to ensure it has been crafted – to respect the charter. The Supreme Court indicated that tobacco companies have a legal product, that they are entitled to communicate information to adult consumers about that product, and the bill is structured and crafted in such a way as to permit them to do that.

The court also indicated, accepting the evidence that there was a relationship between advertising and consumption and validating the federal government's wherewithal to regulate the promotion of tobacco products, that it would be a reasonable limit on freedom of expression if the promotion is targeted at youth or has a lifestyle connotation. We have taken those parameters and that is how we've crafted the bill, so that any promotion that appeals to youth or is associated with youth or has a lifestyle

connotation is an area that is restricted. We feel we have taken a lot of care to reflect the guidance provided by the Supreme Court.

The Chairman: I'm sure the tobacco manufacturers will say before this committee what they've said to some of us in writing already: that the bill infringes upon rights affirmed by the Supreme Court to communicate product and brand preference messages by prohibiting brand signage at point of sale. What do you say to that?

Ms Ferguson: The court did allow certain alternative approaches. I understand that the tobacco companies have indicated or alleged that this would be a freedom of expression issue. But the court did mention options such as a partial ban on advertising, a ban on lifestyle advertising, measures to prohibit advertising aimed at children and adolescents, as well as health labelling requirements with attribution.

We have taken that advice and have structured the bill accordingly. I can only refer you again to the comment of the Attorney General, who indicated that he was confident that the bill respects the charter. We have worked with the Department of Justice to ensure that this is the case. [emphasis added]

ED-56, pp. 47-48

Hon. P. Derek Lewis: ... In a 1995 Supreme Court of Canada decision, key parts of the Tobacco Products Control Act were struck down. In rendering its decision, however, the court made some very helpful observations and rulings which provided guidance for acceptable legislation.

...

The government has taken great care to ensure that the legislative measures contained in Bill C-71 are consistent with the directions provided by the Supreme Court. In doing so, the government recognized that, in order to promote the health of Canadians, the tobacco control measures contained in Bill C-71 must be able to withstand court challenges as already threatened by the tobacco industry. The Supreme Court recognized that the detrimental health effects of tobacco consumption are both dramatic and substantial. The Supreme Court acknowledged that tobacco kills, and confirmed the right of the federal government to legislate controls on the advertising of tobacco products. As Justice LaForest wrote:

... the Parliament can validly employ the criminal law to prohibit tobacco manufacturers from inducing Canadians to consume these products, and to increase public awareness concerning the hazards of their use.

The Supreme Court also held that the purpose of the previous Tobacco Products Control Act, to reduce inducements to use tobacco in light of the health effects of tobacco consumption, is a valid and important legislative objective warranting limitations to the right of free expression.

In the majority judgment, Justice McLachlin wrote:

... even a small reduction in tobacco use may work a significant benefit to the health of Canadians and justify a properly proportioned limitation of free expression.

The government is firmly of the view that Bill C-71 accomplishes this in a reasonable and proportionate manner. [emphasis added]

ED-66, p. 5

Statements by Minister Dingwall to the Standing Senate Committee on Legal and Constitutional Affairs, March 19, 1997:

The government recognizes the freedom-of-speech issues raised by the control of tobacco promotion. In crafting this legislation, we have drawn on the guidance provided by the Supreme Court of Canada in its 1995 ruling on the *Tobacco Products Control Act* to ensure that Bill C-71 respects the *Charter of Rights and Freedoms*.

The Supreme Court of Canada recognized a link between advertising and consumption, and clearly confirmed that the federal government can control tobacco advertising under the criminal law power. The court held that Parliament can:

... validly employ the criminal law to prohibit tobacco manufacturers from inducing Canadians to consume these products, and to increase public awareness concerning the hazards of their use.

...

It is important to remember first that advertising and consumption are related. As I mentioned earlier in my remarks, the Supreme Court recognized this in its 1995 ruling on the *Tobacco Products Control Act*. However, it is also important to understand that the relationship cannot be reduced to a simplistic mathematical equation of cause and effect. It is clear to those who have researched the issue that the smoking decision process is extremely complex. There is no magic bullet. It is not just one factor that causes individuals to start or to continue to smoke. It is clear from the great weight of research in Canada and, yes, internationally, that a combination of factors, including sponsorship promotion, contributes to the decision to smoke.

...

The approach in Bill C-71 is consistent with the guidance provided by the Supreme Court of Canada. The Court determined that restrictions on the promotion of tobacco products are a legitimate means to achieve the government's health objectives and that such curbs are an appropriate response to the health impacts of tobacco use. These restrictions meet the court's requirement that a causal connection be established between the legislative measures proposed and the benefits which are sought.

...

Just as the government has taken guidance from the Supreme Court of Canada in drafting Bill C-71, I would hope that this legislation will offer some assistance and hope to parents. Parents do not want their children to smoke. They want their children to stay healthy. I believe the government has a responsibility to help fathers and mothers keep their children smoke-free. [emphasis added]

ED-68, pp. 6-10

Minister Dingwall:

When I appeared before you previously, I talked about what this legislation will and will not allow. I explained that it has been carefully tailored to respect the guidance of the Supreme Court of Canada. The bill provides for a series of comprehensive restrictions on tobacco promotion; not a total prohibition. Tobacco companies will be allowed to communicate information to their adult customers. However, the use of lifestyle and youth-oriented approaches will be restricted.

...

In this country, the Supreme Court of Canada has already recognized a link between tobacco advertising and consumption and clearly confirmed that the federal government has the right to restrict tobacco advertising. This legislation is important. That is beyond

dispute. However, as I have said before, both here and outside, it is not the panacea. [emphasis added]

ED-74, pp. 7 and 9

Hon. Derek P. Lewis: ... The Health Minister has told us that the drafters followed carefully the guidance provided by the Supreme Court of Canada in its 1995 ruling on the Tobacco Products Control Act to ensure that Bill C71 respects the Charter of Rights and Freedoms. Constitutional experts who appeared before the committee clearly recognized that fact. For instance, Professor Lessard of the Faculty of Law at the University of Victoria said:

The drafters of Bill C71 clearly took their directions from the court's decision and basically redesigned the act so that now we have partial bans and partial restrictions. So you have a direct response to what the Supreme Court of Canada said in RJR-MacDonald.

...

The tobacco industry argued repeatedly that the bill amounts to a de facto ban on advertising and event sponsorships. This is simply inaccurate. The argument does not stand up to scrutiny because the proposed legislation does not ban tobacco promotion. On the contrary, it allows product advertising; it allows the display of tobacco products at retail outlets; it allows tobacco companies to communicate information about their products to adult consumers; it allows the tobacco companies, with some restrictions, to continue to associate the brand names of tobacco products with sponsored events; and it allows the broadcasting of those events.

With respect to the manufacturers' third charge, independent legal expert witnesses who appeared before us confirmed the views of the government's own constitutional experts. The proposed legislation may be technically complex, but it is not vague... [emphasis added]

ED-76, pp. 40-41

Hon. Wilbert J. Keon: ... In many respects, the bill is weaker than the tobacco control blueprint released by the government on December 11, 1995. For example, the blueprint called for a total ban on advertising, to total ban on the use of trademarks on non-tobacco goods and a limit on point of sale package displays to one package per brand. None of these provisions are found in Bill C-71 as they were initially proposed by the government.

ED-78, p. 25

Varied and opposing interests

Besides taking the Supreme Court ruling into consideration, the House of Commons and the Senate had to arbitrate varied and opposing interest issues, *inter alia*:

- The importance of protecting the health of Canadians from the harmful effects of tobacco (45,000 Canadians die every year from diseases caused by cigarettes).
- The extent of the expenses caused by smoking, expenses that all Canadians including non-smokers have to bear (15 billion dollars in medical expenses, lost productivity, absenteeism)

- The importance of protecting young people from tobacco because it is during adolescence that one becomes a smoker, and often for life, a life that will be shortened due to diseases caused by cigarettes.
- The fact that cigarettes contain nicotine, a drug comparable to heroin.
- The fact that the cigarette serves as a drug delivery device.
- The fact that cigarettes cannot be banned because of the number of smokers (more than 6 million).
- The fact that the plaintiffs knowingly supplied the cigarette smuggling networks in the 1990s.

Parliament and the Senate had to accommodate groups with varied interests, in particular the retailers (Canadian Council of Grocery Distributors, National Association of Tobacco and Confectionary Distributors, Alimentation Couche-Tard Inc., Canadian Federation of Independent Grocers), the farmers who grow tobacco (Ontario Flue-cured Tobacco Growers' Marketing Board, the Office des Producteurs de Tabac Jaune du Québec), the match manufacturers (Eddy Match Company Ltd.), the vending machine owners (Regroupement des exploitants de distributrices automatiques de cigarettes (REDAC)), the tobacco manufacturers, the health organizations and the many cultural and sport organizations sponsored by the three major tobacco manufacturers, as well as the City of Montréal, Montréal international, the Board of Trade of Metropolitan Montréal.

(See Appendix A: "Chronological Excerpts of Parliamentary Business" containing several excerpts of House and Senate business)

Sponsorship

During the work in the House and Senate, it became apparent that section 24, dealing with sponsorship, raised serious concerns amongst cultural and sport organizations, in particular amongst the organizers of the Canadian Player's Grand Prix and Indy race in Vancouver. These organizations stated that section 24 compromised the holding of international events in Canada and would have significant financial and social repercussions. The two-year transition time was, in the opinion of several organizations, insufficient. (See Appendix A: "Chronological Excerpts of Parliamentary Business")

Hon. Raymond J. Perrault: ... Honourable senator, I will support the bill, but I believe it needs amendment. At meetings with the minister in the past two days, he has told us that he is working on alternative ideas which will make up for some of the revenue lost by deserving organizations. That is a move in the right direction.

[...]

I believe the bill needs amendments, and I have said that. However, given the parliamentary schedule, it is obvious that the bill cannot be sent back to the other place with any reasonable hope it can be amended by Parliament.

Honourable senators, for these reasons, it is with some reluctance that I support the bill. I should like to see it in a more perfected form. I know we can do better. I also know that money is required to finance many good causes in our community.

Following vigorous representations from all parts of the country, the minister has stated – and I repeat it for the Leader of the Opposition – that other options will be pursued to make it possible for significant sports and cultural events to be sponsored by private and/or public sectors. I support this bill only with this assurance. I believe that, apart from commendable efforts to reduce tobacco and alcohol consumption, the arts in Canada and certain other events must be supported adequately. It is highly desirable that world-class events such as the Indy, worth millions of dollars to the western economy, should go ahead. The number of drama companies and symphonies across the country that are recipients of revenues from the private sector need and must have support, honourable senators.

ED-78, pp. 27-28

The Minister of Health therefore made a commitment to the Senators to review section 24, since the plaintiffs were not interested in continuing to spend more than 60 million dollars a year on sponsorships under the framework allowed by section 24 of the Act.

(See Appendix A: "Chronological Excerpts of Parliamentary Business")

Mr. Rock: When I was first appointed Minister of Health, I found on my desk a copy of a letter sent by my predecessor dated April 27, 1997, to an addressee whose name I cannot now recall. That letter was a commitment to amend the *Tobacco Act* so that international auto sports could continue to enjoy tobacco sponsorship in Canada.

It presented a challenge because it was a commitment that, in order to fulfil, would require us to change the Act. We thought at first that, in a way, it might weaken it. It was in that sense that I said, when asked, that in order to fulfil the commitment we would do the least amount necessary and we would open it as narrowly as possible in order to ensure that we kept our word but did not go further than we had to in doing so. I then added that we would increase taxes to the extent possible and add whatever other regulation we could to achieve our stated goal.

ED-99, pp. 6-7

Royal Assent

The *Tobacco Act* (Bill C-71) received Royal Assent on April 25, 1997.

Change in the social context

Following that, the Canadian social context changed, in particular in Quebec, after the passing of the *Tobacco Act* by the National Assembly on December 17, 1998. That Act prohibits all sponsorship activity effective October 1, 2003, and makes provision for setting up a transition fund. Moreover, the international context has also evolved because the European Economic Community passed a directive prohibiting the sponsorship of cultural and sports events (including the F-1 car race) commencing in 2006. In November 1998, the American tobacco industry entered into an agreement with 50 states whereby the industry agrees to limit its sponsorship activities.

On June 3, 1998, Health Minister Allan Rock tabled a first reading of Bill C-42 amending the Act's section 24 on sponsorship advertising. In this way, he was following up on the commitment that had been made to the Senate.

ED-82

Bill C-42, in its initial form (1st reading ED-82), made provision for a five-year transition period for the tobacco companies' sponsorship activities. The bill prescribed two categories of events:

1. The events that existed and were sponsored by tobacco companies on or before April 25, 1997. Those events would be given an initial two-year transition period. Thereafter, and for a period of three years, promotion activities were to be restricted to the site and the time of the event, in accordance with the conditions stipulated in section 24 of the *Tobacco Act* of 1997.
2. The events for which sponsorship promotion had started on or after April 25, 1997. Those events would not be given the two-year transition period and would be subject to the provisions of section 24 of the *Tobacco Act* for a period of five (5) years.

At the end of the total five-year period, sponsorship advertising by the tobacco industry would be totally prohibited.

ED-82

During the first reading of the bill, Lynn Myers presented the following:

Because of the concerns of event organizers it was agreed that the federal government would take another look at tobacco sponsorship and motor sports. But I must add that this should never have been seen as a *carte blanche* to water down our commitment to reduce tobacco use.

At that time we said that we would respect the *Charter of Rights and Freedoms*, that we would respect international standards and that we would respect the health obligations and objectives of the *Tobacco Act*. As we consulted we heard from event organizers and we heard from health groups that were concerned with the potential influence of sponsorship on young people.

Through the process we remained determined to make this Act even more solid than it was already. In the end we decided that we could not and would not create one set of rules for some motor sports events and another for everyone else. We recognized that we did and had to treat all currently sponsored events equally.

...

That ban is more than even the *Tobacco Act* originally envisaged. That Act would have simply brought in the 90-10 rule as a new status quo.

[TRANSLATION] We have gone one step further in protecting the health of Canadians by cutting any ties between appealing and wholesome activities and tobacco consumption.

[English] Some may ask why we have decided on a period of five years. The five year transition period provides event organizers with plenty of time and plenty of opportunities to seek alternative sponsors. In our consultations with those organizers, it was clear that if we were determined to eliminate the use of sponsorship as a promotional vehicle for tobacco products, and we are, then they wanted time to make

alternative arrangements and they could. In fact I know that the process has already begun.

For example, we as a government are very pleased that Air Canada will become the new title sponsor of the Formula One Canadian Grand Prix next year. We believe that the five-year time frame will allow other event organizers to demonstrate to other potential sponsors how valuable an association with their event can be.

If this was all we were doing on tobacco control, it would be noteworthy enough. Yet we are actually doing far more and that is why Canada is recognized as a world leader in tobacco control. Indeed we keep track of the steps that other governments are taking on this issue. I want to tell my hon. colleagues on both sides of this chamber that our approach is consistent with evolving international standards. Let me offer some examples.

The European Union recently announced that it is moving in the same direction as we are. It intends to ban tobacco sponsored promotions by the year 2006. It intends to pursue a transitional strategy on the way to that ban.

Australia announced last week that it too will totally prohibit tobacco-sponsored promotions by the year 2006.

The United States is moving ahead on actions that will limit the exposure of children to tobacco promotion in ways that are consistent with much that is already in our *Tobacco Act*.

...

In Quebec, the Parti Quebecois government has passed strong legislation that among other things restricts tobacco sales to minors and the promotion of tobacco products. [emphasis added]

ED-87, pp. 54, 56-57

Standing Committee on Health

Bill C-42 was submitted to the Standing Committee on Health on October 8, 1998.
ED-88

The committee members reviewed the proposed amendments, some of which were rejected, while others were accepted.

Ms. Elinor Caplan (Parliamentary Secretary to the Minister of Health): With that in mind, the Canadian Cancer Society identified amendments that it wanted to see in Bill C-42. During second reading debate many members of the opposition indicated support for those amendments. Many opposition members and I can tell the House that many members on the government benches also supported the amendments proposed by the Canadian Cancer Society.

Therefore, at committee, during the second reading clause-by-clause debate, we announced that we were not only intending to amend the bill, but we brought forward three particular amendments which were supportive of the proposals that had been made by the Canadian Cancer Society and supported by many, many others in the House and outside the House.

First, we proposed that October 1, 1998, would specifically be identified as the start date for the transition under this bill. In effect, that means that the five-year clock has

already begun to tick down on sponsorship promotions. If that amendment passes, as it did at committee, and this bill passes in the House, the clock has already begun to tick and the original intent of the timeline is firmly in place, being October 1, 1998.

Second, we proposed that the only events that could be grandfathered would be those that were already promoted in Canada. Although we never intended that it would be otherwise, this change makes it clear that an event cannot be moved from the United States or Australia or wherever into Canada and be treated as if it had already been here.

Third, we proposed that only events that had been held in Canada during the 15 months prior to April 25, 1997, could be grandfathered. Once again, it was never the intention of the government to allow events to be resurrected solely for their value as tobacco-marketing vehicles. However, this amendment, which was agreed to by the committee and is presently before the House in the amended format of this bill, formalizes that intent and makes it absolutely clear as to the way this bill will function and operate.

The Canadian Cancer Society, as I said at committee, proposed two other amendments. One would ban point of sale advertising and the other would set a ceiling on sponsorship spending. We looked at these very seriously and, after review, we believed that both raised questions of feasibility and enforceability. For those reasons we listened very carefully to what witnesses had to say at committee. Today we have a bill before us that does not reflect moving on anything that we do not believe is either feasible or enforceable.

ED-93, pp. 32-33

It is worth stressing here that many organizations and individuals with opposing interests appeared before the House Committee and tabled briefs, *inter alia*:

- ED-102, ED-90 and Appendix B: "List of Witnesses Heard by Various Parliamentary Committees"
- ED-103, ED-91
- The compilation tabled by the Canadian Cancer Society: "Compilation of Selected Evidence Regarding the Impact of Tobacco Advertising and Promotion: A Submission to Parliamentarians for Use During Consideration of Bill C-42" marked as ED-273.
- The statements by the representative of the Canadian Tobacco Manufacturer's Council, a council formed of the three plaintiffs. ED-90
- One representative of the Alliance for Sponsorship Freedom, (containing 250 members, such as the *Benson and Hedges Symphony of Fire at Ontario Place* and even some hotels) who recommended the following amendments to Bill C-42:

Hence, the alliance recommends that the government's new five-year transition period should be just that – five complete years with no off-site restrictions before the total ban comes into force. This would give our valuable events a reasonable time period to find replacement sponsors. It would be consistent with the approach agreed upon by members of the European Union, where sponsorship bans will apply in the years 2003 and 2006. Basically, we're saying don't put all those of-site restrictions on in years three to five.

If Canada's transition period is not harmonized with that of the European Community, then even the international motor sports events that are held in Canada run the risk of being dropped from the circuit entirely. Clearly, this would be in no one's best interest.

Another possible amendment we know you're considering is for sponsorship funding to be capped during the transition period. We again would ask you not to consider that cap because of expenses. We're in the business of trying to make these events grow bigger. We want to make a bigger contribution to the Canadian economy and to entertain more people through our events, and we would like to continue to see those events grow.

Some of the problems with caps would be things like prize money, and so forth. Du Maurier tennis would be a great example. To get big players in every year, they usually have to increase the amount of prizes they are giving, and a cap would certainly restrict that dramatically.

ED-91, p. 8

(See also ED-93, pp. 31, 32, 33 and 34)

On November 25, 1998, Ms. Elinor Caplan (Parliamentary Secretary to the Minister of Health) spoke during the presentation at the third reading of Bill C-42. She presented the following:

Permit me to briefly outline the contents of Bill C-42. As hon. members will recall, one section of the *Tobacco Act* includes restrictions on the way tobacco companies could advertise and promote their financial sponsorship of events such as automobile racing, show jumping, musical events and so forth.

In essence, they could only display their brand names and logos on the bottom 10% on the face of the ads, signs, billboards and so on. This restriction raised concerns. The motor sport industry, for instance, feared that the sudden loss of corporate sponsorship would jeopardize Canada's capacity to host international racing events.

Bill C-42 addresses these concerns. It proposes a phased approach which would delay the enforcement of the *Tobacco Act* promotional restrictions for two years. For the subsequent three years cigarette companies would be allowed to continue sponsoring events. However, their promotional activities outside the actual site, off site, would be restricted to the 10% size restrictions specified in the *Tobacco Act*.

At the end of five years, by 2003, promotional sponsorship by cigarette makers will be banned altogether. That is why I say that Bill C-42 strengthens the *Tobacco Act*. Instead of merely restricting promotional activity, the bill will prohibit them entirely.

These legislative changes will put Canada ahead of other nations that hold the health of their citizens in high regard. Indeed we are moving faster than Australia and the European Union, which are both implementing a similar sponsorship ban in the year 2006, three years after ours.

There is no doubt that some of the cultural and sporting groups may feel the financial pinch when the cigarette manufacturing giants are forced to withdraw their millions of dollars in sponsorship promotion. However, the fact is arts organizations and sports promoters told us over and over again that what they really needed was time to find alternative sources of funding support. That, in a nutshell, is the purpose of Bill C-42.

These groups told us that they also needed fairness. Thus under the proposed amendments every group from the Newfoundland Symphony Orchestra to the Victoria

International Jazz Festival will be treated the same. One group will not be entitled to cigarette money that is denied to another.

It is also important to point out that with Bill C-71, as with Bill C-42 before us today, the government has sought to protect public health while at the same time respecting legitimate concerns of cultural and sports organizations. As such Bill C-42 represents a careful compromise, a delicate balance between those who would desire a complete ban, preferably yesterday, and those who feel it is equally necessary to accommodate sponsored sports, cultural and entertainment events.

Striking that balance has necessitated extensive consultations both with health groups and with representatives of the arts and entertainment industry. In that context I wish to acknowledge the important contribution of the House of Commons Standing Committee on Health in carrying forward the consultation process and refining the bill before us today. As a result of the committee hearings, the government listened and further strengthened Bill C-42 as follows.

First, the start of the phase-in period of the bill is clearly identified as October 1, 1998. This means that if the legislation passes, the five-year clock will have already begun ticking.

Second, the grandfathering clause in Bill C-42 would only apply to events that had been held in Canada. In other words, promoters would not be able to move an event here from the United States or elsewhere merely to benefit from the phase-in provisions of the ban on cigarette sponsorship advertising.

Third, the new amendments would permit the grandfathering only of events that have been held in Canada in the 15 months prior to April 25, 1997. That would prevent promoters from resurrecting long dead festivals solely for their value as tobacco marketing vehicles. These changes to Bill C-42 were proposed by the health community, were adopted by the government and are consistent with our public health approach.

In conclusion, we have all heard the alarming facts. Smoking is far and away the major preventable cause of death and disease in Canada. It is estimated that nearly one in five deaths in Canada can be attributed to smoking and that is more than suicides, vehicle crashes, AIDS and murder combined. Every year 45,000 Canadians die of cancer, heart disease and lung disease as a result of tobacco use. Many more Canadians have their quality of life compromised by emphysema and other respiratory ailments.

We know that many people get hooked on smoking during their teen years and that young people are particularly vulnerable to peer pressure and messages, sometimes subliminal, encouraging them to smoke. Obviously as a caring society we have a moral obligation to act. We have a responsibility toward future generations and a duty to help our impressionable young people resist the lure of this deadly habit.

Health groups across the country urged us to lead the fight against smoking. We have not failed them. The *Tobacco Act*, as we propose to amend it, would give the government some meaningful ammunition in the battle against cigarette use. The legislation gives us as a society the power to look a gift horse in the mouth. We will have the wherewithal to say to tobacco manufacturers "Thanks, but no thanks. We value the health of our children too much to accept your money for event sponsorship".

ED-94, pp. 56-58.

See also Appendix B: "List of Witnesses Heard by Various Parliamentary Committees"

Third reading, then Royal Assent

On December 1, 1998, Bill C-42 passed third reading.
ED-96

[Senator Lynch-Staunton]: Sponsorship is a form of communication; promotion is a form of communication. When Bill C-71 was adopted by Parliament, the balance was such that although such communication was limited, it was still permitted in some form. Bill C-42 goes beyond that and extinguishes that kind of communication. We looked carefully at the question of whether in doing so we crossed the line drawn by the Supreme Court of Canada.

Our best judgment, senator, is that this is constitutionally defensible because even after that form of communication is stopped, the other forms permitted by Bill C-71 will continue. There are still ways in which the manufacturers and purveyors of tobacco can communicate with their customers about their product, whether it is in limited circulation publications, in specific physical places where only persons of age are permitted to go, or whether it is on the package itself.

While it is fair to say that Bill C-42 affects the balance struck by Bill C-71 and further limits the communication between manufacturer and purveyor on the one hand and the customer on the other, it does not extinguish it. It does not commit the legal offence that the former statute did, although it further restricts the nature of the communication.

ED-99, pp. 10-11 (evening sitting)

On December 10, 1998, Bill C-42 received Royal Assent.

Conclusion

Parliamentary debates are useful in the sense that they allow us to identify the social, economic and political context in which Parliament was required to make difficult choices concerning smoking, marketing promotion of cigarettes and the plaintiffs' sponsorship activities.

On reading the parliamentary debates, the intent of Parliament seems clear and unequivocal. Parliament was careful to follow the guidance of the Supreme Court.

The interpretive exercise the Court must perform cannot be limited to either the Blueprint (D-274) or the work by Health Canada officials: it must also take into consideration the briefs submitted. The House of Commons and the Senate heard numerous witnesses, consulted many Canadian and international studies, read a great many documents, including those submitted by the Canadian Cancer Society.

It is clear that Parliament has allowed "information" and "brand-preference" advertising thereby following the Supreme Court ruling. Ultimately, it is upon that parliamentary decision that this Court must focus.

**APPENDIX A: CHRONOLOGICAL EXCERPTS
FROM PARLIAMENTARY BUSINESS (BILLS C-71 AND C-42)**

BILL C-71: TOBACCO ACT

On December 2, 1996, Mr. David Dingwall, Canadian Minister of Health, tabled before the members of Parliament Bill C-71 “*An Act to regulate the manufacture, sale, labelling and promotion of tobacco products, to make consequential amendments to another Act and to repeal certain Acts.*” The short title is the “*Tobacco Act*” (s.1).

Minister’s statements during the tabling of Bill C-71

In his speech presenting the *Tobacco Act* (Bill C-71, ED-52) in his first reading, the Minister of Health presented:

- (a) That the *Tobacco Act* was:

... a central element in our government’s comprehensive tobacco control strategy. It complements the tobacco tax increase and the anti-smuggling initiatives announced last week, as well as the education programs designed to make Canadians more aware of the health consequences of tobacco use.

ED-55, p. 1

- (b) The focus of the bill is simple: health. Let there be no doubt on this particular point. While there are many interests involved in this debate, health, especially the health of young Canadians, is of paramount concern.

ED-55, p. 1

- (c) The government recognizes the complex and pervasive nature of tobacco use in our society. It designed a balanced and an integrated strategy that takes into account the various factors that influence the smoking decision process, particularly how these factors affect young Canadians.

ED-55, p. 1

- (d) This bill addresses the environment, messages and opportunities that affect attitudes, beliefs and behaviours about tobacco use. It does so by restricting the access young people have to tobacco products. It places reasonable limits on the marketing and promotion of these products. It increases health information on tobacco packaging and it establishes powers needed to regulate tobacco products.

ED-55, p. 2

The cost of tobacco on the Canadian economy

Smoking costs Canadians approximately \$15 billion a year, a staggering figure.

ED-55, p. 3

Youth

Of particular concern is the pattern of youth smoking. Approximately 250 000 Canadians each year take up smoking. Eighty-five per cent of these new smokers are under the age of 16 ...

ED-55, p. 3

Madam Speaker, 29 per cent of young people between the ages of 15 and 19 smoke. Fourteen per cent of kids between the ages of 10 and 14 smoke. Half of these smokers will die prematurely of tobacco related illness. The need for action is clear.

ED-55, p. 3

The result is a bill that is balanced and reasonable and that responds to the factors that lead far too many Canadian children to smoke. About two-thirds of all young people try cigarettes. For about half of them, experimentation leads to a habit that becomes regular and addictive over a two or three year cycle.

ED-55, p. 4

Restricting youth access to tobacco products as much as possible is therefore critical. Restraining access and making it difficult for children ages 10 to 14 and teenagers to purchase cigarettes decreases the likelihood that those experimenting with tobacco will graduate to addiction. The *Tobacco Act* will introduce such restrictions.

Photographic identification will be required when proof of minimum age is requested by retailers. As corner stores and gas stations become less viable as a source of supply for young smokers, they will turn to other avenues.

ED-55, p. 4

Health information

In order to enhance public awareness of the hazards of tobacco use, this legislation will increase the amount of health information to be displayed on tobacco product packaging.

Studies confirm that cigarette packaging is second only to television as a key source of health information about tobacco. A 1996 survey conducted for Health Canada revealed that 75 per cent of smokers want health warning messages to remain on cigarette packages as a reminder of some of the health consequences of tobacco use. Half of these smokers who tried to quit or cut back confirmed that labelling on the packages contributed to their decision.

In another study that same year, the majority of Canadians favoured expanding the amount of information on tobacco packages about the presence and effects

of some of the toxic constituents in tobacco and tobacco smoke, such as arsenic, lead and others.

This bill will require that information. The *Tobacco Act* will also address the role that promotion plays in the decision to smoke. Promotion does much more than just convey factual information about a product. Through associations with people, objects, events and ideas, promotion creates a brand identity or image that influences and shapes the attitudes, beliefs and behaviours of consumers and potential consumers.

ED-55, p. 5

Tobacco product promotion

Clearly it is not the exposure to one ad, one display in a convenience store or one tobacco sponsored event that triggers the decision to smoke. People do not get up in the morning and decide suddenly to take up smoking, as some people may have suggested. As I have said before, the decision to smoke, which includes the decision to start and the decision to continue, is a gradual one.

Tobacco promotion contributes to that decision and hinders the quitting process by conveying as many positive and reassuring impressions as possible that smoking is desirable, socially acceptable and more prevalent in society than it actually is, that it is sexy and cool. One should do it to be part of the game.

It is the cumulative effects of tobacco promotion that we as legislators, not members who are bound by political ideology, but those of us as legislators transforming the political ideologies that are in the House, that we must address.

...

The tobacco industry insists that its marketing campaigns do not target youth but that is not the issue here. Whatever the ostensible intent of the tobacco companies, their rich promotional campaigns reach youth. Kids cannot help but be exposed to the images of tobacco that appear on every possible medium in every conceivable location across this country. Being more aware of promotional activities than other age groups, they are susceptible to it. An Ontario study showed that they can name the tobacco sponsors of sports and cultural events. In a Canada-wide survey, 88 per cent could name the country's two most popular brands of cigarettes. That is alarming.

It is not possible to promote a particular brand of a cigarette without at the same time promoting smoking. Our objective is to diminish the prominence and the exposure of tobacco promotion in order to diminish its reach and its influence.

The bill will therefore prohibit tobacco product advertising such as broadcast advertising and billboard, bus panel and street advertising. It will permit tobacco companies to communicate product and brand preference information in print ads in publications that are primarily read by adults, in direct mailings to adults and in places where children are not permitted by law, for example premises that are licensed to sell various alcoholic beverages.

Under the bill the use of tobacco brand names or logos on youth oriented products or those with lifestyle connotations will not be permitted. Young

people should no longer serve as walking billboards for tobacco products by wearing ball caps or backpacks emblazoned with cigarette brand names or symbols.

...

Finally this legislation will give government the authority to regulate tobacco products. While we do not plan to exercise this authority right away, it is important that we have the flexibility to respond quickly to new products that may be introduced on to the market, as well as the developments in social and scientific knowledge as it evolves.

If and when it becomes possible to make tobacco products less hazardous without inadvertently creating new health hazards or triggering negative economic effects, we will have the means to do so.

The legislation will also ensure that we have the information we need to effectively monitor and enforce the production, promotion and sale of tobacco products. Tobacco manufacturers will be required to provide the government with product and sales information as well as information about their manufacturing, distribution and promotion practices.

ED-55, pp. 5 to 7

Taking into account the Supreme Court ruling

Great care has been taken to ensure the measures contained in this legislation reflect the guidance provided by the Supreme Court of Canada and respect the *Charter of Rights and Freedoms*.

...

Contrary to what the tobacco industry may suggest, the Supreme Court of Canada recognized a link between certain forms of tobacco advertising and consumption. In particular the Court stated that lifestyle advertising may as a matter of common sense be seen as having a tendency to discourage those who would otherwise cease tobacco use from doing so.

The Court identifies options which would be a reasonable impairment of the right of free expression, namely: a partial ban on advertising which would allow product information and brand preference advertising; a ban on lifestyle advertising; measures to prohibit advertising aimed at children and adolescents; and attributed health messages on tobacco product packaging. These are precisely the measures that are incorporated in this bill. These clarifications are important because they set the context for the comprehensive and integrated set of measures that are contained in the legislation before us.

This legislation is a product of a deliberate and thoughtful process. We have taken the guidance of the Supreme Court of Canada. We have studied the results of the research conducted by and on behalf of Health Canada as well as the extensive body of international data on tobacco promotion and tobacco use.

ED-55, pp. 7-8
(also see ED-59, p. 4)

Solution to the tobacco epidemic

There is no magic solution to the public health epidemic of tobacco use in our society. There is no law that can turn this problem around overnight, but we can take steps to make tobacco less acceptable and less accessible to youth. We can take measures to counter the positive aura that so often contributes to kids' decisions to smoke. We can ensure that people have the information they need to understand what smoking does to their body and to those exposed to tobacco smoke. We can strike a balance between the reality of tobacco use, the charter of rights and the health interests of Canadians.

Our first priority is the health of Canadians and young Canadians in particular. We have proposed steps which should reduce their tobacco use and lessen the encouragements to smoke they encounter all around them. The bill will help to reduce the sense that tobacco use is just a right of passage for young people on the way to a glamorous adult life.

ED-55, p. 8

On December 5, 1996, the *Tobacco Act* was referred to the Standing Committee on Health.

The *Tobacco Act* at the Standing Committee on Health

On December 6, 1996, the Minister of Health commented to the members of the Standing Committee on Health:

The factors at the source of the Act

Hon. David Dingwall (Minister of Health): ... Let me briefly outline the factors that shape this bill, Mr. Chairman. Last December the government released its Blueprint to protect the health of Canadians. The document defined our health objectives and the approach to tobacco control we proposed at that time.

Since the release of the Blueprint, we have consulted extensively with Canadians from coast to coast to coast. We have considered the views expressed in follow-up consultations with medical and public health experts, provinces and territories, community groups, non-governmental organizations, affected industries, arts and sports groups, and individual Canadians. We have reviewed more than 3,000 submissions presented to Health Canada. Let me emphasize here that we will follow the normal regulatory process and will consult further on the regulations. Those affected will have ample opportunity to comment on the regulations as they are developed.

We also considered research undertaken by Health Canada and a significant and increasing international body of research. We consulted and worked closely through the drafting process with the Department of Justice to ensure our proposals reflect the decision of the Supreme Court of Canada. The Justice Minister has already expressed his confidence that Bill C-71 respects the Supreme Court ruling and the *Charter of Rights and Freedoms*.

All these factors shaped our proposals. They account for the fact that while our approach reflects the directions outlined in the Blueprint, we have refined the original proposals in some areas.

On advertising, for instance, the Blueprint called for the most comprehensive prohibition on advertising possible. That is what we are proposing. Bill C-71 will prohibit all tobacco advertising except non-lifestyle ads in publications with primarily adult readership and in direct mailings.

...

The government is not proposing to prohibit tobacco advertising or sponsorship promotion, but rather to limit and control the manner in which these activities may be carried out. This responds to the decision of the Supreme Court, which recognized the validity and importance of the government's objective, but stated that tobacco companies should be allowed to communicate with consumers of their product. We are acting to limit the damage ultimately done by the inducements to use tobacco products and brands, inducements that counter health education and the best health advice society can offer to young people: simply, don't smoke.

...

In conclusion, Bill C-71 has been very carefully drafted, taking into account the decision of the Supreme Court of Canada. Its goal is to achieve all that a law favouring health could hope to achieve while preserving rights protected by the *Charter of Rights and Freedoms*.

ED-56, pp. 3 to 5

The Act is not a total ban on advertising

Ms. Judy Ferguson (Director General, Health Policy and Information Directorate, Department of Health): Advertising will be restricted at the point of sale. We are limiting advertising to printed material in publications with primarily adult readerships. We are limiting it to direct mail to adults, which includes email, and we will be limiting it to signs in places where young persons are not permitted by law.

As for advertising that companies will be allowed to do, we are looking at the kind of ads that would be detailed in regulations that would be the subject of consultations with the industry. There would be health messages on the ads. There would be toxic-constituent information on the ads, but there would likely as well be a depiction of some sort of the tobacco package, which is one of the more significant advertising tools the tobacco company has.

...

Mr. Dingwall: If I may, Mr. Chairman, to my colleague, they will be able to put their name on the product. If they weren't allowed that, we would be in violation both of trademark and of the *Charter of Rights and Freedoms* because the product is not deemed to be an illegal product. That's the balance here.

ED-56, pp. 10-11

Mr. Dingwall: ... As to the legislation and the policy, we looked at the four key elements of marketing strategies, and whether it be Nike, Pepsi, Coca-Cola – you name it – there are four key elements: the price, the place, the product itself, and the promotion. What we've done in the legislation and in the policy is try to address each of those key elements in a very balanced and comprehensive way.

...

On the place, there have to be some restrictions on the place in terms of where this product is sold and the kinds of conditions in which it is sold.

I say to that individual who says government is overstepping the threshold that the fact of the matter is that 41,000 Canadians die each year because of tobacco consumption. Ministers of health in Quebec, Alberta, B.C. and Nova Scotia say, "This is \$3.5 billion to our health care systems." Therefore we had to put some restrictions on the place, on the promotion of the product, and on the product itself. We've tried to do that.

On the question, why not ban the substance, if we were to ban the substance, I can just see what would happen. We have seven million Canadians who are addicted to smoking in this country, and I think we would trigger a round of smuggling and racketeering in this country that we haven't seen since the days of prohibition. Certainly it's not our intention both to go to racketeering and, if you will, smuggling, because we think in the end more people will end up smoking as a result of that.

We can't ban the substance, but we certainly can put restrictions on the various elements to deny, as much as humanly possible, the access for young people to cigarettes and their effects on them. The longer we can keep the substance away from them, the greater the probability they will not be addicted.

ED-56, p. 14

Regarding the regulation of tobacco products (s. 7 of the Act)

Mr. Speller: ... RJR-MacDonald sent out a fax overnight. I got it this morning. It says:

Regulatory powers – the Bill enables and requires the government...to enact extensive regulations which are not subject to review by Parliament.

Is that true?

Under another area, they say:

Penalties are extreme – any person can accumulate full penalties for each day that an offence is committed. A sign visible for 30 days is punishable by 60 years in prison.

I'm wondering also if that's the case.

Finally, very briefly, on the whole question of regulating nicotine, are there any studies on what happens, for instance, when you lower nicotine? Will people go to other brands, such as U.S. brands, and as a result hurt my tobacco growers? What happens when you lower nicotine? Do people try to get the nicotine somewhere else? Do you have any answers to those?

Ms. Ferguson: About regulation of nicotine, there are studies, and we would have to do research of our own, to assess what the impact of lower rates of nicotine would be. Nicotine is the addictive substance of tobacco products. It's what gives people the buzz; the hit. With every draw, it takes seven seconds for the nicotine to reach the brain. There are different strengths of nicotine within various brands of cigarettes, as you know. One of the things we would want to ensure is that if we do adjust the level of nicotine we wouldn't be

encouraging some kind of compensatory behaviour whereby people would smoke more or they would attempt to get their supply of higher-level-nicotine cigarettes elsewhere. It's not something we are contemplating doing in the immediate future. Clearly research would have to be done to make sure, as I said, we wouldn't inadvertently create negative health consequences or trigger economic impacts that are undesirable.

ED-56, p. 21

Mr. Dubé: Why did you call this the "*Tobacco Act*?" That creates a bit of a problem, because when you say "tobacco," that can also concern tobacco producers even though it says the opposite in the legislation. It's clear that the purpose of the legislation is to control the selling of advertising and tobacco products. Why did you only refer to tobacco?

Ms. Pégeot: There are many reasons for this. First of all, it was short and simple and in parallel with other legislation, such as the *Food and Drugs Act*. Secondly, the legislation affects various aspects of tobacco control, the product itself, access, promotion and labelling. Therefore, we felt that the title properly reflected the content of the legislation. Lastly there are also provincial laws as you probably know which concern tobacco; they refer to tobacco control and regulations. We wanted to distinguish our legislation from provincial laws.

Mr. Dubé: Let me jump ahead to clause 7, which stipulates that the Governor in Council may make regulations establishing standards for tobacco products, etc. I would like you to explain what "prescribing the amounts of substances" means.

Ms. Pégeot: That means that when toxicological knowledge or social science knowledge about the level of use of the product will evolve, or if a new product comes on the market and the Governor in Council believes that this product should not be on the Canadian market, this power will enable the Governor in Council to prescribe the amount of substances.

For instance, this could be nicotine, carbon monoxide contained in smoke or tar contained in tobacco and smoke. The prescription of amounts of substances allowed will mean that the product can be relatively safe. These measures will only be taken when the Governor in Council is convinced that they must be in order to protect the health of Canadian men and women.

...

Ms. Pégeot: This kind of power exists in other legislations administered by the department, more particularly the *Food and Drugs Act* or the *Hazardous Products Act*. This kind of power did not exist before for tobacco products and it was judged necessary that this kind of power could be exercised. If science evolves and gives us the necessary knowledge that would allow the Governor in Council to take certain steps so that the product becomes safe, or if a product is put on the market and, for all kind of reasons, is really judged to be unacceptable for Canadians from a health point of view, the Governor in Council, at that time, should take these kinds of steps. It is his responsibility.

