RJR-MacDonald Inc.
Appellant

v.

The Attorney General of Canada
Respondent

Imperial Tobacco Ltd.
Appellant

v.

The Attorney General of Canada
Respondent

and

The Attorney General of Quebec
Mis-en-cause

and

The Attorney General for Ontario,
the Heart and Stroke Foundation of Canada,
the Canadian Cancer Society,
the Canadian Council on Smoking and Health,
the Canadian Medical Association, and
the Canadian Lung Association
Interveners

Indexed as: RJR-MacDonald Inc. v. Canada (Attorney General)
[1995] 3 S.C.R. 199
File Nos.: 23460, 23490.

21 September 1995

Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

The following are the reasons delivered by

1 LAMER C.J. -- I have had the benefit of reading the reasons of my colleagues. I am in agreement with the reasons of my colleague, Justice Iacobucci, but agree with my colleague, Justice McLachlin, as to the disposition.

The reasons of La Forest, L'Heureux-Dubé and Gonthier JJ. were delivered by

2 LA FOREST J. (dissenting) -- The issues in these appeals are whether the Tobacco Products Control Act, S.C. 1988, c. 20 (the "Act"), falls within the legislative competence of the Parliament of Canada under s. 91 of the Constitution Act, 1867, either as criminal law or under the peace, order and good government clause, and if so whether it constitutes an infringement of freedom of expression under s. 2(b) of the Canadian Charter of Rights and Freedoms which is not justified under s. 1 of the Charter. In broad terms, the Act prohibits, subject to specified exceptions, all advertising and promotion of tobacco products, and prohibits the sale of a tobacco product unless the package containing it sets forth prescribed health warnings and a list of the toxic constituents of the product and of the smoke produced from its combustion.

3 These proceedings began with two separate motions for declaratory judgments before the Quebec Superior Court. The appellant RJR - MacDonald Inc. ("RJR") seeks a declaration that the Act is wholly ultra vires the Parliament of Canada and invalid as an unjustified infringement of freedom of expression guaranteed by s. 2(b) of the Charter. The appellant Imperial Tobacco Ltd. ("Imperial") seeks the same order, but only in respect of ss. 4, 5, 6 and 8 of the Act. The two motions were heard together before Chabot J. of the Quebec Superior Court who rejected the Attorney General of Canada's contention that the Act was valid either as criminal law or under the peace, order and good government clause, and declared the whole of the Act ultra vires the Parliament of Canada. He further held the Act was of no force or effect as an unjustified infringement of s. 2(b) of the Charter. The Quebec Court of Appeal reversed this judgment. While upholding the judge's conclusion regarding the criminal law power, it unanimously held that the Act was intra vires Parliament as falling within the peace, order and good government clause and, by majority, that the infringement of s. 2(b) of the Charter was justified by s. 1 of that instrument. The minority judge would have held ss. 4, 5, 6 and 8 invalid under s. 2(b) of the Charter.

4 The appellants sought and were granted leave to appeal to this Court.

The Legislative Scheme

5 The Act, the long title of which is An Act to prohibit the advertising and promotion and respecting the labelling and monitoring of tobacco products, received Royal Assent on June 28, 1988 and came into force on January 1, 1989. The purpose of the Act is set out in s. 3, which reads:

3. 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 the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

(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

(c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

Section 3 thus states that Parliament's purpose in enacting the legislation is to address the "national public health problem of substantial and pressing concern" arising from the use of tobacco, by protecting young persons and others from inducements to use tobacco products, and by enhancing public awareness concerning the hazards of tobacco use. However, it is of significance to these appeals that, with the exception of a prohibition on the distribution of free samples of tobacco products under s. 7, the Act does not purport to proscribe the sale, distribution or use of tobacco products. Rather, as its long title indicates, the Act seeks to attain its purpose through the institution of a prohibition on the advertising and promotion of tobacco products offered for sale in Canada and through the institution of a requirement that manufacturers of tobacco products display health warnings on tobacco product packages.

6 In furtherance of the purpose set out in s. 3, Parliament has created a legislative scheme that targets three distinct categories of commercial activity: advertising, promotion and labelling. Sections 4 and 5 of the Act, which fall under the title "ADVERTISING", deal with the advertisement and display of tobacco products. Section 4 prohibits the advertisement, by publication, broadcast or otherwise, of tobacco products offered for sale in Canada. An exception to this prohibition is created by s. 4(3) and (4), which stipulate that the prohibition does not extend to foreign advertising in foreign publications imported into Canada or foreign broadcasts retransmitted in Canada, as long as those advertisements are not intended primarily for the purpose of promoting the sale of a tobacco product in Canada. Section 5 is directed to the retail display of tobacco products in retail establishments and vending machines. Section 5(1) stipulates that a retailer may expose tobacco products for sale and may post signs that indicate, other than by their brand names or trade marks, the tobacco products offered for sale on the premises. Section 5(2) permits the operation of tobacco vending machines, and the identification of products and prices on the exterior of the machines.

7 Sections 6 to 8 of the Act fall under the title "PROMOTION", and deal with various direct and indirect promotional activities involving tobacco products. Section 6(1) stipulates that the full name of a tobacco manufacturer may be used in a representation to the public that promotes a cultural or sporting event, but prohibits the use of brand names in such representations unless the use of a brand name is required by a contract made before January 25, 1988. Section 6(2) stipulates that, where a contract requiring the use of a brand name was in place before January 25, 1988, the value of contributions under that contract are frozen at 1987 levels. Section 7 prohibits the free distribution of tobacco products in any form. Section 8 prohibits the use of a tobacco trade mark on any article other than a tobacco product, and also prohibits the use and distribution of tobacco trade marks in advertising for products other than tobacco products; however, a special exemption from the s. 8 prohibition is created under s. 8(3) for the "Dunhill" trade mark.

8 Section 9 falls under the title "LABELLING", and prohibits tobacco manufacturers from selling their products unless they display on the package containing the product unattributed messages describing the health effects of the product as well as a list of the product's toxic constituents and the quantities of those constituents present in it. Section 17(f) authorizes the Governor in Council to adopt regulations prescribing the content, position, configuration, size and prominence of the health messages. Under the Tobacco Products Control Regulations, amendment, SOR/93-389, s. 11 (July 21, 1993), every tobacco package must display one of the following messages:

11. (1) . . .

(a) . . .

(i) "Cigarettes are addictive" . . .

(ii)"Tobacco smoke can harm your children" . . .

(iii) "Cigarettes cause fatal lung disease" . . .

(iv) "Cigarettes cause cancer" . . .

(v)"Cigarettes cause strokes and heart disease" . . .

(vi) "Smoking during pregnancy can harm your baby" . . .

(vii) "Smoking can kill you" . . .

(viii) "Tobacco smoke causes fatal lung disease in non-smokers" . . .

Section 17(g) also authorizes the Governor in Council to require leaflets providing health information to be placed inside packages of a tobacco product and to prescribe their content, form and manner of placement in those packages. 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.

9 One further provision of the Act is of relevance to these appeals. Section 17(a) gives the Governor in Council power to make regulations exempting a tobacco product from the application of ss. 4 and 7 where, in the opinion of the Governor in Council, that product is likely to be used as a substitute for other tobacco products and poses less risk to the health of users than those other products.

10 The enforcement provisions of the Act are found in ss. 11 to 16. These provisions confer upon the Minister the power to designate a "tobacco product inspector" with powers of inspection, search and seizure, analysis, detention of things seized, and forfeiture. The "offences and punishments" for contravention of the Act are set out in ss. 18 and 19. Section 18 stipulates that every person who contravenes ss. 4, 6(2), 7, 8, 9 or 10 is guilty of an offence punishable on summary conviction or an indictable offence. The penalties range in seriousness from a fine not exceeding two thousand dollars or six months' imprisonment, or both, for a first offence on summary conviction, to a fine not exceeding three hundred thousand dollars or two years' imprisonment, or both, for a second or subsequent offence pursued by way of indictment.

The Relevant Statutory Provisions

11 For ease of reference, I set out the relevant provisions of the Act as follows:

4. (1) No person shall advertise any tobacco product offered for sale in Canada.

(2) No person shall, for consideration, publish, broadcast or otherwise disseminate, on behalf of another person, an advertisement for any tobacco product offered for sale in Canada.

(3) For greater certainty, subsection (2) does not apply in respect of the distribution for sale of publications imported into Canada or the retransmission of radio or television broadcasts originating outside Canada.

(4) No person in Canada shall advertise a tobacco product by means of a publication published outside Canada or a radio or television broadcast originating outside Canada primarily for the purpose of promoting the sale in Canada of a tobacco product.

(5) Notwithstanding subsections (1) and (2), the manufacturer or importer of a tobacco product may advertise the product by means of signs at any time before January 1, 1991, if

(a) the amount, determined in accordance with the regulations, expended by the manufacturer or importer on the preparation in 1989 of materials for use in signs and on the presentation of signs in that year does not exceed two thirds of the expenses of the manufacturer or importer, determined in accordance with the regulations, incurred during its last financial year ending before January 1, 1988 for such preparation and presentation;

(b) the amount, determined in accordance with the regulations, expended by the manufacturer or importer on such preparation and presentation in 1990 does not exceed one third of the expenses of the manufacturer or importer, so determined, incurred therefor during the financial year referred to in paragraph (a); and

(c) a health warning is provided in accordance with the regulations on any sign put in place after the coming into force of this Act.

(6) In subsection (5), "sign" does not include

(a) a sign displayed at the place of business of a retailer; or

(b) a representation described in paragraph 6(1)(a) or (b).

5. (1) Notwithstanding section 4, a retailer may

(a) expose tobacco products for sale at the retailer's place of business;

(b) post in that place, in the prescribed form, manner and quantity, signs that indicate, otherwise than by their brand names or trade marks, the tobacco products offered for sale and their prices;

(c) where the retailer's name or trade name contains any word or expression signifying that tobacco products are sold by the retailer, employ that name or trade name, otherwise than in association with a tobacco product, for the purpose of advertising the retailer's business, except by means of a radio or television transmission; and

(d) display at the retailer's place of business, at any time before January 1, 1993, an advertisement or portion thereof

(i)that was displayed in that place before January 25, 1988, or

(ii)that the retailer is obliged to display under the terms of a contract entered into before January 25, 1988, other than a term allowing for the extension or renewal of the contract after that day.