ED-56, pp. 26-27

Regarding section 30 of the Act

Mr. Speller: Thank you. I have a few questions, Mr. Chair. As you know, the Ontario Flue-Cured Tobacco Growers' Marketing Board is coming next, so they will ask my growers' questions for me.

I want to go back to this thing that I got overnight – I think all members did – from RJR-MacDonald. I'm not sure if you've seen it. They bring up a couple of other interesting points and I would like your response to them.

Under the heading of "Product advertising," they say:

"the Bill infringes upon rights, affirmed by the Supreme Court, to communicate product and brand preference messages, by prohibiting brand signage at a point of sale."

In terms of retail displays, they say:

"retailers would lose millions of dollars in contract payments due to the ban on brand signage and further regulations that limit retail displays."

Finally, in terms of sponsorship, they say:

"limitations on the ability to promote events using brand names significantly reduces their commercial value so that major contracts will not be renewed."

Could you comment on RJR-MacDonald's assumptions?

Ms. Ferguson: With respect to their first point, as I understand it, that brand signage is being prevented at point of sale, promotion is being prevented at point of sale, but display is not. The one thing that the Minister did mention briefly in his opening statement is that the Blueprint suggested that we limit the display to one package per brand. Through the consultation process we agreed that was not practical, so the display of brand signage will be permitted. It will be regulated and we will discuss with or consult with the industry as to what that display will look like and how big it will be.

ED-56, p. 35

Regarding sections 18(2) and 21 of the Act

Mr. Dubé: On page 7, subsection 18(2)(b), just at the top of the page, it says:

(b) a report, commentary or opinion in respect of a tobacco product or...

The way it's worded and in that context, it's as though it were prohibited. For example, the wording leaves the impression that someone, either an expert or a promoter who, once the law is passed, wanted to talk about that, even if it's just before a committee, during a public meeting, to say that in his opinion it goes too far, would not have the right to express that opinion any more.

Ms. Pégeot: No, that is not the intent of the subsection. You have to read subsection 18(2) in the context of the definition of the word "promotion" in 18(1). This definition would not at all prohibit the kind of intervention you have just mentioned.

Mr. Dubé: I don't know in what clause, but it says that in the regulations, the only things allowed are those that are authorized by the Act. You say that it's allowed, but it's not written. If it's not written, then it's prohibited.

Ms. Pégeot: This paragraph has to do with the application of the Act and what it says...

Mr. Dubé: No, I'm talking about 18(2).

Ms. Pégeot: That's it. Subsection 18(2) deals with what the law does or does not apply to. It says that the definition of "promotion" does not apply to that kind of activity. So, for example, it does not cover lobbying activity or the activity of people making reports or giving opinions for or against any specific tobacco products.

As a matter of fact, this paragraph was specifically drafted so that the kind of activities you described would not come under the Act.

Mr. Dubé: I had similar reservations concerning clause 21. Line 25 in subclause 21(1) says:

...by means of a testimonial or an endorsement...

That struck me as a bit excessive but if it's taken to refer to the representatives of a tobacco company merely speaking to people about a particular company or commenting on it without necessarily advertizing or using a loudspeaker... Would that type of situation be targeted?

Ms. Pégeot: No, clause 21 applies to a well-known personality saying that he smokes a particular brand, for example, and receiving payments for such an endorsement. So it amounts to having some personality promote the product. I don't know whether you are familiar with the Joe Camel character in the US. He has become a character used in comics and is now seen on packs of cigarettes playing golf or baseball. This is the type of concept that comes under clause 21.

Mr. Dubé: It may depend on where you happen to be. Personally I'm not known in Ottawa but I think I am known in my constituency.

Ms. Pégeot: Yes, if you were paid by a tobacco company to say that you smoke Rothmans, du Maurier or any other brand, you would then come under section 21.

Mr. Dubé: So it's the fact of being paid that counts. If I did it free, what would happen?

Ms. Pégeot: The purpose of the Act is to control the promotion of tobacco products. So whenever the activity is considered to be promotion, it would come under the Act.

Mr. Dubé: Even if I weren't paid to do so?

Ms. Pégeot: That depends. You can certainly tell your friends what brand of cigarettes you smoke. That is not a commercial activity. It's not someone with a commercial interest who is asking you to do that.

Directions given by the Supreme Court in the RJR – MacDonald case

Ms. Ferguson: The Supreme Court set out some fairly clear directions, some parameters within which the government could act. We have looked at those provisions and we feel the legislation has been crafted – we've taken a lot of care to ensure it has been crafted – to respect the Charter. The Supreme Court indicated that tobacco companies have a legal product, that they are entitled to communicate information to adult consumers about that product, and the bill is structured and crafted in such a way as to permit them to do that.

The Court also indicated, accepting the evidence that there was a relationship between advertising and consumption and validating the federal government's wherewithal to regulate the promotion of tobacco products, that it would be a reasonable limit on freedom of expression if the promotion is targeted at youth or has a lifestyle connotation. We have taken those parameters and that is how we've crafted the bill, so that any promotion that appeals to youth or is associated with youth or has a lifestyle connotation is an area that is restricted. We feel we have taken a lot of care to reflect the guidance provided by the Supreme Court.

The Chairman: I'm sure the tobacco manufacturers will say before this committee what they've said to some of us in writing already: that the bill infringes upon rights affirmed by the Supreme Court to communicate product and brand preference messages by prohibiting brand signage at point of sale. What do you say to that?

Ms. Ferguson: The Court did allow certain alternative approaches. I understand that the tobacco companies have indicated or alleged that this would be a freedom of expression issue. But the Court did mention options such as a partial ban on advertising, a ban on lifestyle advertising, measures to prohibit advertising aimed at children and adolescents, as well as health labelling requirements with attribution.

We have taken that advice and have structured the bill accordingly. I can only refer you again to the comment of the Attorney General, who indicated that he was confident that the bill respects the Charter. We have worked with the Department of Justice to ensure that this is the case.

ED-56, pp. 47 and 48

Concerns over restrictions on sponsorship advertising

On December 9 and 10, 1996, the members of the Standing Committee on Health met with several groups with opposing interests regarding the smoking problem:

1. Industry representatives opposed to the Act;
2. Representatives from sports and cultural organizations sponsored by the tobacco industry;
3. Representatives from health organizations;
4. An expert witness consulted by the Committee on the economic consequences of the Act regarding job losses.

The monetary issues raised by the sponsorship of cultural and sports organizations by the three plaintiffs took up a significant part of the Committee's work and

generated fear that these cultural or sports organizations would disappear because of the withdrawal by the plaintiffs who would no longer be interested in sponsorship given the restrictions listed in section 24 of the bill.

For example:

Mr. Yves Rocheleau (Trois-Rivières, BQ): Mr. Speaker, I will continue in the few minutes I have left to tell you how important the Grand Prix de Trois-Rivières mentioned earlier is for jobs. It generates 150 jobs, including 80 directly. It is an event of considerable economic importance for the Trois-Rivières region. It is an international event, because it is broadcast throughout North America. It is televised because it is permitted.

ED-59, p.1

Mr. Roger Pomerleau (Anjou-Rivière-des-Prairies, BQ): Mr. Speaker, I am pleased to speak to the amendments to Bill C-71. I would like to thank the hon. Member for his passionate speech; it was probably because of the subject: tobacco.

The core of the problem with this bill is indeed sponsorship. The measures included in the bill could eliminate a number of cultural, sporting, and social events. Most Bloc members decided today, a Friday, to come back from Montreal to oppose this crazy bill, as Quebecers have asked us to.

On this entire issue, things are far from clear. Members opposite are telling us that it is clearly a health issue, and that we must legislate. Everybody recognizes that smoking is not healthy, and that we must do all we can to prevent our young people from starting to smoke. Unlike the two previous speakers, I am a long-time smoker and, despite several tries, I have not been able to quit. I think it is important to tell our young people not to start smoking, so they will avoid the problem of trying to quit later.

Since we agreed on this in principle, we voted for the bill at second reading. However, we must admit that sponsored cultural and sporting events are basically healthy and may even encourage potential smokers to be more active. We know that, generally speaking, athletes are not heavy smokers.

We are here today to speak to this bill. I would like to point out that not too many members across the way stood up for Quebec's interest in this matter. If I may, I would like to quote from an article published in *La Presse* on February 16, in which the Liberal member for Outremont, who was just mentioned as the exception in that he stood up for Quebec, is quoted by Réjean Tremblay as saying something like the following: "Everyone agrees with the intent of the legislation put forward by the Minister of Health of Canada."

ED-59, p.10

Mr. Maurice Dumas (Argenteuil-Papineau, BQ): ... The Health Minister maintains, without providing any exact figures, that several events have only a fraction of their funding coming from tobacco companies. It is important to note that, according to 16 compatible studies on 88 cultural and sporting events across Canada, it is estimated that these events generate \$133 million in economic benefits as well as 2,179 jobs.

In fact, the public is clear on the subject: cultural and sporting events are greatly appreciated by Canadians. Several of these events provide fun and relaxation to some people and jobs to other people.

Bill C-71 is threatening these events and that is why the Bloc Quebecois cannot vote in favour of this bill at third reading. In Canada, tobacco companies sponsor cultural, sporting and other events to the tune of \$60 million. In Quebec alone, sponsorship by tobacco companies totals nearly \$30 million.

One must not think that the Bloc Quebecois' voting against this bill at third reading means it does not care about the health of Canadians. On the contrary, by voting in favour of this bill at second reading, the official opposition recognized the validity of the government's objectives, particularly the importance of the health of our young people under 18. We disagree with the steps taken by the government to meet its goals.

We agree with what was said by the representatives of the Quebec medical community who have formed a common front reminding federal and provincial governments that they unconditionally support any initiative to put an end to smoking. Unfortunately, Quebec is the province with the highest rate of smokers in the 15 to 19 age group, a third of whom start smoking before 13.

ED-59, p. 17

Second and Third Readings in the House

On December 11, 1996, the Standing Committee on Health reported to the House and during the second reading, amendments were made to sections 8, 12, 13, 14(e), 20, 22, 29, 31(3), 40, 44 and 45. Section 42.1 was also added.

ED-53, ED-61 and ED-62
P-13 to P-16, P-37 and P-38

On March 6, the Minister of Health presented Bill C-71 to the House so that it could proceed to its third reading.

ED-63

In his presentation speech during the third reading, the Minister of Health, David Dingwall, stated the following:

As debate on Bill C-71 has already revealed, smoking has complex and diverse impacts and as the research mounts all around the world we are learning much more about the effects of that use. We are coming to understand more of the factors that influence the decision to smoke and yes, the decision to continue to smoke.

Let me underline one tragic fact. The decision to smoke is being made overwhelmingly by teenagers. Some 85 per cent of all smokers started before the age of 16. Those who suggest that this issue is about adult choices should keep that in mind.

...

Tobacco must be the best example of a preventable cost to medicare. But we estimate that tobacco use costs our society approximately \$15 billion each and every year, about \$3.5 billion resulting from the kinds of direct health care costs I have been talking about.

...

I wish to present to the House some facts that ought to be examined both in light of their substance and in terms of the devastating effects they can have on young people: 29 per cent of 15 to 19 years old and 14 per cent of 10 to 14 years old are currently smoking. Let us imagine a 10 [sic] disease, emphysema and other lung diseases? No. Smoking among teens aged 15 to 19 has increased by as much as 25 per cent since 1991.

...

The National Cancer Institute of Canada has issued a report entitled "Tobacco Marketing and Youth: Examination of Youth Attitudes and Behaviour on Tobacco Industry Advertising and Sponsorship." This is Canada's premier cancer research organization. It concluded an exhaustive review of the available science not only in Canada but indeed beyond our borders.

...

The United States will be implementing a full ban on sponsorship promotion in August 1998. I would like to share the following points from the federal registry of August 28, 1996.

The FDA has found that image based advertising is particularly effective with young people and that the information conveyed by imagery is likely to be more significant to young people than information conveyed by other means in advertisement.

The FDA also pointed to studies showing that children are exposed to substantial and unavoidable advertising... that advertising plays a role in leading young people to overestimate the prevalence of tobacco use, and that these factors are related to young people's tobacco initiation and use.

In essence it is a way in which to present an image and an environment that smoking is okay, that smoking some how is sexy, and that smokers should not worry about getting some form of disease in the future. It is a very well carved and focused strategy by the advertisers but in particular the tobacco companies.

The FDA also looked at sponsored events and found that the effect of sponsored events on young people who attend such events was enormous. Advertising affects young people's opinion of tobacco products, first by creating attractive and existing images that can serve as a badge of identification; second, by utilizing multiple and prolonged exposure in a variety of media; and, third, by associating the product with varied positive events and images.

The World Health Organization also recognized the link between tobacco sponsorship and consumption. It has found that the tobacco industry uses the sponsoring of sports and entertainment to complement and/or replace other marketing activities to reach large audiences and to associate their products with positive images.

...

We introduced a Blueprint in December 1995, whereby numerous consultations took place. We consulted widely with provincial and territorial governments, the health community, tobacco manufacturers, collateral industries, sports and cultural groups, and concerned Canadians. There were over 2,700 submissions in response to the Blueprint. Now, 15 months later, I

stand before the House at third reading of Bill C-71. The bill contains reasonable measures that will restrict advertising and sponsorship promotion.

...

The government has taken into consideration the concerns of the arts and sports events that rely on tobacco company sponsorship. We have set an implementation period for the sponsorship restriction provisions. We will bring them into force in October 1998. This is effectively a two-season adjustment period.

ED-63, pp. 2, 3, 5 and 6

On March 6, 1997, the House of Commons adopted Bill C-71 (ED-64).

Study of the *Tobacco Act* by the Senate

On March 10, 1997, the Senate began study of Bill C-71 (ED-65).

On March 11, 1997, the Honourable P. Derek Lewis presented Bill C-71 during second reading and stated the following:

Honourable senators, I am pleased to rise today to begin the second reading debate of Bill C-71, the Tobacco bill. This bill has one clear and compelling purpose - the health of Canadians, especially the health of young Canadians. Let there be no doubt on this point.

Honourable senators, as the Minister of Health has made clear during debate in the other place, this bill is a central and critical element in the government's comprehensive tobacco control strategy. It complements education programs designed to make Canadians more fully aware of the serious health consequences of tobacco use, as well as the tobacco tax increase and anti-smuggling initiatives announced last November.

The government's tobacco control strategy recognizes the complex and pervasive nature of tobacco use in our society. It takes into account the various factors that influence the smoking decision process: the social environment, messages and events that affect attitudes, beliefs and behaviours about tobacco use. Bill C-71 addresses all of these, but most particularly how these factors affect the decision of young people to start and continue to smoke. Bill C-71 does this in a number of ways: One, it strengthens existing restrictions on the access young people have to tobacco products; two, it places reasonable limits on the marketing and promotion of these products; three, it increases health information on tobacco packaging; and four, it establishes the powers the government will need to regulate the physical nature of tobacco products.

...

Of particular concern, honourable senators, is the pattern of youth smoking. More than 250,000 Canadian youths take up smoking every year. Eighty-five per cent of these new smokers are under the age of 16. Right now, 29 per cent of young people between the ages of 15 and 19 smoke. Fourteen per cent of children between the ages of 10 and 14 smoke. The majority of those young people who continue to smoke into adulthood will die of tobacco-related illness. The need for action is clear.

Some people argue that smoking is a matter of personal choice. Honourable senators, that is simply not so. All Canadians pay for the ravages of smoking. Smoking costs Canada's health care system over \$3.5 billion annually. That is a lot to ask of the health system at a time when all levels of government are trying to restore fiscal sanity to their budgets.

The cost of smoking does not end at the hospital or the doctor's office. Canada's overall economy must also bear the consequences of smoking through lost productivity and lost income. Statistically, smokers are more likely to miss work than non-smokers. Smokers cost Canadian employers approximately \$2 billion annually in employee absenteeism. That is 28 million days that are not worked by people who smoke. All told, the economic cost borne by Canadian society as a whole, due strictly to smoking, is approximately \$15 billion.

...

Honourable senators may recall that in 1988 the government of the day introduced and Parliament passed, the *Tobacco Products Control Act*. This act banned advertising and restricted the promotion of tobacco products, and required packaging of tobacco products to display prominent health messages and information on toxic constituents. In a 1995 Supreme Court of Canada decision, key parts of the *Tobacco Products Control Act* were struck down. In rendering its decision, however, the Court made some very helpful observations and rulings which provided guidance for acceptable legislation.

In the aftermath of the September 1995 Supreme Court decision to strike down key parts of the *Tobacco Products Control Act*, the tobacco industry said that it could regulate itself; but the industry's voluntary code failed at the starting gate, and the people it has failed the most are Canada's young people. That is the very same group which is most vulnerable to lifestyle advertising, sponsorship promotions and tobacco brand name associations. These promotional activities reinforce the mistaken notion that tobacco is normal or innocuous.

The government has taken great care to ensure that the legislative measures contained in Bill C-71 are consistent with the directions provided by the Supreme Court. In doing so, the government recognized that, in order to promote the health of Canadians, the tobacco control measures contained in Bill C-71 must be able to withstand court challenges as already threatened by the tobacco industry. The Supreme Court recognized that the detrimental health effects of tobacco consumption are both dramatic and substantial. The Supreme Court acknowledged that tobacco kills, and confirmed the right of the federal government to legislate controls on the advertising of tobacco products. As Justice LaForest wrote:

...the Parliament can validly employ the criminal law to prohibit tobacco manufacturers from inducing Canadians to consume these products, and to increase public awareness concerning the hazards of their use.

The Supreme Court also held that the purpose of the previous *Tobacco Products Control Act*, to reduce inducements to use tobacco in light of the health effects of tobacco consumption, is a valid and important legislative objective warranting limitations to the right of free expression.

In the majority judgment, Justice McLachlin wrote:

...even a small reduction in tobacco use may work a significant benefit to the health of Canadians and justify a properly proportioned limitation of free expression.

The government is firmly of the view that Bill C-71 accomplishes this in a reasonable and proportionate manner.

ED-66, pp. 3, 4 and 5

Before the Standing Committee on Legal and Constitutional Affairs

On March 19, 1997, the Minister of Health appeared before the Standing Committee on Legal and Constitutional Affairs and stated the following:

The government recognizes the freedom-of-speech issues raised by the control of tobacco promotion. In crafting this legislation, we have drawn on the guidance provided by the Supreme Court of Canada in its 1995 ruling on the *Tobacco Products Control Act* to ensure that Bill C-71 respects the *Charter of Rights and Freedoms*.

The Supreme Court of Canada recognized a link between tobacco advertising and consumption, and clearly confirmed that the federal government can control tobacco advertising under the criminal law power. The Court held that Parliament can:

...validly employ the criminal law to prohibit tobacco manufacturers from inducing Canadians to consume these products, and to increase public awareness concerning the hazards of their use.

The debate, therefore, is whether the restrictions in Bill C-71 are reasonable—reasonable in terms of the problem they attempt to address and reasonable in terms of the consequences they can be expected to have.

We believe that they are. While there may be some economic impact depending upon the business decisions ultimately taken by the tobacco companies, an assessment of this impact must also factor into the equation the economic costs caused by tobacco use, costs that amount to \$15 billion each year in direct health care and lost productivity.

...

It is important to remember first that advertising and consumption are related. As I mentioned earlier in my remarks, the Supreme Court recognized this in its 1995 ruling on the *Tobacco Products Control Act*. However, it is also important to understand that the relationship cannot be reduced to a simplistic mathematical equation of cause and effect. It is clear to those who have researched the issue that the smoking decision process is extremely complex. There is no magic bullet. It is not just one factor that causes individuals to start or to continue to smoke. It is clear from the great weight of research in Canada and, yes, internationally, that a combination of factors, including sponsorship promotion, contributes to the decision to smoke.

The decision to smoke is not just about starting. It also includes the decision to continue to smoke and the decision to delay or avoid quitting. In my view, it is simply untenable to maintain that tobacco promotion does not influence these decisions. Since tobacco promotion is so pervasive in our society, it cannot help but reach young Canadians, so it is equally untenable to maintain that tobacco promotion does not influence youth smoking behaviours.

The tobacco industry has said that the decision to smoke or not to smoke is one for informed adults to make, but what they do not say is that the people who make the decision to start smoking are rarely adults. They are kids, your kids and my kids, young kids between the ages of 14 and 16. By the time they become adults, the decision not to smoke is too often undermined by the addiction to tobacco that has already set in.

...

The approach in Bill C-71 is consistent with the guidance provided by the Supreme Court of Canada. The Court determined that restrictions on the promotion of tobacco products are a legitimate means to achieve the government's health objectives and that such curbs are an appropriate response to the health impacts of tobacco use. These restrictions meet the Court's requirement that a causal connection be established between the legislative measures proposed and the benefits which are sought.

Madam Justice McLachlin said:

Where...legislation is directed at changing human behaviour... the causal relationship may not be scientifically measurable. In such cases, this Court has been prepared to find a causal connection between the infringement and benefit sought on the basis of reason or logic without insisting on direct proof of a relationship between the infringing measure and the legislative objective.

...

I have emphasized from the outset of the debate over this legislation that Bill C-71 is, first and foremost, a health bill. It is about protecting the health of Canadians, particularly young Canadians, from the predictable and preventable consequences of tobacco addiction.

In writing the majority decision of the Supreme Court of Canada, Justice McLachlin said:

...protecting Canadians from the risks associated with tobacco use... constitutes an objective of sufficient importance to justify overriding the right of free expression guaranteed by the Charter.

Justice McLachlin further stated:

...even a small reduction in tobacco use may work a significant benefit to the health of Canadians and justify a properly proportioned limitation of right of free expression.

Senators, we have moved with care and diligence in order to get this legislation right. We have considered the effects of tobacco use. We have followed closely the guidance of the Supreme Court of Canada. We have weighed the available research and the potential impact of the proposed legislative measures.

...

Just as the government has taken guidance from the Supreme Court of Canada in drafting Bill C -71, I would hope that this legislation will offer some assistance and hope to parents. Parents do not want their children to smoke. They want their children to stay healthy. I believe the government has a responsibility to help fathers and mothers keep their children smoke-free.

ED-68, pp. 6 to 10

On page 17, he continues by saying:

In terms of the linkage [between promotion and tobacco use], which is a crucial issue for all of us to reflect upon, let me cite a few things. The National Cancer Institute of Canada has said clearly that there is substantial evidence that young people are aware of and respond to cigarette advertising. We will provide this information to you.

The U.S. Food and Drug Administration has said that evidence from social psychology and marketing research shows that image-based advertising, such as that employed by the cigarette and smokeless tobacco industries, is particularly effective with young people and that the information conveyed by

imagery is likely to be more significant to young people than information conveyed by other means of advertisement.

The American Psychological Association provided expert opinion and specific citation to numerous studies to show that tobacco advertising plays directly to the factors that are central to children and adolescents and thus plays an important role in their decision to use tobacco. I have a number of other things that I will leave with the committee as well. There is good evidence available which makes the link between advertising and tobacco consumption by young people.

ED-68, p. 17

From March 19, 1997, to April 10, 1997, the Standing Senate Committee on Legal and Constitutional Affairs received 33 briefs and met with 61 witnesses representing opposing interests (ED-68 to ED-75), as well as experts in constitutional law summoned by the Committee itself (see Appendix B: List of Witnesses Heard by the Various Parliamentary Committees), for example:

- Hester Lessard, Faculty of Law, University of Victoria (ED-69)
- Gerald Gall, Faculty of Law, University of Alberta (ED-69)
- William Schabas, Professor, Université du Québec à Montréal (ED-70)

who commented on the 1995 RJR -MacDonald decision and Bill C-71.

The industry's point of view

On April 1, 1997, Mr. Robert Parker, attorney representing the Canadian Tobacco Manufacturers Council, consisting of the three plaintiffs, as well as their attorneys, Mr. C. Irving, Mr. S. Potter and Mr. Stephen Sofer, appeared before the Senate Committee.

ED-70, pp. 24 to 60

According to the industry, the fight against smoking is a controversial issue:

Mr. Robert R. Parker, Chairman and Chief Executive Office, Canadian Tobacco Manufacturers Council: ... Obviously, tobacco control is a contentious public policy issue. One of the reasons for that ongoing controversy is that various proponents often make unfounded assumptions about the industry's motives. Many assume wrongly that the manufacturers seek an entirely open marketplace with an uncompromised right to market their products as they see fit. In reality, the manufacturers have no quarrel with the right of the federal government to pursue policies aimed at reducing smoking preference and consumption. Nor do they oppose out of hand responsible and legally acceptable restrictions on the manufacture, promotion and sale of tobacco products, so long as they are workable. In fact, we have imposed such restrictions on ourselves for more than two decades.

The issue of effectiveness, however, and more specifically any evidence as to whether these tobacco control measures actually achieve their intended consequences, is the point at which we part company with many of the critics of tobacco and, indeed, with Health Canada.

ED-70, p. 25

The arguments put forth by Mr. Irving before the members of the Committee are similar to those presented before this Court.

ED-70, pp. 26 to 31

Industry research on their advertising

Mr. Potter: Yes, there are surveys conducted on people, just as Statistics Canada does quantitative surveys to find out how many people are smoking. That does not go to the question of whether an ad is produced on the basis of that information, and there are none. No ad is ever used unless it is repeatedly and extensively tested on people belonging to the target group. The target group of people on which those ad campaigns were tested were always current smokers of legal age to smoke.

ED-70, p. 35

Studying the link between sponsorship and consumption

Mr. Potter: You are right, the lawyers here are the outside lawyers of the three companies. My client thought, this being the Legal and Constitutional Affairs Committee of the Senate, that the way to be helpful to you was to send someone who could speak about legal and constitutional matters. That is why I am here. We had no forewarning of the question which has come from Senator Milne. I did not prepare for it, but I have given an answer on the basis of what I have seen, and I have seen a lot. I can go back and see if there is another answer or a more complete answer.

However, I do want to be clear, Senator Lewis. Surveys are one thing. Studies trying to come to grips with the link between a factor, for example sponsorship, and a result, let us say consumption -- if there is such a link -- is quite different. All companies that sell anything survey their market all the time to try to learn what the market actually is.

All companies do surveys trying to find out what is happening but I am aware of no study of what link there is, if any, between sponsorship and consumption.

ED-70, p. 39

Understanding sections 18 to 22 of the *Tobacco Act* according to Mr. Potter

M. Potter: Senator, with all due respect for Professor Schabas, I believe he is looking at it from a professor's chair. I encourage you, when you look at these articles, to look at it as if you had an ad in mind. You must ask yourself whether that ad can pass three hurdles. Can you satisfy yourself that no one would be able to construe that ad on reasonable grounds to be appealing to anyone under the age of 19? If you get over that hurdle, can you satisfy yourself that that ad will not evoke an emotion, positive or negative, or an image about a style of life such as one that includes several examples?

The third obstacle is clause 20. Will you be accused of using an ad which is likely to create an erroneous impression in anyone who sees it?

When you get over all three of those obstacles-- and I submit you cannot -- you cannot safely say to yourself, "I won't be punished for using this ad," but let us say you can. You then have to look at clause 22(2) and realize there are only three places you can put that ad. It cannot go in any stores, billboards or flyers. It cannot go anywhere except in a publication with a particular kind of readership, in the mail addressed to people by name, or on signs in places from which young people are prohibited by law.

After you get over your three obstacles -- and I submit you cannot -- you have to ask yourself, "Is it worth it for me to use the ad?" You do not get there either. You must come to the conclusion that this is tantamount to a full-blown prohibition, therefore the Supreme Court has already decided that it is an unsavable violation of the Charter.

ED-70, p. 47

Information

M. Potter: As a matter of constitutional and Charter law, senator, it is clear also that lawyers who may complain about an attack on freedom of expression cannot complain about the government putting out more information rather than making less information available to people.

ED-70, p. 53

Several witness with opposing interests appeared before the Senate Committee

On April 2, 1997, the Senate Committee heard several other witnesses with opposing interests, notably Pierre Bourque, the mayor of Montréal, who expressed his fears regarding the economic repercussions of the measures on sponsorship and asked for an extension of the transition period, from two years to three to five years.

ED-71, p. 90 et seq.

Appendix B: List of Witnesses Heard by the Various Parliamentary Committees

On that same date, Mr. John Luik appeared before the Senate Committee (ED-71, pp. 99-100) and stated that:

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

Which was denied by Mr. Waterson (cross-examination of Mr. Waterson, questions 54 to 74).

On June 4, 1988, Mr. Luick appeared before the Standing Senate Committee on Social Affairs, Science and Technology. He presented himself as follows:

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.

Volume 126 of the volumes submitted to the Court of Appeal and the Supreme Court in the first case on TPCA, pp. 25846 and 25854

According to ED-27, John Luik has close and secret ties with the tobacco industry (pp. 35-36, more particularly note 34 appearing on page 55).

Regarding the amendments to Bill C-71

On April 9, 1997, the Minister of Health appeared again before the Senate Committee and made the following statements:

The Honourable David Dingwall, M.P., P.C., Minister of Health: Honourable senators, I followed your hearings with considerable interest. I would like to address some of the matters which have been raised and answer any questions you may have.

In the past weeks, this committee has heard from individuals and organizations who have expressed diverse points of view on issues related to Bill C-71 whereby we will legislate in four key areas: access, labelling, product regulation and tobacco promotion.

Sixteen months ago, my predecessor released the tobacco control Blueprint, a consultation document that set out the legislative directions proposed by the federal government. At this point, we have received about 3,000 submissions regarding tobacco legislation. There were numerous organizations that carefully examined the document and submitted analytical briefs.

Based on these briefs, we held consultations with the tobacco growers, manufacturers, distributors and retailers; arts organizations, including representatives of major festivals; sports associations and major national health groups. We also consulted with provincial and territorial governments.

For the edification of the committee, I wish to table a list of those who submitted comprehensive briefs, which I am sure the clerk will want to have.

Where it was possible for us to accommodate the concerns of interested parties without compromising our health objectives or departing from the guidance of the Supreme Court, we have done so.

When retailers told us that the blueprint proposal to restrict the display of cigarettes at retail to one package per brand would not work in practice, we modified that approach.

At the time the legislation was tabled, the tobacco industry expressed the concern that Bill C-71 would prevent them from distributing their products across provincial boundaries. To further clarify that distribution between manufacturers and retailers would not be affected, we amended the clause on interprovincial delivery during standing committee consideration in the other place.

Growers feared that the bill would unduly interfere in the internal workings of their industry. At report stage, we amended the definition and application clauses of the bill to assure them that it focuses on matters which touch the public rather than the internal workings of industry.

To respond to the concerns of the producers of tobacco-related accessories like matches, we amended the relevant clause to confirm that it was never the government's intention to control the distribution of accessories bearing logos other than those of tobacco companies.

Finally, as we are all aware, some of the proposed restrictions on tobacco sponsorship promotion will not go into effect until October of 1998. This implementation period responds to the concerns of tobacco-sponsored arts and sports groups.

You have all seen the amendments submitted by the Canadian Tobacco Manufacturers Council. They have proposed amendments which would essentially transform the bill before you to a bill much like the *Tobacco Products Control Act* which they fought to have defeated by the Supreme Court.

I am sure all members of the committee have this. This is a summary of the list of all the amendments the tobacco industry has asked me, as the Minister responsible, to implement, which, in essence, would take us back to where we were previously.

You have heard from critics who disagree with Bill C-71. They suggest that the bill is unreasonable. One witness even referred to it as fatally flawed and unconstitutional; a reimposition of the provisions struck down by the Supreme Court of Canada. He also suggested that it is difficult to imagine a tobacco promotion which would not send the advertiser to prison.

When I appeared before you previously, I talked about what this legislation will and will not allow. I explained that it has been carefully tailored to respect the guidance of the Supreme Court of Canada. The bill provides for a series of comprehensive restrictions on tobacco promotion; not a total prohibition. Tobacco companies will be allowed to communicate information to their adult customers. However, the use of lifestyle and youth-oriented approaches will be restricted.

ED-74, pp. 6-7

Example of the Player's Première Cigarette

On that same day, the Minister of Health, Mr. Dingwall, also stated:

Despite claims to the contrary, it is possible for me to show you some examples of the kinds of promotions that would likely be permitted under the new legislation. For instance, this ad for Player's Première is along the lines of what you would expect to see after the act comes into force, with the warning on the bottom 10 per cent. Is that unreasonable to ask of the tobacco companies as we proceed with our legislation?

Once the sponsorship restrictions take effect in October 1998, one might see ads like this one for sponsorship by Export "A" of extreme skiing. We have simply moved the brand name to the bottom 10 per cent of the ad as an illustration. This would be acceptable.

I will now show you what would not be acceptable. The difference, I suggest, is not an unreasonable difference.

Perhaps this could be circulated to members of the committee.

Senator Jessiman: I can see no difference.

The Chair: For clarity, senators, the one with the brown backing is acceptable and the one with the white backing is not.

Senator Nolin: Minister, is what you have showed us the poster that they will be allowed to post?

Mr. Dingwall: Yes. Or, in terms of reasonableness, you might see one of Canada's greatest, Jacques Villeneuve, appearing in a suit bearing the corporate colours of his tobacco sponsor, but not the company's logo, as he does when he competes in some European countries.

ED-74, pp. 7-8

ITL's philosophy

On that issue, Mr. Dingwall pointed out:

Justice McLachlin, writing the decision of the Supreme Court of Canada on the *Tobacco Products Control Act* stated:

... even a small reduction in tobacco use may work a significant benefit to the health of Canadians and justify a properly proportioned limitation of right of free expression.

We are placing, in my view, reasonable limits on tobacco promotion to protect the health of Canadians, particularly young Canadians. Tobacco marketing strategies create and maintain the perception that tobacco use is desirable, socially acceptable, healthy and more pervasive in society than it really is.

The industry itself acknowledges that. For example, an Imperial Tobacco document entitled "Overview 1988" was submitted in evidence to the Supreme Court of Canada in 1995. It states that the marketing objectives and philosophy should be to:

... support the continued social acceptability of smoking through industry and/or corporate action, (e.g. product quality, positive lifestyle advertising, selective field activities and marketing public relations programs).

ED-74, p. 8

The link between advertising and young people

Mr. Dingwall also explained that:

While this is interesting, the real issue is not whether tobacco companies knowingly target young people, it is whether their promotional strategies reach and influence youth. We know that they do. Young people are exposed to ongoing and pervasive strategies that blanket the environment with tobacco promotions. The industry

contests such facts with claims that "No one ever took up smoking after attending a tobacco-sponsored event."

We have never suggested that the relationship between tobacco promotion and youth smoking is that simplistic. Attending a tobacco-sponsored event is just one instance of exposure to tobacco promotion.

Whether they are marketing soft drinks or cigarettes, marketing professionals know that there is no one ad or promotion that will translate into instant sales. They know that the cumulative impact of their promotional strategy is what ultimately affects consumers, not a single ad or a single poster.

In the case of tobacco promotion, each of the dozens of brands on the market in Canada attempts to sell its own uniquely appealing brandimage.

With regard to marketing experts, I wish to quote from a study by Professor Richard Pollay:

Content analysis of advertising shows that cigarette advertising imagery largely consists of pictures of health and images of independence, which are known to the industry to resonate with adolescent needs for autonomy and freedom from authority.

Children and teenagers process many conflicting messages, and tobacco promotions are only one of them. Often, they acknowledge the health hazards of smoking, but tend to discount longer-term health effects and to emphasize more immediate needs like staying slim or being part of the crowd. Tobacco promotions, whether they show the package or promote a tobacco-sponsored event, reinforce and respond to these needs.

The National Cancer Institute of Canada puts it this way:

In sum, both qualitative and quantitative studies examining the effects of advertising on adolescents suggest that the content of advertisements influence attitudes, beliefs and values related to tobacco. They do so by portraying benefits of smoking that resonate with the issues and concerns of adolescents; namely, peer bonding, social approval, independence/autonomy, self-image, body image, adventure-seeking and normative behaviour.

Other countries such as France and Australia have also acknowledged the existence of a link between tobacco advertising and smoking. President Clinton has firmly set the United States on a course quite similar to Canada's, with restrictions on tobacco advertising and promotions because of their effect on young people.

In this country, the Supreme Court of Canada has already recognized a link between tobacco advertising and consumption and clearly confirmed that the federal government has the right to restrict tobacco advertising. This legislation is important. That is beyond dispute. However, as I have said before, both here and outside, it is not the panacea.

Clearly, there are many reasons why people start smoking -- invariably as kids -- or keep smoking as adults. Individual decisions on each of these issues are based on factors that include self-esteem, how much it costs to smoke, and to what extent smokers are concerned about the health consequences of their habit. Other factors include the behaviours of friends and family and environmental influences, such as the messages conveyed by tobacco promotion.

...

Furthermore, when the president of the Canadian Medical Association appeared before you, she confirmed that "children are more vulnerable to addiction."

The World Health Organization and national governments around the world recognize that the best way of arresting this global public health epidemic is by adopting a comprehensive approach to tobacco control. Canada has such an approach. The federal government has many partners in this effort – all of the provincial and territorial governments, as well as the national non-governmental organizations.

ED-74, pp. 9-10

Senators' comments

Senator Doyle

Senator Doyle: Minister, I might say that I find the bill too tentative and too anxious to avoid prohibitions. I would have been far more forthright. However, I did look at the advertisements which you circulated. I was struck by one which offered a cross-hatch of a cigarette and told me what was right with that cigarette. On the reverse side of it, it said that this, with slight modifications, might be permitted. It tells me that this cigarette has full flavour and less irritation. It has dispersion qualities. I have never heard of a dispersion quality. It provides, again, reduced irritation. Reduced from what? Less irritation than what? It is based on research with smokers. Which smokers? Me, for instance?

I do not find that this pseudo-scientific presentation is something at which we should laugh. I think the teenager who tries to persuade his mother that he has found a nice safe cigarette with dispersion qualities might find a good argument on the second trip round and might even find it more persuasive than looking at hockey stars. Do you not think that that type of this-is-good-for-you ad should be totally run out of the business?

Mr. Dingwall: Now you are starting to hit home, Senator. Yes, the substance, in our view, is a very lethal one. There is certainly good evidence, which has been adduced here at your committee on several other occasions, in terms of the effects.

Unfortunately, Senator, I must deal with the decision of the Supreme Court of Canada. That Court has told me, our government and Parliament, that, within reason, you have to allow the manufacturers of the product the opportunity to present their product to the Canadian people.

If we knew years ago what we know today about tobacco consumption, I am certain that it would not be a legal product. However, we must live, as you know, sir, in the real world, in which a large number of our citizens are addicted to tobacco consumption. We did not believe the answer would be a Draconian law which would breach the Supreme Court of Canada.

I fully appreciate the intent of your remarks in terms of just how bad some of this stuff is. It is equally bad for young people when stars in various vocations are supporting the habit of tobacco consumption. That ad is just further inducement to that statement.

Senator Doyle: I still find it very difficult to believe that the Supreme Court of Canada would stand behind dispersion qualities as a reason for smoking.

ED-74, pp. 26-27

After its deliberations on April 9, 1997, the Committee reported to the Senate on April 15, 1997.

ED-74
ED-75-76

Senator Lewis

Let me first address the concerns with this bill expressed by spokespersons and counsel for the tobacco manufacturers. They told us that they have no quarrel with responsible and legally acceptable restrictions on the manufacture, promotion and sale of tobacco products, as long as they are workable.

They then expressed objections to Bill C-71. They said that it contains provisions clearly in violation of the *Canadian Charter of Rights and Freedoms* and that it imposes the same total ban on advertising which the Supreme Court found to be unconstitutional. They also claim that the wording of the bill is vague and does not provide certainty, that the legislation's proposed regulatory power and penalties are excessive.

Let us consider, first, the issue of constitutionality. In developing this bill, the government fully recognized the freedom of speech issues that control of tobacco promotion raises. The Health Minister has told us that the drafters followed carefully the guidance provided by the Supreme Court of Canada in its 1995 ruling on the *Tobacco Products Control Act* to ensure that Bill C-71 respects the *Charter of Rights and Freedoms*. Constitutional experts who appeared before the committee clearly recognized that fact. For instance, Professor Lessard of the Faculty of Law at the University of Victoria said:

The drafters of Bill C-71 clearly took their directions from the Court's decision and basically redesigned the act so that now we have partial bans and partial restrictions. So you have a direct response to what the Supreme Court of Canada said in *RJR-MacDonald*.

In that decision, the Supreme Court recognized a link between tobacco advertising and consumption and clearly confirmed that the federal government can control tobacco advertising under the criminal law power. The Court held that Parliament can validly employ the criminal law to prohibit tobacco manufacturers from inducing Canadians to consume these products, and to increase public awareness concerning the hazards of their use.

The Court further held that even a small reduction in tobacco use may work a significant benefit to the health of Canadians and justify a properly proportioned limitation of freedom of expression.

I share the view of the Minister of Health and that of several constitutional experts who appeared before the committee that this bill respects the *Canadian Charter of Rights and Freedoms*.

The tobacco industry argued repeatedly that the bill amounts to a *de facto* ban on advertising and event sponsorships. This is simply inaccurate. The argument does not stand up to scrutiny because the proposed legislation does not ban tobacco promotion. On the contrary, it allows product advertising; it allows the display of tobacco products at retail outlets; it allows tobacco companies to communicate information about their products to adult consumers; it allows the tobacco companies, with some restrictions, to continue to associate the brand names of tobacco products with sponsored events; and it allows the broadcasting of those events.

With respect to the manufacturers' third charge, independent legal expert witnesses who appeared before us confirmed the views of the government's own constitutional experts. The proposed legislation may be technically complex, but it is not vague. The bill is clear in setting out what will and will not

be permitted. Details specifying the time, place and manner in which these permissions and restrictions will apply will be spelled out in regulations.

The Minister of Health is also on record as being willing to work with the industry to set up some kind of pre-clearance mechanism that would provide greater certainty with respect to potential contraventions.

On the issue of regulations, concern has been expressed that this legislation would confer excessive regulatory authority on the government. The regulatory powers in Bill C-71 are neither unusual nor unique. They are consistent with the powers in other statutes pertaining to, for example, food, drugs, hazardous products, transportation and the environment.

Furthermore, the government will consult with all affected parties in a meaningful and transparent fashion as it develops regulations pursuant to this bill. There will be ample opportunity for stakeholders to comment, both before and after the proposed regulations have been published in the *Canada Gazette*. The transparency of the regulatory process would be further enhanced by the requirement in Bill C-71 that proposed regulations be referred to an appropriate committee for study and consideration.

Much has been made of the issue of excessive penalties and of the search and seizure provisions of the bill. I want to be clear on these points, honourable senators. The search and seizure provisions here do not violate the Charter. They are common to other federal and provincial regulatory schemes which have been upheld by the courts. The Supreme Court has clearly defined the appropriate threshold for the expectation of privacy and warrantless inspections of commercial regulates, and the bill respects that threshold.

Seizure without warrant is only contemplated where a product or promotion contravenes the law, but prosecution will not occur in relation to such a seizure. Where the purpose of any seizure is to gather evidence for a prosecution, inspectors will be required to obtain a warrant under the Criminal Code. Here as elsewhere, the government will work with affected parties to ensure that they are aware of their obligations.

...

On the issue of nicotine addiction, industry spokesmen told us that whether smoking is addictive or not is a matter of opinion, not of fact. They also said that there are definitions under which smoking is clearly addictive. They went on to say that coffee is addictive, chocolate is addictive and potato chips are addictive. The analogies do not do justice to the gravity of the issue before us.

...

Finally, industry spokespersons repeatedly told committee members that no one ever took up smoking after attending a tobacco sponsored event. That is misleading. Health experts have never suggested that the relationship between tobacco promotion and youth smoking is that simplistic. Attending a tobacco-sponsored event is just one instance of exposure to tobacco promotion. It is the cumulative impact of tobacco advertising and promotion that influences consumers.

Health Canada has released the tobacco research reference list of more than 150 studies and reviews, as well as industry marketing reports, that guided the legislation and that documents a link between tobacco promotions and consumer attitudes, beliefs and behaviours, including the beliefs and behaviours of young people.

Tobacco marketing strategies create and maintain the perception that tobacco use is desirable, socially acceptable, healthy and more pervasive in society than it really is.

Research also tells us that 85 per cent of smokers began smoking before they were 16 years of age. I will quote briefly from four of these 150 studies on the issue of whether tobacco advertising and promotion reaches and influences young people.

An 1988 Imperial Tobacco Limited report on overall market conditions notes:

The industry is dominated by the companies who respond most effectively to the needs of younger smokers. Our efforts on these brands will remain on maintaining the relevance to younger persons.

A 1990 study in the *British Journal of Addiction* found that children are highly sensitive to cigarette brand advertising which promotes cigarettes advertising among the young. In 1994, the report of the Surgeon General of the United States similarly noted that tobacco promotion provides a conduit between a young person's actual self-image and their ideal selfimage.

On the issue of sponsorship promotions, a 1996 report by an industry leader noted that sponsorship generally outperforms advertising. Sponsorship can suggest that the brand is sanctioned and approved. It provides a positive, emotional connection between people and product that cannot be achieved through traditional advertising.

A few weeks ago, a major United States cigarette company, the Liggett Group, admitted that tobacco was addictive and that it caused significant health problems. Liggett further admitted that the United State's tobacco industry has for some time specifically targeted teenagers through its advertising and promotions.

Whether Canadian tobacco manufacturers intentionally target young people is not the point. However, their arguments that they do not influence youth are wearing thin. Tobacco advertising and sponsorship promotion has become so pervasive that it cannot help but spill over into segments that are not the primary targets of tobacco marketers. That spillover affects children and youth.

Honourable senators, I am convinced that this bill respects the Charter, and that it is flexible enough to respond to changing marketplace conditions. I also believe that it is reasonable, balanced and warranted. The bill's objective is to protect the health of Canadians, particularly young Canadians, from inducements to smoke. It will achieve its objective by placing reasonable limits on tobacco marketing and promotion, while at the same time allowing companies scope to communicate factual information to adult consumers, as well as to associate the brands names of tobacco products with sponsored events.

Let there be no misunderstanding: It is primarily young people whom we are concerned about, and it is young people who will ultimately benefit from this bill. We are not restricting tobacco sales to adults, and we allow advertising that is clearly targeted to adults. We are, however, saying that tobacco products are inherently hazardous and addictive, and that young people are most vulnerable to taking up smoking and developing a lifelong addiction to tobacco.

Honourable senators, Bill C-71 is an important element of the government's tobacco control strategy, but it is only one element. It will be complemented by health education and awareness programs which will be developed

increasingly by young people, for young people. Last year, the Health Minister created a youth advisory committee to advise him on smoking and other issues. This reflects the youth-oriented nature of the current tobacco programs. The Minister is consulting and involving Canadian youth, and will continue to do so. They are best positioned to develop effective resources to resist peer and social pressures to smoke and to help counter the appealing images that tobacco promotions create.

I want to preface my concluding remarks by noting that this is the second time Parliament has debated tobacco control measures. In 1989, Parliament passed the *Tobacco Products Control Act*. While that act banned tobacco product advertising, it was by no means the end of tobacco promotion in Canada. The tobacco industry likes to say that the 1989 ban has not reduced smoking. What the industry neglects to add is that they continue to market tobacco products aggressively through sponsorship promotion. Since 1989, the industry has invested hundreds of millions of dollars in this effective marketing tool.

In some respects, our deliberations and debates over the past weeks have an element of *déjà vu*. Some things have not changed appreciably over the last eight years. Tobacco companies continue to vigorously promote the products in a pervasive and strategic manner. They continue to predict dire economic consequences if their activities are constrained in any way. Sadly, Canadians continue to take up smoking as children and teens, and continue to die as adults at the rate of 40,000 each year from tobacco-related diseases.

One important thing has changed, honourable senators: We know more than we did in 1989 about the health consequences of smoking. Medical science continues to advance our understanding of those debilitating and deadly consequences. We also know more about the link between promotion and the decision to smoke.

Some honourable senators have suggested that none of the experts who appeared before the committee were able to produce one single study pointing to one single factor that causes someone to start smoking. As the Health Minister and other witnesses emphasized, the smoking decision process is not just about starting to smoke; it is also about continuing to smoke, how much to smoke, and whether or when to quit. We also know that whether or not to smoke is rarely a decision taken by adults. Kids decide to smoke based on the cumulative impact of a number of factors that influence them.

In 1996, the National Cancer Institute of Canada found after extensive review that the weight and consistency of the evidence strongly supports the conclusion that marketing plays a significant role in youth tobacco use. The report reached the following conclusions: one, tobacco advertisements appeal to youth; two, youth are aware of tobacco marketing; three, awareness and perceptions of marketing are linked to smoking intentions and behaviour; four, tobacco marketing campaigns increase youth tobacco use; and five, youth are particularly likely to smoke highly advertised brands.

Honourable senators, while the proposed legislation before us may not be perfect, as both its supporters and critics have charged, it is based on an extensive and growing body of international research that supports findings such as those I have cited.

My final point of comparison is that in terms of public health priorities, very little has changed since this body last debated tobacco control measures. Smoking remains this country's most pressing public health issue. Tobacco is the most costly and relentless killer in this nation. It kills more people than drugs, car accidents, suicides, homicides and AIDS combined. It is responsible for one in every five deaths, and costs \$3.5 billion per year in direct health care costs.

This bill will achieve the government's health objectives, but this will not happen overnight. The industry wants us to measure its effectiveness in terms of days and weeks and months. This is too simplistic.

ED-76, pp. 40 to 45

Senator Wilbert J. Keon

I should also like to remind senators that Bill C-71 is a compromise. Regulating, not banning, tobacco is the issue here. The bill restricts the access young people have to tobacco products, places reasonable limits on the marketing and promotion of these products, increases health information on tobacco packaging, and establishes powers needed to regulate tobacco products. From my perspective, this represents, quite simply, good health policy.

The bill does not include a total ban on tobacco sponsorship advertising, as has been the practice in a number of other countries, including Australia, Italy and France. It is also important to note the World Health Organization has, on a number of occasions, urged a total ban on all direct and indirect advertising and promotion of tobacco products. The United States itself has adopted a law that will ban all tobacco sponsorship advertising effective August 1998.

In many respects, the bill is weaker than the tobacco control Blueprint released by the government on December 11, 1995. For example, the Blueprint called for a total ban on advertising, a total ban on the use of trademarks on non-tobacco goods and a limit on point of sale package displays to one package per brand. None of these provisions are found in Bill C-71 as they were initially proposed by the government.

I will not take the time here today to recite the long list of statistics that you have all heard many times before related the incidence and prevalence of premature death resulting from tobacco use. Indeed, I am aware of some 700 scientific publications on this subject, all leading to the same conclusion.

Suffice it to say that tobacco use is the cause of about 30 per cent of cancer deaths and more than 80 per cent of lung cancer. Of the 45,000 smoking-related deaths per year, almost 40 per cent are from cardiovascular disease. In my own medical career, I have seen, on a daily basis, the tragic damage done to patient's hearts, resulting in premature death and disability.

ED-78 p. 25

Senator Raymond J. Perrault

Honourable senator, I will support the bill, but I believe it needs amendment. At meetings with the Minister in the past two days, he has told us that he is working on alternative ideas which will make up for some of the revenue lost by deserving organizations. That is a move in the right direction.

...

I believe the bill needs amendments, and I have said that. However, given the parliamentary schedule, it is obvious that the bill cannot be sent back to the other place with any reasonable hope it can be amended by Parliament.

Honourable senators, for these reasons, it is with some reluctance that I support the bill. I should like to see it in a more perfected form. I know we can do better. I also know that money is required to finance many good causes in our community.

Following vigorous representations from all parts of the country, the Minister has stated – and I repeat it for the Leader of the Opposition – that other options will be pursued to make it possible for significant sports and cultural events to be sponsored by private and/or public sectors. I support this bill only with this assurance. I believe that, apart from commendable efforts to reduce tobacco and alcohol consumption, the arts in Canada and certain other events must be supported adequately. It is highly desirable that world-class events such as the Indy, worth millions of dollars to the western economy, should go ahead. The number of drama companies and symphonies across the country that are recipients of revenues from the private sector need and must have support, honourable senators.

ED-78, pp. 27-28

Senator Mira Spivak

On sponsorship advertising, the tobacco manufacturers representative told the committee that manufacturers regard such advertising “as quite a different category from product advertising.” Again, let me cite an Imperial Tobacco Limited internal document, “A National Media Plan.” Under “Sponsorship” – “Media,” the objective is clear:

To “Brand” the events we sponsor via media advertising so as to increase the level of awareness, particularly amongst smokers, and potential smokers, of our (trademarks’) association with major world class sporting events and artistic productions.

One of these benign, benevolent ads was for live performances in Calgary of the children’s Broadway musical *Annie*.

The committee also heard repeatedly, that advertising, whatever its form, has one purpose – to convince smokers to switch brands at the expense of a competitor.

I have bibliographies of material presented to the Commission committee and Health Canada’s research reference list. Here we find articles from such “disreputable” – quotation marks provided courtesy of the tobacco manufacturers – journals as *The Journal of the American Medical Association: RJR Nabisco’s Cartoon Camel Promotes Camel Cigarettes to Children*; *The Journal of the National Cancer Institute: Influence of Tobacco Marketing and Exposure to Smokers on Adolescent Susceptibility to Smoking*; *The American Journal of Public Health: Tobacco Promotion and Susceptibility to Tobacco Use among Adolescents Aged 12 through 17 years*.

There are many more. The National Cancer Institute of Canada states:

The cumulative evidence...strongly supports the conclusion that marketing plays a significant role in youth smoking behaviour, both in terms of initial experimentation and brand preference.

The U.S. Surgeon General, in 1994 stated:

Even though the tobacco industry asserts that the sole purpose of advertising and promotional activities is to maintain and potentially

increase market shares of adult consumers, it appears that some young people are recruited to smoking by brand advertising.

Last year the U.S. Food and Drug Administration, in publishing regulations to ban logos and brands completely from sponsored events, stated:

The effect of sponsored events on the young people who attend or see those events is enormous...The agency finds that the evidence regarding the effect of advertising and sponsorship on children's smoking behaviour is persuasive and more than sufficient to justify this regulation.

The World Health Organization, last year, stated:

WHO and its co-sponsors, World No-Tobacco Day, the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Olympic Committee (IOC) join forces in calling for all nations to end sponsorships which in any way associate tobacco products with sporting and cultural activities.

Frankly, there is evidence that young people come to the same conclusions as these institutions, that is, that sponsorship equals smoking, intuitively. When University of Toronto researchers showed Ontario students posters of the jazz festival and Grand Prix racing, having obscured the words on the posters, there was no doubt in student's minds what those posters were about. Some 53 per cent said the racing poster was about cigarettes; only 4 per cent saw it as a poster for Player's racing. Some 20 per cent saw the jazz festival poster as an ad for cigarettes; only 2 per cent recognized it as an ad for the festival.

What did the students say about these ads? They said they "do not think about cancer, driving is more exciting." "Children idolize car racers and kids want to be like car racers and smoke." They also said, "If you are into music, you are into smoking." That is why the back-door route to advertising cigarettes to young people through sponsorship posters and billboards, through television broadcasts that focus repeatedly on product logos on time clocks and banners or through T-shirts and other clever paraphernalia must be restricted.

Cigarette manufacturers claim sponsorship is just to increase market share but the true story about the market comes from the manufacturer's reported sales. In the year following the Supreme Court decision, ads were permitted, taxes were constant and sales in Canada increased by 1.4 billion cigarettes. That is equivalent to the number of cigarettes inhaled by 150,000 new pack-a-day smokers.

ED-78, pp. 42-43

On April 16, 1997, the Senate adopted Bill C-71 without amendments.

ED-79, p. 15

BILL C-42: AMENDMENT TO SECTION 24 REGARDING SPONSORSHIP ADVERTISING**First reading in House of Commons**

On June 3, 1998, the Minister of Health, the Honourable Allan Rock, tabled Bill C-42 "*An Act to Amend the Tobacco Act*" for first reading.

ED-82
ED-86, p. 3

Second reading in House of Commons

On September 30, 1998, Mr. Lynn Myers participated in the debate on Bill C-42 during the second reading and stated the following:

Mr. Lynn Myers (Waterloo—Wellington, Lib.): Mr. Speaker, I am pleased to begin in this House the second reading debate on Bill C-42.

Bill C-42 is a short bill. It is a simple bill. It proposes an amendment to the *Tobacco Act* and focuses on one aspect of the tobacco issue, and one issue alone, and that is the promotion of tobacco products through the sponsorship of events.

What the bill does is straightforward. It will toughen the existing *Tobacco Act*. It will take a piece of legislation that is already one of the strongest in the world and make it even stronger.

The bill would ban the promotion of tobacco sponsorships following a five-year transition period. Although the bill is short, it is not an isolated action. It builds on the enormous step forward which our government took in proposing the *Tobacco Act* and which the last Parliament took in passing the legislation.

That act, members will recall, takes aim squarely at the number one cause of preventable death and disease in Canadian society. Its goal is to protect and promote the health of all Canadians. It is aimed specifically at keeping children and young people from starting to smoke.

The health facts are clear. Last year more than 40,000 Canadians died of tobacco related illnesses. That means that each day, on average, more than 100 Canadians died with tobacco standing in the background. Many of those people died of heart disease. Others died of lung disease. Still others fell victim to cancer or some of the many other illnesses that have their roots in the use of tobacco products.

There are some worrisome trends that could add to that toll over time. The percentage of young people between the ages of 15 and 19 who smoke has actually risen in recent years. We need to take continued and effective action to reverse those trends.

However, we must approach this in a way that recognizes that tobacco is a unique product, yet we simply cannot ban it. Tobacco is addictive and over time it is often deadly. It has made its way throughout our culture and indeed cultures throughout the world.

The reality is that to combat something that pervasive, simplistic solutions simply do not work. For that reason the federal government's approach to tobacco control has included a variety of elements. Legislation, educational programs and taxation have all been part of this mix.

Increasingly we have taken steps to affect other aspects of the process that lead young people to smoke. An important focus of the *Tobacco Act* was to cut the exposure of young Canadians to tobacco promotion. Tobacco advertising had been prohibited for some time and the *Tobacco Act* continues restrictions in a manner that we believe reflects the *Charter of Rights and Freedoms*.

However, as traditional advertising avenues were closed off to the tobacco industry they seized on the use of event sponsorships and promotions.

[TRANSLATION] According to research, the people who market tobacco products are no different from those marketing any other product. They all seek to understand consumer behaviour, especially the behaviour of consumers who are likely to start using their product. We know they are studying the various factors involved in making the decision to smoke.

So who are they studying? Something like 90% of all smokers start before they are 20 years old, usually well before. In fact we can even say as young as 12. So they must logically be an important target.

Like all marketers, these tobacco people want potential customers to associate their brands with positive images. More than that they want to get their product names in front of as many people as possible. They want tobacco products to be linked to events and activities that people enjoy.

With less and less recourse to traditional advertising, association with sports, cultural and other community events has become very important. Events take on cigarette names. Posters and billboards advertising them are everywhere. Therefore people, especially young people, become familiar with the brands, the logos and the overall presence of tobacco in our society.

We might say in this regard that familiarity breeds contempt, not by itself and not in a simple, direct and crystal clear line, yet there it is. There are many factors that influence a 15-year-old's decision to smoke. There are many steps between a first puff and a consistent pack a day addiction. But the research indicates that event promotion is a very significant factor in the overall smoking decision process of our young people. Tobacco brand names can seem to become innocuous, present everywhere, as if they were a normal consumer product.

In making these points about the health impacts of smoking or the importance of event marketing to the tobacco industry, I am simply restating some important points that were made during the debate on the *Tobacco Act* in the last Parliament. Perhaps more important, I am simply restating points that were made on both sides of the House and in the other place in that debate.

This House has historically demonstrated its awareness that smoking kills. Historically it has demonstrated that its support for measures to cut tobacco use by young people are correct and necessary.

The same was true with the *Tobacco Act*. Mr. Speaker, I am sure you recall the outcome of that debate. Reformers, New Democrats and Progressive Conservatives stood with us on it. They stood with the 91% of Canadians who support efforts by government to discourage young people from becoming addicted to tobacco. They stood with the 73% of Canadians who support efforts to discourage smoking among people who already smoke.

It was only the Bloc that opposed the *Tobacco Act*, and that was largely because of concerns about the impact of sponsorship restrictions on events. Now that the Parti

Quebecois government has moved in the same direction as we moved a year ago, I am confident that opposition will change there as well.

Of course, some people outside this Parliament expressed concerns about sponsorship restrictions. Event organizers were concerned that they would not be able to line up new sponsors quickly enough. Some people in communities that look to these events for tourism dollars were concerned about the possible loss of those marquee events.

A particular area that drew some attention was the impact of the *Tobacco Act* on motor sports. If you have ever watched a race you will have noticed that every possible space is adorned with advertising: the cars, the racing suits, the facilities. They are all full of logos of sponsors. Those logos are often of tobacco brands that Canadians, Americans, Europeans and Asians use. Because of the concerns of event organizers it was agreed that the federal government would take another look at tobacco sponsorship and motor sports. But I must add that this should never have been seen as a *carte blanche* to water down our commitment to reduce tobacco use.

At that time we said that we would respect the *Charter of Rights and Freedoms*, that we would respect international standards and that we would respect the health obligations and objectives of the *Tobacco Act*. As we consulted we heard from event organizers and we heard from health groups that were concerned with the potential influence of sponsorship on young people.

Through the process we remained determined to make this act even more solid than it was already. In the end we decided that we could not and would not create one set of rules for some motor sports events and another for everyone else. We recognized that we did and had to treat all currently sponsored events equally.

We also determined that we were being presented with an opportunity to really fine-tune the sponsorship provisions of the *Tobacco Act*, and the result is Bill C -42.

I will now turn to the regime the bill sets out.

At the core of this bill is a five-year transition period. During that time we will move to a total ban on the display of tobacco brand elements in sponsorship promotions.

There are two types of events for the purpose of this bill. The first type includes events that were in existence and had tobacco company sponsors before April 25, 1997. If Parliament agrees, these events would begin with a two-year period under the status quo. Tobacco promotion would be able to continue for that two years and we would continue to allow off-site and on-site promotions.

The next phase for those grandfathered events would last three years. On-site promotions involving tobacco product related brand elements would continue at those events, but these promotions could only be in place for the duration of the event. We would close off opportunities for off-site promotion and we would impose a 90:10 rule that appears in the *Tobacco Act* on those that are permitted. That is to say, only the bottom 10% of the space in the promotional material can display tobacco brand elements.

Direct mailings to identified adults would be permitted, but banners with large tobacco logos on lampposts all over town would not be. Advertising in publications with primarily adult readership would be permitted, but placement in corner stores of posters with cigarette names in bold, big type would end. Promotions such as tent cards in bars, which are legally off limits to young people, would be acceptable, but the same tent cards in regular restaurants would not be.

In short we would cut the tobacco marketers' off-site access to young people dramatically. That stage would end after three years, as I said. That brings us to five years from the date this amendment to the *Tobacco Act* would come into force. On that date, tobacco sponsorship promotions would end.

The second group of events are those in which sponsorships began on or after April 25, 1997. Those events will not be grandfathered. The restrictions currently in the *Tobacco Act* would apply to these events and after five years, the days of complacent sponsorship promotions will end.

...

That ban is more than even the *Tobacco Act* originally envisaged. That Act would have simply brought in the 90-10 rule as a new status quo.

[TRANSLATION] We have gone one step further in protecting the health of Canadians by cutting any ties between appealing and wholesome activities and tobacco consumption.

Some may ask why we have decided on a period of five years. The five-year transition period provides event organizers with plenty of time and plenty of opportunities to seek alternative sponsors. In our consultations with those organizers, it was clear that if we were determined to eliminate the use of sponsorship as a promotional vehicle for tobacco products, and we are, then they wanted time to make alternative arrangements and they could. In fact I know that process has already begun.

For example, we as a government are very pleased that Air Canada will become the new title sponsor of the Formula One Canadian Grand Prix next year. We believe that the five-year time frame will allow other event organizers to demonstrate to other potential sponsors how valuable an association with their event can be.

If this was all we were doing on tobacco control, it would be noteworthy enough. Yet we are actually doing far more and that is why Canada is recognized as a world leader in tobacco control. Indeed we keep track of the steps that other governments are taking on this issue. I want to tell my hon. colleagues on both sides of this chamber that our approach is consistent with evolving international standards. Let me offer some examples.

The European Union recently announced that it is moving in the same direction as we are. It intends to ban tobacco sponsored promotions by the year 2006. It intends to pursue a transitional strategy on the way to that ban.

Australia announced last week that it too will totally prohibit tobacco sponsored promotions by the year 2006.

The United States is moving ahead on actions that will limit the exposure of children to tobacco promotion in ways that are consistent with much that is already in our *Tobacco Act*.

Canada is on a course to beat them all. Our legislation is among the toughest and most far reaching in the world. The initiatives that the *Tobacco Act* enables us to take include the regulation of the product, its components and emissions, more comprehensive reporting requirements for tobacco companies and stricter regulations on sales of tobacco products to minors.

It is also backed up by our continuing efforts to promote and protect health through anti-tobacco initiatives. For example last June we announced \$100 million in spending on the tobacco control initiative. We are proud of that. That money followed through on a commitment that our government made during last year's election. It was a commitment that we were proud to keep because it was really an investment in the health of Canadians.

The tobacco control initiative is co-ordinated and it is comprehensive. It pays particular attention to tobacco use among children and teens, groups vulnerable to taking up smoking.

Reducing the health damage caused by tobacco consumption is increasingly an issue, not only for the federal government but for our colleagues in the provincial governments as well.

A New Democratic government in British Columbia has taken legal steps against tobacco companies because of the costs their products place on the health care system. In Quebec, the Parti Quebécois government has passed strong legislation that among other things restricts tobacco sales to minors and the promotion of tobacco products.

Both provincial strategies complement our own actions at the federal level. They complement our legislative and health promotion approaches. They demonstrate, just as the history of tobacco control legislation does here, that this is not a partisan issue. It is a health issue.

[TRANSLATION] After all, that is the purpose of this bill, a short and straightforward piece of legislation that establishes a new and stricter framework for tobacco promotion through sponsorship and paves the way for the elimination of sponsorship by the year 2003.

It positions us to be heard and be ahead of the United States, most European states and Australia, all countries that have their own solid records on tobacco control.

The action that this bill proposes, together with the restrictions set out in the *Tobacco Act* as well as our tobacco control initiative are individual parts of a unified strategy.

We are continuing to work and invest significant resources to reduce smoking in Canada. We are taking action that we hope and believe will help reduce the percentage of young people who take up smoking.

This bill then is ultimately about the health of Canadians. It is about making a strong piece of legislation even stronger, all the while making it more realistic. It is a bill that I believe merits the support of all parties in this House.

ED-87, pp. 52 to 57

Standing Committee on Health

Bill C-42 was debated in the House on October 8, 1998, and was referred to the Standing Committee on Health.

ED-88 and 89

Health Canada representations

On October 29, 1998, Ms. Elinor Caplan appeared before the Standing Committee on Health on behalf of the Minister of Health and stated the following:

As most of you know, the bill's primary focus is a five-year timetable to end the marketing of tobacco products through event sponsorships. We propose to do this through a transitional process. Events that were in place with tobacco sponsorships prior to April 25, 1997, would have two-year period without new sponsorship restrictions, but only during that time.

During the following three years, we want to tighten the limit significantly. The on-site promotion of tobacco sponsorship would be able to continue, but off-site promotions would have to meet the 90/10 rules of the current *Tobacco*

Act. We would place stringent conditions on those off-site promotions to limit the exposure of young people to this marketing.

In five years, there would be no more promotions of tobacco sponsorships. Event names and facilities would no longer serve as a none-too-subtle reminder of tobacco.

This bill came after substantial discussion with all interested parties. We heard from the arts, sports, and other groups who would be affected by these changes. They indicated that they needed appropriate timeframes to line up new sponsors, and our bill recognizes that.

We also heard from the health community. Those organizations have been front and centre in the work to make Canada tobacco-free. In particular, I'd like to mention the work of the Canadian Cancer Society, Physicians for a Smoke-Free Canada and the Non-Smokers' Rights Association in this broader effort. They have been leaders in the action over time to get the anti-smoking message out to Canadians. They have been powerful forces in encouraging Canadians to keep moving ahead on the tobacco issue.

Health organizations looked at what we were doing with this bill. They understand where we want to go and how we want to get there. I believe they support the direction that we're taking in C-42 toward a prohibition of tobacco sponsorship promotions. Still, we know they had concerns.

They understand that the tobacco industry has constantly sought out new ways to market its products as we have closed off the old channels by laws such as this one. For example, tobacco companies have begun to use the Internet to support events marketing in Canada, something that many could not have foreseen just three or four years ago.

With that in mind, the Canadian Cancer Society identified amendments that it wanted to see in this bill. And during second reading debate, I know that some opposition members indicated their support for those amendments.

Today, I am announcing on behalf of the government that we are prepared to amend this bill to address three of those proposals.

First, we will propose that October 1, 1998, be specifically identified as the start date for the transition under this bill. In effect, that means the five-year clock has already begun to tick down on sponsorship promotion – if this amendment and bill pass.

Second, we will propose that the only events that can be grandfathered would be those that were already promoted in Canada. Although it was never our intent to allow otherwise, this change will make it clear that events cannot be moved from the United States or Australia or wherever into Canada and be treated as if they've always been here.

Third, we will propose that only events that have been in Canada during the 15 months prior to April 25, 1997, can be grandfathered. Once again, it was never our intent to allow events to be restructured solely for their value as tobacco-marketing vehicles. This amendment formalizes that intent.

In all three cases, we see these as clarifications. They are now completely consistent with the intent of the bill and we are pleased to include them now.

The Canadian Cancer Society proposed two other amendments. One would ban point-of-sale advertising and the other would set a ceiling on sponsorship spending. After review, we believe that both raise questions about feasibility

and enforceability. For these reasons, we will be looking forward to what witnesses have to say about those amendments. We'll be looking to this committee for serious consideration of the real implications of both proposals.

I say this not the least of all because experience has taught us that there are limits to what we can achieve through legislation and direct government action.

The government will also be recommending some amendments to Bill C-42.

You will recall that in April 1997, the government made a commitment to accommodate the major concerns of motor sport organizers in Canada. One of the principles that we maintained during the development of the bill as the fulfilment of that commitment was to treat all arts and sports groups equally. The adjustment would update Bill C-41 with respect to the continuing evolving situation in motor sport. The wording of the bill would be changed to expand the criteria for the grandfathered status participants to include not only their personal sponsorship status, but that of events in which they're taking part. The amendment will ensure that all participants in a particular event are treated equally.

We now have a generation of experience with large-scale tobacco control policies and programs. That experience has shown us that there are no simple answers.

ED-90, pp. 2, 3 and 4

Representations from several organizations with opposing interests

Several organizations with opposing interests appeared before the Committee:

- (a) Health organizations that found the transition period too long.

ED-90
ED-91

- (b) A representative of the three plaintiffs who are opposed to Bill C-42.

Mr. Robert R. Parker (President and Chief Executive Officer, Canadian Tobacco Manufacturers Council): ... Some elements of this bill and of the *Tobacco Act* which it will amend meet those tests. Others, regrettably, do not. Members of this committee will be aware that the *Tobacco Act's* predecessor, the TPCA – *Tobacco Products Control Act* – had significant sections struck down by the Supreme Court of Canada in 1995. The TPCA was successfully challenged by our member companies; the *Tobacco Act* is the subject of a second challenge now underway.

For the record, in case any of my comments before you lead to misunderstanding, that challenge will continue and will include all of these amendments, whatever their final form. That's primarily because of what we believe to be the extreme unjustified and unconstitutional restrictions placed on the legitimate rights of manufacturers of a legal product to communicate with their adult customers.

ED-90, p. 49

Mr. Robert Parker: Bill C-42. In the context of sponsorship, it's going to be banned, but the choice is whether to ban it immediately or allow a transition

period so event organizers can seek alternate sources of funding. I think that meets the test of reason. And the decision to apply the same rules to all sponsored events rather than treating them differently – I think that meets the test of reason.

And the decision to say there should be, as I believe will happen under the amendment, a firm start date to this, of October 1, which is what we had believed from the outset – the companies and event organized have generally been operating on that understanding – I think that meets the test of reason.

Overall, is it a common-sense proposal to ban sponsorship entirely? I do not believe that to be the case. I think it materially increases the chances of a piece of legislation once again being struck down by the courts because it is too extreme.

Should there be restrictions on sponsorship? Yes. Should there be restrictions on advertising? Again, yes. Should those be crafted to be reasonable and effective and non-attackable by the courts? I would think nobody more than members of this committee would be in favour of that.

But I must tell you that in regard the bill itself, which was passed by a previous Parliament – and this amendment is not central to that – much of the advice that you get from our friends who appeared earlier this morning leads straight in that direction.

Collectively, you would do yourselves, this issue, and everyone involved in it an enormous service if you would obtain from Statistics Canada and independent advisers accurate information on smoking prevalence in Canada. I've heard more nonsense in the last two days about what Canadians – young or old – have allegedly been doing over the last ten years than I've heard in quite a long time.

You've heard the suggestion that smoking increased after taxes went down. It didn't. You've heard the suggestion that smoking decreased when taxes were high. It didn't. Statistics Canada and Health Canada officials are able to tell you that. An accurate understanding of what really is going on in terms of behaviour by smokers and non-smokers would, I think, help you make improved policy decisions.

ED-90, pp. 60-61

Mr. Grant Hill: Mr. Parker, your assertion is that your ads don't direct themselves to kids. I don't agree with that at all and I'd like to address a specific promotional effort. It's the mountain biking championship. I'm a dad of a number of young men; I have boys who range in age from 14 to older. The mountain biking championship is attractive to those who are well under the legal age to smoke. Your company's efforts in that direction do not only advertise the event but, as one of the gentleman from Quebec said, go on long after the event.

I watch those ads in my own home community and they advertise events here in the east, in Quebec. Those ads can have no economic benefit to the event. They have only an attraction to mountain-biking-age kids. Your statement is absolutely ludicrous and you would do far more credit to your organization if you would stop saying these things.

Some of the other things you say can be debated and discussed, but this statement is beyond belief, I urge you to stop saying these foolish things.

The Chair: Mr. Parker.

...

Mr. Robert Parker: With respect, sir, I have to disagree that it's either foolish or inaccurate. The majority of adult smokers who are brand-switchers are in the 19 to 30 age group. It is very difficult to find any activity – The easy way to prove that is to talk to smokers, and you'll find out that they did what I did as an older teenager. Having occasionally smoked and finally decided I was a smoker and would start buying them instead of bumming them, I switched brands five or six times over the next ten years. That's the general pattern.

It's very difficult to find any activity or image that is attractive to a 19 to 30 year-old that is not attractive to 15-to 17-year-olds. They think they're adults. They want to be treated that way. You have children who I'm sure have told you that: "Dad, I'm old enough." They make up an incontestable part of audiences for family events, whether it's the Benson and Hedges thing or car racing. They're not the targets, not the principal audience. You simply don't find any examples of companies advertising – even when there were some restrictions – in vehicles or events that are primarily for 15-and 16-year-olds, like, for example, on the back of *Jack and Jill* or at soapbox derbies or in comic books.

ED-90, pp. 64-65

- (c) A representative of the Alliance for Sponsorship Freedom, (comprised of 250 members, such as the Benson and Hedges Symphony of Fire at Ontario Place and even hotels) who asked that the following amendments be made to Bill C-42:

Hence, the alliance recommends that the government's new five-year transition period should be just that – five complete years with no off-site restrictions before the total ban comes into force. This would give our valuable events a reasonable time period to find replacement sponsors. It would be consistent with the approach agreed upon by members of the European Union, where sponsorship bans will apply in the years 2003 and 2006. Basically, we're saying don't put all those off-site restrictions on in years three to five.

If Canada's transition period is not harmonized with that of the European Community, then even the international motor sports events that are held in Canada run the risk of being dropped from the circuit entirely. Clearly, this would be in no one's best interest.

ED-91, p. 8

Another possible amendment we know you're considering is for sponsorship funding to be capped during the transition period. We again would ask you not to consider that cap because of expenses. We're in the business of trying to make these events grow bigger. We want to make a bigger contribution to the Canadian economy and to entertain more people through our events, and we would like to continue to see those events grow.

Some of the problems with caps would be things like prize money, and so forth. Du Maurier tennis would be a great example. To get big players in every year, they usually have to increase the amount of prizes they are giving, and a cap would certainly restrict that dramatically.

ED-91, p. 8

- (d) In addition, the Committee received ten briefs.

ED-102 and 103

Amendments

On November 3, 1998, the Standing Committee on Health adopted amendments to Bill C-42.

ED-91

On November 4, 1998, the Committee reported to the House with the proposed amendments.

ED-83

ED-92

Third reading in the House of Commons

On November 16, 1998, Ms. Elinor Caplan (Parliamentary Secretary to the Minister of Health) participated in the debates during the third reading and stated:

Bill C -42 places us consistently among international leaders in controlling the promotion of tobacco. I hope all people watching the debate and those in the House know that the primary focus of the bill is a five -year timetable to end the marketing of tobacco products through event sponsorship. That is a very significant and important component of Bill C -42.

At the end of five years there will be a complete ban on tobacco sponsorship. We propose to accomplish this through a transitional process. Sports and cultural events that were in place with tobacco sponsorship prior to April 25, 1997, would have a two-year period without new sponsorship restrictions but only during that period. During the following three years we want to tighten the limits significantly.

On-site promotion of tobacco sponsorships would be able to continue. Off-site promotions would have to meet the 90:10 rules of the existing *Tobacco Act*. We would place stringent conditions on these off-site promotions to limit the exposure of young people to the marketing of tobacco products. In five years there would be no more promotions of tobacco sponsorship. Event names and facilities would not longer serve as a none-too-subtle reminder of tobacco and tobacco products.

Bill C -42 came after substantial discussions and consultations with all interested parties. We heard from the arts, sports and other groups that would be affected these changes. They indicated that they needed appropriate time frames to line up new sponsors. Bill C-42 recognizes that reality.

We also heard from the health community. Health organizations have been front and centre in the important work of the Government of Canada to help make Canada tobacco free and to ensure tobacco strategies and smoking cessation policies are in place. The Government of Canada acknowledges and supports the important work of the health community.

In particular I mention the work of the Canadian Cancer Society, Physicians for a Smoke Free Canada and the Non-Smokers' Rights Association in the broader effort. Many health groups have been a part of pushing appropriately for tobacco reduction strategies and strong anti-tobacco policies and legislation. They have been the leaders in the action over time to get the anti-smoking message out to Canadians.

They have been powerful forces in encouraging Canadians to keep moving the tobacco agenda ahead and ensuring that Canada remains among world leaders.

Health organizations look at what we were doing in the bill. Most understand where we want to go and how we want to get there. Most support the directions we are taking in Bill C -42 toward the prohibition of tobacco sponsorship promotions. We recognize that most have concerns, and we are aware of those concerns.

They understand that the tobacco industry has constantly sought new ways to market its products. As we in government and previous governments have closed off old channel bylaws such as this one, we know the tobacco industry has found new channels. For example, tobacco companies have begun to use the Internet to support events marketing in Canada, something many could not have foreseen three or four years ago.

With that in mind, the Canadian Cancer Society identified amendments that it wanted to see in Bill C-42. During second reading debate many members of the opposition indicated support for those amendments. Many opposition members and I can tell the House that many members on the government benches also supported the amendments proposed by the Canadian Cancer Society.

Therefore, at committee, during the second reading clause by clause debate, we announced that we were not only intending to amend the bill, but we brought forward three particular amendments which were supportive of the proposals that had been made by the Canadian Cancer Society and supported by many, many others in the House and outside the House.

First, we proposed that October 1, 1998, would specifically be identified as the start date for the transition under this bill. In effect, that means that the five-year clock has already begun to tick down on sponsorship promotions. If that amendment passes, as it did at committee, and this bill passes in the House, the clock has already begun to tick and the original intent of the timeline is firmly in place, being October 1, 1998.

Second, we proposed that the only events that could be grandfathered would be those that were already promoted in Canada. Although we never intended that it would be otherwise, this change makes it crystal clear that an event cannot be moved from the United States or Australia or wherever into Canada and be treated as if it had already been here.

Third, we proposed that only events that had been held in Canada during the 15 months prior to April 25, 1997, could be grandfathered. Once again it was never the intention of the government to allow events to be resurrected solely for their value as tobacco marketing vehicles. However, this amendment, which was agreed to by the committee and is presently before the House in the amended format of this bill, formalizes that intent and makes it absolutely clear as to the way this bill will function and operate.

The Canadian Cancer Society, as I said at committee, proposed two other amendments. One would ban point of sale advertising and the other would set a ceiling on sponsorship spending. We looked at these very seriously and, after review, we believed that both raised questions of feasibility and enforceability. For those reasons we listened very carefully to what witnesses had to say at committee. Today we have a bill before us that does not reflect moving on anything that we do not believe is either feasible or enforceable.

We launched the tobacco control initiative in 1996. We started by setting aside \$50 million a year over five years. We have made a commitment to public education, another key component of our strategy, one that we believe is critical, and we committed yet another \$50 million.

From the very beginning we knew that getting the greatest impact out of these resources would take co-operation with the provinces, territories, communities and

non-governmental organizations. We will be designing and are designing and implementing the elements of the strategy in conjunction with all of those stakeholders who share with us the determination to move the yardstick.

Many years of anti-tobacco programming have given us a great deal of information about what seems to work. Those years have taught us that to battle against tobacco is a step by step process and that it requires action in many areas.

Bill C -42 is one of the many valuable contributions to that work and I look forward to the debate and the passage in the House of the next step forward, a step that will lead to a complete ban in tobacco sponsorship within five years.

ED-93, pp. 31 to 34

On November 25, 1998, Ms. Elinor Caplan participated again, still as part of the third reading. She stated:

Permit me to briefly outline the contents of Bill C-42. As hon. members will recall, one section of the *Tobacco Act* includes restrictions on the way tobacco companies could advertise and promote their financial sponsorship of events such as automobile racing, show jumping, musical events and so forth.

In essence they could only display their brand names and logos on the bottom 10% on the face of ads, signs, billboards and so on. This restriction raised concerns. The motor sport industry, for instance, feared that the sudden loss of corporate sponsorship would jeopardize Canada's capacity to host international racing events.

Bill C -42 addresses these concerns. It proposes a phased approach which would delay the enforcement of the *Tobacco Act* promotional restrictions for two years. For the subsequent three years cigarette companies would be allowed to continue sponsoring events. However, their promotional activities outside the actual site, off-site, will be restricted to the 10% size restrictions specified in the *Tobacco Act*.

At the end of five years, by 2003 , promotional sponsorship by cigarette makers will be banned altogether. That is why I say that Bill C -42 strengthens the *Tobacco Act*. Instead of merely restricting promotional activity, the bill will prohibit them entirely.

These legislative changes will put Canada ahead of other nations that hold the health of their citizens in high regard. Indeed we are moving faster than Australia and the European Union, which are both implementing a similar sponsorship ban in the year 2006, three years after ours.