(2) Notwithstanding section 4, a person who operates a vending machine that dispenses tobacco products may identify or depict those products and their prices on the exterior of the vending machine in the prescribed form and manner.

6. (1) Notwithstanding section 4 and subsection 8(1) but subject to subsection (2) of this section, the full name of a manufacturer or importer of tobacco products and, where required by the terms of a contract entered into before January 25, 1988, the brand name of a tobacco product, may be used, otherwise than in association with a tobacco product, in a representation to the public

(a) that promotes a cultural or sporting activity or event; or

(b) that acknowledges financial or other contributions made by the manufacturer or importer of the tobacco product toward such an activity or event.

(2) Where, in any calendar year, a manufacturer or importer of tobacco products makes financial or other contributions toward cultural or sporting activities or events in respect of which brand names of those products are used, the value of such contributions, determined in accordance with the regulations, shall not exceed the value, so determined, of the contributions made by the manufacturer or importer toward cultural or sporting activities and events in 1987.

7. (1) No distributor shall distribute tobacco products in the absence of consideration therefor, or furnish tobacco products to any person for the purpose of their subsequent distribution without consideration.

(2) No person shall offer any gift or cash rebate or the right to participate in any contest, lottery or game to the purchaser of a tobacco product in consideration of the purchase thereof, or to any person in consideration of the furnishing of evidence of such a purchase.

8. (1) No manufacturer or importer of tobacco products who is entitled to use any trade mark in association with those products, and no person acting with the concurrence or acquiescence of such a manufacturer or importer, shall

(a) apply the trade mark, in any form in which it appears on packages of the product that are sold in Canada, to any article other than a tobacco product or a package or container in which a tobacco product is sold or shipped, or

(b) use the trade mark in any such form for the purpose of advertising any article other than a tobacco product or any service, activity or event,

notwithstanding that the manufacturer or importer is, but for this Act, entitled to use the trade mark in association with that article, service, activity or event.

(2) No person shall distribute, sell, offer for sale or expose for sale any article, other than a tobacco product or a package or container in which a tobacco product is sold or shipped, that bears a trade mark of a tobacco product in any form in which it appears on packages of the tobacco product that are sold in Canada.

(3) Subsections (1) and (2) do not apply in respect of a trade mark if in 1986 tobacco products and other articles bearing that trade mark were sold at retail in Canada and the retail value of those other articles estimated in accordance with the regulations was greater than one-quarter of the retail value of those tobacco products so estimated.
(4) Subsection (2) does not apply in respect of the distribution or sale before January 1, 1993 of an article manufactured before April 30, 1987, or ordered before that date from the manufacturer or supplier of the article otherwise than by the placing of a standing order that requires confirmation or is subject to cancellation after that date.

9. (1) No distributor shall sell or offer for sale a tobacco product unless

(a) the package containing the product displays, in accordance with the regulations, messages pertaining to the health effects of the product and a list of toxic constituents of the product and, where applicable, of the smoke produced from its combustion indicating the quantities of those constituents present therein; and

(b) if and as required by the regulations, a leaflet furnishing information relative to the health effects of the product has been placed inside the package containing the product.

(2) No distributor shall sell or offer for sale a tobacco product if the package in which it is contained displays any writing other than the name, brand name and any trade marks of the tobacco product, the messages and list referred to in subsection (1), the label required by the Consumer Packaging and Labelling Act and the stamp and information required by sections 203 and 204 of the Excise Act.

(3) This section does not affect any obligation of a distributor, at common law or under any Act of Parliament or of a provincial legislature, to warn purchasers of tobacco products of the health effects of those products.

17. The Governor in Council may make regulations

(a) exempting a tobacco product from the application of sections 4 and 7 where, in the opinion of the Governor in Council, that product is likely to be used as a substitute for other tobacco products and poses less risk to the health of users than those other products;

. . .

(f) prescribing, in respect of any tobacco product, the content, position, configuration, size and prominence of the messages and list of toxic constituents referred to in paragraph 9(1)(a);

(g) requiring leaflets furnishing information referred to in paragraph 9(1)(b) to be placed inside packages of a tobacco product and prescribing their content, form and manner of placement in those packages;

. . .

18. (1) Every person who contravenes section 4, 7, 8, 9 or 10

(a) is guilty of an offence punishable on summary conviction and is liable

(i)for a first offence under any of those sections, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding six months, or to both, and

(ii)where the person has previously been convicted of an offence under any of those sections, to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding six months, or to both; or

(b) is guilty of an indictable offence and liable

(i)for a first offence under any of those sections, to a fine not exceeding one hundred thousand dollars or to imprisonment for a term not exceeding one year, or to both, and

(ii)where the person has previously been convicted of an offence under any of those sections, to a fine not exceeding three hundred thousand dollars or to imprisonment for two years, or to both.

(2) Every person who contravenes subsection 6(2) is guilty of an offence punishable on summary conviction and is liable

(a) for a first offence, to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding six months, or to both; or

(b) for a second or subsequent offence, to a fine not exceeding fifty thousand dollars or to imprisonment for a term not exceeding one year, or to both.

(3) Every person who contravenes section 14 or any regulations made under paragraph 17(i) is guilty of an offence punishable on summary conviction and is liable to a fine not exceeding ten thousand dollars.

19. (1) A prosecution in respect of an offence under this Act, other than a prosecution under paragraph 18(1)(b), may not be instituted later than twelve months after the time when the subject-matter of the prosecution arose.

(2) A prosecution for an offence under this Act may be instituted, heard, tried and determined by a court in any territorial jurisdiction in which the accused carries on business regardless of where the subject-matter of the prosecution arose.

(3) No exception, exemption, excuse or qualification prescribed by law is required to be set out or negatived, as the case may be, in an information or indictment for an offence under

this Act or under section 421, 422 or 423 [now section 463, 464 or 465] of the Criminal Code in respect of an offence under this Act.

(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.

Judgments of the Courts Below

Quebec Superior Court reflex, (1991), 82 D.L.R. (4th) 449 (Chabot J.) (translation)

12 Chabot J. found the Act invalid in its entirety, both as being ultra vires the Parliament of Canada under the Constitution Act, 1867 and as constituting an unjustifiable infringement of s. 2(b) of the Charter.

13 In his analysis of the Act under the Constitution Act, 1867, Chabot J., at pp. 467-68, characterized it as legislation that is, in pith and substance, in relation to the regulation of advertising and promotion carried on by a particular industry. Having thus characterized the Act, Chabot J. then determined that it was not a valid exercise of the federal Parliament's criminal law power under s. 91(27) of the Constitution Act, 1867 or Parliament's power to legislate for the peace, order and good government of Canada under s. 91 of the Constitution Act, 1867.

14 With respect to the criminal law power, Chabot J. reasoned that the Act was not valid criminal law because it was not addressed directly to the "evil" against which it was purportedly aimed, i.e., tobacco consumption. He observed, at p. 470, that "advertising in itself does not cause harm, any more than the advertising of tobacco products is by itself harmful to health" and, at p. 468, that "[t]he objective of protecting public health, if it exists, can only be an indirect and remote objective [of the Act]".

15 Turning to the peace, order and good government clause, Chabot J. concluded that the Act did not satisfy the criteria for the "national dimensions" branch of that clause set forth in R. v. Crown Zellerbach Canada Ltd., 1988 CanLII 63 (SCC), [1988] 1 S.C.R. 401. The present cases were, in his view, distinguishable from the Privy Council's decisions in the "temperance cases" (Attorney-General for Ontario v. Attorney-General for the Dominion, [1896] A.C. 348 (the Local Prohibition Case), and Attorney-General for Ontario v. Canada Temperance Federation, [1946] A.C. 193) because, in contrast with those cases, there was "no evidence that the advertisement of tobacco products has attained a stage of pestilence in Canada which would give it the required character and degree of singleness, distinctiveness and indivisibility which would distinguish it clearly from matters of provincial interest" (p. 475). Chabot J. also decided that there was no evidence of a "provincial inability" to control tobacco advertising. He observed, at p. 478, that "the evidence clearly shows the will and the capacity of the provinces to cooperate with each other and with the federal government with respect to the advertising and promotion of tobacco products".

16 Proceeding to an analysis of the Act's validity under the Charter, Chabot J. found the Act to be in violation of the appellants' right to freedom of expression under s. 2(b). He concluded, first (at pp. 484-85), that tobacco advertising has a sufficient expressive content to

constitute a protected activity under s. 2(b) and, second (at p. 486), that the unattributed health message requirement under s. 9 of the Act infringed the appellants' s. 2(b) rights on the ground that "freedom of expression includes the freedom to remain silent".

17 Chabot J. then found, applying the test established by this Court in R. v. Oakes, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, that the s. 2(b) infringement was not justified under s. 1 of the Charter. After considering the uncontradicted evidence adduced by the Attorney General concerning the dire health consequences of tobacco use, Chabot J., at p. 492, concluded that the Attorney General had satisfied the first branch of the Oakes test by demonstrating a "substantial and pressing concern". However, he concluded that the Act did not survive the "proportionality branch of that test. He began his proportionality analysis by holding, at p. 515, that the Attorney General had failed to establish, on the balance of probabilities, that a rational connection exists between a full prohibition on advertising and the objective of reducing tobacco consumption. He also observed, at p. 513, that "[t]he virtual totality of the scientific documents in the state's possession at the time the Act was passed do not demonstrate that a ban on advertising would affect consumption". He then decided that the complete prohibition on advertising under the Act did not meet the test of minimal impairment of the appellants' s. 2(b) rights. He observed, at pp. 515-16, that no evidence had been adduced at trial demonstrating that a complete prohibition on tobacco advertisements would reduce tobacco consumption more effectively than a partial ban, or that unattributed health warnings would be more effective than attributed health warnings. Finally, with respect to the proportionality between effects and objectives, Chabot J. concluded, at p. 517, that the Act constitutes "social engineering" and "an extremely serious impairment of the principles inherent in a free and democratic society which is disproportionate to the objective of the [Act]".

Quebec Court of Appeal 1993 CanLII 3500 (QC CA), (1993), 102 D.L.R. (4th) 289 (LeBel and Rothman JJ.A., Brossard J.A. dissenting in part) (translation)

18 The Court of Appeal allowed the appeals from the decision of Chabot J. and upheld the constitutional validity of the Act in its entirety. It was unanimous in deciding that the Act was not beyond the legislative competence of the Parliament of Canada under s. 91 of the Constitution Act, 1867 and, although the Attorney General had conceded that the Act constituted an infringement of the appellants' rights under s. 2(b), a majority (Brossard J.A. dissenting) decided that the infringement was justifiable under s. 1 of the Charter.

19 Writing for a unanimous Court of Appeal with respect to the constitutionality of the Act under the Constitution Act, 1867, Brossard J.A. began his analysis by characterizing the Act as legislation, in pith and substance, in relation to the protection of public health (at p. 339). Brossard J.A. criticized, at pp. 338-39, the trial judge's pith and substance analysis on two grounds. First, he decided that the trial judge had confined himself to an excessively literal interpretation of the Act by failing to explore a possible connection between the Act's statement of purpose in s. 3 and its legal effect on tobacco advertising and promotion. Second, he held that the trial judge had confused the evidentiary requirements for the application of s. 1 of the Charter, under which the effectiveness of the legislation is a relevant criterion, with the requirements for ascertaining pith and substance in a division of powers analysis, where it is not.

20 Brossard J.A. then proceeded to consider whether the Act was a valid exercise of the federal criminal law power under s. 91(27) of the Constitution Act, 1867 or the peace, order

and good government clause under s. 91 of the Constitution Act, 1867. He began by deciding that the Act did not fall under the criminal law power. He found it significant, at pp. 341-42, that neither tobacco consumption nor tobacco advertising are activities that have an "affinity with some traditional criminal law concern" (p. 342) and observed that, although the Act makes the advertising and promotion of tobacco products illegal, the "real evil" the Act is designed to combat, tobacco consumption, continues to be legal in Canada. Parliament, he reasoned, at pp. 340-41, cannot criminalize the ancillary activities relating to a principal activity when it has not criminalized the principal activity itself. Brossard J.A. decided, however, that the Act fell within the federal Parliament's power to legislate for the peace, order and good government of Canada because it satisfied the test for the "national dimensions" branch of that power developed in Crown Zellerbach, supra. He observed, at p. 348, that the problem of tobacco consumption has developed into a matter of national concern comparable in scope to that of alcohol consumption addressed in the temperance cases. He also noted, at p. 350, that the health problems resulting from tobacco consumption have a "singleness, distinctiveness and indivisibility that distinguish them clearly from matters that are of strictly provincial interest". Finally, he concluded that the Act met the "provincial inability test" because "[t]he fact is that communications, whether radio or television broadcasting, or even newspaper publishing, do not recognize frontiers, still less provincial borders" (pp. 350-51).

21 The Court of Appeal was divided on the validity of the Act under the Charter. LeBel J.A., writing for the majority, accepted that the Act infringed the appellants s. 2(b) rights, but held that the infringement was justified under s. 1 of the Charter. LeBel J.A., at pp. 311-12, first noted that the trial judge had erred in applying a civil standard of justification in his application of the Oakes analysis. He observed, at p. 313, that, in cases involving socio-economic legislation such as the Act, this Court has "recognized the need for an attitude of deference with regard to legislative choices", and has required the state to meet an attenuated standard of justification under the Oakes analysis.

22 Applying the attenuated Oakes standard, LeBel J.A. held that the Act was a justifiable infringement under s. 1 of the Charter. He first observed that "there does not appear to be a serious debate" that the objective of reducing the number of smokers in Canada is pressing and substantial (p. 321), and then proceeded to an application of the proportionality test. There was, he held, at p. 323, sufficient evidence adduced at trial to establish a rational connection between a prohibition of tobacco advertising and the goal of reducing tobacco consumption. He conceded that there was no evidence on the record demonstrating, on the criterion of the civil balance of proof, that the prohibition of these forms of advertising would attain that objective. However, he noted that there was sufficient expert testimony and documentation adduced at trial to "attest, at the very least, to the existence of a body of opinion favourable to the adoption of a legislative measure such as the restriction of tobacco advertising in order to diminish consumption over time" (p. 323). LeBel J.A. also observed, at p. 324, that, in Imperial's internal documentation, "there are commentaries suggesting that the objective of tobacco advertising is either promotion, recruitment of new smokers, or consolidation of market share by reassuring current smokers".

23 Second, LeBel J.A. held, at pp. 326-27, that the Act satisfied the minimal impairment test because the measures adopted under the Act did not prohibit consumption of tobacco, did not allow for the control of foreign advertising, and permitted the continued availability of tobacco product information at retail establishments. Finally, he found it significant that the legislative objective, addressing a serious health problem, outweighed the adverse effects of

the legislation on the appellants' right to commercial expression which, he noted, at p. 326, "seeks exclusively to advance the respondents' interests in marketing, distributing and selling a product recognized as harmful".

24 Brossard J.A., in dissent, agreed with LeBel J.A. that the Act's objective was pressing and substantial, and that ss. 7 and 9 met the requirements of the Oakes test but, in his view, ss. 4, 5, 6 and 8 did not satisfy either the rational connection or the minimal impairment branches of the Oakes proportionality test.

25 With respect to the rational connection test, Brossard J.A. distinguished between three different types of advertising (at pp. 383-84): informative advertising (which disseminates information concerning product content), brand loyalty advertising (which is aimed solely at promoting one brand over another based on the colour, design and appearance of the packaging), and lifestyle advertising (which creates an image by associating the product's consumption with a particular lifestyle). Brossard J.A. found, at p. 384, that the prohibition on informative advertising and brand preference advertising was not rationally connected to the goal of reducing consumption of tobacco because "there is not a single piece of evidence in the record with any probative value to the effect that it encourages non-smokers to become smokers . . . or smokers to increase their consumption, or that it prevents smokers from reducing their consumption or quitting if they want to". However, he found, at p. 385, that the prohibitions respecting lifestyle advertising met the rational connection test owing to the testimony adduced at trial concerning the stimulative effect of such advertising upon the consumer behaviour of young persons.

26 Proceeding to the minimal impairment requirement, Brossard J.A. held, at p. 387, that, with the exception of the prohibition upon lifestyle advertising, ss. 4, 5, 6 and 8 of the Act did not minimally impair the appellants' rights because "it would easily have been possible to exclude from the general ban any advertising which is purely informative, there being no proof even on the level of possibility that such advertising has any impact on consumption". Thus, Brossard J.A. concluded, at p. 392, that ss. 4, 5, 6 and 8 of the Act could not be justified under s. 1 of the Charter, but that ss. 7 and 9 could be justified under s. 1 of the Charter. Brossard J.A. did not uphold the prohibition on lifestyle advertising, even though he decided it was theoretically justifiable under s. 1, because Parliament made no distinction between types of advertising in the legislation.

Issues Before This Court

27 The argument before this Court was conducted on the basis of two constitutional questions, stated by Chief Justice Lamer on November 4, 1993:

1 Is the Tobacco Products Control Act, S.C. 1988, c. 20, wholly or in part within the legislative competence of the Parliament of Canada as being a law enacted for the peace, order and good government of Canada pursuant to s. 91 of the Constitution Act, 1867; as being enacted pursuant to the criminal law power in s. 91(27) thereof; or otherwise?

2 Is the Tobacco Products Control Act wholly or in part inconsistent with the right of freedom of expression as set out in s. 2(b) of the Canadian Charter of Rights and Freedoms and, if so, does it constitute a reasonable limit on that right as can be demonstrably justified pursuant to s. 1 thereof?

Analysis

1. Jurisdiction under the Constitution Act, 1867

The Criminal Law Power

28 The first question arising on these appeals is whether the Act constitutes a valid exercise of the federal criminal law power and is therefore intra vires the federal Parliament. Section 91(27) of the Constitution Act, 1867 confers on the federal Parliament the exclusive power to legislate in relation to the criminal law. The criminal law power is plenary in nature and this Court has always defined its scope broadly. As Estey J. observed in Scowby v. Glendinning, 1986 CanLII 30 (SCC), [1986] 2 S.C.R. 226, at p. 238, "[t]he terms of s. 91(27) of the Constitution must be read as assigning to Parliament exclusive jurisdiction over criminal law in the widest sense of the term"; see also Attorney-General for Ontario v. Hamilton Street Railway Co., [1903] A.C. 524 (P.C.), at pp. 528-29. In developing a definition of the criminal law, this Court has been careful not to freeze the definition in time or confine it to a fixed domain of activity; see Goodyear Tire and Rubber Co. v. The Queen, 1956 CanLII 4 (SCC), [1956] S.C.R. 303, at p. 311 (per Rand J.); R. v. Zelensky, 1978 CanLII 8 (SCC), [1978] 2 S.C.R. 940, at pp. 950-51 (per Laskin C.J.). In Proprietary Articles Trade Association v. Attorney-General for Canada, [1931] A.C. 310 (PATA), at p. 324, the Privy Council defined the federal criminal law power in the widest possible terms to include any prohibited act with penal consequences. Subsequent to that decision, this Court recognized that the Privy Council's definition was too broad in that it would allow Parliament to invade areas of provincial legislative competence colourably simply by legislating in the proper form; see Scowby, supra, at p. 237. So, as Estey J. put it in Scowby, at p. 237, "it was accepted that some legitimate public purpose must underlie the prohibition". This necessary adjustment was introduced in Reference re Validity of Section 5(a) of the Dairy Industry Act, 1948 CanLII 2 (SCC), [1949] S.C.R. 1 (the Margarine Reference). Rand J. drew attention, at pp. 49-50, to the need to identify the evil or injurious effect at which a penal prohibition was directed. He stated:

A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.

. . .

Is the prohibition . . . enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law . . . . [Emphasis added.]