There is no doubt that some of the cultural and sporting groups may feel the financial pinch when the cigarette manufacturing giants are forced to withdraw their millions of dollars in sponsorship promotion. However, the fact is arts organizations and sports promoters told us over and over again that what they really needed was time to find alternative sources of funding support. That, in a nutshell, is the purpose of Bill C-42.

These groups told us that they also needed fairness. Thus under the proposed amendments every group from the Newfoundland Symphony Orchestra to the Victoria International Jazz Festival will be treated the same. One group will not be entitled to cigarette money that is denied to another.

It is also important to point out that with Bill C-71, as with Bill C -42 before us today, the government has sought to protect public health while at the same time respecting legitimate concerns of cultural and sports organizations. As such Bill C -42 represents a careful compromise, a delicate balance between those who would desire a complete ban, preferably yesterday, and those who feel it is equally necessary to accommodate sponsored sports, cultural and entertainment events.

Striking that balance has necessitated extensive consultations both with health groups and with representatives of the arts and entertainment industry. In that context I wish to acknowledge the important contribution of the House of Commons Standing Committee of Health in carrying forward the consultation process and refining the bill before us today. As a result of the committee hearings, the government listened and further strengthened Bill C-42 as follows.

First, the start of the phase-in period of the bill is clearly identified as October 1, 1998. This means that if the legislation passes, the five-year clock will have already begun ticking.

Second, the grandfathering clause in Bill C-42 would only apply to events that had been held in Canada. In other words, promoters would not be able to move an event here from the United States or elsewhere merely to benefit from the phase-in provisions of the ban on cigarette sponsorship advertising.

Third, the new amendments would permit the grandfathering only of events that have been held in Canada in the 15 months prior to April 25, 1997. That would prevent promoters from resurrecting long dead festivals solely for their value as tobacco marketing vehicles. These changes to Bill C-42 were proposed by the health community, were adopted by the government and are consistent with our public health approach.

In conclusion, we have all heard the alarming facts. Smoking is far and away the major preventable cause of death and disease in Canada. It is estimated that nearly one in five deaths in Canada can be attributed to smoking and that is more than suicides, vehicle crashes, AIDS and murder combined. Every year 45,000 Canadians die of cancer, heart disease and lung disease as a result of tobacco use. Many more Canadians have their quality of life compromised by emphysema and other respiratory ailments.

We know that many people get hooked on smoking during their teen years and that young people are particularly vulnerable to peer pressure and messages, sometimes subliminal, encouraging them to smoke. Obviously as a caring society we have a moral obligation to act. We have a responsibility toward future generations and a duty to help our impressionable young people resist the lure of this deadly habit.

Health groups across the country urged us to lead the fight against smoking. We have not failed them. The *Tobacco Act*, as we propose to amend it, would give the government some meaningful ammunition in the battle against cigarette use. The legislation gives us as a society the power to look a gift horse in the mouth. We will have the wherewithal to say to tobacco manufacturers "Thanks, but no thanks. We value the health of our children too much to accept your money for event sponsorship."

ED-94, pp. 56 to 58

On December 1, 1998, Bill C-42 was adopted at third reading.

ED-96

Bill C-42 in the Senate

On December 7, 1998, Bill C-42 had second reading in the Senate and the Honourable Francis William Mahovlich stated:

Briefly, the amendments contained in Bill C-42 would strengthen the *Tobacco Act* passed by the last Parliament. This legislation would put us squarely at the

international forefront of tobacco control. Other countries are developing similar bans, but we will have ours in place first, three years ahead of the European Union.

Bill C-42 introduces a transitional process that would give existing events a two-year period without new sponsorship restrictions. During the following three years, off-site promotions would be confined to the lower 10 per cent of any signs, banners, billboards, or posters associated with the event in restricted locations. This transitional period would allow events organizers the time they need to find alternate sponsors.

In five years, there would be no more promotions of tobacco sponsorship whatsoever. Event names and facilities would no longer serve as none-too-subtle reminders of tobacco, and the law would apply even-handedly to all – busker festivals, hang-gliding championships, dance competitions, or air shows.

Honourable senators, I should like to draw your attention to a few more changes that were made to the bill as originally drafted during committee hearings in the other place. These amendments, as I understand it, sought to address the concerns of the health community which has been so active in helping Canada combat the tobacco menace.

Specifically, the first of these amendments would clarify that the five-year phase-in of the promotions ban actually began last October 1. In other words, the clock is already ticking for tobacco companies.

The other two amendments restrict the legislation's grandfathering provisions to events recently held and already promoted in Canada. The intent is to ensure that events cannot be moved to Canada from the United States or elsewhere and be treated during the law's phase-in period as though they have always been held here. Similarly, it should not be permissible to resurrect long-abandoned events merely for their value as tobacco marketing vehicles.

I mentioned a moment ago that Bill C-42 would strengthen the *Tobacco Act*. That is true because there is no complete ban on those types of promotions under the existing Act. All that is required under the current law is that cigarette companies adhere to the 90-10 rule which restricts their advertising space to the bottom 10 per cent of signs and billboards.

The health community was not satisfied with that, nor should we be. If we believe in severing the noxious association between cigarettes and entertainment, then we must do it right. Simply shrinking brand names or moving them around on the billboard will not do the trick. We must be prepared to rid our nation of signs and symbols of smoking because they are a constant and unwelcome invitation to our young people. They are like a siren call, beckoning Canadians toward manifest danger.

Honourable senators, we in this chamber understand the importance of combating our single biggest public health threat with all the weapons at our disposal. Bill C-42 alone will not rid our society of smoking, but it would take us one more worthwhile step closer.

I would urge my honourable colleagues to support this legislation.

On motion of Senator Kinsella, for Senator Lavoie-Roux, debate adjourned.

Standing Senate Committee on Legal and Constitutional Affairs

Bill C-42 was examined by the Standing Committee on Legal and Constitutional Affairs on December 9, 1998. At that time, John Luik appeared again and he acknowledged having worked as a consultant for the tobacco industry and affirmed that he has a Ph.D. in social sciences.

ED-99, pp. 18, 19 and 24

Mr. Parker, representing the three plaintiffs, also appeared, stating:

Do I believe that advertising and promotion for tobacco-related events or for the tobacco products themselves should generally not be visible to children and certainly not be directed at them? Absolutely. There are many areas in which we are in general agreement with the goals and, in some cases, with the methods. There are an equal number of instances where we think that the methods are extreme and unworkable, however. Banning sponsorships, the issue before you, is certainly an example of that.

ED-99, p. 21

On December 9, 1998, the Honourable Allan Rock, Minister of Health, also appeared before the Senate Committee, stating:

Mr. Rock: When I was first appointed Minister of Health, I found on my desk a copy of a letter sent by my predecessor dated April 27, 1997, to an addressee whose name I cannot now recall. That letter was a commitment to amend the *Tobacco Act* so that international auto sports could continue to enjoy tobacco sponsorship in Canada.

It presented a challenge because it was a commitment that, in order to fulfil, would require us to change the Act. We thought at first that, in a way, it might weaken it. It was in that sense that I said, when asked, that in order to fulfil the commitment we would do the least amount necessary and we would open it as narrowly as possible in order to ensure that we kept our word but did not go further than we had to in doing so. I then added that we would increase taxes to the extent possible and add whatever other regulation we could to achieve our stated goal.

You ask what changed my mind. Frankly, we found a better way. We found a way to fulfil that commitment while at the same time making the *Tobacco Act* tougher on tobacco. We found a way to turn that difficulty into an opportunity. As I have already explained, the *Tobacco Act* approved by Parliament in the spring of 1997 would have allowed tobacco sponsorship to go on forever. Although it was limited, there would still be a tobacco company's name at the event and, indeed, off-site.

We found a way to fulfil the commitment to allow the motor sports to continue with sponsorship but, at the same time, we found a way to write into the law a date by which not only that sponsorship but all sponsorship would end forever. That date is only five years distant. In the meantime, as you have heard me say in opening and as you know from the bill, the sponsorship provisions would be severely restricted after the first two-year period.

My answer, in short, senator, is that although I thought at first that we would have to create an exception to permit motor sports to continue, the fact is we found a better way.

In answer to the question about what further legislation I have in mind, in the very short term, we will be tabling regulations dealing with reporting requirements. They will fulfil commitments we made in June of this year when I tabled Bill C -42 that arise from a long period of consultation with interested and knowledgeable parties.

We will also be publishing information letters with respect to other proposed regulations, including labelling, packaging and some other elements of marketing. Fundamentally, our intended steps in the short to medium term will involve regulations, which will exercise powers provided by the *Tobacco Act* and which form part of the overall strategy against tobacco.

ED-99, pp. 6, 7 (evidence for the evening session)

A bit further on, following a question by Senator Lynch-Staunton on the constitutionality of the Act, he explained:

Senator Lynch-Staunton: ... One of the reasons Minister Epp's bill was struck down by the Supreme Court is that the majority felt that it was not Charter -proof and that it violated the Charter by not allowing commercial free speech. Why would their opinion in that case not be the same as in this case since there is to be imposed, within five years, a partial ban on commercial free speech?

Mr. Rock: In essence, it is free speech in the commercial context. The Supreme Court of Canada found that there is a right in the commercial context for a vendor of goods to communicate with potential customers of goods, and to extinguish that communication is a violation of the right to free speech in the commercial sense.

I will give you a short answer because the long one would be very tiresome. It seems to me on a reading of the Supreme Court of Canada's judgment the first time around that they found on an overall consideration of the statute that it effectively deprived the vendor of the right to communicate with the customer. It cut off the communication altogether, and that was unreasonable.

Bill C -71 was drafted to permit a level of communication, which Parliament thought was commensurate with the nature of what is communicated. Those who smoke could get information from people who sold smoking materials relevant to the smoker's decision about which brand to purchase, in which size, and so on. Bill C-71 allows a degree of communication commensurate with the societal risk as Parliament assessed it.

Sponsorship is a form of communication; promotion is a form of communication. When Bill C -71 was adopted by Parliament, the balance was such that although such communication was limited, it was still permitted in some form. Bill C -42 goes beyond that and extinguishes that kind of communication. We looked carefully at the question of whether in doing so we crossed the line drawn by the Supreme Court of Canada.

Our best judgment, senator, is that this is constitutionally defensible because even after that form of communication is stopped, the other forms permitted by Bill C -71 will continue. There are still ways in which the manufacturers and purveyors of tobacco can communicate with their customers about their product, whether it is in limited circulation publications, in specific physical places where only persons of age are permitted to go, or whether it is on the package itself.

While it is fair to say that Bill C -42 affects the balance struck by Bill C-71 and further limits the communication between manufacturer and purveyor on the one hand and the customer on the other, it does not extinguish it. It does not commit the legal offence that the former statute did, although it further restricts the nature of the communication.

ED-99, pp. 10-11 (evidence for the evening session)

Third reading in the Senate

On December 10, 1998, the Honourable Gérald-A. Beaudoin participated in the debate on Bill C-42, stating:

Hon. Gérald-A. Beaudoin: Honourable senators, I have a few words to say on the legal and constitutional issue involving Bill C-42. We all know that Canada's Parliament can legislate on substances that present a danger because of its jurisdiction over criminal matters. Tobacco presents a health hazard. Canada's Parliament is inspired to intervene in this matter, particularly because it has considerable legislative authority, in my opinion. The provinces, of course, have jurisdiction in health matters and they too can intervene, but they do not intervene in the same way and for the same reasons as Parliament. They are in their field, that is property and civil law under section 92.13, whereas the federal government bases its legislative jurisdiction in criminal matters on section 91.27. Another problem is that of tobacco advertising.

A total ban on advertising contravenes the Canadian *Charter of Rights and Freedoms* under freedom of expression, but a relative and not absolute ban is acceptable according to current case law at the highest legal level.

I am glad that we covered this thoroughly in the Standing Senate Committee on Legal and Constitutional Affairs because the issue has not been resolved.

That having been said, I personally find the bill perfectly acceptable.

ED-100, p. 36

On December 10, 1998, Bill C-42 was adopted at third reading.

ED-100, p. 40

APPENDIX B: LIST OF WITNESSES HEARD BY VARIOUS PARLIAMENTARY COMMITTEES

Bill	COMMITTEE	DATE	ORGANIZATION	NAME
C-71	Standing Committee on Health	December 6, 1996 (Session No. 25)	<i>Department of Health</i> <i>Ontario Flue-Cured Tobacco Growers' Marketing Board</i>	Judy Ferguson Murray Kaiserman Chris McNaught France Pégeot Frank Menich
C-71	Standing Committee on Health	December 9, 1996 (Session No. 26)	<i>Alliance for Sponsorship Freedom</i> <i>Artists for Tobacco-Free Sponsorship</i> <i>Canadian Cancer Society</i> <i>Canadian Conference of the Arts</i> <i>Canadian Council on Smoking and Health</i>	Léon Méthot Christine Mitton Mary Moulton Andy Nulman Mike Smith Andrew Cash Jack Micay Charles Montpetit Alain Poirier Rob Cunningham Lyne Deschênes Ken Kyle Keith Kelly David Hill Ron Stewart

Bill	COMMITTEE	DATE	ORGANIZATION	NAME
C-71	Standing Committee on Health (cont.)	December 9, 1996 (Session No. 26) (cont.)	<i>Canadian Tennis Association</i> <i>Canadian Tobacco Manufacturers' Council</i> <i>Quebec Coalition for Tobacco Control</i> <i>Department of Health</i> <i>Québec City Summer Festival</i> <i>Grand Prix F1 du Canada Inc.</i> <i>[Canadian F1 Grand Prix]</i> <i>Harbourfront Centre, Toronto</i> <i>International Jazz Festival, Vancouver</i> <i>McMaster Meighen</i> <i>National Association of Tobacco and Confectionery Distributors</i>	Jane Wynne Marie-Josée Lapointe Robert Parker Mario Bujold Louis Gauvin Gilles Lépine Laurent Marcoux Judy Ferguson France Pégeot Michel Létourneau Normand Legault Richard Prieur William Boyle Robert L. Kerr Colin Irving David Crauch Luc Dumulong Mark Tobenstein

Bill	COMMITTEE	DATE	ORGANIZATION	NAME
C-71	Standing Committee on Health (cont.)	December 9, 1996 (Session No. 26) (cont.)	<i>Non-Smokers Rights Association</i>	François Damphousse Garfield Mahood David T. Sweanor
			<i>Ontario Place</i>	Max Beck
			<i>Regroupement des exploitants de distributrices automatiques de cigarettes (REDAC)</i>	Michel Bouliane Pierre Patenaude
			<i>Tennis Canada</i>	Richard Legendre Bob Moffatt
			<i>Université du Québec à Montréal</i>	Pierre Fortin
			<i>As an Individual</i>	Pierre Lemieux (Economist)
C-71	Standing Committee on Health	December 10, 1996 (Session No. 27)	<i>Action on Smoking and Health</i>	Les Hagen
			<i>Board of Trade of Metropolitan Montreal</i>	André Godbout Luc Lacharité
			<i>Canadian Council of Grocery Distributors</i>	Michel Fafard Michel Nadeau
			<i>Department of Health</i>	Judy Ferguson Louise Maguire-Wellington

Bill	COMMITTEE	DATE	ORGANIZATION	NAME
				Chris McNaught France Pégeot
			<i>Montréal International</i>	Francis Fox Charles Lapointe Gilbert Rozon
			<i>National Cancer Institute of Canada</i>	Allan Best
			<i>Ontario Campaign for Action on Tobacco</i>	Michael Perley
			<i>Physicians for a Smoke-Free Canada</i>	Cynthia Callard Jim Walker
			<i>Vancouver Fireworks Society</i>	Raymond Greenwood

Bill	COMMITTEE	DATE	ORGANIZATION	NAME
C-71	Standing Senate Committee on Legal and Constitutional Affairs	March 19, 1997 (Issue No. 50)	<i>Health Canada</i>	Chris McNaught André Juneau Judy Ferguson
C-71	Standing Senate Committee on Legal and Constitutional Affairs	March 20, 1997 (Issue No. 51)	<i>On Bill C-71</i>	Hester Lessard, Faculty of Law, University of Victoria Gerald Gall, Faculty of Law, University of Alberta
C-71	Standing Senate Committee on Legal and Constitutional Affairs	April 1, 1997 (Issue No. 52)	<i>On Bill C-71</i> <i>Canadian Tobacco Manufacturers' Council</i>	William Schabas (professor, UQAM) Robert R. Parker Colin Irving Simon Potter Stephen Sofer
C-71	Standing Senate Committee on Legal and Constitutional Affairs	April 2, 1997 (Issue No. 53)	<i>L'Office des producteurs de tabac jaune du Québec</i> <i>Alimentation Couche-Tard Inc.</i> <i>Alliance for Sponsorship Freedom</i>	Germain Ducharme Michel Gadbois Wayne Renke Max Beck Michel Létourneau

Bill	COMMITTEE	DATE	ORGANIZATION	NAME
C-71	Standing Senate Committee on Legal and Constitutional Affairs (cont.)	April 2, 1997 (Issue No. 53) (cont.)	<i>Artists For Tobacco-Free Sponsorship</i> <i>International Management Group, Toronto, Ontario</i> <i>Coalition for Commercial Freedom of Speech</i> <i>Flashmédia Inc.</i> <i>Eddy Match Company Limited</i> <i>Outdoor Advertising Assn. of Canada</i> <i>Greater Montréal Convention and Tourism Bureau</i> <i>Tourism Toronto</i> <i>Vancouver Fireworks Society</i> <i>City of Montréal</i>	Andrew Cash Alain Poirier Michael Merrall Rupert T. R. Brendon R. S. Engle Nicolas Péniisson David C. Pigott Peter M. Gallop The Honourable Charles Lapointe Kirk Shearer Raymond Greenwood Pierre Bourque, Mayor John Luik Robert Allan, prof. economics, UBC Pierre Fortin, prof. economics, UQAM

Bill	COMMITTEE	DATE	ORGANIZATION	NAME
C-71	Standing Senate Committee on Legal and Constitutional Affairs	April 3, 1997 (Issue No. 54)	<i>Atlantic Federation of Musicians</i> <i>25th St. Theatre Centre Inc.</i> <i>Théâtre du Nouvel-Ontario Inc.</i> <i>Canadian Conference of the Arts</i> <i>Canadian Council of Grocery Distributors</i> <i>Canadian Federation of Independent Grocers</i> <i>Canadian Coalition for Responsible Tobacco Retailing – Operation I.D.</i> <i>Regroupement des exploitants de distributrices automatiques de cigarettes (REDAC)</i> <i>Canadian Tennis Association</i> <i>Molstar Sports & Entertainment</i>	Peter J. Power Karen Planden Robert Gagné Keith Kelly Michel Nadeau John Scott Peter K. Flach Pierre Patenaude Raymond Laporte Richard Legendre Brent Scrimshaw Rick Dearden

Bill	COMMITTEE	DATE	ORGANIZATION	NAME
C-71	Standing Senate Committee on Legal and Constitutional Affairs (cont.)	April 3, 1997 (Issue No. 54) (cont.)	<i>Grand Prix Player's Ltée de Trois-Rivières</i> <i>Canadian Institute of Child Health</i> <i>Canadian Medical Association</i> <i>Canadian Cancer Society</i> <i>Action on Smoking and Health</i> <i>Quebec Coalition for Tobacco Control</i> <i>Non-Smokers' Rights Association</i>	Léon Méthot Jenny Tipper Judith Kazimirski Rob Cunningham Les Hagen Louis Gauvin Eric LeGresley Ruth Sullivan Liora Salter
C-71	Standing Senate Committee on Legal and Constitutional Affairs	April 7, 1997 (Issue No. 55)	<i>On Bill C-71</i>	Wayne MacKay, Nova Scotia Human Rights Commission Richard Pollay, Faculty of Commerce, UBC Dr. Allan Best, National Cancer Institute of Canada

Bill	COMMITTEE	DATE	ORGANIZATION	NAME
C-71	Standing Senate Committee on Legal and Constitutional Affairs (cont.)	April 7, 1997 (Issue No. 55) (cont.)	<i>National Association of Tobacco and Confectionery Distributors</i> <i>Ontario Korean Businessmen's Association</i>	Luc Dumulong Mark Tobenstein David Crouch Joseph Chung Brian Smith
C-71	Standing Senate Committee on Legal and Constitutional Affairs	April 9, 1997 (Issue No. 56)	<i>Health Canada</i>	Chris McNaught
C-71	Standing Senate Committee on Legal and Constitutional Affairs	April 10, 1997 (Issue No. 57)		
C-42	Standing Committee on Health	October 29, 1998 (Session No. 52)	<i>Canadian Cancer Society</i> <i>Physicians for a Smoke-Free Canada</i> <i>Quebec Student Sport Federation, Québec and Chaudière-Appalaches</i>	Rob Cunningham Cynthia Callard Gilles Lépine

Bill	COMMITTEE	DATE	ORGANIZATION	NAME
C-42	Standing Committee on Health (cont.)	October 29, 1998 (Session No. 52) (cont.)	<i>Quebec Coalition for Tobacco Control</i> <i>Info-tabac</i> <i>Canadian Tobacco Manufacturers' Council (CTMC)</i>	Louis Gauvin Denis Côté Rob Parker
C-42	Standing Committee on Health	November 3, 1998 (Session No. 53)	<i>Health Canada</i> <i>Canadian Medical Association</i> <i>Non-Smoker's Rights Association</i> <i>Alliance for Sponsorship Freedom</i>	Bill Maga Chris McNaught Dr. Cindy Forbes Dr. Isra Levy David Sweanor Max Beck
C-42	Standing Senate Committee on Legal and Constitutional Affairs	December 9, 1998 (Issue No. 49)	<i>Health Canada</i> <i>Canadian Tobacco Manufacturer's Council</i> <i>As an individual</i> <i>Physicians for a Smoke-Free Canada</i> <i>Canadian Cancer Society</i>	Michael O'Neill Chris McNaught Robert Parker John Luik David Esdaile Rob Cunningham

Bill	COMMITTEE	DATE	ORGANIZATION	NAME
C-42	Standing Senate Committee on Legal and Constitutional Affairs (cont.)	December 9, 1998 (Issue No. 49) (cont.)	<i>Non-Smoker's Rights Association</i> <i>Info-tabac</i>	David Sweanor Denis Côté
C-42	Standing Senate Committee on Legal and Constitutional Affairs	December 10, 1998 (Issue No. 50)		
C-42	Standing Committee on Health	May 30, 2000 (Session No. 22)	<i>Health Canada</i> <i>National Association of Tobacco and Confectionery Distributors</i> <i>Quebec Food Retailers Association</i> <i>Ontario Korean Businessmen's Association</i>	Ian Potter Jane Meyboom Daniel Hara Karen M. Walker Luc Dumulong Kammal Tannis Diane Héту Don Cha

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COMPARISON BETWEEN THE TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹ AND THE TOBACCO ACT

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Long Title</p> <p>An Act to regulate the manufacture, sale, labelling and promotion of tobacco products, to make consequential amendments to another Act and to repeal certain Acts.</p>	<p>TPCA: An Act to prohibit the advertising and promotion and respecting the labelling and monitoring of tobacco products.</p> <p>TSYPA: An Act to restrict access to tobacco by young persons.</p>		
<p>Section 2</p> <p>"accessory" means a product that may be used in the consumption of a tobacco product, including a pipe, cigarette holder, cigar clip, lighter and matches.</p>	<p>No equivalent.</p>	<p>The SCC did not comment on any of the definitions in the TPCA. The TSYPA was not challenged before the Supreme Court of Canada.</p>	

¹ The TSYPA is also replaced by the *Tobacco Act*. The TSYPA was not challenged in *RJR-MacDonald Inc. v. Attorney General of Canada* [1995] 3 R.C.S. 199.
² Refers to Supreme Court of Canada decision in *RJR-MacDonald Inc. v. Attorney General of Canada* [1995] 3 R.C.S. 199.

NB: In this table, RJR refers to RJR-MacDonald Inc; RBH refers to Rothmans, Benson & Hedges; and ITL refers to Imperial Tobacco Ltd. Unless otherwise specified the statement "stay requested" refers to the fact that all three tobacco companies have requested a stay of the provision.

The three tobacco companies seek a declaration that the entire *Tobacco Act* is *ultra vires* the Parliament of Canada.

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
"analyst" means a person designated as an analyst under subsection 34(1).	TPCA: "analyst" means a person designated as a tobacco product analyst pursuant to section 11;		
"brand element" includes a brand name, trade-mark, trade-name, distinguishing guise, logo, graphic arrangement, design or slogan that is reasonably associated with, or that evokes, a product, a service or a brand of product or service, but does not include a colour.	TPCA: "trade-mark" includes any trade-mark whether or not it is registered or registrable as such under the Trade-marks Act, and any recognizable variation thereof.		
See definition of "manufacture" below.	TPCA: "distributor" means a person engaged in the business of selling tobacco products otherwise than at retail only, and includes a manufacturer or importer thereof;		
"emission" means a substance that is produced when a tobacco product is used.	No equivalent.		

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
"entity" includes a corporation, firm, partnership, association, society, trust or other organization, whether incorporated or not.	No equivalent.		
"furnish" means to sell, lend, assign, give or send, with or without consideration, or to barter or deposit with another person for the performance of a service.	No equivalent.		
"inspector" means a person designated as an inspector under subsection 34(1).	TPCA: "inspector" means a person designated as a tobacco product inspector pursuant to section 11;		
"manufacture", in respect of tobacco products, includes the packaging, labelling, distributing and importing of tobacco products for sale in Canada.	No equivalent.		

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>"manufacturer", in respect of tobacco products, includes any entity that is associated with a manufacturer, including an entity that controls or is controlled by the manufacturer or that is controlled by the same entity that controls the manufacturer.</p>	<p>TPCA: "manufacturer" includes any corporation that is associated with a manufacturer;</p> <p>TPCA: 2(2) Associated corporations</p> <p>(2) For the purposes of this section, two corporations are associated with each other if one is controlled by the other or if both are controlled by the same person.</p>		
<p>"Minister" means the Minister of Health.</p>	<p>TPCA: "Minister" means the Minister of Health;</p> <p>TSYPA: "<i>Minister</i>" means the Minister of Health;</p>		
<p>"package" means the container, receptacle or wrapper in which a tobacco product is sold.</p>	<p>TPCA: "package" means any pack, carton, wrapping or other container in which tobacco products are customarily sold at retail;</p>		
<p>"prescribed" means prescribed by regulation.</p>	<p>TPCA: "prescribed" means prescribed by regulations made under this Act;</p> <p>TSYPA: "<i>prescribed</i>" means prescribed by regulation;</p>		

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
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TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>"retailer" means a person who is engaged in a business that includes the sale of a tobacco product to consumers.</p>	<p>TPCA: "retailer" means a person engaged in any business that includes the sale of tobacco products at retail;</p>		
<p>"sell" includes offer for sale and expose for sale.</p>	<p>No equivalent</p>		
<p>"tobacco product" means a product composed in whole or in part of tobacco, including tobacco leaves and any extract of tobacco leaves. It includes cigarette papers, tubes and filters but does not include any food, drug or device that contains nicotine to which the <i>Food and Drugs Act</i> applies.</p>	<p>TPCA: "tobacco product" means any product manufactured from tobacco and intended for use by smoking, inhalation or mastication, and includes nasal and oral snuff;</p> <p><i>TSYPA: "tobacco product" means (a) tobacco leaves, and (b) any product manufactured from tobacco, including nasal and oral snuff, intended for use by smoking, inhalation or mastication and includes cigarette, tubes and filters.</i></p>		
<p>"young person" means a person under eighteen years of age.</p>	<p><i>TSYPA covered sales to person under the age of eighteen.</i></p>		

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**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION²	COMMENTS
Section 3 This Act is binding on Her Majesty in right of Canada or a province.	No equivalent.		No Stay requested.

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**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Section 4</p> <p>Describes the purpose of the Act:</p> <p>(a) to protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;</p> <p>(b) to protect young persons and others from inducements to use tobacco products and the consequent dependence on them;</p> <p>(c) to protect the health of young persons by restricting access to tobacco products; and</p> <p>(d) to enhance public awareness of the health hazards of using tobacco products.</p>	<p>TPCA, Section 3</p> <p>The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,</p> <p>(a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;</p> <p>(b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and</p> <p>(c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.</p>	<p>McLachlin J. at para 144: "As my colleague has noted, the <i>Tobacco Products Control Act</i> is but one facet of a complex legislative and policy scheme to protect Canadians from the health risks of tobacco use. However, the objective of the impugned measures themselves is somewhat narrower than this. The objective of the advertising ban and trade mark usage restrictions must be to prevent people in Canada from being persuaded by advertising and promotion to use tobacco products. The objective of the mandatory package warning must be to discourage people who see the package from tobacco use. Both constitute important objectives." See also p. 336, para. 146.</p>	<p>The purpose is similar to the purpose of the TPCA with the addition of paragraph c) which incorporates a purpose similar to the TSYPA.</p> <p>No stay requested.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
	<p><i>TSYPA, Section 3</i></p> <p><i>The purpose of this Act is to protect the health of young persons by restricting their access to tobacco in light of the risks associated with the use of tobacco.</i></p>		
<p>Section 5</p> <p>No person shall manufacture a tobacco product that does not conform with the standards established by the regulations.</p>	<p>No equivalent.</p>	<p>La Forest J. in dissent, but speaking for the majority on the issue of division of powers, said: "...the detrimental health effects of tobacco consumption are both dramatic and substantial...tobacco kills." (para. 32, p. 245) "This Court may validly employ the criminal law power to prohibit or control the manufacture, sale and distribution of products that present a danger to public health" (para. 39, p. 252)</p>	<p>Such powers, which are common to legislation dealing with hazardous consumer products (food, drugs, pesticides, household chemicals), were not in the TPCA or the TSYPA. See also <i>Hazardous Products Act</i>.</p> <p>No stay requested.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Section 6</p> <p>Requires manufacturers to provide any information about their tobacco products and the emissions as the Minister specifies in regulations.</p>	<p>Section 10 of the TPCA and sections 17 to 21 of the TPC Regulations required quarterly reports on toxic constituents, monthly sales data and annual sponsorship contribution report. Information concerning emissions was not required.</p>	<p>Not part of RJR.</p>	<p>Reporting requirements on emissions.</p> <p>No stay requested.</p>
<p>Section 7</p> <p>Authorizes regulations setting standards for all aspects and all emissions of all tobacco products and the information to be provided by manufacturers about their tobacco products.</p>	<p>No provisions concerning regulation of tobacco products. Section 10 of the TPCA required information only on the constituents.</p>	<p>Not part of RJR.</p>	<p>Regulations making authority is provided in accordance with powers given in Section 6 to regulate the product.</p> <p>No stay requested.</p>
<p>Section 8</p> <p>Prohibits furnishing tobacco products to "young persons" as defined in section 2.</p>	<p><i>Section 4 of the TSYPA prohibited furnishing tobacco products to persons under 18.</i></p>	<p>Not part of RJR.</p>	<p>No stay requested.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Section 9 Requires retailers to post signs informing public that sales of tobacco products to young persons are illegal and provides exception by regulation for use of provincially mandated signs</p>	<p><i>Section 7 of the TSYPA required retailers to post signs informing the public that sales of tobacco products to young persons were illegal.</i></p>	<p>Not part of RJR.</p>	<p>No stay requested.</p>
<p>Subsection 10(1) Requires at least 20 cigarettes per package or a greater number set by regulation. Subsection 10(2) sets the minimum number, quantity or portion of other tobacco products by regulation.</p>	<p><i>Section 7.1 of the TSYPA required at least 20 cigarettes per package.</i></p>	<p>Not part of RJR.</p>	<p>Subsection 10(2) authorizes the setting of minimum quantity rules for tobacco products other than cigarettes in regulations. No stay requested.</p>
<p>Section 11 Prohibits self-serve displays of tobacco products, unless exempted by regulations.</p>	<p>No equivalent.</p>		<p>Covers self-service display of "tobacco products" but not of accessories. No stay requested.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Section 12</p> <p>Prohibits sales by means of vending machines, except 1) in bars etc if the machine has a prescribed security device or 2) in places to which the public does not have reasonable access.</p>	<p><i>Section 5 of the TSYPA prohibited installation of vending machines except in bars, taverns and beverage rooms. No security requirements. Machines existing in other locations at coming into force could remain in place.</i></p>	<p>Not part of RJR.</p>	<p>Section 12 restricts the location of vending machines.</p> <p>No stay requested.</p>
<p>Subsection 13(1)</p> <p>Subsection 13(1) prohibits mailing of tobacco products or their delivery across a provincial boundary for consideration except between manufacturers and retailers.</p>	<p>No equivalent.</p>		<p>Subsection 13(1) ensures that tobacco products are sold in a face to face transaction permitting verification of age before the customer receives a tobacco product.</p> <p>No stay requested.</p>
<p>Subsection 13(2)</p> <p>Subsection 13(2) prohibits advertising a service to mail tobacco products or deliver them across a provincial boundary.</p>	<p>No equivalent.</p>		<p>Subsection 13(2) is a corollary to subsection 13(1).</p> <p>No stay requested.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Section 14</p> <p>Authorizes regulations respecting:</p> <p>1) documentation to prove age; and</p> <p>2) signs at retail, secured vending machines, minimum quantities of tobacco products other than cigarettes and self-service displays, including exceptions.</p>	<p><i>Section 10 of the TSYPA authorizes regulations with respect to the placement of vending machines and the content and placement of signs at retail.</i></p>	<p>Not part of RJR.</p>	<p>No stay requested.</p>
<p>Subsection 15 (1)</p> <p>Requires health messages and a declaration of the amount of emissions specified by regulations in both official languages on all tobacco products. Subsection 15(2) requires the same declarations on leaflets if required by the regulations.</p>	<p>Subsection 9(1) of the TPCA authorized regulations mandating health warnings and toxic constituent labelling requirements on packaging and on leaflets .</p>	<p>McLachlin J. at Para. 146: "While the limited objective of reducing tobacco-associated health risks by reducing advertising-related consumption and providing warnings of dangers is less significant than the broad objective of protecting Canadians generally from the risks associated with tobacco use, it nevertheless constitutes an objective of sufficient importance to justify overriding the right of free expression guaranteed by the Charter. Even a small reduction in tobacco use may work a significant benefit to the health of Canadians and justify a properly proportioned limitation of right of free expression. "</p>	<p>Subsection 15 (1) also covers information about emissions which should be provided to consumers and which was not included in the TPCA.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Subsection 15 (3)</p> <p>Permits optional attribution of health messages to a prescribed person or entity.</p>	<p>Subsection 9(2) of TPCA prohibited the addition of any extra wording to the packaging other than trademarks, health messages, toxic constituents and information required under the <i>Excise Act</i></p>	<p>All of section 9 of the TPCA was struck by the Supreme Court of Canada (SCC) because subsection 9(2) prevented tobacco companies from attributing the health warnings to their author.</p> <p>McLachlin J at para. 124, "The combination of the unattributed health warnings and the prohibition against displaying any other information which would allow tobacco manufacturers to express their own views, constitutes an infringement of the right to free expression guaranteed by s. 2(b) of the <i>Charter</i>."</p>	<p>Section 15 does not prohibit additional information as was the case under subsection 9(2) of the TPCA.</p> <p>Subject to regulations, subsection 15(3) expressly authorizes attribution of the health message at the option of the manufacturer.</p> <p>Stay requested.</p>
<p>Section 16</p> <p>Clarifies that compliance with the Act does not constitute fulfilment of the manufacturer's common law duty to warn of hazards of its product.</p>	<p>Equivalent to subsection 9(3) of TPCA.</p>	<p>Struck down by SCC as part of section 9.</p>	<p>No stay requested.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
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TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Section 17</p> <p>Authorizes regulations setting out the form and content of the health messages and emission information and the manner in which they are to be displayed on all tobacco products and leaflets and for prescribing anything that is to be prescribed.</p>	<p>Section 17 of the TPCA authorized, <i>inter alia</i>, regulations setting out the manner in which the health warnings and toxic constituent information were to be displayed on tobacco products.</p>		<p>Section 17 of Tobacco Act is more specific than section 17 of the TPCA.</p> <p>No stay requested.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Section 18</p> <p>Defines the term "promotion".</p>	<p>The TPCA prohibited advertising (section 4), the use of trade marks on non-tobacco products (section 8) and free distribution (section 7). It also restricted retail display (section 5) and sponsorship promotions (section 6).</p>		<p>The term "promotion" is used to cover different activities used by marketers to promote products or services. Section 18 must be read as a whole. Subsection 18(1) sets out a general definition which is qualified by the broad exceptions in subsection 18(2). Section 18 must also be read in the context of Part IV and in light of the purpose of the Act set out in section 4. In this setting, it is clear that section 18 applies only to commercial promotion.</p> <p>Stay requested.</p> <p>Challenged under the <i>Charter</i>.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Subsection 18(1) sets out the following general definition: "promotion" means a representation about a product or service by any means, whether directly or indirectly, including any communication of information about a product or service and its price and distribution, that is likely to influence and shape attitudes, beliefs and behaviours about the product or service."</p> <p>Subsection 18(2) specifies that Part IV of the <i>Tobacco Act</i> does not apply to:</p> <ul style="list-style-type: none"> a) literary, scientific and artistic works; b) reports, studies and opinions; and c) intra-industry communications <p>unless consideration is given for the specific use of or reference to a tobacco product or brand in the work, production, performance, report etc.</p>	<p>No equivalent.</p>		

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Section 19</p> <p>Prohibits all forms of promotion except where permitted by the Act or the regulations.</p>	<p>No equivalent.</p>		<p>Part IV of the <i>Tobacco Act</i> governs all forms of marketing used to promote a tobacco product or a brand element of a tobacco product. This section cannot be read in isolation from the provisions in the Act setting out specific permissions and prohibitions for different types of promotion (e.g. section 22 advertising and section 24 sponsorship promotion).</p> <p>Stay requested.</p> <p>Challenged under the Charter.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Section 20</p> <p>Prohibits promotions that are false, misleading or deceptive or likely to create an erroneous impression about the characteristics, health effects or health hazards of a tobacco product or its emissions.</p>	<p>No equivalent.</p>		<p>Section 20 parallels subsection 5(1) of the <i>Food and Drugs Act</i> which provides that "No person shall label, package, treat, process, sell or advertise any food in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety."</p> <p>Stay requested.</p> <p>Challenged under the <i>Charter</i>.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Section 21</p> <p>Prohibits a testimonial for or endorsement of tobacco products by a person, character or animal. Depiction of a person, character or animal in a tobacco product promotion is a testimonial or endorsement, except where the depicted person, character or animal is a trade-mark that appeared on a tobacco product sold in Canada on December 2, 1996.</p>	<p>No equivalent.</p>		<p>No stay requested.</p> <p>Challenged under the <i>Charter</i> only by IITL.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Section 22:</p> <p>Permits information and brand preference advertising while prohibiting lifestyle advertising and advertising that appeals to young persons.</p> <p>Subsection 22(1) prohibits advertisements for tobacco products except where permitted.</p> <p>Subsection 22(2), subject to regulations, permits information advertising and brand preference advertising that is not lifestyle advertising or advertising that appeals to young persons, where the advertising appears in:</p> <ol style="list-style-type: none"> 1) publications mailed to named adults; 2) publications with at least 85% adult readership; and 3) signs in places where young persons are not permitted by law. 	<p>Subsection 4(1) of the TPCA banned all advertising of tobacco products for sale in Canada except advertisements in foreign publications: subsection 4(3).</p>	<p>McLachlin J. at para 162: "I turn first to the prohibition on advertising contained in s. 4 of the law. ... It extends to advertising which arguably produces benefits to the consumer while having little or no conceivable impact on consumption. Purely informational advertising, simple reminders of package appearance, advertising for new brands and advertising showing relative tar content of different brands -- all these are included in the ban."</p> <p>at para 164: "...while one may conclude as a matter of reason and logic that lifestyle advertising is designed to increase consumption, there is no indication that purely informational or brand preference advertising would have this effect. The government had before it a variety of less intrusive measures when it enacted the total ban on advertising, including: a partial ban which would allow information and brand preference advertising; a ban on lifestyle advertising only; measures such as those in Quebec's <i>Consumer Protection Act</i> to prohibit advertising aimed at children and adolescents."</p> <p>and at para.176 "I have found ss. 4, 8 and 9 of the <i>Tobacco Products Control Act</i> constitute unjustified infringements on free expression. See also <i>Iacobucci J.</i> at para. 188 and 191 and <i>La Forest J.</i> at para. 88 and 95.</p>	<p>Section 22 must be read as a whole. Subsection 22(1) sets out a general prohibition but is subject to subsection 22(2) which permits information and brand preference advertising but not lifestyle advertising or advertising appealing to young persons.</p> <p>Stay requested.</p> <p>Challenged under the <i>Charter</i>.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
Subsection 22(3) contains definitions of "brand-preference advertising", "information advertising" and "lifestyle advertising".			
<p>Section 23</p> <p>Prohibits packaging a tobacco product contrary to the regulations.</p>	See section 9 of the TPCA	Section 9 was struck down by the SCC. See discussion under subsection 15(3) of the <i>Tobacco Act</i> .	<p>No stay requested.</p> <p>Challenged under the <i>Charter</i> only by VTL.</p>