See also R. v. Morgentaler, 1993 CanLII 74 (SCC), [1993] 3 S.C.R. 463, at p. 489.

29 Taking into account the broad definition of the criminal law developed by this Court, I am satisfied that the Act is, in pith and substance, criminal law. A law's pith and substance, or "matter", is best described as its dominant purpose or true character; see Morgentaler, supra, at pp. 481-82. From a plain reading of the Act, it seems clear that Parliament's purpose in enacting this legislation was to prohibit three categories of acts: advertisement of tobacco

products (ss. 4 and 5), promotion of tobacco products (ss. 6 to 8) and sale of tobacco products without printed health warnings (s. 9). These prohibitions are accompanied by penal sanctions under s. 18 of the Act, which, as Lord Atkin noted in PATA, supra, at p. 324, creates at least a prima facie indication that the Act is criminal law. However, the crucial further question is whether the Act also has an underlying criminal public purpose in the sense described by Rand J. in the Margarine Reference, supra. The question, as Rand J. framed it, is whether the prohibition with penal consequences is directed at an "evil" or injurious effect upon the public.

30 In these cases, the evil targeted by Parliament is the detrimental health effects caused by tobacco consumption. This is apparent from s. 3, the Act's "purpose" clause, which bears repeating here:

3. 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 the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

(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

(c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

Quite clearly, the common thread running throughout the three enumerated purposes in paras. 3(a) to (c) is a concern for public health and, more specifically, a concern with protecting Canadians from the hazards of tobacco consumption. This is a valid concern. A copious body of evidence was introduced at trial demonstrating convincingly, and this was not disputed by the appellants, that tobacco consumption is widespread in Canadian society and that it poses serious risks to the health of a great number of Canadians. I note in passing the well-established principle that a court is entitled, in a pith and substance analysis, to refer to extrinsic materials, such as related legislation, Parliamentary debates and evidence of the "mischief" at which the legislation is directed; see Morgentaler, supra, at pp. 483-84; Reference Re Anti-Inflation Act, 1976 CanLII 16 (SCC), [1976] 2 S.C.R. 373, at p. 437; Re Upper Churchill Water Rights Reversion Act, 1984 CanLII 17 (SCC), [1984] 1 S.C.R. 297, at pp. 317-19. An appropriate starting point in an examination of these extrinsic materials is the speech given by Jake Epp, the Minister of National Health and Welfare, on November 23, 1987 before second reading of Bill C-51, which was later given Royal Assent to the Act. He stated (House of Commons Debates, vol. IX, at p. 11042):

The federal Government has taken an active role in addressing the issue of cigarette smoking. It is important for people to understand why smoking, which was thought of as merely a personal habit, has become a legitimate public concern. There is overwhelming evidence that tobacco smoke is the largest preventable cause of illness, disability and premature death in Canada. Moreover, it has also become evident that Canadians who are consistently exposed to smoke in the environment may suffer from adverse health effects. Not surprisingly, the public is increasingly asking for an environment that protects non-smokers from tobacco smoke.

As Minister of National Health and Welfare, my primary concern is the health of Canadians. Therefore, I must do all that I can to protect their health by discouraging the advertising and promotion of tobacco, and by increasing public health knowledge of the health hazards of smoking.

This is not a moral crusade. It is not a case of some overzealous individuals attempting to force their life-style on others. It is responsible government action in reaction to overwhelming evidence that tobacco, despite its widespread use by a third of the adult population, is actually responsible for 100 deaths a day in Canada.

31 Apart from shedding light upon the government's intent in introducing this legislation, this speech also gives some indication of the nature and scope of the societal problem posed by tobacco consumption. Statistics show that approximately 6.7 million Canadians, or 28 percent of Canadians over the age of 15, consume tobacco products; see expert report prepared for Health and Welfare Canada by Dr. Roberta G. Ferrence, Trends in Tobacco Consumption in Canada, 1900-1987 (1989). The harm tobacco consumption causes each year to individual Canadians, and to the community as a whole, is tragic. Indeed, it has been estimated that smoking causes the premature death of over 30,000 Canadians annually; see Neil E. Collinshaw, Walter Tostowaryk, Donald T. Wigle, "Mortality Attributable to Tobacco Use in Canada" (1988), 79 Can. J. Pub. Health 166; expert report prepared for Health and Welfare Canada by Dr. Donald T. Wigle, Illness and Death in Canada by Smoking: An Epidemiological Perspective (1989). 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, esophagus, 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.

Similarly, in the report of Dr. Donald T. Wigle, supra, one finds the following conclusion:

Tobacco smoke contains over 4,000 known chemicals many of which are toxic. Over 50 chemicals present in tobacco smoke and tobacco smoke per se, are known to cause cancer in animals, humans or both.

. . .

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. This conclusion is accepted by all leading health professional organizations and by many governments and international agencies including:

--Canadian Medical Association

--Canadian Public Health Association

--Health and Welfare Canada

--Canadian Cancer Society

--Canadian Lung Association

--Canadian Heart Foundation

--Canadian Council on Smoking and Health

--U.S. Surgeon General/U.S. Department of Health and Human Services

--World Health Organization

--International Agency for Research on Cancer.

32 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. "Health", of course, is not an enumerated head under the Constitution Act, 1867. As Estey J. observed in Schneider v. The Queen, 1982 CanLII 26 (SCC), [1982] 2 S.C.R. 112, at p. 142:

. . . "health" is not a matter which is subject to specific constitutional assignment but instead is an amorphous topic which can be addressed by valid federal or provincial legislation, depending in the circumstances of each case on the nature or scope of the health problem in question.

Given the "amorphous" nature of health as a constitutional matter, and the resulting fact that Parliament and the provincial legislatures may both validly legislate in this area, it is important to emphasize once again the plenary nature of the criminal law power. In the Margarine Reference, supra, at pp. 49-50, Rand J. made it clear that the protection of "health" is one of the "ordinary ends" served by the criminal law, and that the criminal law power may validly be used to safeguard the public from any "injurious or undesirable effect". The scope of the federal power to create criminal legislation with respect to health matters is broad, and is circumscribed only by the requirements that the legislation must contain a prohibition accompanied by a penal sanction and must be directed at a legitimate public health evil. If a given piece of federal legislation contains these features, and if that legislation is not

otherwise a "colourable" intrusion upon provincial jurisdiction, then it is valid as criminal law; see Scowby, supra, at pp. 237-38.

33 As I have indicated, it is clear that this legislation is directed at a public health evil and that it contains prohibitions accompanied by penal sanctions. Is it colourable? In my view, it is not. Indeed, it is difficult to conceive what Parliament's purpose could have been in enacting this legislation apart from the reduction of tobacco consumption and the protection of public health. If Parliament's underlying purpose or intent had been to encroach specifically upon the provincial power to regulate advertising, it would surely have enacted legislation applying to advertising in more than one industry. Similarly, if Parliament's intent had been to regulate the tobacco industry as an industry, and not merely to combat the ancillary health effects resulting from tobacco consumption, then it would surely have enacted provisions that relate to such matters as product quality, pricing and labour relations. In this respect, the present cases must be distinguished from cases such as Morgentaler, supra, where there was evidence that Nova Scotia's major purpose in enacting the Medical Services Act, R.S.N.S. 1989, c. 281, which purported to be for the control of private health care facilities, was in fact the elimination of free-standing abortion clinics, or Switzman v. Elbling, 1957 CanLII 2 (SCC), [1957] S.C.R. 285, where it was clear that Quebec's intention in enacting the Act Respecting Communistic Propaganda, R.S.Q. 1941, c. 52, was not to control the use of property but to suppress freedom of speech, a federal matter. In both these cases, it was clear that the provincial legislature was attempting to intrude indirectly upon federal powers when it could not do so directly; see also Re Upper Churchill Water Rights Reversion Act, supra. By contrast, there 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 substance, aimed at regulating the dairy industry.

34 Why, then, has Parliament chosen to prohibit tobacco advertising, and not tobacco consumption itself? In my view, there is a compelling explanation for this choice. It is not that Parliament was attempting to intrude colourably upon provincial jurisdiction but that a prohibition upon the sale or consumption of tobacco is not a practical policy option at this time. It must be kept in mind that the very nature of tobacco consumption makes government action problematic. 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.

35 However, the mere fact that it is not practical or realistic to implement a prohibition on the use or manufacture of tobacco products does not mean that Parliament cannot, or should not, resort to other intermediate policy options. As Sheila Copps, then an opposition MP,

commented during the debate concerning Bill C-51, House of Commons Debates, supra, at p. 11047:

We realize that tobacco has been a part of our culture for many hundreds of years. We realize that the negative health effects of tobacco have become evident only in the last number of years. Yet frankly, from a strict political point of view, I do not think any political party would want to go into the next election trumpeting itself as the party which will introduce prohibition on tobacco. That is a fact.

If we are stopping short of actually banning the sale of this hazardous product, what steps are we prepared to take to cut down on its use over the next number of years? Certainly, a ban on tobacco advertising is one strategy which is supportable in the move to cut down on the consumption of tobacco.

Jake Epp, the Minister of National Health and Welfare, made a similar observation during the debate, at p. 11045:

Prohibiting the sale of a social drug like tobacco is not feasible, but prohibiting the advertising and promotion of this toxic substance is both feasible and desirable. . . .

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.

36 It is apparent from these comments that the social problems created by tobacco consumption are complex and that innovative legislative solutions are required to address them effectively. Faced with the insurmountable difficulties a complete prohibition upon tobacco consumption would create, the federal Parliament has undertaken the task of devising such solutions. Indeed, the Act forms only one part of a comprehensive and multi-faceted federal and provincial program to control and reduce the consumption of tobacco. This program has been in development for over 25 years. As early as 1969, the Standing Committee on Health, Welfare and Social Affairs produced a report entitled Report of the Standing Committee on Health, Welfare and Social Affairs on Tobacco and Cigarette Smoking (1969). In that report, the Committee advocated the progressive elimination of tobacco consumption through the introduction of intermediate measures. The Committee stated, at p. 30:

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. It seems reasonable to introduce whatever steps are feasible to progressively eliminate the promotion of cigarette sales and preparations should be made to assist growers and others affected by reductions in cigarette sales. It is also desirable to increase educational efforts to discourage cigarette smoking and to expand activities to make cigarette smoking less hazardous for those who continue to smoke.

In this regard, the Committee recommended, at p. 32, that "cigarette advertising and all other promotion of cigarette sales be progressively eliminated" and suggested, at pp. 52-53, a complete elimination of all cigarette promotional activities within four years from enactment of any legislation. Since 1969, the Department of National Health and Welfare has introduced a variety of educational programmes and has supported research and health promotion organizations in the battle against tobacco consumption. In 1983, for example, Health and Welfare Canada published Canadian Initiatives in Smoking and Health in which it stated, at pp. 79 and 81:

A major initiative toward concerted action with the ten provinces and the two territories began in 1980, when smoking and health was identified as a high priority area for joint action. In November 1980, a federal-provincial working group was established.

When this task force reported back a year later, both federal and provincial governments were involved in a variety of smoking prevention, cessation, and research projects. The scale of these activities had grown apace and presented many opportunities for mutual assistance and cooperation.

For its part, the federal government was engaged in support, research, and program development and implementation in several critical areas.

. . .

The Health Promotion Directorate, responsible for the overall smoking and health program, was engaged in research and data base development projects; a major national prevention project, "Toward a Generation of Non-Smoking Canadians"; a cessation project with community pharmacists; and a mass media, community-linked cessation campaign, "Time to Quit", aimed at the general public.

37 In 1985, "federal, provincial and territorial ministers of health agreed to work jointly with non-governmental organizations in the development and implementation of a National Program to Reduce Tobacco Use" ("Break free -- For a new generation of non-smokers"); see Health and Welfare Canada, National Program to Reduce Tobacco Use: Orientation Manuals & Historical Perspective (1987). In June 1987, Health and Welfare Canada released a "Directional paper of the national program to reduce tobacco use in Canada", where, at p. 4, seven "strategic directions" were recommended to "achieve a non-smoking program that will assist in producing a generation of non-smokers by the year 2000":

1 Legislation

2 Access to Information

3 Availability of Services/Programs

4 Message Promotion

5 Support for Citizen Action

6 Intersectoral Policy Coordination

7 Research/Knowledge Development

Among the legislative measures recommended in that Paper were the identification of tobacco products as hazardous products and the "prohibition of direct or indirect advertising, promotion and sponsorship of tobacco products or requirement of large health warnings to make promotion less attractive" (p. 20). In 1988, the legislative committee responsible for studying Bill C-51, which was subsequently adopted by Parliament as the Act, held hearings and heard from 104 organizations representing a variety of interests, including medicine, transport, advertising, smokers' rights, non-smokers' rights, and tobacco production.

38 Subsequent to the passage of the Act, Parliament has also introduced an array of legislative measures as part of its larger initiative to curb tobacco consumption. These include a law prohibiting the sale of tobacco to minors (Tobacco Sales to Young Persons Act, S.C. 1993, c. 5.), a law eliminating smoking in federal government work environments (Non-smokers' Health Act, S.C. 1988, c. 21), and the prohibition of the sale of cigarettes in the small package formats often purchased by children (so-called "kiddie packs" of less than 20 cigarettes); see An Act to amend the Excise Act, the Customs Act and the Tobacco Sales to Young Persons Act, S.C. 1994, c. 37. Parliament has also sought to reduce smoking through major tax increases in 1985, 1989 and 1991, although taxes were partially rolled back in 1994 due to a large contraband problem. Also relevant is that nine provinces have introduced legislation respecting the sale of tobacco to young persons and smoking in public places (Tobacco Control Act, 1994, S.O. 1994, c. 10; Tobacco Control Act, S.N. 1993, c. T-4.1; Tobacco Access Act, S.N.S. 1993, c. 14; Tobacco Sales Act, S.N.B. 1993, c. T-6.1; Tobacco Sales to Minors Act, S.P.E.I. 1991, c. 44; The Minors Tobacco Act, R.S.S. 1965, c. 381; An Act to Protect the Health of Non-smokers, S.M. 1990, c. S125; Tobacco Product Act, R.S.B.C. 1979, c. 403, as amended, S.B.C. 1992, c. 81; An Act Respecting the Protection of Non-smokers in Certain Public Places, R.S.Q., c. P-38.01).

39 Quite clearly, then, Parliament has been innovative in seeking to find alternatives to a prohibition on the sale or use of tobacco. In light of the practical difficulties entailed in prohibiting the sale or consumption of tobacco, and the resulting need for innovative legislative solutions, Parliament's decision to criminalize tobacco advertisement and promotion is, in my view, a valid exercise of the criminal law power. 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. This was recognized as early as the Margarine Reference, supra. There, it is true, this Court decided that s. 5(a) of the Dairy Industry Act, R.S.C. 1927, c. 45, which prohibited the importation of margarine into Canada, was ultra vires the federal Parliament, but this decision was based on the holding that margarine was not a threat to the health of Canadians and, accordingly, that s. 5(a) was an invalid intrusion upon the provincial power to regulate local trade. However, in so deciding, the Court also made clear that the federal Parliament could validly legislate under the criminal law power with respect to health and product safety. In his concurring reasons, supra, at pp. 82-83, Locke J. stated:

It cannot, in my opinion, be successfully contended that if the real purpose of the prohibition of the importation, manufacture or sale of these products was the protection of the general health of the public the Dominion might not properly legislate.

40 Later, in R. v. Wetmore, 1983 CanLII 29 (SCC), [1983] 2 S.C.R. 284, this Court addressed the question whether ss. 8 and 9 of the Food and Drugs Act, R.S.C. 1970, c. F-27, which prohibited the sale of drugs prepared under unsanitary conditions and false or misleading advertisement of drugs, were a valid exercise of the federal criminal law power. Those provisions read as follows:

8. No person shall sell any drug that

(a) was manufactured, prepared, preserved, packed or stored under unsanitary conditions; . . .

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.

In upholding the constitutionality of these provisions under s. 91(27), Laskin C.J., writing for the majority, stated, at pp. 288-89:

An examination of the various provisions of the Food and Drugs Act shows that it goes beyond mere prohibition to bring it solely within s. 91(27) but that it also involves a prescription of standards, including labelling and packaging as well as control of manufacture. The ramifications of the legislation, encompassing food, drugs, cosmetics and devices and the emphasis on marketing standards seem to me to subjoin a trade and commerce aspect beyond mere criminal law alone. There appear to be three categories of provisions in the Food and Drugs Act. Those that are in s. 8 are aimed at protecting the physical health and safety of the public. Those that are in s. 9 are aimed at marketing and those dealing with controlled drugs in Part III of the Act are aimed at protecting the moral health of the public. One may properly characterize the first and third categories as falling under the criminal law power but the second category certainly invites the application of the trade and commerce power.

However, it is unnecessary to pursue this issue and it has been well understood over many years that protection of food and other products against adulteration and to enforce standards of purity are properly assigned to the criminal law. [Emphasis added.]

It is clear from Laskin C.J.'s analysis that legislation with respect to food and drugs that is aimed at protecting the "physical health and safety of the public" is a valid exercise of the federal criminal law power. This was also the view of the British Columbia Court of Appeal in Standard Sausage Co. v. Lee, [1933] 4 D.L.R. 501, supplemented by addendum at [1934] 1 D.L.R. 706, affirmed in Wetmore, supra, at pp. 292-93, where it upheld the constitutionality under the criminal law power of a prohibition against the adulteration of foods under ss. 3, 4 and 23 of the Food and Drugs Act, R.S.C. 1927, c. 76. In reaching this decision, Macdonald J.A. stated, at pp. 506-7:

. . . if the Federal Parliament, to protect the public health against actual or threatened danger, places restrictions on, and limits the number of preservatives that may be used, it may do so under s. 91 (27) of the B.N.A. Act. This is not in essence an interference with property and civil rights. That may follow as an incident but the real purpose (not colourable and not merely to aid what in substance is an encroachment) is to prevent actual, or threatened injury or the likelihood of injury of the most serious kind to all inhabitants of the Dominion.

. . .

The primary object of this legislation is the public safety -- protecting it from threatened injury. If that is its main purpose -- and not a mere pretence for the invasion of civil rights -- it is none the less valid. . . .

41 Moreover, in my view, the necessary implication of the reasoning in Wetmore and the Margarine Reference is that the federal criminal law power to legislate with respect to dangerous goods also encompasses the power to legislate with respect to health warnings on dangerous goods. Since health warnings serve to alert Canadians to the potentially harmful consequences of the use of dangerous products, the power to prohibit sales without these warnings is simply a logical extension of the federal power to protect public health by prohibiting the sale of the products themselves. As noted by Lamer C.J. in R. v. Swain, 1991 CanLII 104 (SCC), [1991] 1 S.C.R. 933, at p. 999, "it has long been recognized that there also exists a preventative branch of the criminal law power". This is also the implication of this Court's decision in Labatt Breweries of Canada Ltd. v. Attorney General of Canada, 1979 CanLII 190 (SCC), [1980] 1 S.C.R. 914, where Estey J., although finding a detailed regulatory scheme with respect to production and content standards for malt liquor under the Food and Drugs Act, R.S.C. 1970, c. F-27, to be ultra vires Parliament, observed, at pp. 933-34:

That there is an area of legitimate regulations in respect of trade practices contrary to the interest of the community such as misleading, false or deceptive advertising and misbranding, is not under debate.

42 In this respect, it is significant that Parliament has already enacted numerous prohibitions against the manufacture, sale, advertisement and use of a great variety of products that Parliament deems, from time to time, to be dangerous or harmful. For example, the Hazardous Products Act, R.S.C., 1985, c. H-3, amended R.S.C., 1985, c. 24 (3rd. Supp.), s. 1, which has been found to be a valid exercise of the criminal law power by the Manitoba Court of Appeal in R. v. Cosman's Furniture (1972) Ltd. (1976), 32 C.C.C. (2d) 345, contains the following provisions:

2. In this Act,

"advertise", in relation to a prohibited product or restricted product,
includes any representation by any means whatever for the purpose of promoting directly or indirectly the sale or other disposition of the product;

. . .