COMPARISON BETWEEN THE
 TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)
 AND THE TOBACCO ACT

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Section 24</p> <p>Limits promotion through sponsorship. Subsection 24(4) permits sponsorship promotion that does not involve lifestyle and is not youth related. The combined effects of subsections 24(1) to (3) is that lifestyle and youth related sponsorship are permitted where the tobacco product related brand element is restricted to the bottom 10% of the display surface of the promotional material and where those material are limited to the media or location specified in paragraphs 24(3)(a) to (d).</p> <p>Subsection 24(1) authorizes, subject to any applicable regulations, the display of a tobacco a brand element in a promotion for a sponsored performance, event or activity where the performance, event or activity has lifestyle or youth associations.</p>	<p>Section 6 of the TPCA permitted the use of the names of tobacco manufacturers or importers and of tobacco brand names -- if not used in association with a tobacco product -- in a sponsorship promotion of a cultural or sporting event or activity that acknowledges a contribution by the manufacturer or importer .</p>	<p>Section 6 of the TPCA was struck by the SCC along with sections 4, 8 and 9 on the basis that it was not severable from those sections: McLachlin J. at para 176 "I have found ss. 4, 8 and 9 of the <i>Tobacco Products Control Act</i> constitute unjustified infringements on free expression. These provisions spearhead the scheme under the Act and cannot be severed cleanly from other provisions dealing with promotion and trade mark usage, ss. 5 and 6.."</p>	<p>Sponsorship promotion acknowledges a contribution of resources by the use of the brand name of the contributor in the promotion of the sponsored event.</p> <p>No stay requested.</p> <p>Challenged under the Charter only by IFL.</p>

COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)
AND THE TOBACCO ACT

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>After October 1, 1998, or an earlier date set by order, subsections 24(2) and (3) will limit the display of a tobacco brand element in a promotion for a sponsored performance, event or activity that has lifestyle or youth associations to:</p> <p>24(2), the bottom 10% of the sponsorship promotion; and</p> <p>24(3), the following locations:</p> <ul style="list-style-type: none"> a) publications mailed to named adults; b) publications with at least 85% adult readership; c) signs at the event; and d) signs in places where young persons are not permitted by law. 		<p>McLachlin J. at para 164: "...while one may conclude as a matter of reason and logic that lifestyle advertising is designed to increase consumption, there is no indication that purely informational or brand preference advertising would have this effect. The government had before it a variety of less intrusive measures when it enacted the total ban on advertising, including: a partial ban which would allow information and brand preference advertising; a ban on lifestyle advertising only; measures such as those in Quebec's <i>Consumer Protection Act</i> to prohibit advertising aimed at children and adolescents."</p> <p>See also Iacobucci J. at para. 188 and 191 and La Forest J. at para. 88 and 95.</p>	<p>Where a sponsored event is associated with lifestyle or youth, both the use of the brand element and the location of the promotion are controlled.</p> <p>The implementation of subsections 24(2) and (3) has been delayed until October 1, 1998 or an earlier date set by order, to give time for sponsored persons, entities, events, activities and facilities to seek alternative sponsorship.</p> <p>No stay requested.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Subsection 24(4) requires that the use of a brand element in a promotion for a sponsored performance, event or activity conform with regulations where the sponsored performance, event or activity does NOT have a lifestyle or youth association.</p>	<p>No equivalent.</p>		<p>In the absence of a lifestyle or youth association, subsection 24(4) permits the display of a tobacco brand element in a sponsorship promotion that acknowledges a contribution of resources from a manufacturer. The limits set out in 24(2) and (3) do not apply.</p> <p>No stay requested.</p>
<p>Section 25</p> <p>Permits the use of a tobacco brand element on a permanent facility where it conforms with the regulations.</p>	<p>No equivalent.</p>		<p>No stay requested.</p> <p>Challenged under the Charter only by IFL.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Sections 26 to 28</p> <p>Permit a controlled use of tobacco brand elements on non-tobacco products.</p> <p>Section 26 permits the use of tobacco brand elements on tobacco accessories such as matches and lighters.</p> <p>Sections 27 and 28 restrict the use of tobacco brand elements only on lifestyle and youth associated non-tobacco products.</p>	<p>Section 8 of the TPCA was an absolute prohibition on the use of any tobacco product trademarks on any non-tobacco good or in the advertising of any non-tobacco good, except where it was used on a non-tobacco good for sale in Canada in 1986.</p>	<p>The total prohibition on the use of tobacco trade marks on non-tobacco products was struck down by the SCC.</p> <p>McLachlin J. at para 158: “ On the other hand, there does not appear to be any causal connection between the objective of decreasing tobacco consumption and the absolute prohibition on the use of a tobacco trade mark on articles other than tobacco products. ... “It is hard to imagine how the presence of a tobacco logo on a cigarette lighter, for example, would increase consumption.” ” [Emphasis added]</p> <p>By a 6:3 majority, the Court found that prohibiting tobacco trade marks on non-tobacco products was rationally connected to achieving the objectives of the Act; however, by a 5:4 majority, the Court found that the absolute prohibition of tobacco trade marks on non-tobacco products was not minimally impairing.</p>	

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Section 26</p> <p>Subject to regulations, subsection 26(1) permits the sale of smoking accessories bearing tobacco brand elements.</p> <p>Subsection 26(2) requires that a promotion for a smoking accessory displaying a tobacco brand element conform with the regulations and as with tobacco product promotions, be displayed only in the following locations:</p> <ol style="list-style-type: none"> 1) publications mailed to named adults; 2) publications with at least 85% adult readership; 3) signs in places where young persons are not permitted by law. 	<p>See "Section 26 to 28" above.</p>		<p>Subsection 26(1) permits the sale of smoking accessories that display tobacco brand elements.</p> <p>Stay requested only by IFL.</p> <p>Challenged under the Charter only by IFL.</p>

COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Section 27</p> <p>Prohibits the furnishing or promotion of a tobacco product where its brand element is</p> <p>1) displayed on a non-tobacco product (other than a smoking accessory) that has-lifestyle or youth associations; or</p> <p>2) used with a service that has lifestyle or youth associations.</p>	<p>See "Section 26 to 28" above.</p>	<p>McLachlin J. at para 158: " On the other hand, there does not appear to be any causal connection between the objective of decreasing tobacco consumption and the absolute prohibition on the use of a tobacco trade mark on articles other than tobacco products.</p> <p>at para 164: "...while one may conclude as a matter of reason and logic that lifestyle advertising is designed to increase consumption, there is no indication that purely informational or brand preference advertising would have this effect. The government had before it a variety of less intrusive measures when it enacted the total ban on advertising, including: a partial ban which would allow information and brand preference advertising; a ban on lifestyle advertising only; measures such as those in Quebec's <i>Consumer Protection Act</i> to prohibit advertising aimed at children and adolescents."</p> <p>See also Iacobucci J. at para. 188 and 191 and La Forest J. at para. 88 and 95.</p>	<p>Prohibits the sale of tobacco products where the brand element is used on non-tobacco products that have lifestyle or youth associations</p> <p>Stay requested.</p> <p>Challenged under the Charter.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Section 28</p> <p>Permits the sale and advertising, subject to regulations and in accordance with section 22 of this Act, of a tobacco product where its brand element is</p> <ul style="list-style-type: none"> 1) displayed on a non-tobacco product (other than a smoking accessory) that does NOT have lifestyle or youth associations; or 2) used with a service that does NOT have lifestyle or youth associations. <p>Section 28 also permits the promotion, subject to regulations, of</p> <ul style="list-style-type: none"> 1) a non-tobacco product (other than a smoking accessory) that displays a tobacco brand element and that does NOT have lifestyle or youth associations; and 2) a service that displays a tobacco brand element and that does NOT have lifestyle or youth associations. 	<p>See "Section 26 to 28" above.</p>		<p>No stay requested.</p> <p>Challenged under the Charter only by IFL.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Section 29</p> <p>Prohibits manufacturers and retailers from</p> <ol style="list-style-type: none"> 1) giving consumers free tobacco products or smoking accessories displaying tobacco brand names; 2) offering rewards or other consideration for the purchase of a tobacco product; 3) offering tobacco products or smoking accessories in consideration for or as an inducement to a purchase or a service. 	<p>Section 7 of the TPCA prohibited manufacturers and retailers from</p> <ol style="list-style-type: none"> 1) giving consumers free samples; and 2) giving gifts, cash rebates, or the right to participate in any contest, lottery or game for the purchase of a tobacco product. 	<p>The Court unanimously found that s.7 of the TPCA did not violate the Charter.</p> <p>McLachlin J. stated at para 177: "Section 7 of the Act prohibits the free distribution of any tobacco product in any form, a provision which is closely connected to the law's objective. In my view, this provision should stand..."</p>	<p>Section 29 expands the prohibition with respect to free tobacco products in section 7 of the TPCA to include smoking accessories that display tobacco brand elements. Offering tobacco products or their surrogate smoking accessories as inducements to buy other products or services is also prohibited.</p> <p>No stay requested.</p> <p>Challenged under the Charter only by ITL.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or <i>TSYPA</i>	SCC DECISION ²	COMMENTS
<p>Section 30</p> <p>Subsection 30(1) authorizes the retail display of tobacco products and accessories that conform with the regulations.</p> <p>Subsection 30(2) authorizes retailers to post signs that conform with the regulations indicating the availability of tobacco products and their price.</p>	<p>Section 5 of the TPCA excepted out retail displays from the ban on advertising tobacco products by permitting retailers to:</p> <ol style="list-style-type: none"> 1) expose tobacco products for sale; 2) post signs indicating, other than by their brand names or trade-marks, that the retailer has tobacco products for sale and their price; and 3) to continue to use a business name that signifies that tobacco products are sold by the retailer. 	<p>Section 5 of the TPCA was not found contrary to the Charter but was struck down when section 4 was struck because, section 4 could not be "severed cleanly" from it in view of the opening words of section 5: McLachlin J. at para. 176.</p>	<p>No stay requested.</p>
<p>Section 31</p> <p>Prohibits a person in Canada from communicating prohibited promotions</p> <ol style="list-style-type: none"> 1) on behalf of another person (except for promotions in foreign publications); or 2) by means of a publication, broadcast or other means of communication that originates outside Canada. 	<p>Subsection 4(2) to (4) of the TPCA prohibited a person in Canada from communicating prohibited advertisement</p> <ol style="list-style-type: none"> 1) on behalf of another person (except for promotions in foreign publications); or 2) by means of a publication or broadcast that originates outside Canada. 	<p>Subsection 4(2) to (4) were struck by the SCC because the Court concluded that section 4 was a complete ban.</p>	<p>Section 31 prohibits doing indirectly what cannot be done directly.</p> <p>Stay requested by ITL only with respect to subsection 31(3).</p> <p>Section 31(3) challenged as <i>ultra vires</i> the Parliament of Canada by ITL.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Section 32</p> <p>Requires manufacturers to provide information to the Minister about promotions under Part IV in accordance with the regulations.</p>	<p>See subsection 10(3) of the TPCA.</p>		<p>No stay requested.</p> <p>Challenged under the <i>Charter</i> only by ITL.</p>
<p>Section 33</p> <p>Authorizes regulations respecting</p> <ol style="list-style-type: none"> 1) the promotion of tobacco products and tobacco brand elements and non-tobacco products, services and facilities that bear tobacco brand elements and the packaging of tobacco products, 2) accessibility signs; and 3) reports by manufacturers about promotional activities. 	<p>See subsection 10(3) of the TPCA.</p>		<p>No stay requested.</p> <p>Challenged under the <i>Charter</i> only by ITL.</p>
<p>Section 34</p> <p>Authorizes the Minister to designate inspectors and analysts.</p>	<p>See Section 11 of the TPCA and section 8 of the TSYPA.</p>	<p>The SCC did not comment on any of the enforcement provisions in the TPCA.</p>	<p>No stay requested.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Sections 35, 36 and 39</p> <p>Sections 35 (inspection), 36 (warrant to search dwelling-place) and 39 (seizure) deal with enforcement powers of entry inspection, examination, sampling and seizure.</p>	<p>Section 12 and 13 of the TPCA contain powers of entry, inspection, examination, sampling and seizure.</p> <p><i>Subsection 9(1) of the TSYPA provides for the entry of inspectors into places from which tobacco products are being sold.</i></p>	<p>The SCC did not comment on any of the enforcement provisions in the TPCA or the TSYPA.</p>	<p>Stay of section 35 only by ITL and stay by all three tobacco companies on sections 36 and 39.</p> <p>Section 35 challenged under the Charter only by ITL. Sections 36 and 39 challenged under the Charter by all three tobacco companies</p>
<p>Section 37</p> <p>Authorizes analysts to issue certificates containing the results of an analysis or examination.</p>	<p>See section 15 of the TPCA.</p>	<p>The SCC did not comment on any of the enforcement provisions in the TPCA.</p>	<p>No stay requested.</p>
<p>Section 38</p> <p>Requires persons in charge of places under inspection to provide reasonable assistance to the inspector and not to obstruct, hinder or make false statements to an inspector in the course of an inspection.</p>	<p>Section 14 of the TPCA and subsections 9(2) and (3) of the TSYPA.</p>	<p>The SCC did not comment on any of the enforcement provisions in the TPCA.</p>	<p>No stay requested.</p>

COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)
AND THE TOBACCO ACT

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Section 39</p> <p>See "Sections 35, 36 and 39" above.</p>			
<p>Section 40</p> <p>Provides a civil procedure under which a person who owns a seized thing may seek its restoration.</p>	<p>No equivalent.</p>		<p>Similar to section 25 of the <i>Hazardous Products Act</i>.</p> <p>No stay requested.</p>
<p>Section 41</p> <p>Provides for forfeiture of seized products or other things to which the Act applies by consent, on conviction or by default after 60 days.</p>	<p>See s. 16 of the TPCA. See subsections 6(1) and (2) of the TSYPA.</p>	<p>The SCC did not comment on any of the enforcement provisions in the TPCA.</p>	<p>Similar to section 25 of the <i>Hazardous Products Act</i>.</p> <p>Stay requested by ITL only.</p> <p>Challenged under the Charter only by ITL.</p>
<p>Section 42</p> <p>Authorizes regulations respecting the powers and duties of inspectors and analysts and the taking of samples.</p>	<p>No equivalent.</p>		<p>No stay requested.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Section 42.1</p> <p>Requires the Minister to lay proposed regulations before the House of Commons.</p>	<p>No equivalent.</p>		<p>This provision permits the House of Commons to directly scrutinize and approve regulations proposed under the <i>Tobacco Act</i> before they are made by the Governor in Council.</p> <p>Regulations produced April 24, 1997 as exhibit I-1 were not concurred in by the House of Commons.</p> <p>No stay requested.</p>
<p>The offence provisions are set out in sections 43 to 48. Please see chart appended to this chart.</p>	<p>The offence provision are found at section 18 of the TPCA and subsections 4(1), 5(4) and 6(3), section 7.2 and subsection 9(4) of the TSYPA</p>	<p>The SCC did not comment on any of the offence provisions in the TPCA.</p>	<p>No stay requested.</p>
<p>Section 49</p> <p>Provides that each day that an offence continues is a new offence</p>	<p>No equivalent.</p>		<p>No stay requested.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Section 50</p> <p>Provides that a director or officer of a corporation may be charged with an offence separately from or in addition to the corporation.</p>	<p>No equivalent.</p>		<p>No stay requested.</p>
<p>Section 51</p> <p>The limitation period for summary offences is 2 years.</p>	<p>In subsection 19(1) of the TPCA the limitation period for summary offences is 12 months.</p>	<p>The SCC did not comment on any of the procedural provisions in the TPCA.</p>	<p>No stay requested.</p>
<p>Section 52</p> <p>Permits a prosecution to take place in any jurisdiction in which the accused carries on business.</p>	<p>See subsections. 19(2) of the TPCA.</p>	<p>The SCC did not comment on any of the procedural provisions in the TPCA.</p>	<p>No stay requested.</p>
<p>Section 53</p> <p>Provides that an exception, exemption, excuse or qualification need not be set out in the information or indictment but rather must be proven by the accused.</p>	<p>See section 19 of the TPCA.</p>	<p>The SCC did not comment on any of the procedural provisions in the TPCA.</p>	<p>No stay requested.</p> <p>Challenged under the Charter only by FTL.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Section 54</p> <p>Provides that an accused may be convicted of an offence committed by an employee or agent of the accused and refers to a due diligence defence for the accused.</p>	<p>No equivalent.</p>		<p>No stay requested.</p>
<p>Section 55</p> <p>Provides that in the absence of evidence to the contrary, copies and extracts of information obtained during an inspection that are certified by the inspector are admissible in evidence as proof of their content.</p>	<p>No equivalent.</p>		<p>No stay requested.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Section 56</p> <p>Provides that an analyst's certificate or report is admissible in evidence without proof of the signature on it if provided to the accused before the trial. Accused may, with the leave of the court, require the attendance of the analyst.</p>	<p>See section 15 of the TPCA.</p>	<p>The SCC did not comment on any of the procedural provisions in the TPCA.</p>	<p>No stay requested.</p>
<p>Section 57</p> <p>Provides that in the absence of evidence to the contrary, an indication on a package that</p> <ol style="list-style-type: none"> 1) it contains a tobacco product is evidence that the product is a tobacco product; or 2) it was made by a named person is evidence that it was made by that person. 	<p>No equivalent.</p>		<p>No stay requested.</p>

COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Sections 58</p> <p>Provides that a court may, in its discretion, assess additional fines equal to the monetary benefit accruing from an illegal act.</p>	<p>No equivalent.</p>		<p>No stay requested.</p> <p>Challenged under the <i>Charter</i> only by ITL.</p>
<p>Section 59</p> <p>Provides that a court may, in its discretion impose additional orders on a convicted accused.</p>	<p>No equivalent.</p>		<p>No stay requested.</p> <p>Paragraph 59(c) challenged under the <i>Charter</i> by all three tobacco companies and paragraph 59(f) challenged under the <i>Charter</i> only by ITL.</p>
<p>Section 60</p> <p>Authorizes the Minister to enter into agreements with provinces or other bodies respecting the administration and enforcement of the <i>Tobacco Act</i> and to enter into equivalency agreements with a province.</p>	<p>No equivalent.</p>		<p>No stay requested.</p> <p>Subsection 60(3) challenged as <i>ultra vires</i> the Parliament of Canada by ITL.</p>

**COMPARISON BETWEEN THE
TOBACCO PRODUCTS CONTROL (TPCA) AND TOBACCO SALES TO YOUNG PERSONS ACTS (TSYPA)¹
AND THE TOBACCO ACT**

TOBACCO ACT	TPCA or TSYPA	SCC DECISION ²	COMMENTS
<p>Sections 61 - 65</p> <p>Contain consequential amendments to the <i>Hazardous Product Act</i> and repeal the TPCA and the TSYPA.</p>			<p>No stay requested.</p>
<p>Section 66</p> <p>Provides that subsection 24(2) and (3) will come into effect on October 1, 1998 or such earlier date as may be set by order.</p>	<p>No equivalent.</p>		<p>No stay requested.</p>

APPENDIX 9

TOBACCO PRODUCTS INFORMATION REGULATIONS

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I. TOBACCO PRODUCTS INFORMATION REGULATIONS

A. Introduction

1. The *Tobacco Products Information Regulations* went into effect on June 26, 2000, and required tobacco manufacturers to affix health warnings and information on cigarette packages as of December 26, 2000, for brands with sales representing more than 2% of total cigarette sales in Canada. The other brands were to comply with the regulatory requirements within one year.
2. On September 12 and 13, 2000, the appellants ITL, RBH and JTI presented before this Court, then presided over by the Honourable Judge Danielle Grenier, an interlocutory motion requesting a stay on the enforcement of the Regulations.
3. The appellants mainly pleaded the impossibility of printing the warnings in colours that matched as closely as possible those of the source document.
4. On September 20, 2000, the Honourable Judge Grenier rejected the motion as being unfounded.
5. The allegations of the appellants as to the impossibility of printing the warnings “*in colours that matched as closely as possible those of the source document,*” on their inability to comply with the Regulations regarding the manufacturing and insertion into the packages of a pamphlet measuring “*approximately 50 x 88 mm*” and the fears of imprisonment that could result from it, were not founded in reality.
6. During the trial, the appellants did not submit any evidence listing these impossibilities on which they were basing their argument for the request for a stay.
7. It was also proven that the appellants had complied with the Regulations and had printed the health information, the warnings and the information regarding the constituents, as required by the *Tobacco Products Information Regulations*.
8. This argument on the impossibility of complying with the Regulations due the lack of precision in its provisions was not pursued in the plaintiffs’ briefs.
9. If it had not been for this ruling rejecting the arguments of the appellants, Canadians would have been deprived of essential information on the damaging effects of smoking on health, on the basis of an argument without any factual basis.

10. In order to understand the dispute regarding the *Tobacco Products Information Regulations*, it is necessary to go back to part of the argument as presented in the interlocutory motion requesting a stay on the enforcement of the Regulations.
11. First of all, it is important to observe that the appellants did not contest during the hearing on the motion and still do not contest to this day:
 - The contents of the warnings (subs. 3(2) – *Tobacco Products Information Regulations*);
 - The contents of the health information that must appear on the package or the pamphlet;
 - Disclosure of the contents of toxic emissions and constituents.¹

The reasons for the challenge were the following:

- Feasibility of printing the warnings;
- Inability to comply with the Regulations regarding the manufacturing and insertion of a prospectus containing health information;
- Toxic emissions and constituents;
- Power of delegation;
- Federal jurisdiction;
- Expropriation;
- Freedom of expression;
- Effectiveness of health messages.

¹ **I-49 ITL- Press release, July 6, 2000:** [Translation] "*We are not taking this action because we object to Health Canada messages appearing on our packages, or the content of these messages. We do not object to the new Health Canada messages containing images.*"

B. Reasons for the challenge

1. Feasibility of printing the warnings

12. The appellants alleged that the warnings had to be identical from one brand to another² while the Regulations (subs. 3(3)) mention that the colours must match as closely as possible those of the source document with the greatest clarity possible given the printing technique used.
13. The evidence tabled as part of motion for a stay revealed that the number of colours used in printing the packages varies from one package to another so that for several packages, adding additional colours would be possible, while others would be required to work with the available colours to reproduce the health messages. The regulations do not impose a specific reproduction technique, the manufacturers have all the latitude needed to print the warnings (including the affixing of labels).
14. Trial evidence finally demonstrated that the appellants had complied with the Regulations and had printed the warnings, as required by the *Tobacco Products Information Regulations*.
15. This argument on the impossibility of complying with the Regulations was not pursued in the plaintiffs' briefs.

2. Inability to comply with the Regulations regarding the manufacturing and insertion of a prospectus containing health information

16. The slide top packages represent 94.51% of the sales of the plaintiff ITL. However, ITL had requested, through an interlocutory motion, the total suspension of the regulations since for certain small "flip-top" packages, it alleged it was impossible to insert the prescribed pamphlet measuring "approximately 50 x 88 mm" (subs. 7 (2)) but rather a 42.5 mm x 77.5 mm³

² **Affidavit of Fred Prinzen (para. 12):**
*"I have read the proposed Tobacco Product Information Regulations (the "TPIR"). While they do not state explicitly what process is required to produce the warnings, in order to **identically reproduce** the pictorial images in the Source documents, at least a three colour and most probably a four colour process is required."*

³ **Affidavit de Thomas Glenn (para. 9):**
"The prescribed leaflets must be 7.5 mm to 12 mm less than the height and width of the inner dimensions of Imperial's flip-top packages in order to be inserted automatically. For certain flip-top packages this results in leaflets as small as 42.5 mm by 77.5 mm; the surface area of such a leaflet would be 25% less than the surface area of a 50 mm by 88 mm leaflet."

pamphlet. This argument does not take into account the fact that subs. 7(2) of the Regulations mentions that the dimensions are approximately 50 x 88 mm or that the pamphlet can be folded.

17. Only ITL presented this argument.
18. The evidence demonstrated that ITL has complied with the Regulations regarding the manufacturing and insertion into cigarette packages of a pamphlet "approximately 50 x 88 mm," as required by the *Tobacco Products Information Regulations*. This argument regarding the impossibility of complying with the Regulations due to the imprecision of the provisions was not pursued in the plaintiffs' briefs.

3. Toxic emissions and constituents

19. In their motion for a stay, the plaintiffs requested the immediate suspension of sections 8 to 11 of the Regulations on the grounds that the information on emissions and constituents appearing on the side of certain packages would be printed using a font point size of less than 10 points.
20. The Regulations (para. 11(b)) do not stipulate any minimum size of the characters, stipulating only that the information required must be adapted to the size of the package.
21. The plaintiffs complied with the Regulations and did not pursue this argument in their briefs.

4. Power of delegation

22. The plaintiffs allege that the *Tobacco Products Information Regulations* is *ultra vires* of the Act (para. 3(a) of ITL's re-amended statement).
-

23. However,

- Sections 4(d) and 17 of the *Tobacco Act* delegates to the Governor in Council the power to impose health messages on the packaging. Section 42.1 adds that the Governor in Council may not make any regulations pursuant to sections 7, 14, 17, 33 or 42 unless the Minister has tabled the proposed regulations before the House of Commons.
- Section 42.1 adds that the competent committee of the House of Commons is automatically given the draft regulations and can conduct an enquiry or hold public hearings on this issue and report its findings to the House.
- The following steps have been completed regarding the challenged regulations:
 - May 12, 2000 Tabling of the proposed regulations before the House of Commons, following numerous consultations with the industry.⁴
 - May 30, 2000 Public hearings before the House of Commons Standing Committee on Health.
 - May 31, 2000
 - June 1, 2000
 - June 5, 2000
 - June 6, 2000
 - June 7, 2000
 - June 8, 2000 Tabling before the House of Commons of the report from the Standing Committee on Health and unanimous approval by the House.

24. The challenged regulations benefit from a presumption of validity:

CÔTÉ, Pierre-André, Interprétation des lois, 2e édition,
Les Éditions Yvon Blais Inc., 1990

⁴ For a detailed list of the consultations, see the affidavit of François Choquette, D-164, para. 5 to 42.

On pages 349 and 350:

[Translation]

The presumption of validity indeed applies to the interpretation of statutes with respect to the Constitution as well as to regulations with respect to the enabling statutes and Common Law regulations relative to excess of power.

Intent of the regulations

25. The appellant party did not contest the validity of s. 4 of the *Tobacco Act* or its intent:

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

(a) to protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

(b) to protect young persons and others from inducements to use tobacco products and the consequent dependence on them;

(c) to protect the health of young persons by restricting access to tobacco products; and

(d) to enhance public awareness of the health hazards of using tobacco products.

26. Paragraph 17(a) of the *Tobacco Act* provides the Governor in Council with the power to impose health messages on the packaging:

17. The Governor in Council may make regulations

(a) respecting the information that must appear on packages and in leaflets about tobacco products and their emissions and the health hazards and health effects arising from the use of the products and from their emissions;

27. The *Tobacco Products Information Regulations* participates in the legislative objective:

ED-115 *Tobacco Products Information Regulations – Regulatory Impact Analysis Statement*, SOR/2000-272, June 26, 2000, *Canada Gazette*, Part II, Vol. 134, No. 1.

On page 1748:

*These Regulations support the Tobacco Act ("the Act") in providing a legislative response to a national health problem of substantial and pressing concern. In particular, **the Regulations serve to uphold the purposes of the Act by:***

- protecting the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;*
- protecting young persons and others from **inducements to use tobacco products** and the consequent dependence on them; and*
- **enhancing public awareness of the health hazards of using tobacco products.***

On page 1749:

*However, the positive overall trend masks the fact that smoking rates remain alarmingly high in certain populations. **The smoking rate among youth aged 15-19, in contrast to that observed among adults, has increased significantly during the last ten years.** In 1999, 28 percent of Canadian teens smoked. This is a significant increase from 23 percent in 1991. Approximately 62 percent of First Nations and 72 percent of Inuit smoke. **This rate is more than double that of the general population. In addition, tobacco use is higher among Canadians of lower socio-economic status and among Francophones.***

*The primary objective of the federal government's tobacco control strategy is to reduce the use of tobacco products among all Canadians and, to the extent possible, the related adverse health impacts of tobacco use - including among young persons. **The Regulations, which require the display of health warnings and health information on tobacco packaging, will be a key component of the federal government's public education campaign on tobacco use.***

On page 1750:

Research has indicated that the impact of the current health warning messages seen on packages of tobacco products is wearing out.^{5 6 7}
^{8 9} . They are no longer as effective as before since they have been in

⁵ **ED-141 (FC 20-26) Tilson February 2000 – Literature Search on the Use of Borders as Part of a Messaging System:**

p. 3:

Another important criteria is motivation, the need to motivate consumers to comply with the warning message. Related to the challenge of motivating the public is the problem of the "familiarity effect," that is, the more familiar people are with a situation or product, the less hazardous they perceive it to be, and the less likely they are to read or comply with the warning. The authors recommend that where familiarity is a factor, "stronger warnings or perhaps other efforts will be required.

⁶ **ED-144 (FC 20-23) Environics October 1999 – Canadian Adult and Youth Opinions on the Sizing of Health Warning Messages**

p. 6:

Large majorities of Canadians of all ages, both smokers and non-smokers, agree that current health warning messages on cigarette packages provide important information for smokers to be reminded of and are worth re-reading. However, majorities also feel that the messages are worn-out and have lost their effectiveness; this sentiment is particularly strong among smokers.

⁷ **ED-147 (FC 20-19) Health Warning Testing – Environics 1999-06-24:**

p. 25:

The proposed designs are seen as an effective way to revitalize the current health warnings that appear on tobacco packaging. Whereas the current design is seen as almost invisible due to familiarity and the black and white designs, the colourful, and occasionally startling, images have the ability to seize attention from smokers and non-smokers alike.

⁸ **ED-149 (FC 20-17) Environics, March 29, 1999 - Health Canada - Office for Tobacco Control Qualitative Focus Group Report Regarding Health Warning Labels and Images on Cigarette Packages**

p. 5:

Clearly, smokers were open to the idea of new messages and warning labels on cigarette packages. Smokers have typically memorized all of the current warning labels and are not paying much attention to them since they have seen the same messages for so long.

⁹ **ED-165 (FC-20-12) Environics, March 1998 - Focus Group Report on Warning Labels for Cigars, Pipe and Chewing Tobacco:**

p. 12:

Awareness of Current Warning Labels

There is remarkably little awareness of existing warning labels on cigars, cigarillos and pipe tobacco. A majority of participants either do not recall there being any warning labels at all, or do not have any recall of the messaging. In the case of cigars, it was often pointed out that no warning label appears on individual cigars and most people buy cigars individually. There may be labels on cigars boxes, but people seldom buy whole boxes and in any case these cigar box labels are quite inconspicuous. In the case of cigarillos and Colts, the current warning labels are so inconspicuous and totally blend in with the colour of the packaging that participants were genuinely surprised when it was pointed out that there is any warning label currently on Colts at all! The fact that most people do not recall any warning labels at all is bolstered by the fact that

place for some years. In addition, they do not address a number of knowledge gaps on the part of users, nor do they reflect the true level of hazard associated with the product.¹⁰ Additionally, as current labelling practices are done on a voluntary basis, not all tobacco products sold in Canada are labelled.¹¹

On page 1752-1753:

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

many of the people who do claim to recall labels talk about "The Surgeon-General's Warning" – something which does not exist in Canada.

¹⁰ **ED-165 (FC 20-12) Environics, March 1998 - Focus Group Report on Warning Labels for Cigars, Pipe and Chewing Tobacco:**

p. 11:

Many participants mentioned hearing things about through word of mouth about the possible consequences of cigars and pipes and links with mouth cancers etc..., but they do not recall ever being exposed to any particular information from "official" sources about these products. Some have been told of hazards by their doctors and dentists or from family members, but generally cigar and pipe smokers expressed an interest in getting more specific information about the consequences of these products. A couple of people also mentioned having seen some news documentaries about possible consequences from these products, but in general, people felt that one has to ask for specific information on the health risks of cigars and pipes.

p. 12:

In the case of chewing tobacco, there was a similar tendency to extrapolate knowledge about the hazards of cigarettes to chewing tobacco. Once again there was little specific awareness about the hazards of chewing. Some mentioned seeing some posters in their school, but none reported learning about it in school classes. A couple of participants also mentioned having seen some Alberta government TV ads on the dangers of chewing tobacco. A couple mentioned that the warning label on the can was the only information they had which drew a clear link between the dangers of tobacco in general and the dangers of chewing tobacco.

¹¹ **ED-164 (FC 20-13) CROP – March 1998 – Focus Group Report on Warning Labels for Cigars, Pipe and Chewing Tobacco**

p. 13: [Translation]

Knowledge of warning messages

None of the participants spontaneously mentioned warning messages appearing on the packaging of cigars, pipe tobacco or chewing tobacco. Spontaneous references were noted more in several groups regarding warnings on cigarette packages; the latter are much better known to mixed smokers (cigarettes and pipe or cigar). The most frequent mentions dealt with: "Smoking can kill you" or "Smoking can cause cancer."

displayed health warning.^{12 13 14 15 16 17 18 19 20 21} All these elements are found in the Regulations, and contribute to make the required health

¹² **ED-124 (FC 20-57) Environics May 2000 – Canadian Opinion on the Size of Health Warning Messages - A Validation Survey.**

p. 6:

7.0 Effectiveness of Changing the Size of Health Warnings

◦ *About six in ten Canadians think that increasing the size of health warnings on cigarette packages would be more effective both in informing Canadians about the health effects of tobacco and in encouraging Canadians to reduce their tobacco use.*

p. 8:

9.0 Effectiveness of Different Sized Health Warning Messages

◦ *When shown pictures of two packages of cigarettes, Canadians think that the package with the larger size health warning message is much more effective both in informing Canadians about the health effects of tobacco and in encouraging Canadians to reduce their tobacco use. Brand recall is high.*

¹³ **ED-130 (FC 20-29) Tilson April 2000 – Literature Search on the Use of "pictograms" and "pictures" as part of a messaging system:**

p. 2:

◦ *Pictorials can enhance warnings by serving to enhance noticeability. The primary requirement of an effective warning is that it be noticed.*

...

◦ *Pictorials can convey consequence information and instructions.*

...

◦ *The use of pictorials and pictographs along with text may enhance understanding among those with poor reading skills or whose first language is not English.*

¹⁴ **ED-141 (FC 20-26) Tilson February 2000 – Literature Search on the Use of Borders as Part of a Messaging System:**

p. 1:

For any health or warning message to fulfill its objectives, it must be: legible; read; understood; believed; personally relevant; and remembered. The format of the warning has the greatest influence on the warning's noticeability and legibility; and also on what parts of the warning are remembered.

p. 7:

The authors draw several conclusions from the studies regarding the key elements of effective warnings:

◦ *"A warning must attract attention."*

◦ *"A warning must be seen and read in order to be effective. The presence of a warning on a label ... does not guarantee that it will be encountered."*

◦ *"The more noticeable a warning is, the more effective it will be."*

◦ *"The appropriate use of colour, size, and a pictorial can increase the impact of the message."*

¹⁵ **ED-140 (FC 20-25) CMRDI Kindra December 15, 1999 – Tobacco Warning Labels and Packaging - Issues, Prospects and Strategies:**

p. 2:

Pictures, pictographs or graphics, in combination with HW messages are without a doubt, more effective than words alone. Care should be taken to ensure that usage of symbols, pictures and graphics is based on the rule of cross-cultural clarity, non-ambiguity and simplicity. Another reason for using non-verbal enhancers would be for the purpose of reaching consumers that have difficulty with text comprehension. HWMs under consideration, in our opinion, meet the criteria of non-ambiguity and relevance.

16 **ED-140 (FC 20-25) CMRDI Kindra December 15, 1999 – Tobacco Warning Labels and Packaging - Issues, Prospects and Strategies**

p. 33:

i- Message Design: Pictures, Pictographs, Graphics and Words

In the overwhelming consensus of current studies, marketing research has found that, as compared to word-only communications, the inclusion of pictorial stimuli in marketing communications increase levels of recall for messages, (Leong, Ang, Tham, 1996; Miniard et al., 1991; Mitchell, 1986; Childers and Houston, 1984; Gardner, 1986; Kieras, 1978; Kisielius, 1982; Lutz and Lutz, 1977; Nelson, 1979, Holbrook, 1981; Unnava et al, 1991; Costley and Brucks, 1992): there seems to be truth in the saying, "a picture is worth a thousand words.

p. 34:

Another reason for including not only text, but also pictorial stimuli would be for the purpose of reaching consumers who have difficulty with text comprehension. If clear pictorial stimuli were included, these consumers would be able to more clearly understand the HWMs.

p. 39:

Colour can also have an impact on attention paid to a message. Research has shown positive correlations between the use of multiple colours and messages readership, and/or recall, (Gronhaug, Kvitastein, Gronmo, 1991; Finn, 1988; Geboy, 1996). If few resources are devoted to message processing, as they would be in the case of neos or habs reading the message, messages with some colour outperform black and white messages, in terms of persuasions of subject, (Meyers-Levy and Peracchio, 1995). This is because the colour may be used as a heuristic cue to infer quality or goodness, because colour makes objects more pleasing, generally, (Ball, 1965; Click and Stempel, 1976).

p. 40:

Colour is also related to the message vividness. Vividness is a measure of how much the message "jumps out" at the consumer. This includes how bright, noticeable and eye-catching the message is. Research generally shows that the HWM should be as vivid as possible, (Keller and Block, 1997), which includes large size and brilliant colours, since vivid information tends to have higher levels of information processing associated with it, (Keller and Block, 1997, Shapiro, MacInnis and Heckler, 1997; Vakratsas and Ambler, 1999). Since smokers are low level processors, generally, stimuli that generate higher levels of processing are advantageous in terms of readership, recognition, recall, and by extension, impact on choice.

17 **ED-144 (FC 20-23) Environics October 1999 – Canadian Adult and Youth Opinions on the Sizing of Health Warning Messages**

p. 44:

Effectiveness of Suggested Changes to Health Warning Messages

Majorities of smokers of all ages believe that using pictures and using colour are effective ways to make these messages more noticeable.

warnings more easily noticed, believed and recalled. As for relevance, the contents of the health warnings were selected to make them relevant to

18 **ED-145 (FC 20-22) Nilsson September 1999 – Legibility and Visual Effectiveness of some Proposed and Current Health Warnings on Cigarette Packages**

p. 1:

The best new designs were about 2 times as legible and 3.5 times as effective as those in present use. Size of the printed words was the principle factor determining legibility. Doubling the size of the letters more than doubled the legibility. Warnings with bigger pictures were more effective than those with smaller pictures. Warnings with color pictures were more effective than those with black and white pictures. Some other implications of the data for the design of warnings are discussed. Establishment of a comparative standard to ensure legibility of warnings is recommended.

p. 12:

7. *Use color pictures to improve visual effectiveness.*
8. *Use the biggest pictures possible to improve visual effectiveness.*

19 **ED-143 (FC 20-20) Liefeld September 15, 1999 – The Relative Importance of the Size, Content and Pictures on Cigarette Package Warning Messages**

p. iii:

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.

20 **ED-147 (FC 20-19) Health Warning Testing – Environics 1999-06-24:**

p. 6:

In general, those designs that emphasized the use of text were seen as less effective than those where the picture could deliver the message. The majority of smokers fall into the lower income and education groups, where functional illiteracy tends to be higher than among other socio-economic groups. Clear visuals, where the picture actually does say a thousand words, will have the greatest "across the board" impact on the smoking population.

21 **ED-149 (FC 20-17) Environics March 29, 1999 - Health Canada - Office for Tobacco Control Qualitative Focus Group Report Regarding Health Warning Labels and Images on Cigarette Packages:**

p. 24:

Participants were shown the black and white images on a package, of the lung with a cigarette coming out of it and asked about their opinion of this image.

Most were not particularly impressed with the black and white smoking lung image, and while this was the first package they were shown, most felt that it did not capture their attention to a great degree. Most felt that colour was essential if an image is to appear on cigarette packages.

p. 29:

Some of the younger groups (13-16 years old) were not particularly interested in increasing the size of the warning messages, and they claimed they did not read them. However, if the coverage of the packages was to be increased, it was important to use coloured images and pictures to capture their attention.

the target groups, especially the smokers known as "quitters" and "pre-quitters."

Because smokers have indicated they want more information on what compounds are found in the smoke they inhale^{22 23 24 25 26 27}, six toxic emissions are now required to be displayed on the packages (compared to three in the former Regulations). Similarly, toxic constituent information is required on smokeless tobacco packages to provide important information to the users of these products as well.²⁸ Finally, smoking cessation messages were developed in order to assist smokers who are trying to quit, or are considering quitting.²⁹

²² **ED-149 (FC 20-17) Environics March 29, 1999 - Health Canada - Office for Tobacco Control Qualitative Focus Group Report Regarding Health Warning Labels and Images on Cigarette Packages:**

p. 9:

However, while some of the potential quitters in all the age groups mentioned that they thought the current messages could be changed or improved, they still felt it was important to convey health information to the consumer. "I would like to hear more," "I want to hear about the effects," "If we allowed anybody to do what we do to ourselves, we would call it murder," were some of these comments.

²³ **ED-150 (FC 20-16) Environics February 1999 - Health Canada - Office for Tobacco Control Focus Group Report Regarding Messages On Cigarette Package Slides and Flip-Tops:**

p. 4:

To the extent that they want more information it is usually focused around wanting more information about the toxic ingredients in cigarettes and wanting more fact-based information backed up by research.

p. 5:

Most smokers have, at some point, read the information about tar, nicotine and carbon monoxide content. Many want more of this kind of information, including longer lists of toxic constituents.

²⁴ **ED-164 (FC 20-13) CROP March 1998 – Focus Group Report on Warning Labels for Cigars, Pipe and Chewing Tobacco:**

p. 12: [Translation]

Information sources on the health risks of these products

Generally, the participants indicated there is little information in circulation regarding the health risks of products such as cigars and pipes. When the topic is addressed, there is a strong tendency to deal with the advertising and messages pertaining to cigarettes. The limited size of the market for pipe or cigar smokers may, according to some, explain the situation. According to others, the lack of information on this subject generates a perception to the effect that these products are less dangerous than cigarettes. However, through the various comments, it was felt that many would like to know more about the composition of cigars. That said, the opinions issued in the past regarding the low risk for products consumed occasionally and without inhaling the smoke explains the weak predisposition regarding information on the health risks of these products.