"controlled product" means any product, material or substance
specified by the regulations made pursuant to paragraph 15(1)(a) to be included in any of the classes listed in Schedule II;

"hazardous product" means any prohibited product, restricted product
or controlled product;

. . .

"prohibited product" means any product, material or substance included in Part I of Schedule I;

"restricted product" means any product, material or substance included in Part II of Schedule I;

. . .

4. (1) No person shall advertise, sell or import a prohibited product.

(2) No person shall advertise, sell or import a restricted product except as authorized by the regulations made under section 5.

5. The Governor in Council may make regulations

(a) authorizing the advertising, sale or importation of any restricted product and prescribing the circumstances and conditions under which and the persons by whom the restricted product may be advertised, sold or imported;

. . .

15. (1) Subject to section 19, the Governor in Council may make regulations

. . .

(d) prescribing the form and manner in which information shall be disclosed on a label and the manner in which a label shall be applied to a controlled product or container in which a controlled product is packaged;

(e) prescribing hazard symbols and the manner in which hazard symbols shall be displayed on a controlled product or container in which a controlled product is packaged;

43 From the foregoing, it is clear that Parliament could, if it chose, validly prohibit the manufacture and sale of tobacco products under the criminal law power on the ground that these products constitute a danger to public health. Such a prohibition would be directly analogous to the prohibitions on dangerous drugs and unsanitary foods or poisons mentioned earlier, which quite clearly fall within the federal criminal law power. 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.

44 Seen in this light, the only true distinction that can be drawn between the measures adopted under the Act and an outright prohibition on the sale or consumption of tobacco is with respect to the form employed by Parliament to combat the "evil" of tobacco consumption. However, such a distinction, unaccompanied by any evidence of colourability, is not constitutionally significant. Once it is conceded, as I believe it must be, that tobacco

consumption has detrimental health effects and that Parliament's intent in enacting this legislation was to combat these effects, then the wisdom of Parliament's choice of method cannot be determinative with respect to Parliament's power to legislate. The goal in a pith and substance analysis is to determine Parliament's underlying purpose in enacting a particular piece of legislation; it is not to determine whether Parliament has chosen that purpose wisely or whether Parliament would have achieved that purpose more effectively by legislating in other ways; see R. v. Big M Drug Mart Ltd., 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 358 (per Wilson J.) and Morgentaler, supra, at p. 487:

> Only when the effects of the legislation so directly impinge on some other subject matter as to reflect some alternative or ulterior purpose do the effects themselves take on analytic significance.

There is no evidence that the practical effect of the Act, or the lack thereof, reflects any "alternative or ulterior purpose".

The Appellants' Principal Arguments

45 The foregoing considerations, it seems to me, are sufficient to establish that the pith and substance of the Act is criminal law for the purpose of protecting public health and that Parliament accordingly has the legislative authority under s. 91(27) of the Constitution Act, 1867 to enact this legislation. However, I think it right to address directly the three principal arguments raised by the appellants in support of their submission that the Act is not valid as criminal law: first, that the conduct prohibited by the Act does not have an "affinity with a traditional criminal law concern"; second, that Parliament cannot criminalize an activity ancillary to an "evil" if it does not criminalize the "evil" itself; and, third, that the Act is more properly characterized as regulatory, not criminal, legislation. I will now address each of these arguments in turn.

i. Affinity of the Act with a Traditional Criminal Law Concern

46 The appellants' first argument is that the Act is not a valid exercise of the criminal law power because it does not involve conduct having an affinity with a traditional criminal law concern. The appellants observe that both tobacco consumption and tobacco advertising have always been legal in this country and, on this basis, argue that this legislation does not serve a "public purpose commonly recognized as being criminal in nature"; see Swain, supra, at p. 998.

47 In my view, this argument fails because it neglects the well-established principle that the definition of the criminal law is not "frozen as of some particular time"; see Zelensky, supra, at p. 951 (per Laskin C.J.). It has long been recognized that Parliament's power to legislate with respect to the criminal law must, of necessity, include the power to create new crimes. This was made clear as early as 1931, when the Privy Council upheld the validity of the Combines Investigation Act, R.S.C. 1927, c. 26, in PATA, supra. That legislation criminalized a wide array of commercial activities not hitherto perceived to have an affinity with criminal law concerns. However, Lord Atkin explained that this fact alone was not sufficient to preclude the application of the criminal law power. He stated, at pp. 323-24:

> In their Lordships' opinion s. 498 of the Criminal Code and the greater part of the provisions of the Combines Investigation Act fall within the power of the Dominion

Parliament to legislate as to matters falling within the class of subjects, "the criminal law including the procedure in criminal matters" (s. 91, head 27). The substance of the Act is by s. 2 to define, and by s. 32 to make criminal, combines which the legislature in the public interest intends to prohibit. The definition is wide, and may cover activities which have not hitherto been considered to be criminal. But only those combines are affected "which have operated or are likely to operate to the detriment or against the interest of the public, whether consumers, producers, or others"; and if Parliament genuinely determines that commercial activities which can be so described are to be suppressed in the public interest, their Lordships see no reason why Parliament should not make them crimes. "Criminal law" means "the criminal law in its widest sense": Attorney-General for Ontario v. Hamilton Street Ry. Co., [1903] A.C. 524. It certainly is not confined to what was criminal by the law of England or of any Province in 1867. The power must extend to legislation to make new crimes. . . . It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes. . . . [Emphasis added.]

Soon after that decision, in Attorney-General for British Columbia v. Attorney-General for Canada, [1937] A.C. 368, the Privy Council adopted similar reasoning to uphold a prohibition on price discrimination under the criminal law power. Later, this Court, following in large part the reasoning employed by the Privy Council in PATA, supra, sustained a prohibition of resale price maintenance under the criminal law power (Campbell v. The Queen, [1965] S.C.R. vii) and a federal law authorizing the courts to make orders prohibiting the continuation of illegal practices or to dissolve illegal mergers; see Goodyear Tire, supra. In the Goodyear Tire case, at p. 311, Rand J. reaffirmed the reasoning in the PATA case and made the following observation:

It is accepted that head 27 of s. 91 of the Confederation statute is to be interpreted in the widest sense, but that breadth of scope contemplates neither a static catalogue of offences nor order of sanctions. The evolving and transforming types and patterns of social and economic activities are constantly calling for new penal controls and limitations and that new modes of enforcement and punishment adapted to the changing conditions are not to be taken as being equally within the ambit of parliamentary power is, in my opinion, not seriously arguable.

48 In my view, the reasoning in PATA and Goodyear Tire is directly applicable here. The simple fact that neither tobacco consumption nor tobacco advertising have been illegal in the past in no way precludes Parliament from criminalizing either of those activities today. Indeed, given the fact that the first medical reports linking cigarette smoking to disease did not emerge until the 1950s, and that governments have only recently been made aware of the truly devastating health consequences of tobacco consumption, it is clear that Parliament had no reason, before that time, to criminalize this activity. 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. In Canada, the decision to criminalize tobacco advertising was made incrementally, as part of a 25-year public policy process, and only after Parliament had determined that there was compelling evidence concerning the health effects of tobacco consumption and that the variety of non-criminal measures then in place were not sufficiently effective in reducing consumption. It would be artificial, if not absurd, to limit Parliament's

power to legislate in this emerging area of public health concern simply because it did not, and logically could not, legislate at an earlier time.

ii. The Ancillary Nature of the Prohibited Act

49 The appellants' second argument is that the Act lacks the requisite "criminal public purpose" because Parliament cannot criminalize an activity ancillary to an "evil" (the advertisement and promotion of tobacco), when the underlying activity the legislation is designed to combat (the manufacture, sale and consumption of tobacco) is itself legal.

50 In my view, this argument fails because it cannot be reconciled with the recent jurisprudence of this Court. In both Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), 1990 CanLII 105 (SCC), [1990] 1 S.C.R. 1123 (the Prostitution Reference), and Rodriguez v. British Columbia (Attorney General), 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519, this Court upheld the constitutionality of legislation that criminalized an ancillary activity without also criminalizing the underlying activity or "evil". In the Prostitution Reference, for example, this Court upheld the constitutionality of ss. 193 and 195.1(1)(c) of the Criminal Code, R.S.C. 1970, c. C-34, which prohibited the solicitation of clients for prostitution and the operation of bawdy houses, but did not, at the same time, prohibit prostitution itself. In reaching the conclusion that these provisions were constitutionally valid, Dickson C.J. reasoned as follows, at p. 1142:

> While I recognize that Parliament has chosen a circuitous path, I find it difficult to say that Parliament cannot take this route. The issue is not whether the legislative scheme is frustrating or unwise but whether the scheme offends the basic tenets of our legal system. The fact that the sale of sex for money is not a criminal act under Canadian law does not mean that Parliament must refrain from using the criminal law to express society's disapprobation of street solicitation. Unless or until this Court is faced with the direct question of Parliament's competence to criminalize prostitution, it is difficult to say that Parliament cannot criminalize and thereby indirectly control some element of prostitution -- that is, street solicitation. [Emphasis in original.]

In that case, Lamer J. (as he then was) also made the following observation, at p. 1191:

> As I have noted above, prostitution itself is not a crime in Canada. Our legislators have instead, chosen to attack prostitution indirectly. The Criminal Code contains many prohibitions relating to the act of taking money in return for sexual services. Among the offences that relate to prostitution are the bawdy-house provisions, the procuring and pimping provisions, as well as other more general offences that indirectly have an impact on prostitution related activities; for example provisions such as disturbing the peace. In my view, these laws indicate that while on the face of the legislation the act of prostitution is not illegal, our legislators are indeed aiming at eradicating the practice.

A similar line of reasoning was employed by this Court in Rodriguez, supra, where the constitutionality of a prohibition against assisted suicide under s. 214(b) of the Criminal Code, R.S.C., 1985, c. C-46, was upheld despite the fact that suicide itself was, and is at present, not illegal in this country.