²⁵ **ED-169 (FC 20-10) Environics March 1997 – Phase I - Public Attitudes Toward Toxic Constituent and Health Warning Labelling on Cigarette Packaging:**

p. 7:

3.2 Toxic Constituents

When those participating in the toxic constituent sessions were asked to name those ingredients in cigarettes that are dangerous, virtually all participants could recall the three ingredients currently listed on the package (i.e. tar, nicotine, and carbon monoxide). When asked if they could name anything else, only a small number could offer any other answer.

p. 7:

Upon being exposed to a list of 15 chemicals, most participants admit that this information is new to them. Some express surprise when exposed to this information. Others claim to be unaffected.

p. 9:

3.3 Descriptive Statements

The idea of providing descriptive statements that explain the health risks of the toxic constituents is generally well received by participants. In particular, they like statements that provide them with new information, that are easy to understand, that are definitive, that describe health hazards that concern them, and that address short-term health risks.

26 **ED-176 (FC 20-08) Environics June 1996 – Phase II - Public Attitudes Toward the listing of Toxic Ingredients on Cigarette Packages: A Survey Report:**

p. 4:

2.0 SUMMARY OF RESEARCH FINDINGS

Although most Canadians (70% of adults and 72% of young people, aged 12 to 17) feel at least somewhat informed about what is in cigarettes, almost three-quarters (73% and 83%) feel there should be more information about the content of cigarettes.

...

A majority of Canadians believe a list of toxic constituents along with an informational statement would be at least somewhat effective in the following ways: providing information about the chemicals and toxins in cigarettes (78% and 79%); discouraging young people not currently smoking from starting (73% and 80%); discouraging themselves from smoking (57% and 77%); and discouraging smoking among young people who currently smoke (53% and 55%). Just under half (48% and 45%) think this will be effective in discouraging adults who smoke.

27 **ED-178 (FC 20-07) Environics April 1996 – Phase I - Public Attitudes Toward Toxic Constituent Labelling on Cigarette Packages Qualitative Research Report:**

p. 4:

Participants initially criticized the list of toxic constituents presented to them because they felt it did not provide enough information. They wanted more information about what amounts of each chemical were truly dangerous, what the effects were, and how cigarettes compared to other products currently on the market.

p. 11:

4.7 General Awareness of Toxic Ingredients in Cigarettes

Virtually all participants mention tar, nicotine, and carbon monoxide as toxins that are in cigarettes. However, beyond that, few are able to name any other chemicals. In some cases, participants actually believe that there are only these hazardous ingredients in tobacco, although in most cases, participants believe there are other hazards, but do not know exactly what they are.

28 **ED-164 (FC 20-13) CROP March 1998 - Focus Group Report on Warning Labels for Cigars, Pipe and Chewing Tobacco:**

Given the significance of the adverse health consequences of tobacco use^{30 31}, and the importance of providing essential information in the most effective way, the Regulations are considered the best option."

28. All of that connects with the concerns expressed by the Supreme Court of Canada in *RJR-MacDonald v. Attorney General of Canada*, [1995] 3 S.C.R. 199:

La Forest J., on page 274:

p. 11: [Translation]

Moreover, the discussion on the health risks of chewing tobacco was brief, the participants generally having little awareness of the issue. It was noted simply that there was frequent mention of the negative effects of such use on the mouth and teeth.

- 29 **ED-126 (FC 20-30) Environics May 2000 – Health Warning Messages on the Flip/Slide and Inserts of Cigarette Packaging a Survey of Smokers:**

p. 3:

Overall, the survey finds that recall and notice of the insert messages is higher than that for flip/slide messages. While both formats are seen, by a majority of smokers, as effective in providing information to smokers, flip/slide messages are rated more highly than insert messages on a number of dimensions.

- 30 **D-156 ROBITAILLE N.-Michelle, “Le tabagisme, la maladie et la mort,” Expert opinion for the Attorney General of Canada, July 2000**

p. 25: [Translation]

II-d) Tobacco, illnesses and death

Smoking is the main public health problem, particularly in Quebec where the proportion of smokers is the highest in North America. In 1996, according to Statistics Canada, more than 45,000 Canadians died prematurely due to tobacco use (12,000 in Quebec): 40% cardiovascular diseases, 40% cancer and 20% lung diseases.

Smoking caused more deaths than traffic accidents, suicides, AIDS and drug use put together.

Smoking is responsible for:

- *85% of lung cancers;*
- *85% of chronic obstructive lung diseases;*
- *30% of all cancers;*
- *30% of cardiovascular diseases.*

- 31 **D-107 RITTER, Leonard, “Toxicology and Tobacco”, Expert opinion for the Attorney General of Canada, July 2000**

p. 15:

- *Tobacco smoke and/or tobacco condensates contain up to 43 compounds which the International Agency for Research on cancer have identified as carcinogenic.*
- *Tobacco smoke is one of the most toxic substance in widespread use.*
- *The tobacco industry has been aware for almost forty years of the adverse health effects which could be associated with the use of tobacco, but did not publish or release the breadth or depth of their knowledge.*

The most distressing aspect of the evidence is that tobacco consumption is most widespread among the most vulnerable, the young and the less educated, at whom much of the advertising is specifically directed.

29. Ian Potter, Assistant Deputy Minister, Health Canada, testified before the Standing Committee on Health on May 30, 2000, as part of the hearings on regulations.³²

On page 38/496:

Health warning messages are a vital part of any tobacco control regime. They fulfil one of the key goals of the Tobacco Act, and that is to enhance public awareness of the health hazards of tobacco use. Research indicates that the impact of the current health warning messages now seen on the packages of products is wearing out. The current messages also do not address the knowledge gap.

Our research shows that Canadians are generally aware that tobacco is bad for health, but they are not aware of the range and seriousness of the diseases caused by smoking.^{33 34} In particular, smokers are less likely than non-smokers to think tobacco use is a major health problem. This is one of the fundamental reasons we are pursuing these regulations.

³² ED-111 Hearings before the Standing Committee on Health, May 30, 2000, session, page 38/496.

³³ ED-149 (FC 20-17) Environics March 29, 1999 – Health Canada – Office for Tobacco Control Qualitative Focus Group Report Regarding Health Warning Labels and Images on Cigarette Packages :

p. 9:

Most of the adults said they thought the concept of health messages was very important, not necessarily for themselves, but for children contemplating starting smoking. "I never read them, I'm only concerned for the kids." Many of the youth, on the other hand, did not care about the health messages and believed that the health risks were implausible.

³⁴ ED-184 (FC 20-05) Cecil & Evans March 16-31, 1996 – Perceived Believability Among Adolescents of Health Warning Labels on Cigarette Packs:

p. 503

With respect to awareness and acceptance of the health risks associated with smoking, two main conclusions have been drawn. First, the majority of adolescents are unaware of the more specific health consequences of smoking (e.g. cancer of the oral cavity), even though they are generally aware that smoking may cause cancer (Dawley, Fleischer, & Dawley, 1985; O'Rourke, O'Byrne, & Wilson-Davis, 1983; Palmer, 1970). Second, compared to adolescents who smoke and intend to smoke in the future, nonsmokers and nonintenders are more likely to be aware of and to accept the general and specific health consequences associated with smoking (Dawley et al., 1985; Murray & Cracknell, 1980; Murray, Swan, Johnson, & Bewley, 1983). In response to these findings, academic researchers (Evans et al., 1978; Fishbein, 1977; Murray et al., 1983) and the Federal Trade Commission (FTC, 1981; Waxman, 1985) suggested the need for more specific health warning labels on cigarette packs focusing on the more immediate physiological effects, instead of merely labels with the general admonition that cigarette smoking is dangerous to one's health.

For example, young people who smoke are notably less likely, at 68%, than non-smoking youth, at 89%, to see tobacco as a major health problem.³⁵ That is, of young people who are non-smokers, 89% see tobacco use as a major health problem, but of young smokers, only 68% see it as a major health problem. This is the knowledge gap that these regulations are intended to address.

Not all tobacco products in Canada are labelled, and currently no labelling regulations are in place since the Supreme Court decision. These will fill that gap.

With the proposed products information regulations, there would be specific requirements in place to ensure effective health warning messages are placed on all tobacco products sold in Canada. The labels would call renewed attention to the health warning messages and fill in knowledge gaps among smokers and non-smokers."

30. The intent of the warnings on the packaging is to educate the public on the dangers of smoking and contribute to its reduction:

- *R.J.R.-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311:

On page 353:

Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

- *Attorney General of Canada v. R.J.R.-MacDonald Inc.* [1993] R.J.Q. 375 (C.A.):

³⁵ ED-144 (FC 20-23) Environics October 1999 – Canadian Adult and Youth Opinions on the Sizing of Health Warning Messages

p. 22:

Youth who smoke (68%) are notably less likely than non-smoking youth (89%) to see tobacco use as a major health problem.

Brossard J., on pages 436 and 437:

[Translation]

As for s. 9, neither the judgment in appeal nor Respondents contest the fact that negative messages are likely to discourage consumption. In my view, this is more of a probability than a mere possibility. The argument invoked by Respondents, which is accepted in the judgment in appeal, is simply that it was not shown that an unattributed negative message has a greater impact in this regard than a message which is attributed to those imposing it.

- *Tobacco Products Information Regulations – Amendment of March 20, 1993, Regulatory Impact Analysis Statement:*

On page 795:

[Translation]

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

On page 797:

[Translation]

*Moreover, the examination of results from six surveys, including a **survey conducted on behalf of Imperial Tobacco Inc and made public during legal proceedings against the Act, revealed that the Canadian population possesses a superficial knowledge of the consequences of smoking on health.** These surveys showed that Canadians underestimate the potential lethality of lung cancer (65% compare to the actual rate of 90%); only half of Canadians know that smoking is an important cause of cardiac disease and although most of them consider tobacco to be an addictive substance, 30% of Canadians continue to smoke and nearly 47,000 took up the habit in the last year. Improved health messages would help smokers become more aware of the damaging effects of smoking. This measure is part of the logic of the Tobacco Products Control Act. Although it is difficult to predict the impact of this measure on smokers, certain data tends to demonstrate that consumption should drop by approximately 0.6% per year and that the improved messages could encourage smokers to give up the habit and induce potential smokers not to start at all.*

- Regulatory Impact Analysis Statement, January 18, 1989:

On page 70:

*The new medical public health notices that must appear on all tobacco products will replace the current notices, which are published voluntarily and **inform the public** on the dangers connected to the consumption of these products.*

- D-142 Surgeon General of the United States "Reducing the Health Consequences of Smoking," 1989:

Page 14:

***One element of the decision of whether or not to smoke is personal understanding of the dangers involved.** Chapter 4 reviews changes in public knowledge since 1964. The most basic findings from scientific research on the health consequences of smoking have been conveyed to and accepted by the American public, at least at a generalized level. Nevertheless, **survey research reveals important gaps in public understanding of the hazards of smoking. Smokers report less understanding of the basic consequences of smoking than do nonsmokers; furthermore, smokers often do not internalize, or personalize, the hazards they acknowledge as applying to smokers in general.** In addition, knowledge of smoking-and-health facts beyond the most basic information is not possessed by significant numbers of Americans. Thus, a substantial educational task remains.*

Page 478:

Effectiveness of Cigarette Warning Labels

*In May 1987, the Assistant Secretary for Health, Department of Health and Human Services, transmitted a report to Congress on the effects of health warning labels (US DHHS 1987d). Based on a review of the research literature, the report reached three major conclusions. First, **health warning labels can have an impact on consumers if designed to take account of factors that influence consumer response to warning labels** (e.g. a consumer's previous experience with the product, previous knowledge of the risks associated with product use, and education and reading levels). Second, **health warning labels can have an impact upon the consumer if the labels are designed effectively** (e.g. visible format and providing specific rather than general information). Third, **studies that have examined the impact of health warning labels in "real world" situations have concluded that the labels did have an impact on consumer behaviour.** The report cautioned, however, that the results of these studies "cannot be regarded as conclusive evidence that health warning labels are necessarily effective in all situations". This Section reviews*

evidence related to the effectiveness of cigarette warning labels in the United States.

Page 480:

*Furthermore, information in the current warnings is presented technically and abstractly rather than in a concrete and personal manner. **A reader is more likely to read and learn information that is made personally relevant as opposed to that which is abstract and technical (Fishbein 1977). Researchers who have addressed the format of warnings have found that consumers' attention will be most effectively caught by novel formats** (Cohen and Srull 1980). This line of study has suggested that the communications effectiveness of the post-1984 warnings may have been diminished because the same rectangular shape of the pre-1985 warnings was maintained (Bhalla and Lastovicka 1984).*

31. The appellants allege that the Regulations are *ultra vires* because the government adopted them with the intent of reducing the value of their trademarks and to deprive them of the possibility of communicating with their consumers (ITL Brief, p. 59).
32. They refer the court to P-10 *New Directions for Tobacco Control in Canada – A National Strategy*, in which the word *denormalization* means, according to their allegations, that this could be the government's objectives.
33. However, that document explains in detail the meaning of the government policy of *denormalization*:

Normalize - to make normal or regular

Normalization - the process of making normal or regular

Denormalization - to remove, or steer away from, what seems to be normal"

...

"Denormalization, in the context of social behaviour, aims to change attitudes toward what is generally regarded as normal or acceptable behaviour, including through social marketing. When attitudes change, behaviour will also change because humans generally want to act in ways that are acceptable to others.

There are many examples of how social behaviour has been "denormalized", for example:

- *Failure to use safety belts and child restraints;*
- *Drinking and driving;*

- *Poop and scoop laws for dogs; and*
- *The shift away from corporal punishment for children.*

There is clearly scope to consider further behavioural denormalization, particularly where it focuses on the consequences for others, rather than just the person smoking:

- *Working to discourage smoking in enclosed public or private spaces where others could be affected by second-hand smoke, including children in the home;*
- *Working to discourage smoking by and around pregnant women. (Appendix C)*

34. Nowhere in this document is there mention of reducing the value of the trademarks or depriving the plaintiffs of the possibility of communicating with their consumers. The plaintiffs presented no evidence regarding these allegations.

5. Federal jurisdiction

35. In paragraph 3(c) of the ITL re-amended statement, it can be read:

They are ultra vires the Parliament of Canada in that they constitute the regulation of an industry within the exclusive jurisdiction of the Provinces and not a valid exercise of the federal criminal law power.

36. It would appear that the appellants abandoned this argument in their briefs. It is still useful to point out to the Honourable Court the basis for federal jurisdiction in this matter.

- In *RJR-MacDonald v. Attorney General of Canada*, [1995] 3 S.C.R. 199, the Supreme Court of Canada unanimously concluded that the imposition of health messages prescribed by the *Tobacco Products Control Act* in 1989 was a federal jurisdiction in criminal law.

La Forest J., on page 257:

*In my view, once it is accepted that Parliament may validly legislate under the criminal law power with respect to the manufacture and sale of tobacco products, **it logically follows that Parliament may also validly legislate under that power to prohibit the advertisement of tobacco products and sales of products without health warnings. In either case, Parliament is legislating to effect the same underlying criminal public purpose: protecting Canadians from harmful and dangerous products.***

La Forest J., on page 263:

The appellants' third argument is that the Act is fundamentally regulatory, not criminal, in nature.

...

In my view, this argument fails because it disregards the long-established principle that the criminal law may validly contain exemptions for certain conduct without losing its status as criminal law.

La Forest J., on page 321:

In a modern state, labelling of products, and especially products for human consumption, are subject to state regulation as a matter of course.

...

Seen in this way, the mandatory health warnings under s. 9 are no different from unattributed labelling requirements under the Hazardous Products Act, under which manufacturers of hazardous products are required to place unattributed warnings, such as "DANGER" or "POISON", and hazard symbols, such as skull and crossbones on their products; see Consumer Chemicals and Containers Regulations, SOR/88-556. I should add that the issue has ramifications for many other spheres of activity where individuals may in certain prescribed circumstances be required to place danger signs on facilities used by the public or on construction sites, and so on.

McLachlin J., on page 326:

*The first issue is whether Parliament had the power to enact the ban and warning requirements, given that advertising and promotion of particular industries generally are matters of provincial competence. **I agree with my colleague, Justice La Forest, that Parliament may impose advertising bans and require health warnings on tobacco products under its criminal law power.***

Major J., on page 364:

*The Act, **except for s. 9 and its associated provisions relating to mandatory health warnings on tobacco packaging**, cannot be upheld as valid criminal legislation. The Act is a regulatory measure aimed at decreasing tobacco consumption.*

6. Expropriation

37. Paragraph 3(d) of the re-amended ITL statement, reads:

They effect the virtual expropriation of Imperial's assets in its trademarks and in its packages, without the slightest compensation being paid or contemplated and without Parliamentary authority to this effect, even assuming Parliament could give it.

38. Economic and property rights are not protected under the Charter.

- *Irwin Toy Limited v. A.G. of Quebec*, [1989] 1 S.C.R. 927:

On page 1003:

*The intentional exclusion of property from s. 7, and the substitution therefore of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that **economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee.***

- *Reference Re Criminal Code (Man.)*, [1990] 1 S.C.R. 1123:

On pages 1170 and 1171:

In short then I find myself in agreement with the following statement of McIntyre J. in the Reference Re Public Service Employee Relations Act (Alta.), supra, at p. 412:

It is also to be observed that the Charter, with the possible exception of s. 6(2)(b) (right to earn a livelihood in any province) and s. 6(4), does not concern itself with economic rights.

39. The exercise of regulatory power, notably for purposes of public interest, does not equal expropriation. The government is not appropriating 50% of the package for its own use, but to promote public health.

- HOGG, P.W., *Constitutional Law of Canada*, 4th Edition, Toronto, Carswell, 1997:

On page 714:

*Most forms of regulation impose costs on those who are regulated, and it would be intolerably costly to compensate them. Moreover **much regulation has a redistributive purpose: it is designed to reduce the rights of one group (manufacturers, employers, for example) and increase the rights of another (consumers, employees, for example).** A compensation regime would work at cross-purposes to the purpose of the regulations.*

40. The plaintiffs had pleaded the argument of expropriation unsuccessfully during the introduction of the new regulations in 1993.
 - ED-209, *RJR-MacDonald Inc. v. A.G. of Canada* – Transcript of audio tapes of proceedings: Mr. Colin K. Irving:

Page 34:

*The statute authorizes the government to convey information. **It does not authorize the government to expropriate the company's packaging.** That is what they are doing now and in my submission they are doing it without any supporting evidence at all. That is the point.*

41. This three-line argument presented in the JTI brief on page 9 is completely identical to the one submitted and rejected by the Supreme Court in 1995 in the *RJR* case. Such an argument has no better chance of being accepted in this case.
42. The plaintiffs are already committing approximately 35% of their package surface to health messages. The new regulations will only be increasing this surface area by 15% to bring it up to 50%.^{36 37}

³⁶ ED-143 (FC 20-20) Liefeld September 15, 1999 – The Relative Importance of the Size, Content and Pictures on Cigarette Package Warning Messages

p. iii:

8. For 95% of smokers and 80% of non-smokers, 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.

43. Several federal laws and regulations require the affixing of messages on the packaging of certain products without it diminishing the value of the product's trademark:

- *RJR-MacDonald v. Attorney General of Canada*, [1995] 3 S.C.R. 199:

La Forest J., on page 321:

In a modern state, labelling of products, and especially products for human consumption, are subject to state regulation as a matter of course.

...

Seen in this way, the mandatory health warnings under s. 9 are no different from unattributed labelling requirements under the Hazardous Products Act, under which manufacturers of hazardous products are required to place unattributed warnings, such as "DANGER" or "POISON", and hazard symbols, such as skull and crossbones on their products; see Consumer Chemicals and Containers Regulations, SOR/88-556. I should add that the issue has ramifications for many other spheres of activity where individuals may in certain prescribed circumstances be required to place danger signs on facilities used by the public or on construction sites, and so on.

- *Regina v. Steinberg's Ltd.*, 80 D.L.R. (3d) 741:

On page 751:

*... that a statute which in its entirety deals with honest labelling has a pith and substance which is the protection of the consumer, and is legislation "in relation to" criminal law. **The categories of crime are not closed**, and the development of new commercial trade practices in recent years requires that these categories be broadened to include what has become known as consumer protection legislation.*

³⁷ ED-149 (FC 20-17) Environics March 29, 1999 - Health Canada - Office for Tobacco Control Qualitative Focus Group Report Regarding Health Warning Labels and Images on Cigarette Packages:

p. 7:

Most participants in all groups favoured 60 percent of the package being devoted to health information. They felt this made the messages legible and still left some room for the manufacturer to identify the brand.

On page 753:

*The Consumer Packaging and Labelling Act has the public purpose of safeguarding the peace and security of consumers (i.e., their peace of mind and their security arising from the knowledge that they are not being fraudulently imposed upon by suppliers **in cases where the consumers' means of knowledge is clearly inferior to that of the supplier**) and of preventing **the commercially immoral acts of false or intentionally misleading labelling and packaging**, and thus, in my opinion, complies squarely with the tests prescribed by Lord Atkin and Rand, J., supra.*

- *R. v. Westfair Foods Ltd.*, 111 Man. R. (2d) 47:

On page 50:

*[13] The **Consumer Packaging and Labelling Act** has two primary purposes. The first purpose is to ensure that any information provided to a consumer on a prepackaged product is not false or misleading in any way. However, there is a second purpose and that is to provide information to consumers so they can make informed choices. That is the mischief which s. 4 is intended to prevent.*

On page 51:

The purpose of this legislation is clearly to arm the consumer with the knowledge necessary to make an informed buying decision about products being offered for sale.

- *R. v. Importations cachères Hahamovitch Inc.*, 500-36-001436-982:

On page 2:

[Translation]

*In effect, the protection of Canadian health, as in the case there, is justification for federal Parliament to legislate standards for labelling food products, and in the case of these being contravened, to impose penalties upon summary conviction. This is a criminal matter within federal jurisdiction and was definitively ruled as such by the Supreme Court in *R v. Wetmore* (1983) 3 S.C.R. 284.*

*In other classes, The following judgements follow the same course. *RJR-MacDonald Inc. v. The Attorney General of Canada* [1995] 3 S.C.R. 199 and *R v. Hydro-Québec* [1997] 3 S.C.R. 213.*

- *Hazardous Products Act*, R.S.C., c. H-3, para. 15 (c), (d), (e);

- *Consumer Chemicals and Containers Regulations*, SOR/88-556, sections 13 to 19;
- *Consumer Packaging and Labelling Act*, R.S.C., c. C-38, subs. 18(1);
- *Consumer Packaging and Labelling Regulations*, C.R.C., c. 417.

44. The presence of health messages on packages is also justified in order to counteract the image projected by certain packages, to the effect that certain tobacco products are better for one's health.³⁸

- RBH 3802 (JM-3) Canadian Classics Historical:

Page 9267:

Response to "Without Additives" was highly positive. It appears to generate more positive impact than "100% Canadian tobacco".

- *Smokers appear to take the phrase at face value...i.e. that it implies a "healthier...more natural" product. While a healthier product was not a preoccupation among these individuals, it was one which they would appear to value.*
- *The benefit of a cigarette without additives may be more related to the smoker's relationship with others. There was some evidence that a cigarette positioned as "healthier" would deflect or reduce criticism... "it would get critics off my back...it sounds not as bad".*

- ED-275 *Federal Trade Commission – Cigarette Report for 2000 – issued May 2002:*

Page 2:

In August 1999, the Commission gave final approval to a consent agreement with the R. J. Reynolds Tobacco Company that resolved charges that advertisements for Winston no additives cigarettes implied, without a reasonable basis, that Winston cigarettes are less hazardous than otherwise comparable cigarettes because they do not contain additives. The settlements requires Reynolds to include the disclosure No

³⁸ **ED-163 (FC 20-14) Environics April 1998 - Smokers' Attitudes Towards "Light" and "Mild" Cigarettes**

p. 31:

"Additive-Free" and "100% Natural" Cigarette Labelling

Smokers are divided over the meaning of the phrases "additive-free" and "100% natural tobacco"; while pluralities feel that these statements mean that such cigarettes are just as toxic, large minorities feel that these statements mean that the cigarettes are less toxic than other cigarettes.

additives in our tobacco does NOT mean a safer cigarette² in most advertising for Winston or any other tobacco products Reynolds advertises as having no additives. In addition, the disclosure must be included in all advertising for Winston no-additive cigarettes for one year, regardless of whether that advertising contains no additives claim. Reynolds need not include the disclosure, however, if it has scientific evidence demonstrating that its no additives cigarette poses materially lower health risks than other cigarettes.

7. Freedom of expression

45. Paragraph 3(e) of ITL's re-amended statement, states:

They violate section[s] 2 of the Charter and cannot be justified under section 1 of the Charter.

46. The government action, namely the impugned regulations, is not intended to restrict the plaintiffs' freedom of expression:

- *Irwin Toy Limited v. A.G. of Quebec*, [1989] 1 S.C.R. 927:

Page 976:

With regard to freedom of expression, if the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee.

47. The effect of the government action is not to restrict the plaintiffs' freedom of expression.

48. The plaintiffs did not prove that the effect of the government action was to restrict the freedom of expression.

- *Irwin Toy Limited v. A.G. of Quebec*, [1989] 1 S.C.R. 927:

On page 976:

*Even if the government's purpose was not to control or restrict attempts to convey a meaning, the Court must still decide whether the **effect** of the government action was to restrict the plaintiff's free expression. Here, **the burden is on the plaintiff to demonstrate that such an effect occurred**. In order so to demonstrate, a plaintiff must state her [sic] claim with reference to the **principles and values underlying the freedom**.*

49. These values are:

- 1- The search for truth;
- 2- Participation in decision-making on interests of a social and political nature;
- 3- Diversity in the forms of individual self-fulfillment and human flourishing.

50. The plaintiffs must therefore provide evidence and describe the contents of the message they would like to transmit, but which they are unable due to the regulations and what connection there is with the search for truth, participation within society or individual self-fulfillment and human flourishing of the consumers in their message?

- *Irwin Toy Limited v. A.G. of Quebec*, [1989] 1 S.C.R. 927

On page 976:

We have already discussed the nature of the principles and values underlying the vigilant protection of free expression in a society such as ours. They were also discussed by the Court in Ford (at pp. 765-67), and can be summarized as follows: (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.

On page 977:

But the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.

51. In other words, and to paraphrase McLachlin J. in *RJR-MacDonald v. Attorney General of Canada*, [1995] 3 S.C.R. 199, on page 343, the plaintiffs must prove to the Court that due to the effect of the regulations being challenged, the consumer is:

... deprived of an important means of learning about product availability to suit their preferences and to compare brand content with an aim to reducing the risk to their health.

52. There is no evidence in the file to the effect that the regulations deprive the consumer of some information on the product brand.³⁹
53. In fact, the regulations increase the quantity of information available to the consumer.
- o See the examples of cigarette packages to compare the quantity of information given:
 - Before 1972
 - 1972 to 1989
 - 1989 to 1994
 - 1994 to 2000
 - 2000 and onward
 - See the excerpts of the testimony by Michel Poirier, President and CEO of the plaintiff JTI-MacDonald Corp., July 21, 2000:
 - . pages 30 to 35
 - . pages 45 to 47
54. The plaintiffs tend rather to want to reduce the quantity of information available to the consumer:
- Michel Poirier, July 21, 2000
Pages 109 to 130
 - MP-14 (RJR-1389) Vantage Concept Research:

On page 80153 3116:

³⁹ **ED-140 FC 20-25 CMRDI Kindra December 15, 1999 – Tobacco Warning Labels and Packaging - Issues, Prospects and Strategies**

p. 2:

The tobacco industry's ability to communicate brand information is not impaired significantly by the allocation of 50-60% surface area for HWMs. This is so because the space devoted to the commercial message is still fairly dominant, irrespective of the exact size of the HWMs. Furthermore, the present set of actions being contemplated by Health Canada, do not prevent the industry from using colour, graphics, logos, brand names, as well as borders and font types and size to communicate meaning and message to the consumer.

*They [the smokers] were reminded of the alleged negative side of cigarette-smoking by being taken to the idea of cigarette smoke containing, other than tar and nicotine, substances which are identified as harmful by such an authority as the Ministry of Welfare and Health. **This was all the more surprising to smokers because tar and nicotine were generally all they knew about the content of cigarette smoke. They were also reminded that they kept taking in 100% of those compounds.** The EW proposition was also interpreted negatively in such a way that as much as 50% of those allegedly harmful substance would still have to be inhaled through this filter having such an innovative design.*

...

***All of the three expressions explored in this project (harmful substances, impurities and problematic compounds) led respondents to become curious about exactly what they might be.** Of these, harmful substances induced verbalized negatives most.*

...

Of the four concept directions explored (EW, EW/LSS/EVG, LESS/BEST and FILTER STORY), LESS/BEST was found to be most acceptable in consumer terms. The three benefits were presented in a simple, itemized and smoker-friendly manner, with endorsement of the recent consumption tendency toward "less", and without hard scientific notes.

55. The imposition of a health message does not violate the Charter as long as the plaintiff can, if they want, attribute it to Health Canada:

- *RJR-MacDonald v. Attorney General of Canada*, [1995] 3 S.C.R. 199:

McLachlin J., on page 349:

The government is clearly justified in requiring the appellants to place warnings on tobacco packaging. For the reasons given with respect to the advertising ban, a lower level of constitutional scrutiny is not justified in deciding whether it was necessary to prohibit the appellants from attributing the message to the government and whether it was necessary to prevent the appellants from placing on their packaging any information other than that allowed by the regulations.

8. Effectiveness of health messages

56. The plaintiffs' argument regarding the ineffectiveness of the warnings is based on two erroneous premises:

- That the warnings serve only to reduce the number of smokers and not to inform smokers regarding the damaging effects of smoking;

- That it is possible to isolate the effects of health messages on tobacco consumption although multiple factors influence the behaviours of smokers.
57. Among the factors that generated fluctuations in the consumption of tobacco during the 90s, there are two that the plaintiffs cannot ignore: sponsorship advertising replaced traditional advertising and smuggling caused the price of cigarettes to drop.
 58. Based on statistics regarding the increase of tobacco consumption among young people as well as a draft report from Dr. William Leiss dated 1995, the appellants state that the government's policy "proved to be a complete failure" and "has not had any positive public benefit."⁴⁰
 59. Since the intent of the health messages was to inform the public of the dangers of tobacco, it is impossible to seriously state that they have had no "positive public benefit."
 60. The primary objective of the health message was information justified by the importance and gravity of smoking; it is impossible to state that since 1989 the messages have had no "positive public benefit."
 61. Since the rate of tobacco-product consumption has diminished from 30% in the overall population in 1990 to 24% in 2000,⁴¹ it is therefore impossible to state as peremptorily that the health messages have had no "positive public benefit."
 62. The plaintiffs pleaded during the interlocutory injunction that the rate of consumption, during that same period, had gone from 21% to 28% among young people aged 15 to 19. Would this rate have been higher without the health messages? Would this rate have been lower without smuggling? What would this rate of consumption have been if the plaintiffs had not conducted any sponsorship advertising?
 63. Are the plaintiffs ready, now that the rate of consumption among the 15-19 age group has dropped to 25% in 2000, a year in which the new health messages

⁴⁰ **A-5 "The Consultation Paper – Proposed New Labelling Requirements for Tobacco Products" – January 1999:**

p. 10:

Over the years, the public has become increasingly aware of the health hazards associated with using tobacco products. ... Health labels almost certainly played a role in increasing the awareness of these hazards, given that these messages were so visible.

⁴¹ **Larry Swain, ²Smoking Prevalence in Canada, 1985-2000², D-245, page 4.**

were highly publicized, to admit their effectiveness? Once again, it is impossible to state that the health messages have had no positive effect.

64. If, however, this suggestion were to be correct, it would not be of any assistance to the plaintiffs since it would further anchor the importance of increasing the impact of health messages.
65. The plaintiffs are asking that the regulations be declared null by trying to discredit a research report written by Professor John Liefeld dated September 15, 1999, and entitled "The relative importance of the size, content and pictures on cigarette package warning messages."⁴²
66. The plaintiffs brought forth no evidence on this subject and did not have Mr. Liefeld testify.
67. The plaintiffs did not establish how the memo produced under EP-14 tainted the Liefeld report.
68. Subject to what was stated previously, the plaintiffs, Rothmans Benson & Hedges, themselves commented on the previous work of Professor Liefeld in the following terms:
 - RF-9 (RBH-3914) – A review of the expert panel report prepared for Health Canada:

Page 10837:

My overall reaction on first reading "When Packages can't Speak" is that it leans to being a typical scholarly, politically correct, piece of work designed to offend no one. The vagueness of conclusions would make it difficult to pin down the EXPERT PANEL on almost any aspect of the report involving a subjective interpretation. The words of the report are couched in such a manner that the EXPERT PANEL could neither be criticized for their work nor held accountable for non delivery of any anticipated results from the introduction of plain/generic packaging for tobacco products.

69. The conclusions of the Canadian International Trade Tribunal on March 28, 2000, (EP-13) did not invalidate Professor Liefeld's report.
70. Dr. John Luik, who had wanted to prepare the report, was in a conflict of interest since he had worked closely with the tobacco industry.

Studies by Health Canada

71. Over the last many years, Health Canada has obtained several studies and reports on the packaging of tobacco products, warnings and the emission of toxic constituents. Here are a few of the titles and excerpts:

- **D-142 (FC-20.1) *Reducing the Health Consequences of Smoking, 1989, Surgeon General of the United States.***
- **ED-195 (FC-20.2.) *Tobacco Health Warning Messages, Inserts and Toxic Constituent Information Study - Qualitative Study - 1992, by Tandemar:***

Page 21:

Conclusions:

- *Cigarette packages are an important and desired resource for health information on smoking, with current messages frequently referenced by the majority of smokers.*
- *Messages are particularly important to young smokers (12-15), who may be less aware of the health risks associated with smoking.*

- **JF-21 (FC-20.3.) “*Youth Smoking Survey, 1994: Technical Report - Qualitative Study - 1994, by Stephens and Morin:***

Page 67:

Implications for Education and Message Promotion

The majority of Canadian youth do not believe that one has to smoke many years to affect health, nor do they believe that smokers can quit anytime they want. Further, the majority believe that quitting smoking can reduce health damage. Such beliefs should be continually reinforced.

However, there is still a substantial proportion of Canadian youth smokers who hold beliefs that are counter to the existing medical knowledge concerning health effects and the ease of quitting smoking. More importantly, these beliefs may discourage quit attempts. The health knowledge and belief items indicate several areas in which those who have tried to quit and those who have not may differ. Those who have not attempted to quit recently are more likely to believe that smokers can in fact quit anytime they want and are less likely to believe that quitting smoking reduces health damage.

Page 106:

Implications for Regulation and Legislation

A key component of the Canadian government's tobacco control strategy is **to communicate to the public the health hazards of tobacco use. Cigarette pack health warning labels represent this strategy.** The present survey supports the notion that **these warning labels are an effective tactic**, as almost all youth regard them as credible, and many have good recall of the health problems specified in the warning (see Chapter 7).

Page 122:

◦ There appears to be a positive relationship between the recall of pack warning labels and the recall of health problems for lung cancer, heart problems, strokes, and cancer, as **those who have seen these warning labels are more likely to recall the corresponding health problem, relative to those who have not seen such labels.**

◦ Current smokers aged 15-19 do not seem to know the levels of toxins in their cigarettes, as just about half (47%) could not identify at least one ingredient level. Only about one third of current smokers (ages 15-19) want more prominent toxic ingredient information on their cigarette packs.

Page 133:

As outlined in a recent government report, "strong" health messages are required on cigarette packs that are intended to "enhance public awareness of the hazards associated with smoking by ensuring effective communication of pertinent information about tobacco products and their use". **Thus, given this objective, warning label "effectiveness" is not so much an issue of attitude or behaviour modification as successful communication of information.** There are several components or stages to communication. To be effective, a message has to be noticed, read, understood, believed, seen as personally relevant, and recalled. Thus, **warnings will have little impact unless they are seen, believed, personally meaningful, and memorable.**

Page 135:

Findings from the YSS suggest that cigarette pack warning labels are a credible source of smoking – related health information, even without attribution of the warning to a source. However, not all health messages are equally effective; **the more powerful and personally relevant messages seem to be more memorable.** In order to be salient for youth, certain warning messages should be targeted to this

age group. The messages should not only be powerful and dramatic, but also be perceived as relevant by this age group. This may be achieved by the use of certain features such as short, blunt wording, as well as the explicit mention of the target group on the label. **Labels should also convey the fatal nature of the smoking related diseases by including information about prognosis, time to death, or years of life lost.** Moreover, some research has shown that long-term health consequences of smoking are irrelevant to youth and that short-term or immediate health effects (e.g. shortness of breath, coughing, stained teeth) may be more powerful deterrents to smoking onset. Thus, the communication of the short-term effects caused by smoking should be included as additional or alternative messages on warning labels.

- **ED-190 (FC-20.4.) *When Packages Can't Speak: Possible Impacts of Plain and Generic Packaging of Tobacco* - March 1995, from an expert panel (M. E. Goldberg, G. Kindra, J. Lefebvre, J. Leifeld, J. Madill-Marshall, N. Martohardjono, H. Vredenburg).**
- **ED-184 (FC-20.5.) *Perceived Believability Among Adolescents of Health Warning Labels on Cigarette Packs* - March 1996, by Cecil and Evans:**

Page 503:

With respect to awareness and acceptance of the health risks associated with smoking, two main conclusions have been drawn. First, the majority of adolescents are unaware of the more specific health consequences of smoking (e.g., cancer of the oral cavity), even though they are generally aware that smoking may cause cancer (Dawley, Fleischer, & Dawley, 1985; O'Rourke, O'Byrne, & Wilson-Davis, 1983; Palmer, 1970. Second, compared to adolescents who smoke and intend to smoke in the future, nonsmokers and nonintenders are more likely to be aware of and to accept the general and specific health consequences associated with smoking (Dawley et al., 1985; Murray & Cracknell, 1980; Murray, Swan, Johnson & Bewley, 1983). In response to these findings, academic researchers (Evans et al., 1978; Fishbein, 1977; Murray et al., 1983) and the Federal Trade Commission (FTC, 1981; Waxman, 1985) suggested the need for more specific health warning labels on cigarette packs focusing on the more immediate physiological effects, instead of merely labels with the general admonition that cigarette smoking is dangerous to one's health.

Page 515:

In conclusion, we found high levels of belief in the validity of the health warning labels introduced in 1985. Differences in levels of belief according to smoking status were obtained, although the effect size was

small. The development of different labels that are shorter in length, more visible, and include pictorial designs may be more effective than the current warning labels (Beltramini, 1988; CBRC, 1992; USDHHS, 1994). A carefully designed pre-test of possible labels on various target populations, including adolescents, should be the basis for developing more effective labels. Such labels incorporated in school-based smoking prevention programs could, in fact, highlight these warnings on cigarette packs for children and adolescents. On the other hand, as presently employed, the cigarette pack as a medium of dissemination of the health warning labels may be less than efficacious.

- **ED-186 (FC-20.6.) Cigarette Packaging Study - The Evaluation of New Messages - Quantitative Study - March 1996, by Tandemar:**

Page 13:

Cigarette packaging is considered an important resource for information about health risks associated with smoking. It is a particularly important resource for teens. Virtually all smokers have seen the messages and they are read an average 1.7 times per day.

- **ED-178 (FC-20.7.) Public Attitudes Toward Toxic Constituent Labelling on Cigarette Packages - Qualitative Study - April 1996, by Environics:**

Page 11:

4.7 General Awareness of Toxic Ingredients in Cigarettes

*Virtually all participants mention tar, nicotine, and carbon monoxide as toxins that are in cigarettes. However, beyond that, few are able to name any other chemicals. In some cases, participants actually believe that there are only these three hazardous ingredients in tobacco, although in most cases, **participants believe there are other hazards, but do not know exactly what they are.***

Page 13:

*Despite their mixed reaction to the list of toxins, most expressed the belief that it should be on cigarette packages. Although they felt it would have virtually no effect on current smokers, they felt that the list contained important and new information that people should have. **They also felt it could have an effect on young people who have not yet started to smoke.** Interestingly, this view was shared by both adults and teens.*

- **ED-176 (FC-20.8.) *Public Attitudes Toward the Listing of Toxic Ingredients on Cigarette Packages: A Survey Report - Quantitative Study - June 1996, by Environics:***

Page 4:

2.0 SUMMARY OF RESEARCH FINDINGS

- *Although most Canadians (70% of adults and 72% of young people, aged 12 to 17) feel at least somewhat informed about what is in cigarettes, **almost three-quarters (73% and 83%) feel there should be more information available about the contents of cigarettes.***
- ***Canadians express almost unanimous support (89% and 91%) for requiring cigarette companies to display a list of toxic constituents on cigarette packages.** Most Canadians (88% and 92%) also support the idea of requiring cigarette companies to display an informational statement about the effects of chemical constituents along with this list.*
- *A majority of Canadians believe a list of toxic constituents along with **an informational statement would be at least somewhat effective in the following ways: providing information about the chemicals and toxins in cigarettes (78% and 79%); discouraging young people not currently smoking from starting (73% and 80%); discouraging themselves from smoking (57% and 77%); and discouraging smoking among young people who currently smoke (53% and 55%). Just under half (48% and 45%) think this will be effective in discouraging adults who smoke.***

- **ED-179 (FC-20.9.) *A 3SC Analysis of Specific Control Measures - Report - June 1996, by Environics:***

Pages 7-8:

*First, we recommend that, if tobacco companies are required to list the toxic constituents of tobacco on product packaging, they should also be required to present this information in ways that meet certain standards of design and format. As we have shown, smokers in general do not put a great deal of importance on aesthetics, but their sensual side does, perhaps, make them more inclined than others to be attracted to materials that stimulate the senses of some way. **As such, to attract the attention of smokers at all, it seems clear that information targeted at them must be presented with the "highest production values".***

*Second, we suggest that **information about toxic constituents on cigarette packaging may attract some interest and have some influence if it is bolstered by other communications efforts with***

tough message that have the power to resonate with smokers. One such message that could be used as a king [sic] of lever to boost smokers' willingness to consider the toxic constituents of tobacco is the message that toxins increase profits for tobacco companies. This message builds on smokers' inherent distrust of private sector motivations and may, in fact, influence smokers to look twice at toxic constituent listings.