51 In my view, the reasoning in the Prostitution Reference and Rodriguez is directly applicable to the present cases. Although the manufacture, sale and consumption of tobacco

has not been criminalized under the Act, it is clear that Parliament's underlying purpose in criminalizing tobacco advertising and promotion is to eradicate the practice. The fact that Parliament has chosen a "circuitous path" to accomplish this goal does not in any way lessen the constitutional validity of the goal. I emphasize once again that it is the pith and substance of the legislation, not Parliament's wisdom in choosing the legislative method, that is the touchstone in a division of powers analysis.

iii. The Creation of Exemptions Under the Criminal Law Power

52 The appellants' third argument is that the Act is fundamentally regulatory, not criminal, in nature. In support of this argument, they observe that the Act contains exemptions for publications and broadcasts originating outside Canada (s. 4(3)), for the Dunhill trademark (s. 8(3)), and for tobacco product substitutes exempted by the Governor in Council on the ground that they pose less risk to the health of users (s. 17(a)). The practical effect of these exemptions, the appellants argue, is that the very same act can be legal when committed by one party in Canada but illegal when committed by another.

53 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. As early as 1959, in Lord's Day Alliance of Canada v. Attorney General of British Columbia, 1959 CanLII 42 (SCC), [1959] S.C.R. 497, this Court held that the Lord's Day Act, R.S.C. 1952, c. 171, which prohibited gambling on Sunday, was a valid exercise of the criminal law power despite the fact that s. 6 of that Act created an exemption for provinces which had passed legislation to the contrary. In upholding the validity of the Act, Rand J. explained, at pp. 509-10, that this exemption did not detract from the criminal nature of the legislation:

> The legislative efficacy in prohibiting the activity named is that solely of Parliament; the effect of the exception is to declare that in the presence of a provincial enactment of the appropriate character the scope of s. 6 automatically ceases to extend to the provincial area covered by that enactment. The latter is a condition of fact in relation to which Parliament itself has provided a limitation for its own legislative act. That Parliament can so limit the operation of its own legislation and that it may do so upon any such event or condition is not open to serious debate.

54 This principle was reiterated in Morgentaler v. The Queen, 1975 CanLII 8 (SCC), [1976] 1 S.C.R. 616, where this Court addressed the constitutionality of s. 251 of the Criminal Code, R.S.C. 1970, c. C-34. Under s. 251(1) of the Code, the intentional procurement of a miscarriage was declared to be unlawful. However, under s. 251(4) and (5), Parliament had also created an exemption for miscarriages carried out by qualified medical practitioners where the life of the woman was in danger. Laskin C.J., dissenting in the result but not on this issue, made it clear that the creation of such an exemption did not detract from the validity of the provision as criminal law, at p. 627:

> I need cite no authority for the proposition that Parliament may determine what is not criminal as well as what is, and may hence introduce dispensations or exemptions in its criminal legislation. It has done this in respect of gaming and betting by prescribing for lawful operation of pari-mutuel systems . . ., by exempting agricultural fairs or exhibitions from certain of the prohibitions against lotteries and games of chance . . . and by expressly permitting lotteries under stated conditions. . . .

55 Most recently, in R. v. Furtney, 1991 CanLII 30 (SCC), [1991] 3 S.C.R. 89, this Court reaffirmed Laskin C.J.'s conclusion. In Furtney, the Court addressed a challenge to s. 207 of the Criminal Code, R.S.C., 1985, c. C-46, which prohibited lotteries but created an exemption for provincial lotteries conducted in accordance with terms and conditions of licences issued by the Lieutenant Governor. The Court held that the Code provision was valid criminal law, even though it delegated regulatory power to the provincial Lieutenant Governors in Council to create exemptions. In reaching the conclusion that s. 207 was a valid exercise of the criminal law power, Stevenson J. stated, at p. 105:

I note that these very provisions were referred to as valid by Laskin C.J. in his dissenting judgment (the majority not addressing the matter) in Morgentaler v. The Queen, 1975 CanLII 8 (SCC), [1976] 1 S.C.R. 616. The Chief Justice (at p. 627) referred to Parliament's authority to introduce dispensations or exemptions from criminal law in determining what is and what is not criminal.

Stevenson J. expressed his agreement with Laskin C.J.'s view and gave the following rationale for his conclusion, at pp. 106-7:

The appellants question whether the criminal law power will sustain the establishment of a regulatory scheme in which an administrative agency or official exercises discretionary authority. In so doing they ask the question "referred to by Professor Hogg" in his Constitutional Law of Canada . . . at p. 415. Hogg suggests that the question is really one of colourability. . . . In my view the decriminalization of lotteries licensed under prescribed conditions is not colourable. It constitutes a definition of the crime, defining the reach of the offence, a constitutionally permissive exercise of the criminal law power, reducing the area subject to criminal law prohibition where certain conditions exist. I cannot characterize it as an invasion of provincial powers any more than the appellants were themselves able to do. [Emphasis added.]

56 The clear implication of this Court's decisions in Lord's Day Alliance, Morgentaler and Furtney, is that the creation of a broad status-based exemption to criminal legislation does not detract from the criminal nature of the legislation. On the contrary, the exemption helps to define the crime by clarifying its contours. In my view, this is precisely what Parliament has done in creating exemptions under the Act. The crime created by Parliament is the advertisement and promotion of tobacco products offered for sale in Canada. Rather than diluting the criminality of these acts, the exemptions to which the appellants refer serve merely to delineate the logical and practical limits to Parliament's exercise of the criminal law power in this context. For example, it is clear that the exemption for foreign media under s. 4(3) was created to avoid both the extraterritorial application of Canadian legislation and the page-by-page censorship of foreign publications at the border. It must also be kept in mind that the exemption thereby created extends only to foreign publications imported into Canada or the retransmission of broadcasts originating outside Canada. Section 4(4) limits this exemption by prohibiting persons in Canada from advertising products for sale in Canada by way of foreign publications of broadcasts. 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. There is an equally logical and practical explanation for the exemptions created under ss. 17(a) and 8(3). With respect to the exemption under s. 17(a), which permits the Governor in Council to make regulations exempting substitute tobacco products from the application of ss. 4 and 7 where they pose less risk to the health of users, it

is clear that Parliament was seeking to encourage the development of alternatives to tobacco. Such an exemption is, of course, completely consistent with the Act's underlying purpose of protecting public health. With respect to the exemption for Dunhill products under s. 8(3), it is clear that Parliament was addressing the legitimate concern that this trademark is unique because it has a marketing existence quite independent from tobacco. Thus, none of these exemptions serves in any way to confuse, or detract from, the category of acts Parliament has validly criminalized under the Act.

57 For all the foregoing reasons, I am of the view that the Act is a valid exercise of the federal criminal law power. Having reached this conclusion, I do not find it necessary to address the Attorney General's further submission that the Act falls under the federal power to legislate for the peace, order and good government of Canada. Accordingly, I now proceed directly to a consideration of the Act's validity under the Charter.

2. The Canadian Charter of Rights and Freedoms

Introductory

58 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; see Ford v. Quebec (Attorney General), 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, at pp. 766-67; Irwin Toy Ltd. v. Quebec (Attorney General), 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at pp. 976-78; Rocket v. Royal College of Dental Surgeons of Ontario, 1990 CanLII 121 (SCC), [1990] 2 S.C.R. 232, at pp. 241-45. On this general issue, then, there only remains the question whether this infringement is justified under s. 1, a matter to which I shall turn in a moment.

59 Before doing so, however, it is appropriate to draw attention to the fact that the Attorney General did not concede that s. 9 of the Act, which requires tobacco manufacturers to place an unattributed health warning on packages of these products, constitutes an infringement of the appellants' right to freedom of expression. In my view, the Attorney General was correct in not making this concession. However, since there is considerable overlap between my discussion of this issue and my discussion of s. 1, I shall for convenience address this distinct issue separately at the conclusion of my general s. 1 analysis.

Section 1 of the Charter

The Legislative Objective and Context

60 Section 1 of the Charter guarantees the rights and freedoms set out therein "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". It is well established that the onus of justifying the limitation of a Charter right rests on the party seeking to have that limitation upheld, in this case the Attorney General. In Oakes, supra, this Court set out two broad criteria as a framework to guide courts in determining whether a limitation is demonstrably justified in a free and democratic society. The first is that the objective the limit is designed to achieve must be of

sufficient importance to warrant overriding the constitutionally protected right or freedom. The second is that the measures chosen to achieve the objective must be proportional to the objective. The proportionality requirement has three aspects: the measures chosen must be rationally connected to the objective; they must impair the guaranteed right or freedom as little as possible; and there must be proportionality between the deleterious effects of the measures and their salutary effects.

61 The appellants have conceded that the objective of protecting Canadians from the health risks associated with tobacco use, and informing them about these risks, is pressing and substantial. Rather than focusing upon the objective, the appellants submit that the measures employed under the Act are not proportional to the objective. In adopting this strategy, they rely heavily upon Chabot J.'s rigorous application of the proportionality requirement at trial. There, Chabot J. equated the burden of proof under the s. 1 analysis to the burden in a civil trial, stating, at p. 515:

> . . . the burden of proof of justification under s. 1 of the Charter rests on the party who seeks to uphold the limitation of a guaranteed right. This burden is the civil burden of proof, the balance of probabilities. However, this balance of probabilities must be applied rigorously and the evidence must be cogent and persuasive. . . .

Applying this standard, Chabot J. decided that the Attorney General had not demonstrated that the prohibition of tobacco advertising and promotion under ss. 4 to 8 of the Act, and the s. 9 requirement that tobacco manufacturers print unattributed health warnings on tobacco products, are proportional to the objective of reducing tobacco consumption. The appellants submit that Chabot J.'s approach was correct and argue that this Court should defer to his factual findings.