- **ED-169 (FC-20.10.) Public Attitudes Toward Toxic Constituent and Health Warning Labelling on Cigarette Packaging - Qualitative Study – April 1997, by Environics.**

Page 7:

3.2 Toxic Constituents

*When those participating in the toxic constituent sessions were asked to name those ingredients in cigarettes that are dangerous, virtually all participants could recall the three ingredients currently listed on the package (i.e. tar, nicotine, and carbon monoxide). **When asked if they could name anything else, only a small number could offer any other answers.***

- **ED-168 (FC-20.11.) Public Attitudes Toward Tobacco Advertising Warning Labels and Tobacco Packaging - Qualitative Study - 1997, by Environics.**

Page 13:

Image Is What Matters

***Another segment tended to like messages that addressed issues of appearance, and personal image.** Among the labels examined "Smoking shortens your breath and decreases your energy level", "Smoking makes your breath smell and your teeth yellow", and "Smoking is a weakness, not a strength" were preferred. This group argued that smokers – particularly young smokers – do not think about their health. They do, however, think about their personal image.*

- **ED-165 (FC-20.12.) Focus Group Report on Warning Labels for Cigars, Pipe and Chewing Tobacco - Qualitative Study - March 1998, by Environics:**

Page 13:

Opinion of Current Warning Labels

Participants were generally not very enthusiastic about the current warning labels and this is very consistent with what we have observed in past research with cigarette smokers. Since the participants are current users of cigars, pipes or chewing tobacco, the warning labels have clearly failed to deter these individuals from their habit. As a result, many comments are made that to the effect that reading a warning label is not going to make anyone suddenly stop smoking or chewing. **In any case, as has been pointed out, the warning labels on these products are so inconspicuous, many people have not even noticed them.** There was also a sentiment that the labels do not tell people anything specific about cigars or pipes and that the general idea that tobacco is unhealthy is something everyone already knows.

- ED-164 (FC-20.13.) Focus Group Report on Warning Labels for Cigars, Pipe and Chewing Tobacco - Qualitative Study - March 1998, by CROP.

Page 12:

[Translation]

Sources of information on the health risks of these products

Generally, **the participants indicated there is little information in circulation regarding the health risks of products such as cigars and pipes.** When the topic is addressed, there is a strong tendency to deal with the advertising and messages pertaining to cigarettes. The limited size of the market for pipe or cigar smokers may, according to some, explain the situation. According to others, **the lack of information on this subject supports the perception that these products are less dangerous than cigarettes.** However, various comments indicated that **many would like to know more about the composition of cigars.** That said, the notices issued in the past regarding the low risk for products consumed occasionally, without inhaling the smoke explains the weak predisposition regarding information on the health risks of these products.

- ED-163 (FC-20.14.) Smokers' Attitudes Towards "Light" and "Mild" Cigarettes – Quantitative Study – April 1998, by Envirionics:

Page 31:

"Additive-Free" and "100% Natural" Cigarette Labelling

*Smokers are divided over the meaning of the phrases "additive-free" and "100% natural tobacco"; while pluralities feel that these statements mean that such cigarettes are just as toxic, **large minorities feel that these statements mean that the cigarette are less toxic than other cigarettes.***

Smokers were asked, if a cigarette package had a statement on it saying "additive-free", what would this mean to them in terms of how toxic the cigarette in the package would be. Just over four in ten each say that this would mean that the cigarettes are just as toxic (43%) or that this would mean that the cigarettes are less toxic (41%). Two percent say that this would mean that the cigarettes are more toxic, while 14 percent offer no opinion.

...

*Smokers were also asked, if a cigarette package had a statements on it saying "100% natural tobacco", what would this mean to them in terms of how toxic the cigarettes in the package would be. About four in ten each say that this would mean that the cigarettes are just as toxic (45%) or that **this would mean that the cigarettes are less toxic (38%)**. Five percent say that this would mean that the cigarettes are more toxic, while 11 percent offer no opinion.*

- **ED-160 (FC-20.15.) Focus Group Report to Health Canada - OTC - on Attitudes Towards "Light" and "Mild" cigarettes - Qualitative Study - January 1999, by Environics.**

Page 3:

Almost all of the participants reported that they began smoking as teenagers – usually around the ages of 12-14. Smoking at that age was appealing because it was often associated with a minor act of rebellion (i.e. stealing cigarettes from the parents, sneaking out to smoke) or out of some desire to fit in with other teenagers. Only a handful of smokers reporter that they started smoking as adults.

- **FC-20.16. Messages on Cigarette Package Slides and Flip-Tops - Qualitative Study - February 1999, by Environics.**

Page 5:

*Virtually all smokers claim that these warning messages will not make them quit smoking. Most do acknowledge that even if these messages will not make them quit, it is still good to get a reminder every now and then of the health risks of smoking. **The warning labels may also act***

as a deterrent to new smokers and perhaps help people who are trying to motivate themselves to quit.

There was also a consensus that the warning messages had been the same for so many years that they had stopped noticing them, whereas in the beginning when the warning labels were something new, they had definitely taken notice.

Most smokers have, at some point, read the information about tar, nicotine and carbon monoxide content. Many want more of this kind of information, including longer lists of toxic constituents

- ED-149 (FC-20.17.) Health Warning Labels and Images on Cigarette Packages - Qualitative Study - March 1999, by Environics.

Page 5:

- **Clearly, smokers were open to the idea of new messages and warning labels on cigarette packages. Smokers have typically memorized all of the current warning labels and are not paying much attention to them since they have seen the same messages for so long.**
- *In all of the groups, participants were extremely positive and impressed with visual images of the cancerous mouth, lungs and brain. The mouth was seen to be the most impressive because the mouth is what we see in a person, whereas the lungs are inside. Many participants said that if these images were on cigarette packages, they would be afraid to let anyone see their packs and they would be more motivated to try to quit.*

Page 6:

- *Most thought that putting these pictures directly on cigarette packages was a very good idea. Participants thought these pictures would capture a whole new segment of people who are currently ignoring the text warning messages.*

Page 7:

- **KOZ cigarettes were seen to be a great package and very appealing to young people. The target is clearly young teens (15 and under) and teenage girls in particular, as they have a very "cute2 [sic] look – sleek and portable.**
- *Most participants in all groups favoured 60 percent of the package being devoted to health information. They felt that this made the messages legible and still left some room for the manufacturer to identify the brand.*

Page 9:

4.0 Current Awareness of Warning Labels and Sources of Information

All the participants were aware of the health messages on cigarette packages and could repeat the health messages in detail. **Most of the participants however, were bored with the messages and claimed they did not read them anymore.** "The messages are a joke" "[Messages] could be better", "I don't notice them anymore". Participants are becoming less influenced by the current health messages and think they can be improved substantially. Some smokers are also superstitious about certain messages ("Mom will only buy the packs with 'smoking harms your baby' on them").

However, while some of the potential quitters in all the age groups mentioned that they thought the current messages could be changed or improved, they still felt **it was important to convey health information to the consumer.** "I would like to hear more", "I want to hear about the effects", "If we allowed anybody to do what we do to ourselves, we would call it murder", were some of these comments.

...

Most of the adults said they thought the concept of health messages was very important, not necessarily for themselves, but for children contemplating starting smoking. "I never read them, I'm only concerned for the kids". **Many of the youth, on the other hand, did not care about the health messages and believed the health risks were implausible.**

Page 29:

12.0 Amount Of Space on Cigarette Packages Devoted to Health Information

...

- Most participants in both the French and English groups favoured a **greater amount of space being devoted to health messages.**
- Most participants favoured 60 percent of the package being covered by health messages, but emphasized the **importance of colour images and graphics as a key component** and short messages that were new and factual.
- Some of the younger groups (13-16 years old) were not particularly interested in increasing the size of the warning messages, and they claimed they did not read them. However, **if the coverage of the packages was to be increased, it was important to use coloured images and pictures to capture their attention.**

- ED-148 (FC-20.18.) **Attitudes Towards Tobacco Regulations - Quantitative Study - March 1999, by Environics.**
- ED-147 (FC-20.19.) **Health Warning Design Testing - Qualitative and Quantitative Study - June 1999, by Environics.**

Page 6:

Current Message Awareness

- *There is a high level of awareness of the current health warnings on cigarette packages. **Many participants stated that the warnings had become virtually invisible and no longer had the power to seize their attention.** Smokers and non-smokers alike said that **the average smoker had become desensitized to these warnings.***
- *In general, those **designs that emphasized the use of text were seen as less effective than those where the picture could deliver the message.** The majority of smokers fall into the lower income and education groups, where functional illiteracy tends to be higher than among other socio-economic groups. Clear visuals, where the picture actually does say a thousand words, will have the greatest "across the board" impact on the smoking population.*
- *When participants were asked about the size of the warning, there was overall agreement that 60 percent of the package was an acceptable size for the health warning labels. **It was also felt that there would be enough remaining room on the package for brand trademarks, text and other visual product identifiers.***

Reactions to Individual Designs

- *The saying "a picture says a thousand words" is applicable to the effectiveness of the tobacco warnings tested during this focus group exercise. The warnings that generated the highest level of positive interest tend to be the ones that rely on a visual, rather than a textual, approach.*

- ED-143 (FC-20.20.) **The Relative Importance of the Size, Content & Pictures On Cigarette Package Warning Messages - Conjoint Analysis - September 1999, by Dr. Liefeld:**

Page iii:

8. *For 95% of smokers and 80% of non-smokers, 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 increase 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.

- ED-146 (FC-20.21.) Effects of Increasing the Area Occupied by Health Warnings on Cigarette Packages – Quantitative Study - September 1999, by Créatec +:

Page 27:

In other words, an increase in the warning area has significant effects on all of the criteria used except for attractiveness of the package, and these effects begin with the first increase (to 40% on the package area, from 30%). These effects are even more significant when the area is increased from its current 30% to 50% or 60%.

Page 29:

3.4 Conclusions

- *All of the results point to the conclusion that simply increasing the warning area on cigarette packages to 40% from the current 30% causes two major changes in the perceptions of members of the four target groups:
 - . *it makes them see the warnings as more likely to discourage smoking among people in general, as well as among specific social types;*
 - . *it increases the perceived credibility of the warning messages.**
- *Increasing the warning area to 40% from 30% has two other effects that are significant, but that at first glance appear more moderate if we consider only the broader categories to which they apply – smoker image and product image. However, on closer inspection, we see that this increase in warning area has substantially larger effects on certain perceptions that are crucial in the war against tobacco. Specifically, the larger warning area:
 - . *increases the perceived dangerousness of tobacco;*
 - . *reduces the perceived intelligence, healthiness, and physical attractiveness of smokers.**
- *To achieve a negative impact on general attractiveness of cigarette packages, the warning area must be increased to at least 50%, because at 40%, the effects are too limited to be significant.*
- *When the area occupied by warnings is increased to 50% from the current 30%, the effects observed at 40% are amplified, and all categories of effects become significant.*

- *When the warning area is increased to 60% from 50%, the effects continue to increase, but the general attractiveness of the package is the main variable affected.*

- **ED-145 (FC-20.22.) Legibility and Visual Effectiveness of Some Proposed and Current Health Warnings on Cigarette Packages - Quantitative Study - September 1999, by Nilsson:**

Page 1:

SUMMARY

*At the Health Canada – UPEI Legibility Testing Laboratory, seven new designs for warnings on cigarette packages were tested along with two designs presently in use. Legibility was measured in terms of the maximal distance at which the warnings could be read. Visual effectiveness was measured using a rating scale. The new designs included pictures as well as words. Three sizes were evaluated. The results based on over 7,000 observations made by 14 persons with normal acuity and normal colour vision had a reliability of 98% for legibility and 97% for effectiveness. **The best new designs were about 2 times as legible and 3.5 times as effective as those in present use.** Size of the printed words was the principle factor determining legibility. Doubling the size of the letters more than doubled the legibility. **Warnings with bigger pictures were more effective than those with smaller pictures. Warnings with colour pictures were more effective than those with black and white pictures.** Some other implications of the data for the design of warnings are discussed. Establishment of a comparative standard to ensure legibility of warnings is recommended.*

- **ED-144 (FC-20.23.) Canadian Adult and Youth Opinions on the Sizing of Health Warning Messages - Quantitative Study - October 1999, by Environics:**

Page 6:

- *Large majorities of Canadians of all ages, both smokers and non-smokers, agree that current health warning messages on cigarette packages provide important information for smokers to be reminded of and are worth re-reading. However, **majorities also feel that the messages are worn-out and have lost their effectiveness**; this sentiment is particularly strong among smokers.*

...

IMPROVING HEALTH WARNING MESSAGES

- ***Adults, both smokers and non-smokers, are most likely to suggest the use of pictures in health warning messages as a way to make them more effective.** Young Canadians, both*

smokers and non-smokers, tend to advocate more detailed information as well as the use of pictures.

- **ED-142 (FC-20.24.) Tobacco Labelling and Packaging Strategies - October 1999, by Focus Strategies and Communications Inc. (Fassbender, HP):**

Page 3:

It is my considered opinion, that based on the existing strength of all the current cigarette brands in the market, a warning message that takes up to 60% of the package will have no significant detrimental effect on current brand recognition by smokers. All of the research that I have seen conducted by Health Canada and other agencies, such as the Cancer Society confirms that existing smokers recognize most cigarette brands by their colour alone, not only the brand name. If you accept this premise, then each package does not need a significant amount of space for the brand identity in order to be recognized.

I would also like to add that up to now, it has never been the practice of the tobacco industry to use the package itself to communicate any product attributes. Other than a simple positioning line or benefit statement, the package has solely been the brand identity not a positioning or advertising vehicle. Examples of the benefit statements used might be such as, "Light and Mild", "Smooth Flavour", etc. I do not believe that these would be impaired by a smaller space as they have no direct relationship to consumer choices at the point of purchase.

- **ED-140 (FC-20.25.) Tobacco Warning Labels and Packaging: Issues, Prospects and Strategies - December 1999, by CMRDI (Kindra, GS):**

Page 33:

In the overwhelming consensus of current studies 25 [sic], marketing research has found that, as compared to word-only communications, the inclusion of pictorial stimuli in marketing communications increase [sic] levels of recall for messages, (Leong, Ang, Tham, 1996; Miniard et al., 1991; Mitchell, 1986; Childers and Houston, 1984; Gardner, 1986; Kieras, 1978; Kisielius, 1982; Lutz and Lutz, 1977; Nelson, 1979, Holbrook, 1981; Unnava et al., 1991; Costley and Brucks, 1992): there seems to be truth in the saying, "a picture is worth a thousand words."

Page 34:

Another reason for including not only text, but also pictorial stimuli would be for the purpose of reaching consumers who have difficulty with text comprehension. If clear pictorial stimuli were included, these consumers would be able to more clearly understand the HWMs 26.

Page 40:

Colour is also related to the message vividness. Vividness is a measure of how much the message 'jumps out' at the consumer. This includes how bright, noticeable and eye-catching the message is. Research generally shows that the HWM should be as vivid as possible, (Keller and Block, 1997), which includes large size and brilliant colours, since vivid information tends to have higher levels of information processing associated with it, (Keller and Block, 1997, Shapiro, MacInnis and Heckler, 1997; Vakratsas and Ambler, 1999)30. Since smokers are low level processors, generally, stimuli that generate higher levels of processing are advantageous in terms of readership, recognition, recall, and by extension, impact on choice.

Page 53:

9. Colour should be used in the words and the message, Gronhaug, Kvitastein, Gronmo, 1991; Finn, 1988; Geboy, 1996; Meyers-Levy and Peracchio, 1995), but it must be tested whether highlighting or full colour is more appropriate, for both word and pictorial stimuli in the HWMs. Words should be black on a white background, or black letters on a fluorescent background would also be very legible. If pictorials are used, they should be bright and eye-catching, which is known as "vividness".

10. HWMs should be as vivid as possible, (Keller and Block, 1997, Shapiro, MacInnis and Heckler, 1997; Vakratsas and Ambler, 1999). Fluorescent backgrounds (black ink) and **colourful pictorials are recommended.** Some research has suggested a zig zag border, rather than a straight border. Messages should also be relatively distinctive, as discussed in conclusion 8, above (Centre for Behavioural Research, 1992).

11. The tobacco industry's ability to communicate their brand information is not significantly impaired because the non-dominant attribute still is processed, irrespective of the size of the focal attributes, Coupey, Irwin and Payne, 1998; Brown, 1993 (t.v. advertisements); Heath et al, 1994; Janiszewski, 1990). This is even more true because **the industry can still use graphics, logos, brand names, borders, colours, and font types and sizes to communicate their uniquenesses,** (Environics, 1999).

- **ED-141 (FC-20.26.) Literature Search on the use of “borders” as part of a messaging system - December 1999, by Tilson Consulting.**
- **ED-134 (FC-20.27.) Business Impact Test Consultation Report: Tobacco Products Information & Reporting Regulations - March 2000, by Consulting and Audit Canada.**
- **ED-131 (FC-20.28.) Business Impact Assessment: Proposed Tobacco Products Information - April 2000, by Blair Consulting.**
- **ED-130 (FC-20.29.) Literature Search on the use of “pictograms” and “pictures” as part of a messaging system - April 2000, by Tilson Consulting.**

Page 2:

Pictures/Pictograms

- . *Representational pictographs (more detailed, realistic) are preferred over abstract symbols.*
- . *Pictorials can enhance warnings by serving to enhance noticeability. The primary requirement of an effective warning is that it be noticed.*
- . *Incorporating novelty features into the warning design can serve as a powerful reinforcement of the warning message. Pictorials are one such means of strengthening the impact of the message.*
- . *Pictorials can convey consequence information and instructions.*
- . *The addition of pictographs to warnings improves compliance.*
- . *Warnings containing a pictorial or icon generate significantly faster response time than warnings without them.*
- . *Recognition and recall of pictures is superior to that of words.*
- . *Pictographs that include a limited amount of text are better understood than those with no accompanying verbal information.*
- . *The use of pictorials and pictographs along with text may enhance understanding among those with poor reading skills or whose first language is not English.*
- . *Using graphics with text to convey health information improves comprehension and recall.*
- . *There is some evidence that using graphics that arouse fear is more effective in encouraging compliance with the warning message.*

- **ED-126 (FC-20.30.) Consumer Response to Health Messages on Inserts and on Package Slides - Quantitative Study - May 2000, by Environics:**

Page 3:

Overall, the survey finds that recall and notice of the insert messages is higher than that for flip/slide messages. While both formats are seen, by a majority of smokers, as effective in providing information to smokers, flip/slide messages are rated more highly than insert messages on a number of dimensions.

- **ED-123 (FC-20.31.) Testing New Health Warning Messages for Cigarette Packages: A Summary of Three Phases of Focus Group Research - Quantitative Study - May 2000, by Environics:**

Page 5:

Most participants felt that the new larger health warning messages, featuring colour photographs, were a definite improvement over the current warning messages. Teenagers were particularly impressed with the use of pictures and the larger size of the messages that allow for the dissemination of more information. Most participants were moved by the dramatic and scary pictures and messages, such as the woman smoking through a hole in her throat, the sick baby, the cemetery with grieving loved ones, and warnings that depicted the physical and health consequences of smoking, such as the diseased mouth. The consensus was that the approach taken was good and was an improvement over the status quo.

Some participants were sceptical as to how much of a difference such messages would make in reducing the smoking rate. However, most participants felt that the messages showed valuable information and that they could have an impact on certain populations, such as pregnant women smokers, teens thinking of starting to smoke, those thinking of quitting and other groups of smokers.

- **ED-132 (FC-20.32.) An investigation of Health Warning Labels for Tobacco Packaging - May 2000, by Graphic Art Technical Foundation (GATF).**
- **ED-125 (FC-20.33.) Health Warning Messages on the Flip-Slide and Inserts of Cigarette Packaging. - May 2000, by Environics.**
- **ED-127 (FC-20.34.) Benefit Cost Analysis of Proposed Tobacco Products Information & Regulations - June 2000, by Hara Associates.**

- **ED-133 (FC-20.55.) Revalidation Study, Créatec +, March 2000:**

Page 23:

3.3 Conclusions

[Translation]

- *All the results obtained converge to conclude that the amended notices do not change the conclusions of the August 1999 study regarding the effects of an increased area. In fact, overall, it can be generally concluded that the effects, at worst, would have been the same. A very close analysis, by criteria, indicates that for two aspects only, the effects would have indeed been amplified.*
- *Beyond that validation, this study demonstrates once again that an area increased to 50% is translated into significant effects on all the surveyed criteria.*

- **ED-129 (FC-20.56.) Revalidation Study, Dr. John P. Liefeld, University of Guelph, April 14, 2000.**

- **ED-124 (FC-20.57.) Revalidation Study, Environics, May 2000.**

- **ED-128 (FC-20.58.) Commentary on the Proposed New Tobacco Products Labelling Requirements, Katherine Covell, Ph.D., April 21, 2000.**

Plaintiffs position

72. The plaintiffs did not present any studies, expert testimony or evidence allowing the court to question all of the data obtained by Health Canada.
73. Dr. Roderick Power, the plaintiffs' expert, himself refuted the theory put forth by the lawyers of the tobacco manufacturers who argued that the health messages have no effect.
74. Not only did he concede in his report and during his testimony that the new Canadian health messages "*might have a very little effect*" on consumption (which he can not however quantify), he admits that the Canadian population in general is not aware of certain risks mentioned in the warnings and concluded that he was in favour of providing people with information such as that appearing in Canadian health messages:

"I am all for people having information."

Power, Volume 18, March 5, 2002, p. 43.

Power, *Expert witness statement of Roderick Power*, p.9.

75. When we know that one in two smokers will die from an illness caused by tobacco, even if we accept Dr. Power's hypothesis of a "very small reduction" in the level of consumption, such a reduction cannot be called insignificant. These remarks coincide with those of McLachlin J. who wrote in the 1995 *RJR-MacDonald* judgement, in para. 146:

While the limited objective of reducing tobacco-associated health risks by reducing advertising-related consumption and providing warnings of dangers is less significant than the broad objective of protecting Canadians generally from the risks associated with tobacco use, it nevertheless constitutes an objective of sufficient importance to justify overriding the right of free expression guaranteed by the Charter. Even a small reduction in tobacco use may work a significant benefit to the health of Canadians and justify a properly proportioned limitation of right of free expression.

76. It should be noted on this issue what Lord Woolf and Lord Ward of the United Kingdom Court of Appeal had to say:

Lord Woolf MR:

55. *It may be correct that the reduction in consumption would be "fairly small" from the ban as the Tobacco Companies submit. However, **even a small reduction which reduces the incidence of cancer even to a marginal degree is difficult to describe as a matter of insignificance.***

Lord Justice Ward, para. 69:

*(a) ... As Pfizer made clear, **uncertainty as to the existence or extent of the risks to human health should not preclude taking of protective measures. They prevail over economic considerations***

*(b) In any view of the evidence, which is vast and incapable of final adjudication in an interim application, there must be a real risk that someone or more persons may be seduced by advertising to start smoking, to become irretrievably addicted to it and as a result to suffer injury and even untimely death. **Saving even one person from that harm is a legitimate endeavour for the Government.***

Imperial Tobacco Ltd. v. Secretary of State for Health, [2000] 1 ALL, E.R. 527 (Court of Appeal).

77. Evidence has revealed however that the plaintiffs do not inform their consumers of the toxic effects of smoking on health.
78. The plaintiffs provide no information to their consumers regarding the toxic effects of smoking on health, even though the *Tobacco Act* allows them to do so, and in addition it does not discharge them of their obligations to smokers.

S. 16. This Part does not affect any obligation of a manufacturer or retailer at law or under an Act of Parliament or of a provincial legislature to warn consumers of the health hazards and health effects arising from the use of tobacco products or from their emissions.

79. According to Mr. Ricard of ITL, smoking is an “adult informed choice.” However, what characterizes his clientele who start using his products is the fact they are for the most part “minors” and “less educated” people, as was stated by the Supreme Court in 1995:

Perhaps the most distressing aspect of the evidence introduced at trial is that tobacco consumption is most widespread among the young and the less educated -- those segments of the population who are least able to inform themselves about, and to protect themselves from, its hazards. The majority of Canadian tobacco smokers start smoking regularly in their teens, and approximately one in five begin smoking regularly as early as 13; see expert report of Dr. Roberta G. Ferrence, supra; "Project Plus/Minus," prepared for Imperial Tobacco Ltd. (1982).

(...) Moreover there are more smokers among people with less formal education. While, in 1986, 60 percent of those with no high school education smoked on a daily basis, only 8 percent of those with a university degree did so; see expert report of Dr. Roberta G. Ferrence, supra, at p. 32.

[*RJR-MacDonald Inc. v. Canada \(Attorney General\)*, \[1995\] 3 S.C.R. 199, para. 66.](#)

80. The situation has not changed since 1995, as confirmed by Judy Ferguson, who stated that the some 300,000 children and adolescents who start smoking every year present an average age of 14½ to 15.

Ferguson, volume 35, Q25, p. 7122.

81. This situation is not new to the plaintiffs who have several documents that report on smoking among children, some of whom start at the age of 10.

D-171 Marketing Research debrief - An investigation of the factors contribution [sic] to the growth of DuMaurier.

82. Mr. Swain confirmed that there still exists a connection between the prevalence of smoking and education.

D-245 Swain, "Smoking Prevalence in Canada, 1985-1999," p. 5.

83. The fact that the warnings are accompanied by photographs will make it possible to inform a clientele for whom the warnings could be missed, such as young people whose language level does not allow them to sufficiently understand the health messages, the illiterate and foreign nationals who do not understand either official language.

C. Conclusions

84. As was pointed out in 1968 by the United States Court of Appeal in *Banzhaf v. Federal Communications Commission*, 405 F. 2d 1082:

Pages 1098 et seq.:

*In these circumstances, the Commission could reasonably determine that news broadcasts, private and governmental educational programs, the information provided by other media, and the prescribed warnings on each cigarette pack, inadequately inform the public of the extent to which its life and health are most probably in jeopardy. The mere fact that information is available, or even that it is actually heard or read, does not mean that it is effectively understood. A man who hears a hundred "yesses" for each "no," when the actual odds lie heavily the other way, cannot be realistically deemed adequately informed. Moreover, **since cigarette smoking is psychologically addicting, the confirmed smoker is likely to be relatively unreceptive to information about its dangers; his hearing is dulled by his appetite. And since it is so much harder to stop than not to start, it is crucial that an accurate picture be communicated to those who have not yet begun.***

Thus, as a public health measure addressed to a unique danger authenticated by official and congressional action, the cigarette ruling is not invalid on account of its unusual particularity. It is in fact the product singled out for special treatment which justifies the action taken. In view of the potentially grave consequences of a decision to continue – or above all to start – smoking, we think it was not an abuse of discretion for the Commission to attempt to insure not only that the negative view be heard, but that it be heard repeatedly.

85. The *Tobacco Products Information Regulations* is not *ultra vires*, does not constitute an expropriation and contributes to the objectives of the *Tobacco Act*.

APPENDIX 10

TOBACCO REPORTING REGULATIONS

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A. Introduction

1. Pursuant to the *Tobacco Products Control Act* (TPCA), some reporting requirements were imposed under the *Tobacco Products Control Regulations* (TPCR), SOR/89-21, December 27, 1988.
2. On September 21, 1995, the Supreme Court of Canada declared some sections of the TPCA inoperative and, as a result, only sections 17 to 20 of the TPCR remained in force.
3. Those sections required manufacturers and importers to report selected information on tobacco sales volume, ingredients and emissions.
4. The *Tobacco Reporting Regulations* replaced sections 17 to 20 of the TPCR.

B. The objectives of the Regulations

5. The objectives of the Regulations are summarized in the *Regulatory Impact Analysis Statement* published in *Canada Gazette*.

The Regulations expand the reporting requirements of the Tobacco Products Control Regulations (TPCR) by allowing Health Canada to obtain more complete data on tobacco products and by providing better access to more relevant and current information about the toxic substances in tobacco products and tobacco smoke. With this information, Health Canada will be in a better position to: increase awareness among Canadians of the content of tobacco products and the practices of tobacco manufacturers; support Canadian smokers to make better and more informed choices on tobacco use; assess the impact of smoking on Canadians and implement better control measures. For example, Health Canada could propose new Regulations that would require tobacco products to be modified in a given way to reduce nicotine content (and thus addiction) and toxicity, thus reducing the adverse health impacts of tobacco use.

...

The Regulations expand current reporting requirements to include more classes of tobacco products sold in Canada. The expanded list of tobacco products to be reported includes: cigarettes, cigarette tobacco, leaf tobacco, pipe tobacco, cigars, tobacco sticks, kreteks (clove and tobacco cigarettes), bidis (small tendu leaves hand-wrapped over tobacco), and smokeless tobacco. It is essential that Health Canada has access to information on the hazards of all tobacco products sold in Canada to better inform Canadians about hazards of tobacco use.

The Regulations also require that an expanded list of toxic chemicals found in tobacco smoke be reported for the above-mentioned classes of

tobacco products with three exceptions: cigars, pipe tobacco and smokeless tobacco. Cigars and pipe tobacco are exempt from this requirement as standardized test methods have not yet been developed to test for the smoke from these products. Smokeless tobacco is exempt from the requirement as this product does not produce smoke. The list of reportable chemicals found in mainstream smoke (inhaled by the smoker) and side stream smoke (inhaled by non-smokers) is being increased from three (tar, nicotine and carbon monoxide) to more than 40 different chemical compounds. Manufacturers and importers must also report on a list of 33 chemicals found in whole tobacco (unburned tobacco). However, the Regulations allow for limited reporting for manufacturers with small market shares of the total sales of a designated product in that year in Canada. Additionally, for tobacco products where the level of selected chemicals in smoke has been demonstrated through laboratory testing to be similar among brands, tobacco manufacturers have the option to test a smaller number of brands using a mathematical calculations [sic]. Using this "benchmarking" provision in the Regulations would significantly reduce testing costs to industry while ensuring Canadians can still be fully informed of the range and level of toxic emissions in tobacco products.

The Regulations further require that tobacco manufacturers and importers provide product test results to Health Canada annually. Gathering this information is important in determining the level of hazardous toxins in tobacco products in addition to helping Health Canada better inform Canadians and ensure that tobacco products are not modified without the knowledge of the Department.

Manufacturers and importers are also required to report information on all aspects of their products, including the tobaccos and other components or ingredients used in the manufacturing process, and the papers, tubes and filters. This requirement applies to all manufacturers and importers of the above-mentioned classes of tobacco products sold in Canada. In addition, manufacturers and importers of cigarette papers, tubes and filters would be required to submit information on ingredients, components and performance specifications of these products. This information will be reported on a quarterly basis and will assist Health Canada in tracking trends in tobacco consumption as well as acting to alert the Department to possible changes or effects of changes in manufacturing procedures for tobacco products. Information on what products are being purchased by manufacturers and importers is also important to provide information on new products being introduced into the Canadian market so that Health Canada can adjust its programs where necessary.

...

The Regulations also specify that manufacturers and importers of tobacco products are required to report quarterly on promotional activities on a brand-by-brand, province-by-province basis. They stipulate, for example, that copies of all promotional materials and facsimiles of signs and programs used or displayed on site of sponsored events or activities be provided to Health Canada. The reporting requirements also include the cost of manufacturing the packaging of all consumer tobacco products. This information is essential in that all promotional activities undertaken by tobacco manufacturers have the potential of inducing nonsmokers to take

up smoking. Health Canada can use this information to develop strategies to counter these activities with its own public educational initiatives.

(Emphasis added)

Tobacco Reporting Regulations—Regulatory Impact Analysis Statement

6. During the hearings before the Standing Committee on Health, those objectives were discussed in the following terms:

The tobacco industry would provide monthly and quarterly sales reports on its tobacco products by brand. It would deliver information on how products are researched, including how new tobacco products are developed, the analysis of consumer attitudes and behaviour, and marketing approaches. Information on how tobacco companies promote their products, particularly at the retail level, would be required. In terms of manufacturing, information on product processing would be submitted to Health Canada.

The proposal requires reporting on more toxic chemicals found in tobacco. The list of chemical compounds to be reported on would grow from currently three to more than forty.

The proposed reporting regulations would increase our understanding of how the tobacco industry gains market share. Industry sales data would give us more information on the amount and type of tobacco products sold in various areas of the country. By matching this data with our statistics on tobacco use, we'd be able to draw a much more full picture of smoking trends and how we might address them.

What the additional data reveals about consumer behaviour will help us more effectively reach the Canadian public on issues of tobacco use. With information on product ingredients and research on product modification, Health Canada would be better able to monitor the dangerous and addictive aspects of tobacco products. Better information on tobacco product ingredients and the chemicals in tobacco smoke and unburned tobacco would ensure consumers' right to know of the ingredients and the hazards of the products they are using.

ED-111 – Testimony by Ian Potter, Assistant Deputy Minister, Health Canada, in the hearings on the Regulations before the Standing Committee on Health, on May 30, 2000, pp. 38/496-497.

The reporting regulations are an important element in the comprehensive tobacco control strategy. These reports perform three key tasks. First, they inform public policy-makers. Just as the labels are important for informing the consumer and the public, the reporting regulations appropriately inform the policy-makers.

Second, the reports generated inform science regarding product and ingredient content. For example, we have asked for manufacturing

procedures. This information is necessary to determine how the product is made and to better understand the tobacco industry. Asking for ingredients on a quarterly basis will assist Health Canada in tracking and predicting trends in tobacco consumption.

[TRANSLATION] The reports will ensure that any manufacturer claims for improved product can be clearly supported by evidence. The inventory of information will allow Health Canada to have early knowledge of the production plan, providing important insights into production and brand trends.

[English]

Third, the reporting regulations provide vital marketing information to better inform and target health programming in areas of prevention and cessation. Reports on sales will help Health Canada to track trends in consumption in general as well as trends across Canada, which can be used to support our own research, since consumers of tobacco products often underestimate their consumption.

This information is important in targeting effective cessation, prevention, and public health education efforts at the most appropriate groups. This will increase the value of the programs and ensure that public moneys are expended more effectively. We will get a bigger bang for our buck.

ED-111 – Testimony by Gillian Lynch, General Director, Bureau of Tobacco Control, Health Canada, in the hearings on the Regulations before the Standing Committee on Health on June 6, 2000, pp. 474/496-497.

C. The requirement to provide information on tobacco products

7. The *Reporting Regulations* are not unique with respect to the requirement for tobacco manufacturers to provide reports and analyses concerning their products.
8. Much of the information concerning the ingredients, the additives and the emissions required by the *Tobacco Reporting Regulations* is already supplied by the plaintiffs to the government of British Columbia under the *Tobacco Testing and Disclosure Regulation*, adopted July 31, 1998.
9. In accordance with the British Columbia regulation, tobacco manufacturers must provide:
 - a report on the ingredients and additives:

2 (1) *Every manufacturer must submit an annual report to the minister which identifies and lists, by brand, all ingredients and additives in every brand of cigarette or cigarette tobacco of the manufacturer that is sold, offered for sale, distributed, advertised or promoted in British Columbia in a calendar year...*

- a report on the constituents:

3 (1) Every manufacturer must submit an annual report to the minister that identifies and lists all of the following, by brand, for every brand of cigarette of the manufacturer that is sold, offered for sale, distributed, advertised or promoted in British Columbia in a calendar year...

- a report on the volume of cigarettes sold:

6 (1) In this section, "unit" for cigarettes means a single cigarette. (2) A manufacturer must report the total number of units for every brand of cigarette of the manufacturer that is sold in British Columbia in a calendar year by January 31 the following year.

Tobacco Testing and Disclosure Regulation, B.C. Reg. 282/98.

10. The plaintiffs agreed to comply with that regulation following an agreement entered into as part of the legal proceedings undertaken by JTI-MacDonald claiming, *inter alia*, that the regulation adopted by British Columbia was beyond provincial jurisdiction.

ED-202 Memorandum of agreement of the settlement of the Supreme Court action A982885 between JTI-MacDonald Corp., Plaintiff, and the Attorney General of British Columbia, Defendant.

11. In the United States, the states of Massachusetts and Texas adopted regulations requiring tobacco manufacturing companies to produce detailed reports on their products.

ED-49 Massachusetts *Tobacco Ingredients and Nicotine Yield Act*, Mass. Gen. Laws. Ch. 94. §307B (2000) and Mass. Regs. Code. Tit.105, §660.000 (2001)

Texas. Stat., Public health provisions, 76th Leg, Ch. 62, § 19.02(13)(1999).

12. In Europe, the European Parliament Directive 2001/37/CE asks member states to require tobacco product manufacturers and importers to submit "*a list of all ingredients, and quantities thereof, used in the manufacture of those tobacco products by brand name and type.*"

13. That list is accompanied by a "*statement setting out the reasons for the inclusion of such ingredients in those tobacco products. It shall indicate their function and category. The list shall also be accompanied by the toxicological data available to the manufacturer or importer regarding these ingredients in burnt or unburnt form as appropriate, referring in particular to their effects on health and taking into account, inter alia, any addictive effects...*"

D-130 Directive 2001/37/CE of the European Parliament, section 6.

14. Reporting requirements exist, moreover, in many federal statutes, in particular:

- The *Income Tax Act*, R.S.C. (1985), c. 1 (5th Supp.);
- The *Canadian Environmental Protection Act (1999)*, 1999, c. 33; see also *New Substances Notification Regulations*, SOR/94-260;
- The *Canada Corporations Act*, (R.S. 1970, c. C-32).

D. The grounds for the challenge

1. The authority to delegate

15. The plaintiffs allege that the *Tobacco Reporting Regulations* are beyond the jurisdiction of the *Tobacco Act*.
16. Their argument is in essence based on the fact that they do not recognize the connection between the objectives of the Act and the information required by the Regulations.
17. Yet, the uncontroverted evidence regarding the complexity and the extent of the smoking problem demonstrates the need for the government to have access to the information required by the Regulations in order to meet the legislative objectives.
18. The plaintiffs object to all the requests for information under the Regulations. Not one has met with their approval.
19. In spite of many pre-hearing conferences and requests for concessions, their position has remained unchanged: no information is necessary for the government to fulfil the objectives set out in section 4 of the Act.

a. Information on the manufacturing processes, ingredients, constituents and toxic emissions

20. The plaintiffs allege that there is neither reason nor logic (p. 63 of the ITL brief) for the disclosure of information concerning their product manufacturing processes and the modifications that are made in these processes (section 10 of the Regulations). They make a similar argument regarding the disclosure of information concerning their suppliers (section 11 of the Regulations). They did not present any evidence in support of their objection.
21. We need only think of the W.S. Rickert study concerning the manipulation of the nicotine content of Canadian cigarettes by tobacco manufacturers to understand the necessity for the government to obtain information on

manufacturing processes for tobacco products (and on their modifications) where the objective is health protection.

22. That study shows that tobacco manufacturers control the nicotine content of their cigarettes by modifying the manufacturing process, in particular by using reconstituted tobacco.

The main vehicle for increasing the nicotine content of the tobacco in Canada cigarettes has been through selection of appropriate leaves (nicotine content varies with leaf position) and genetic manipulation of cultivars. However, if the brown fraction represents reconstituted material, the nicotine content of that material would be subject to a far greater control by the manufacturer.

D-118 *A historical study of nicotine yields of Canadian cigarettes in relation to the composition and nicotine content of cigarette tobacco (1968-1995)* by W.S. (Bill) Rickert, p. 50.

23. The study points out that Imperial Tobacco raised the nicotine content of several of its brands through the addition of reconstituted tobacco.

The nicotine content of cigarette tobacco has been increasing roughly in a linear way since about 1980. This increase is most evident in the lamina fraction but is also noticeable in fractions of midrib and stem. With respect to individual brands of cigarettes, there are impressive differences; the nicotine content of Players RSFT manufactured by Imperial Tobacco increased rapidly from about 1980 to 1995 compared with Rothmans KSFT manufactured by Rothmans B&H. This suggests significant differences in cigarette design strategies among Canadian manufacturers which is further emphasized by the recent use of a "Brown" component in the manufacture of many Imperial Tobacco brands.

(Emphasis added)

D-118 *A historical study of nicotine yields of Canadian cigarettes in relation to the composition and nicotine content of cigarette tobacco (1968-1995)* by W.S. (Bill) Rickert, p.50.

24. Since nicotine is the drug in tobacco that causes the smoker's drug addiction (see *Section III, para. 11 et seq.*), nothing more is needed to understand the importance of this information for protecting the health of Canadians.
25. The impact of this information is even more warranted in a health protection context since the effectiveness of the physician's intervention with the patient is limited by the addiction.

D-156 Robitaille, "*Le tabagisme, la maladie et la mort au Canada*" [Tobacco, Disease and Death in Canada].

26. What would the prevalence of smoking be today if the Canadian tobacco manufacturers had not regularly raised the nicotine content of cigarettes between 1980 and 1995? None of the three plaintiffs deemed it appropriate to mention at trial the increase in the nicotine content of Canadian cigarettes during the years when they argued the failure of government policies.
27. The testimony by toxicologist Leonard Ritter demonstrates that, because of their toxicity, cigarettes continue to be a product about which the government must obtain the most information possible. What happens if the tobacco manufacturers alter the tobacco used, the manufacturing process, the composition of the paper? What happens if a change in a product we already know is capable of causing cancer also makes it capable of causing birth defects?

Now, what if there was a change in the tobacco that was used, or there was a change in the curing process, or there was a change in the part of the plant which was being used to manufacture the tobacco product? Or what if there was a change in the composition of the paper? I can go on and on and on. And what if that change resulted in a profile change that now made a product which was capable of causing cancer also very capable of causing birth defects?

Now, if we didn't have these studies continue on an ongoing basis and if we couldn't evaluate the results of those studies on an ongoing basis, how would we detect a change in the toxicity as a result of the change in the profile of the manufacturing process, so to speak?

Ritter, Volume 11, pp. 2384 to 2388.

28. The toxicity of the product and the fact that no one is aware of the impact of the changes made by the manufacturers justify obtaining, on a continuous basis, data on the manufacturing processes, the ingredients, the constituents and the toxic emissions.
29. There are some 4,000 chemical products in cigarette smoke, 43 of which have been identified as carcinogens.

Ritter, Volume 11, p. 2360.

30. What happens if the government does not continuously obtain information on toxic tobacco emissions and a change made to the product by the tobacco companies substantially raises the number of smoking-related deaths? How can the effects of the product modifications be understood without any data?

31. During Ed Ricard's testimony, ITL objected strongly to giving the Court its studies on the harmful health effects of its products. Forced by the Court to provide those studies, ITL's counsel suggested restricting the undertaking to 1986 to then answer that no study had been conducted more recently than 1986...
32. We can nevertheless learn two things from the undertakings made in the examination of Mr. Ricard:

- ITL concedes having obtained some mutagenicity studies (*Ames mutagenicity studies*) on several types of cigarettes containing expanded tobacco, on the mutagenicity of flue-cured tobacco and on the effect of the permeability of cigarette paper. That is an admission that some changes in ingredients, constituents and manufacturing processes are capable of having an impact on the carcinogenic potential of the product. Why would ITL have conducted such studies if there were no reason or logic for thinking that the health of smokers might be affected?

- ITL failed to inform smokers of the findings of its studies and refuses to voluntarily disclose them to the government.

Undertakings by Ed Ricard January 28 - January 29, 2002 - Dated March 11, 2002

33. Where the objective is health protection, it is easy to understand the interest in obtaining this information when we know that even the plaintiffs study the way in which the "design" of their products changes their carcinogenic potential.

... The information gained will not only rank any one country's products but may also provide data on what are the significant design features influencing mutagenicity...

D-110D Ames Mutagenic Activity of Mainstream Condensate of Six Commercial Cigarettes for Imperial Tobacco Ltd. (Canada) - Project RIO. Report No. T. 153-C. Restricted [marked EDM/BTM/46D].

34. It is just as easy to understand the importance to the government of obtaining the information required by the regulations when we know the ITL policy is to make smoking "acceptable" and that, to achieve this objective, it has to deny acknowledging that cigarettes are unsafe.

I thought that I should write to explain why it is that I cannot support your contention that we should give a higher priority to projects aimed at developing a "safe" cigarette (as perceived by those who claim our current product if "unsafe") by either eliminating, or a least reducing to

acceptable levels, all components claimed by our critics to be carcinogenic.

The BAT objective is and should be to make the whole subject of smoking acceptable to the authorities and to the public at large since this is the real challenge facing the Industry. Not only do I believe that this is the right objective but I also believe that it is an achievable one.

...

A second practical objection is that in attempting to develop a "safe" cigarette you are, by implication in danger of being interpreted as accepting that the current product is "unsafe" and this is not a position that I think we should take

(Emphasis added)

D-97 Letter to Purdy Crawford, Imasco Ltd., regarding development of SAFE Cigarette. [Includes] Note for E.A.A. Brunell, Esq. [from A.L. Heard] Canadian Project.

35. ITL adopted a document destruction policy that means that the information, which might be necessary for assessing the impact of using an ingredient or of a product modification may no longer be available when required.

JPB-64 Imperial Tobacco Limited, Department of Research and Development, Document Retention Policy.

See also

Rolah Ann McCabe v. British American Tobacco Australia, Judgment of Justice Eames, Supreme Court of Victoria, delivered 22 March 2002.

b. Information on sales

36. The plaintiff tobacco companies also argue that reason and logic cannot explain the link existing between the request for sales information, in particular for Canada as a whole, for each province and, for exports, by country of destination (section 13 of the Regulations), and the objectives of the Act (p. 63 of the ITL brief).
37. Mr. Ricard, ITL representative, concedes that, through the Canadian Tobacco Manufacturers Council (CTMC), the three plaintiffs exchange amongst themselves much data such as sales to distributors, shipments to their distributors and total weekly sales.

38. Mr. Ricard states that this is the same data that his company objects to giving to the government under the *Tobacco Reporting Regulations*:

287 Q- Question 85, we're referring to... it's changes [sic] of data between companies. Would you please tell the Court why you do so?

A- Yes, My Lord, the three (3) companies exchange, we exchange our shipment data, as I have mentioned; we exchange our total sales by company to our distributors, the shipments that we make to our distributors; the total sales by company on a weekly basis; and on a monthly basis, we exchange the sales by brand. And again, the reason for that is so that each of the companies can know what the total sales volume is, that this is the type of information that we could each [sic], after survey to find out, and there are companies available on that, but through the CTMC, the major companies did agree to exchange shipment data, because we felt that there was no concern about each of the three (3) companies knowing exactly the amount of volume that we ship.

288 Q- Isn't it a fact that, under the reporting ranks, you have to provide the Government similar information?

A- Again I'm not... don't know specifically all of the details of every report that we have to provide to the Government, but our sales shipment information, as far as I know, is part of what we have to report, yes.

Ricard, Volume 9, January 28, 2002, Q287-288, pp. 1851-1852.

39. That data is just as relevant to the government as it is to the tobacco companies, only the ultimate goals are different.
40. The government needs that information to learn about the extent and the impact of issues like smuggling.
41. Mr. Ricard confirmed at trial having exported substantial quantities of his products to the United States in the 1990s:

Again, that's a reference to the same thing, that we removed the limits that we had placed on our shipments to certain customers, and this relates to the duty-free and export market. And it's referring to that same thing.

Ricard, Volume 9, January 28, 2002, Q364, p. 1922.

42. When we know that these "exports" were reintroduced into the country, it is easy to understand the significance to the government of obtaining the data required by the regulations.
43. It is even easier to understand the importance of that information when we know the impact of smuggling on the inducement to use tobacco.

44. The plaintiffs' documents speak loudly to the fact that the result of cigarette smuggling was a considerable reduction in their price, thereby making them more accessible and contributing to the increase in smoking among young people.^{1 2 3 4}

c. Information on research projects

45. The plaintiffs object to the disclosure of information concerning their research on the grounds of the absence of a connection between obtaining this information and the health protection objectives (page 63 of the ITL brief). They submitted no evidence in support of their argument.
46. ITL, jointly with its parent corporation British American Tobacco and its other worldwide subsidiaries, conducted exhaustive scientific research into its products' carcinogenicity.
47. That research, which had remained secret until just recently, was revealed to the public when the BAT had to open its files to the public at its Guildford storage facility in England.
48. Some of those documents were presented to the Court by Leonard Ritter:
- D-108 – BAT – A review of the biological activity of smoke – Report RD.2177, 1 November 1990:

¹ **LN-9 (RJR-1302) 1992 Cigarette Marketing Action Plans, p. 80140 4083:**
"The Tobacco Market – March 1992
1. Price/taxation will continue to have the largest impact on tobacco usage now and in the future."

² **LN-76 (RJR-96) The Canadian Tobacco Market 1993, p. 80120 8411:**
"Impact of smuggled product
...
For the first time we have seen an increase in reported consumption."

³ **D-89 Letter from Mr. Don Brown, Chairman, President and Chief Executive Officer of Imperial Tobacco Limited to Mr. Ulrich Herter, B.A.T. Industries, June 3, 1993:**
Page 500028145-6:
"1. Temporary Royalty Rate Reduction
Until the smuggling issue is resolved, an increasing volume of our domestic sales in Canada will be exported, then smuggled back for sale here."

⁴ **D-86 (ITL-439) – Broad Strokes 1994:**
Page 17965:
"Our withdrawal from smuggling plummeted our share."

SUMMARY:

This Report brings together results from the biological studies carried out over the last thirty years to investigate the influence cigarette product parameter changes have on the biological activity of smoke.

In this Report, activity is defined by the Ames Test, Mouse Skin Painting and Inhalation. Whilst the significance of these tests is open to debate, they have all been used extensively in evaluating the toxicity of tobacco smoke.

A wide range of product parameter features are discussed including tobacco types, reconstituted and novel smoking materials, paper, filters, additives as well as the changes brought about by modifying smoking pattern.

Summary charts allow a rapid overview of specific features and comparison of the relative responses found with the three assays.

- Report #164 "Summary of Ames Tests for Mutagenicity of Smoke Condensates," ITL Montréal, July 2, 1981, D-110C:

Of the several short-term tests that have recently been proposed for detecting the mutagenic/carcinogenic potential of chemicals, the one developed by Professor Bruce N. Ames appears to be the most reliable, and consequently has gained worldwide acceptance (p. 1).

The Ames mutagenicity test is relatively inexpensive, easy to perform and permits quantitative comparisons of smoke condensates to be made (p. 7).

Although correlations with the long-term carcinogenicity test are not perfect, any substance damaging the human genetic material should be of concern to man. Thus, tobacco smoke mutagenicity, should be studied for its own sake and not because it happens to correlate with its carcinogenicity (p. 7).

- Report T-234 'Bioassays of Mainstream and Sidestream Condensate from a Product with Total Sidestream Reduction and from Commercial Cigarettes,' BAT, February 5, 1992, D-110A, at page i:

A product with total reduction of sidestream smoke components has recently been developed as part of Project "LESS".

The activity per unit weight of mainstream and sidestream condensates from this cigarette and a range of products of comparable mainstream delivery has been measured in the following in vitro bioassays.

- Bacterial mutagenicity (Ames Test)
- Mammalian chromosome damage
- Micronucleus formation
- Cytotoxicity

The result of the assays showed that the smoke condensates of the development cigarette did not differ in any major way from those of a range of products with similar mainstream deliveries. (Emphasis added)

- Report #165 “Ames Mutagenicity of Mainstream and Sidestream Smoke Condensates,” ITL Montréal, May 13, 1981, D-110B:

Four lots of mainstream and sidestream smoke condensates were...tested for mutagenicity (p. 1)... (and the results showed that)... mainstream and sidestream smoke condensates from flue-cured tobacco cigarettes are similar in terms of Ames mutagenicity... this is the first clear demonstration of mutagenic activity in sidestream smoke condensates (p. 3).

- Report T.153-C “Ames Mutagenic Activity of Mainstream Condensate of Six Commercial Cigarettes for Imperial Tobacco Ltd. (Canada) – Project RIO,” BAT, October 1984, D-110D:

The relative specific mutagenicity of mainstream condensate from six commercial cigarettes selected from the Canadian market were assessed using the Ames bacterial mutagenicity assay as part of a program to identify design characteristics influencing biological activity (PROJECT RIO) (p. iii).

The experimental results showing specific mutagenic activity are summarised in Figure 1. Craven A was ranked as the most mutagenic condensate followed by PLAYERS LIGHT, DU MAURIER, Export A, Mark 10 and Matinée (least mutagenic) (p. 2).

- Report #146 “The Use of the Freiri Slave Smoker to Investigate Changes in Smoking Behaviour” ITL Montréal, March 25, 1975, D-110E:

In monitoring the smoking habits of six Matinée King Size smokers as they encounter different cigarettes, smoke levels appear to be adjusted such that yields of nicotine...are maintained. By the incorporation of ventilation in cigarettes of specific tobacco blend, a level of nicotine closely matching that of their normal cigarette is maintained (p.1).

It was with... manipulations that...it was possible for the smoker to duplicate once again his nicotine yield (p. 8)

From these comparisons, it is seen that even though cigarette construction differed, similar smoke nicotine deliveries could be achieved, with little modification in smoking parameters (p.8).

Two studies have been described which show that a small group of Matinée King Size smokers, when smoking one different cigarette per day, change their smoking pattern (p. 14).

When a modified version of their normal cigarette is encountered (stronger tobacco blend, but with much increased ventilation), these smokers maintain a nicotine level... compared to their normal cigarette (p. 14).

49. The link between this research on the carcinogenic potential of cigarettes and the health protection objective is obvious.
50. It is even worrisome to think that the plaintiffs have research findings on the impact of modifications to their products and that they are firmly opposed to revealing them to the government and to smokers.
51. The usefulness to the government of the information requested in the regulations is evident when we learn of the international research conducted by a group of companies to which ITL belongs. That research indicates the extent of the information's usefulness in the goal of protecting the health of Canadians.
52. The research subjects are numerous: the effects of nicotine, the additives, the impact of product modification, the chemistry of the smoke, the reduction of specific constituents, etc. It is appropriate here to reproduce some excerpts from the *Research Policy Group Meeting* held in Vancouver in 1989:

Smoking and Health

...

A key area identified for additional work was the effects of nicotine, in addition, work in the following areas was considered to merit consideration: possible identification of susceptible minorities, confounding factors in heart disease and environmental tobacco smoke and examination of trends in various sub-types of lung cancer.

...

Potential Implications for Modification of Existing Products

RET described the current work on DNA adducts which had involved compounds which were present in cigarette smoke. Scientific aspects of this work would be monitored on an ongoing basis by the GRG.

...

Smoke Chemistry

For future product and process developments, e.g. Greendot, EPCOT, DEER, and for the evaluation of additives, more precise information on tobacco smoke and chemistry is required. Data is needed on pyrolysis and interactions between smoke components and adventitious chemicals. Our research results generated internally must stand up to external review.

...

Offensive Strategies

General Innovative Concepts: Flavours

CJTG described research in Brazil with respect both to natural and synthetic tobacco flavours.

...

Tobacco Biotechnology - Opportunities

Brown & Williamson's programme for introducing new varieties of nicotiana were described. Both genetic breeding and the use of molecular biology had been used: there were advantages and disadvantages with both techniques, although molecular biology, with the possibility for specific gene identification, showed the greater potential. So far the programme had produced Y-1, a high nicotine flue-cured tobacco, which was now being grown in commercial quantities. However, there were some problems in producing in the U.S.A. and it was necessary to grow off-shore to maintain proprietary control. Regulatory problems might also occur with genetically altered material.

...

D-99 Minutes and Draft of Minutes of September 89 Research Policy Group Meeting.

See also

D-98 Product Development Conference Montreal

53. There are many examples as to relevance of the government being informed of the existence of this research for its health protection objective.
54. Reference can also be made to the impact of the use of reconstituted tobacco on the increase in the nicotine content of cigarettes to observe the link existing between the importance of obtaining information on the manufacturers' research into toxicity, effects on health, ingredients and modifications to the products.

D-118 *A historical study of nicotine yields of Canadian cigarettes in relation to the composition and nicotine content of cigarette tobacco (1968-1995)* by W.S. (Bill) Rickert, p. 50.

55. The *compensation* phenomenon also helps us understand the importance of obtaining data on the "manner in which" consumers use tobacco products (para. 15(1)(g)).
56. In his report and during his testimony, chemist André Castonguay presented the risks to which this phenomenon exposes the smoker:

[TRANSLATION]

Smokers who have developed an addiction to nicotine will change their smoking habits in several ways to maintain their nicotine intake level. This phenomenon is called "compensation." In practical terms, smokers who usually consume strong cigarettes and try light cigarettes will alter their inhalation profiles to increase their nicotine dose.

1- Smokers may increase or decrease consumption frequency (number of cigarettes smoked per day).

2- Smokers who consciously or unconsciously wish to increase their nicotine absorption (nicotine delivery) may inhale the smoke more deeply. They adopt this behaviour by increasing the volume of the puff.

One of the results of this behaviour is to increase the exposure of the distal areas of the lungs to tobacco smoke. The lung is composed of a series of branching tubes called bronchi. In smokers, these tubes can develop cancers called "squamous cell carcinomas".

D-113 Castonguay – Caractéristiques physiques, chimiques et toxicologiques des tabacs manufactures canadiens [Physical, chemical and toxicological characteristics of Canadian manufactured tobaccos].

57. The link between obtaining information on taste and flavour research (para. 15(1)(d)) and the health protection objective is evident when we study the discoveries tobacco companies have made in this field and their effects on the health of smokers.
58. We need only think of the menthol that is not added to the tobacco but to the packaging paper:

...A Menthol cigarette is just a regular cigarette where menthol is applied. In the case of the tailor made cigarettes... the Menthol is... is just a...they're just crystals, menthol crystals ...

... And the way that the menthol is applied to the factory-made cigarettes is that the menthol is applied to the foil, actually, that goes inside and then the cigarettes are put in...

Q- The foil goes inside what, Mr. Ricard?

A- Inside the package.

Ricard, examination on January 23, 2002, Volume 7, Q62-64, p. 1312.

59. In 1998, a report by the United States Surgeon General revealed that mentholated cigarettes could be contributing to the increase in lung cancers among smokers by facilitating the absorption of the toxic cigarette smoke emissions.

Investigators have postulated that the more frequent smoking of menthol cigarettes by African Americans, compared with whites, contributes to their increased rate of lung cancer (Harris et al. 1993). In a recent experimental study of 12 persons after the amount of menthol injected into experimental cigarettes was increased, the amount of carbon monoxide exhaled by African American smokers also increased (Miller et al. 1994). In a comparison of smoking behaviour associated with mentholated cigarettes and regular cigarettes among 29 subjects, McCarthy and colleagues (1995) found higher mean puff volume and higher puff frequency after participants smoked regular cigarettes than after they smoked mentholated

cigarettes; however, no differences in mean expired carbon monoxide levels were found. Available data suggest that mentholated cigarettes are not smoked more intensely than regular cigarettes (Jarvik et al. 1994; Miller et al. 1994; McCarthy et al. 1995; Ahijevych et al. 1996). Thus, mentholated cigarettes may promote lung permeability and diffusibility of smoke constituents (Jarvik et al. 1994; McCarthy et al. 1995; Clark et al. 1996a).

ED-146 Report of the Surgeon General 1998, *Tobacco use among U.S. racial/ethnic minority groups*, U.S. Department of Health and Human Services, Public Health Service, p. 142.

d. Information on promotion

60. The plaintiffs are also challenging the link between the disclosure of information concerning the spending and costs associated with their promotion and advertising activities (s. 16 et seq.) and the objectives of the Act.
61. The analysis of that data allows Health Canada to obtain, among other things, information on the marketing of tobacco products so that health programs for prevention and cessation are more informed and more accurately targeted.
62. That information is the same type as is provided by the American tobacco companies to the Federal Trade Commission.
63. The analysis of this type of data, repeated in Richard Pollay's chart, demonstrates, for example, that between 1989 and 1995, during the "*total advertising ban*" as the plaintiffs describe it, ITL almost doubled its sponsorship spending (\$18,239,000 in 1989 to \$37,669,000 in 1995) and that its promotional spending has not stopped growing.

D-239 Tobacco Promotion Spending Patterns in Canada (C\$000),
Richard W. Pollay - Feb. 2002.

64. This is why, as is written in the Regulatory Impact Analysis Statement, "This information is essential in that all promotional activities undertaken by tobacco manufacturers have the potential of inducing non-smokers to take up smoking. Health Canada can use this information to develop strategies to counter these activities with its own public educational initiatives."

Tobacco Reporting Regulations—Regulatory Impact Analysis Statement.

65. In the United States, the Federal Trade Commission, pursuant to the *Federal Cigarette Labelling and Advertising Act*, presents a detailed annual report to Congress on the aggregate of the tobacco companies' promotional spending.

ED-275 Federal Trade Commission (FTC). Report to Congress for 1998, pursuant to the *Federal Cigarette Labelling and Advertising Act*. Washington, D.C.: FTC, 2000.

ED-46 Federal Trade Commission - Report to Congress for 1997 pursuant to the *Federal Cigarette Labelling and Advertising Act*. Washington, D.C.: FTC, 1999.

66. With the information obtained from the American tobacco companies, the FTC was able to appraise the extent of the promotion aimed at promoting cigar use:

ED-276 – Federal Trade Commission – Report to Congress – Cigar Sales and Advertising and Promotional Expenditures for Calendar Years 1996 and 1997 – issued: 1999; p. 4:

C. The Increase in Advertising and Promotional Expenditures

The dramatic increase in cigar use in America has occurred in tandem with the increase in promotional activities surrounding cigar smoking. In the early 1990s, cigar enthusiasts began promoting fancy cigar dinners and smoker's evening [sic] in expensive restaurants and hotels. Such cigar events at restaurants, bars, and private clubs are now common. In addition, Cigar Aficionado and Smoke, two magazines devoted almost entirely to cigar smoking, have been introduced since 1992 and have rapidly gained popularity. These magazines have featured on their covers and in profile articles numerous cigar smoking actors and actresses, sports figures, and celebrity models. Also in recent years, cigars have appeared as props and in the plot lines of numerous movies and television shows. The data reported herein provide specific information on the types of advertising and promotional activities conducted by the leading cigar manufacturers in calendar years 1996 and 1997.

Table 3 reports the cigar manufacturers' total advertising and promotional expenditures for 1996 and 1997, together with a breakdown of those expenditures into sixteen advertising and promotional categories. The cigar manufacturers' total expenditures on advertising and promotion increased thirty-two percent from 1996 to 1997, from \$30.9 million to \$41 million. Moreover, there was a significant increase in the amount spent in almost every category of advertising and promotional expenditure.

By far, the industry's largest expenditures in 1996 and 1997 were on promotional allowances – that is, discounts and other incentives given to retailers to encourage cigar sales. In both years, these expenses comprised approximately forty percent of the total amount expended for advertising and promotion. The dollar amount spent on promotional allowances increased over thirty-one percent, from approximately \$12.4 million in 1996 to \$16.3 million in 1997.

Magazine advertising was the manufacturers' second largest advertising expense in both years, comprising over twenty-one percent of total expenditures in 1996 and twenty-four percent in 1997. Actual expenditures for magazine advertising increased forty-nine percent from 1996 to 1997, from \$6.6 million to almost \$10 million. Point of sale advertising, the next largest expenditure category, increased almost thirty-seven percent, from \$3.8 million in 1996 to \$5.2 million in 1997.

67. A bill requiring tobacco companies to provide information on their promotion activities and scientific research was tabled before the United Kingdom's House of Commons on January 18, 2002.

ED-51-UK-Tobacco Disclosure Bill

2. The distribution of jurisdictions

68. We refer the Court to the legal argument.

3. Constant unreasonable search

69. We also refer the Court to the legal argument, reiterating however, that the purpose of the information required by the Regulations is to achieve the legislative objectives, and adding the following with respect to the argument concerning confidentiality.
70. ITL claims that the Regulations constitute unreasonable search on the grounds that there is no provision in the Act or the Regulations guaranteeing the confidentiality of the information provided (page 66 of the ITL brief). It refers to *Gernhart v. Her Majesty the Queen*, [2000] 2 F.C. 292.
71. But, the situation in *Gernhart* was actually the opposite to that presented in the *Tobacco Act* and the Regulations. In the *Income Tax Act*, R.S.C. (1985) c. 1 (5th Supp.) there was a provision requiring the transmission by the Minister of copies of documents the taxpayer might expect to remain confidential.

176. (1) As soon as is reasonably practicable after receiving notice of an appeal to the Tax Court of Canada, other than one referred to in section 18 of the Tax Court of Canada Act, the Minister shall cause to be transmitted to the Tax Court of Canada and to the appellant, copies of all returns, notices of assessment, notices of objection and notifications, if any, that are relevant to the appeal.

(Emphasis added)

72. The *Tobacco Act* contains no provision requiring the Minister to disclose the information obtained under the *Tobacco Reporting Regulations*.
73. The disclosure of documents obtained under the Regulations is further governed by the *Access to Information Act*, R.S.C., c. A-1, which stipulates that the head of a federal institution is required, subject to the section's other provisions, to refuse to disclose records containing, *inter alia*, trade secrets of a third party, financial, commercial and scientific information:

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

(a) trade secrets of a third party;

(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

E- Conclusion

74. The *Tobacco Reporting Regulations* are constitutional and contribute to the legislative objectives of the *Tobacco Act*. They are not *ultra vires* and do not contravene the Charter.

APPENDIX 11

THE LEGISLATIVE FACTS,

THE TRIAL,

THE REAL ISSUE

1. The plaintiffs reiterated their objection to the admissibility into evidence of all documents received by the Court in its judgement of May 2, 2002, for the reasons listed in EP-1, given the non-reliability of that evidence (Plaintiffs' joint appendix #4).
2. The plaintiffs are repeating the same arguments as those presented in writing and orally on February 22 and April 24, 2002.
3. The Attorney General reiterates the written and oral arguments presented before the Court on this issue and adds the following:
4. The plaintiffs are mistaken regarding the Court's role in a case involving the constitutionality of a legislative measure pertaining to section 1 of the Charter. They allege that because a fact is being challenged, the Court does not have recourse to extrinsic evidence. This thesis is erroneous and has been rejected by the courts. They also allege that smoking raises strong emotions and leads to often extreme and contradictory positions, making it necessary to test the evidence. This argument is also without basis.
5. The present dispute deals principally with the reasonableness of certain provisions of the *Tobacco Act* regarding section 1 and it is for that purpose that the documents on the Attorney General's extrinsic evidence list were tabled before the Court.
6. There are only two rules regarding the evidence of legislative facts:
 - . The plaintiff party must not be taken by surprise;
 - . The documents presented to the Court must not be doubtful in themselves.
7. The documents labelled with the numbers 1, 16, 24, 27, 28, 46, 48, 127 and 167, which had been excluded by this Court on May 2, 2002, cannot be described as emanating from doubtful sources (on this issue, refer to the written notes handed to the Court during the hearing of February 22 and April 24 as well as to the oral arguments).

8. Moreover, it must be pointed out that the Court gave the plaintiffs the opportunity to table documents as extrinsic evidence, which they did. As for document ED-16 “World Bank – Curbing the Epidemic” to which the plaintiffs object, it must be pointed out that the document is presented to the Court as part of a body of opinions that take the position that certain comprehensive legislative measures can contribute in reducing smoking. The subject of that document was described in the Attorney General of Canada’s table as follows:

- . Tobacco, an international scourge on health
- . Global measures against smoking and restrictions on the promotion of tobacco products
- . Recommendation for the display of health messages on cigarette packages
- . Recommendation for the implementation of an international agreement prohibiting or restricting the promotion of tobacco products
- . Recommendation for the regulation of tobacco products
- . Recommendation for controlling tobacco promotion activities
- . Adoption of legislation by Parliament - reasonableness

9. Document ED-16 was adopted by the World Bank. Document ED-1, issued by the World Bank Group (March 2002) refers to it in a precise manner (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. Document ED-16 was adopted by the United Nations committees responsible for coordinating the work of 18 United Nations organizations that collaborate in implementing measures aiming to reduce smoking throughout the world.

11. The plaintiff, JTI MacDonald, in the document “joint appendices,” at tab 4, paragraphs 8 to 24, states that the document was deliberately written to trick people. It is a serious and unfounded accusation.

12. Figure 4.2.a reproduced on page 40 of ED-16 illustrates that excerpt from page 39:

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

13. The fact that graph 4.2.b indicates the reduction in Canadian tax in 1993 rather than February 1994 has no impact, for the graph demonstrates the reduction in consumption for the period before the tax reduction and the subsequent increase, which was confirmed by Mr. Swain (see report by Mr. Swain, D-245, Table 5).
14. The allegations by JTI MacDonald regarding document ED-16 properly demonstrates that the thesis of the plaintiffs is to invite the Court to make this case into a trial of the adjudicating facts, which we contend is not the Court's role. Document ED-16 is, as it appears, a collective work and a summary of previous studies. This document has been tabled as extrinsic evidence to support the reasonableness of the *Tobacco Act* and its regulations. The Attorney General of Canada reiterates that the analysis of human behaviour, such as the consumption of tobacco products and the effects of commercial advertising, are complex issues and have not yet been resolved in a definitive manner.
15. Document ED-16 is a study that found a need to institute a set of comprehensive measures that are similar to the program recommended by the World Health Organization, the World Bank and the United Nations.

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. The plaintiffs had every opportunity to present the Court with positive evidence, which they did not do. They also had every opportunity to table extrinsic evidence. However, they have not tabled any positive evidence to counter ED-16. The Court has not ruled in a definitive and adjudicative manner on the plaintiffs' multiple issues and objections that are simply aimed at inviting the Court to render an abstract judgement.
17. As for the Turkish study referred to on page 47 of ED-16 as well as paragraphs 12 to 14 of the JTI MacDonald argument, the interpretation made by the plaintiff JTI MacDonald is nothing but an unfounded inference and does not cast any doubts on the conclusion that advertising messages on cigarette packages contribute to reducing smoking.
18. Moreover, the presentation made by the plaintiff JTI MacDonald regarding the events occurring between the 1960s and 1988 are unfounded. Health messages were affixed to the packaging of tobacco products sold in Turkey in 1982. The authors described the events that occurred beforehand due to the fact that they examined the evolution of prices and consumption for the 1960 to 1982 period. It is appropriate to reproduce the text of the article regarding the analysis on health messages.

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. The allegations and inferences of the plaintiff JTI MacDonald regarding document ED-16 and the reference to study EP-8 “Cigarette Demand, Health Scares and Education in Turkey” are unfounded.
20. Moreover, it must be pointed out that the authors of ED-16, regarding the effects of health messages, refer to other studies including a Canadian survey from 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)

See 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. The allegations of plaintiff JTI MacDonald that the authors of ED-16 are unqualified are unfounded.
22. The plaintiff JTI MacDonald alleges that since study ED-16 refers to work by Henry Saffer which was subsequently published in a book by M. P. Jha and F. J. Chaloupka, it follows that Mr. Saffer's work has no value. This allegation is unfounded. It is appropriate to reproduce the preface of 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. These 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. Moreover, it is appropriate to point out that document EP-9 "Tobacco Control in Developing Countries" was published by Oxford Publicity Press on behalf of "The Human Development Network, the World Bank and the Economics Advisory Service, World Health Organization." As to the allegation (para. 17, EP-9, page 231) that Canada was included in a group of countries that included Afghanistan or Sudan, it must be pointed out that the table only serves to compare countries where there are advertising bans and countries where there are none. Several of the countries listed experienced consumption reductions, such as Iceland, Italy and Singapore. Moreover, there is no foundation to the plaintiff's interpretation that the authors felt that several of the countries listed in table 9.3 in the column "comprehensive ban" should not have been mentioned because, for example, in Canada, the *Tobacco Products Control Act* was not enacted until 1989. On pages 228 and 229 of document EP-9, the authors refer to Roemer (1993) (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)

The Roemer study (1993) (D-127) mentions the following on page 32:

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. The allegation by JTI MacDonald that the authors of ED-16 assumed the countries listed in table 9.3 had a “comprehensive ban” for the 81 to 91 period is erroneous.
25. The allegations are erroneous that the conclusion quoted in paragraphs 20 and 21 of document EP-10 “Henry Saffer, Frank Chaloupka – The Effect of Tobacco Advertising Bans on Tobacco Consumption” is unfounded. The conclusion of the study is on 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 indicates 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 end 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 predicts 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.

Document ED-127 “Consulting and Audit Canada”

26. The Privy Council Office has implemented a regulatory policy (ED-106) that must be followed by regulatory organizations that want to propose the adoption of or changes to regulations. According to this policy, the regulatory organizations must conduct:

Benefit-cost analysis. It must be demonstrated that the benefits of regulatory requirements are greater than their costs. When regulations address health, social, economic or environmental risks, it must also be demonstrated that regulatory effort is being expended where it will do the most good. For all regulatory proposals, a benefit-cost analysis must be carried out to assess potential effects, such as impacts on the environment, workers, consumers and other sectors of society. The Business Impact Test, or equivalent analysis, must be undertaken to assess the effect that major regulatory proposals will have on Canadian businesses.

27. In this case, that is what the Department of Health did by asking, through the Department of Public Works and Government Services, Consulting and Audit Canada to proceed with the evaluation of the proposed amendments to the information regulations. Consulting and Audit Canada is a special operating agency in Public Works and Government Services Canada. They provide an accounting and auditing certification service. That organization has conducted business with more than 40 international agencies, developed countries and developing countries (skills transfer). Consulting and Audit Canada asked the firm Hara & Associates to conduct the costs-benefits study.
28. The allegations of JTI MacDonald regarding study ED-127 are erroneous. The inferences it is asking the Court to make are unfounded.
29. At the beginning of their study, the authors pointed out that they used a conservative approach. A final examination reveals the seriousness of the study, which could not be compared to document EP-12.
30. The authors of document ED-127 mention at the beginning of their study:

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 of 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. It also points out the difficulties raised by the study on the effect of health messages as follows:

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. The allegations by JTI MacDonald (paragraphs 30 and 31) that this study was based solely on the Turkish study (EP-8), that the Australian study inferred a negligible impact and that the others neglected to examine the Canadian context, are erroneous.

33. The authors of the impact study noted the following:

a) Relative to Canadian situation, the authors state on pages 3-2 and 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 "Smoking during pregnancy can harm your baby", 41% recalled "Smoking can kill you", 37% recalled "Smoking causes cancer", and smaller proportions for the rest. Smokers were more likely to recall the messages than non-smokers. Those with less than a 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. "Smoking during pregnancy can harm your baby", was recalled by 58% of teenagers; 48% recalled "Smoking can kill you", 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) In terms of the U.S. situation, the authors state on 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 do 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) Relative to the Australian study, the authors made their own analysis of the study and state on pages 3-4 and 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". 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 include:

. 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) As for the international studies, the authors state on pages 3-6 and 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 represents 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. They read: "Caution: Cigarette Smoking May be Hazardous to Your Health". 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. Moreover, Appendix B of ED-127 “Consulting and Audit Canada” is a bibliographic list of the literature examined.
35. It is appropriate to point out that study ED-127 is a costs-benefits study and that the authors were very cautious in their 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. The allegations of JTI MacDonald regarding document ED-181 “Environics – Public Attitudes Toward Toxic Constituent Labelling on Cigarette Packages – April 1996” demonstrate once again that it is trying to invite the Court to rule on all sorts of adjudicative issues as if the proceedings it has undertaken pertained to civil liability, which is not the case.
37. In other words, for each element of extrinsic evidence presented, the plaintiffs are trying to convince the Court to conduct multiple trials in a single trial. The authors of the costs-benefits study refer to other studies, which are also being contested by the plaintiffs because they argue they are insufficient or erroneous!

38. The Attorney General of Canada contends that the decision rendered by the Canadian International Trade Tribunal deals only with the administrative process of issuing a contract. The Trade Tribunal did not examine the qualities of study ED-129 "The Relative Importance of the Size, Content and Pictures on Cigarette Package Warning Messages – April 24, 2000." Dr. Liefeld is unaware of what Health Canada has done.
39. Moreover, it must be pointed out that the concerns of Health Canada regarding the fact that Dr. Luik was in a conflict of interest were more than just concerns:
- a) In 1988, J. Luik appeared before the Parliamentary Committee mandated to study the *Tobacco Products Control Act*.

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) On April 3, 1997, Mr. Luik appeared before the Parliamentary Committee mandated to study Bill C-71.

Dr. John Luik: Unlike many of your witnesses, I am here today to speak simply as a private citizen who has some expertise on a small part of the question which you are considering. I do not want to speak on behalf of anyone, except at one point I wish to introduce some evidence. In fact, I have arranged to have copies of a book written by myself and my co-author from the U.K, Mr. Mike Waterson, to be distributed to you. In some sense, the submission is a joint one, although Professor Waterson is unable to be here today.

In the course of any given year, I am typically engaged as a consultant by several dozen organizations on a variety of projects. I have worked, for example, for many health care organizations on a variety of health-

related issues. To be fair, I have also undertaken work for a number of tobacco companies on the issue before you, namely, advertising and, in particular, the issue of tobacco advertising and young people.

I should like to say something briefly 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.

c) During cross-examination, Mr. Waterson answered as follows questions pertaining to his connection with Mr. 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 fist [sic] 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 "Advertising and Markets". 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?*

Mr. 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.

Mr. 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:*

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

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

A- *I have no memory of being invited to it but I am invited to a lot of things 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,

"I 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."

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

Mr. Simon Potter:

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

Mr. Maurice Régnier:

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?*

Mr. 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 [sic] 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 sense, 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.

Mr. 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,

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

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, Mr. 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, Mr. Waterson, Q. 54 to 74)

- d) Mr. Luik was part of ARISE (Associates for Research Into the Science of Enjoyment), an organization secretly funded by the tobacco industry (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, paragraph 55).
- e) On December 9, 1998, Mr. Luik appeared before the Senate Committee (ED-98) and stated:

Mr. John C. Luik testifying as an individual:

Honourable senators, I am appearing as an independent witness. You have my brief. The most useful thing I could do in my 10 minutes is to address the questions raised by Senators Lynch-Staunton and Joyal as the basis of what I wish to say.

This is now the sixth time since Minister Epp introduced his legislation in 1987 that I have appeared before either this committee or a House of Commons committee to speak about the issue of tobacco advertising.

The questions that the gentlemen raised this afternoon will provide an excellent format for my remarks.

...

More particularly, in February of this year, the Lancet, a leading medical publication, published an article of mine about the very issue that this bill addresses, the question of sponsorship.

More to the point, as Senator Lynch-Staunton directly asked Health Canada officials, is the question of whether there is any evidence that a single person will begin to smoke if a person like Mr. Villeneuve appears with a Rothman's t-shirt or suit. (page 18)

Senator Kenny: Mr. Luik, are you now or have you ever been in the pay of tobacco company manufacturers?

Mr. Luik: I have certainly acted as a consultant, yes.

Senator Kenny: Mr. Parker, in your opening comments you talked about not objecting to government regulation. What you wanted was the same standards of regulation as in other fields.

Mr. Parker: That is what I said, yes. (page 20)

40. The Attorney General of Canada contends that the allegations by JTI MacDonald do not put into doubt the seriousness and value of the study conducted by Mr. Liefeld; they are unfounded allegations. (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 others, is to "enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products". 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 for two 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 or acquaintance or scientific reports of the hazards of smoking in the media.*
8. *For 95% of smokers and 80%, [sic] 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 @ [sic] 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- "The relative Importance of the Size, Content & Pictures On Cigarette Package Warning Messages" (conducted August 1999), was executed Marc [sic] 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. Moreover, the plaintiff JTI MacDonald or the other plaintiffs could have called Mr. Luik as a witness for principal evidence and thereby could have provided positive evidence regarding the health messages, since Dr. Luik, who is well known to the plaintiffs, presented himself as being qualified to conduct such a study.
42. The Attorney General of Canada is not asking the Court to draw a negative inference from the fact the plaintiffs did not ask Dr. Luik to testify, for it would be inviting the Court to an equivocal exercise in speculation and hypothesis. What is important is the evidence, including the evidence of legislative facts that were presented to the Court.
43. The plaintiffs are asking the Court to draw multiple negative inferences regarding the evidence of legislative facts presented by the Attorney General of Canada. These inferences are not based on any positive evidence.
44. The Court provided the plaintiffs with all the needed latitude to present contrary positive evidence. No positive evidence was presented to counter document ED-16 "Curbing the Epidemic," document ED-127 "Consulting and Audit Canada" and 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. The allegations made by the plaintiffs against the abovementioned documents only seek to discredit the authors in the absence of all contrary positive evidence.
46. These allegations are similar in nature to those presented against each of the Attorney General's witnesses who testified on the legislative facts regarding the public health problem posed by smoking.

The trial

47. The plaintiffs are asking the Court to conclude that:
 - Dr. Ritter is not credible;
 - Dr. Robitaille is not qualified to speak on anything but cardiac disease;

- Dr. Davis, although he is an epidemiologist, cannot say anything about the effects of tobacco product marketing, regardless of the epidemiological problem smoking presents.
 - Professor Castonguay knows nothing on the chemistry of tobacco;
 - Dr. Pollay is not credible;
 - Professor Morissette did not check all sources of legislation;
 - Professor Castonguay should have checked the irritant capacities of the 4,000 chemical components of the Première cigarette, even if ITL has not examined any;
 - Mr. Swain should have examined tobacco use for the period of 1970 to 2000, rather than 1985 to 2000, despite the fact he explained to the Court the reasons why he could not compare studies using different methodologies;
 - Ms. Judy Ferguson was not qualified to explain the work of Health Canada and the legislative options examined, even though the plaintiffs refer to it abundantly in their arguments.
48. The plaintiffs allege several times in their arguments that the lawyers representing the Attorney General made all kinds of decisions during the trial aimed at inducing the Court into error.
49. The lawyers representing the Attorney General consider it pointless to respond to each of the allegations targeting them, for what is at the heart of this case are the numerous sections of the *Tobacco Act* as well as the information and reporting regulations whose constitutionality is being contested by the plaintiffs.
50. The plaintiffs also withdrew some of the witnesses that were to be presented:
- Zalman Amit, first witness announced in 1997;
 - Stan Smith, co-plaintiff and President of RJR-MacDonald;
 - Lucy Henke, who was to give testimony for 2 days and answer the following “key question”:

*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
 - And Gérald Wilde, who was to testify on the effect of the health messages and the psychology of adolescents.

¹ Plaintiffs’ pre-trial conference memorandum.

51. None of the plaintiffs' representatives, who had signed affidavits supporting the motion to suspend the information and reporting regulations, testified to contest the regulations.
52. The Attorney General of Canada is not yet asking the Court to draw any inference since what matters is the positive evidence presented to the Court, including the evidence of legislative facts.

The real issue

53. This dispute involving the Charter must rise above the immediate interests of the parties, for the interests in question exceed the economic interests of the plaintiffs and definitely involve the present and future interests of Canadians, smokers or non-smokers, young people and the future generations who must be protected from the damaging effects of cigarettes while respecting the *Charter of Rights and Freedoms*.