62 It is my view that Chabot J.'s approach was not the correct one in the circumstances of these cases, and that he erred in deciding that the civil burden of proof must be "applied rigorously". As I will show, it is also my view that the Attorney General adduced sufficient evidence at trial to justify the limitation on freedom of expression entailed by this legislation, and that the appellants' argument accordingly fails. However, before I proceed to reexamine the evidence, I find it necessary to clarify in more detail the nature of Chabot J.'s error. Throughout his judgment, Chabot J. referred to the requirements set forth in Oakes as a "test". In so doing, he adopted the view, unfortunately still held by some commentators, that the proportionality requirements established in Oakes are synonymous with, or have even superseded, the requirements set forth in s. 1. This view is based upon a misperception of this Court's jurisprudence. The appropriate "test" to be applied in a s. 1 analysis is that found in s. 1 itself, which makes it clear that the court's role in applying that provision is to determine whether an infringement is reasonable and can be demonstrably justified in a "free and democratic society". In Oakes, this Court established a set of principles, or guidelines, intended to serve as a framework for making this determination. However, these guidelines should not be interpreted as a substitute for s. 1 itself. It is implicit in the wording of s. 1 that the courts must, in every application of that provision, strike a delicate balance between individual rights and community needs. Such a balance cannot be achieved in the abstract, with reference solely to a formalistic "test" uniformly applicable in all circumstances. The s. 1 inquiry is an unavoidably normative inquiry, requiring the courts to take into account both the nature of the infringed right and the specific values and principles upon which the state seeks to justify the infringement.

63 This Court has on many occasions affirmed that the Oakes requirements must be applied flexibly, having regard to the specific factual and social context of each case. The word "reasonable" in s. 1 necessarily imports flexibility. In a significant, but often neglected, passage from Oakes itself, Dickson C.J. warned against an overly formalistic approach to s. 1 justification, stating, at p. 139, that "[a]lthough the nature of the proportionality test will vary depending on the circumstances, in each case the courts will be required to balance the interests of society with those of individuals and groups". Shortly thereafter, he reaffirmed this warning in R. v. Edwards Books and Art Ltd., 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713, at pp. 768-69, where, referring to the Court's decision in Oakes, he stated:

The Court stated that 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.

Later, in R. v. Keegstra, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697, at p. 735, Dickson C.J. had occasion to elaborate more fully upon the nature of the Oakes inquiry, stating that it was "dangerously misleading to conceive of s. 1 as a rigid and technical provision". He noted at p. 735 that,

[f]rom a crudely practical standpoint, Charter litigants sometimes may perceive s. 1 in this manner, but in the body of our nation's constitutional law it plays an immeasurably richer role, one of great magnitude and sophistication.

The role played by s. 1, he observed, at pp. 735-36, is to bring "together the fundamental values and aspirations of Canadian society" through the "dual function" of activating Charter rights and permitting such reasonable limits as a free and democratic society may have occasion to place upon them. In applying a "rigid or formalistic approach to the application of s. 1", he cautioned, at p. 737, the courts risk losing sight of the "synergetic relation" that exists between Charter rights and the context in which they are claimed. In United States of America v. Cotroni, 1989 CanLII 106 (SCC), [1989] 1 S.C.R. 1469, at pp. 1489-90, I also stressed the importance of this "synergetic relation", and the resulting need to avoid what I called a "mechanistic approach" in the application of the s. 1 analysis:

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.

For a similar contextual approach to the s. 1 analysis, see R. v. Jones, 1986 CanLII 32 (SCC), [1986] 2 S.C.R. 284, at p. 300; Andrews v. Law Society of British Columbia, 1989 CanLII 2 (SCC), [1989] 1 S.C.R. 143, at pp. 184-85; Black v. Law Society of Alberta, 1989 CanLII 132 (SCC), [1989] 1 S.C.R. 591, at pp. 627-28; Edmonton Journal v. Alberta (Attorney General), 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326, at pp. 1355-56, 1380; McKinney v. University of Guelph, 1990 CanLII 60 (SCC), [1990] 3 S.C.R. 229, at pp. 280-81; and Dickason v. University of Alberta, 1992 CanLII 30 (SCC), [1992] 2 S.C.R. 1103, at p. 1122.

64 It appears, then, that Chabot J.'s principal error in applying a "rigorous" civil standard of proof was his failure to take into account the specific context in which the s. 1 balancing must

take place. This Court has on many occasions stated that the evidentiary requirements under s. 1 will vary substantially depending upon both the nature of the legislation and the nature of the right infringed. In the present cases, both these contextual elements are highly relevant to a proper application of the s. 1 analysis. Accordingly, before proceeding to an analysis of the evidence submitted at trial, I find it necessary to explore in more detail both the nature of the legislation and the nature of the right it infringes.

65 I turn first to the nature of the legislation. In my discussion of the criminal law power, I concluded that the Act is, in pith and substance, criminal law aimed at the protection of public health. In enacting this legislation, Parliament clearly intended to protect public health by reducing the number of inducements for Canadians to consume tobacco, and by educating Canadians about the health risks entailed in its consumption. The appellants concede, and in my view there is no doubt, that this goal is pressing and substantial. At trial and before this Court the Attorney General adduced copious evidence, some of which is set forth in the criminal law power discussion, demonstrating that tobacco consumption is one of the leading causes of illness and death in our society. It is noteworthy that the detrimental effects of tobacco consumption impact not only upon the estimated 30,000 Canadians who die from related diseases each year, but also upon every member of our community. Apart from the apparent danger posed to nonsmoking members of the community by secondary smoke, all Canadians, and not merely tobacco consumers, must shoulder the heightened tax burden arising from the high cost of medical care for tobacco users who become ill.

66 Having conceded that the objective of protecting public health from the detrimental effects of tobacco consumption is pressing and substantial, the appellants submit, and Chabot J. agreed, that the facts respecting the harmful effect of tobacco are irrelevant to the application of the proportionality analysis. Chabot J. stated, at p. 491:

> . . . much of the expert scientific evidence relating to the effects of tobacco on health, however voluminous and instructive, was nevertheless, with respect, irrelevant to the case and, in the humble view of the court, served merely to colour the debate unnecessarily.

With respect, I disagree. In my view, the nature and scope of the health problems raised by tobacco consumption are highly relevant to the s. 1 analysis, both in determining the appropriate standard of justification and in weighing the relevant evidence. In this respect, it is essential to keep in mind that tobacco addiction is a unique, and somewhat perplexing, phenomenon. Despite the growing recognition of the detrimental health effects of tobacco use, close to a third of the population continues to use tobacco products on a regular basis. At this point, there is no definitive scientific explanation for tobacco addiction, nor is there a clearly understood causal connection between advertising, or any other environmental factor, and tobacco consumption. This is not surprising. One cannot understand the causal connection between advertising and consumption, or between tobacco and addiction, without probing deeply into the mysteries of human psychology. Many of the workings of the human mind, and the causes of human behaviour, remain hidden to our understanding and will no doubt remain so for quite some time. In this respect, it is instructive to consider the view of the Surgeon General of the United States, who observed in his 1989 report entitled Reducing the Health Consequences of Smoking -- 25 Years of Progress -- A report of the Surgeon General, at pp. 512-13:

> There is no scientifically rigorous study available to the public that provides a definitive answer to the basic question of whether advertising and promotion increase the level of

tobacco consumption. Given the complexity of the issue, none is likely to be forthcoming in the foreseeable future.

However, despite the lack of definitive scientific explanations of the causes of tobacco addiction, clear evidence does exist of the detrimental social effects of tobacco consumption. As I discussed earlier, overwhelming evidence was introduced at trial that tobacco use is a principal cause of deadly cancers, heart disease and lung disease, and that tobacco is highly addictive. 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 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; see expert report of Dr. Roberta G. Ferrence, supra; "Project Plus/Minus", prepared for Imperial Tobacco Ltd. (1982). Indeed, it has been estimated that, among young Canadians who continue to use tobacco, six times more will die prematurely of disease caused by smoking than from car accidents, suicide, murder and AIDS combined; see expert report of Dr. Donald T. Wigle, supra. 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.

67 It appears, then, that there is a significant gap between our understanding of the health effects of tobacco consumption and of the root causes of tobacco consumption. In my view, this gap raises a fundamental institutional problem that must be taken into account in undertaking the s. 1 balancing. Simply put, a strict application of the proportionality analysis in cases of this nature would place an impossible onus on Parliament by requiring it to produce definitive social scientific evidence respecting the root causes of a pressing area of social concern every time it wishes to address its effects. This could have the effect of virtually paralyzing the operation of government in the socio-economic sphere. As I noted in McKinney, supra, at pp. 304-5, predictions respecting the ramifications of legal rules upon the social and economic order are not matters capable of precise measurement, and are often "the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society, and other components". To require Parliament to wait for definitive social science conclusions every time it wishes to make social policy would impose an unjustifiable limit on legislative power by attributing a degree of scientific accuracy to the art of government which, in my view, is simply not consonant with reality. As LeBel J.A. observed in the Court of Appeal (at pp. 311-12):

Interpreted literally, mechanically, without nuance, the Oakes test and the burden of proof which it imposes on the state would most often negate its ability to legislate.

Moreover, such an approach misconceives the nature of 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.

It is necessary to understand the limits and the nature of policy choices. It is often difficult to forecast the future and to anticipate the beneficial or negative consequences of government

policy. A well-conceived policy may be poorly applied. The necessary institutional resources may fail; unforeseen obstacles may intervene. If one is to apply rigorously the criterion of civil proof on the balance of probabilities it will be impossible to govern. On this basis, it would not be possible to make difficult but sometimes necessary legislative choices. There would be conferred on the courts a supervisory role over a state itself essentially inactive.

68 In several recent cases, this Court has recognized the need to attenuate the Oakes standard of justification when institutional constraints analogous to those in the present cases arise. In Irwin Toy, supra, at pp. 993-94, this Court stated:

> . . . in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck. Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude.
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> . . .
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> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. . . .
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> In other cases, however, rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed. For example, in justifying an infringement of legal rights enshrined in ss. 7 to 14 of the Charter, the state, on behalf of the whole community, typically will assert its responsibility for prosecuting crime whereas the individual will assert the paramountcy of principles of fundamental justice. There might not be any further competing claims among different groups. In such circumstances, and indeed whenever the government's purpose relates to maintaining the authority and impartiality of the judicial system, the courts can assess with some certainty whether the "least drastic means" for achieving the purpose have been chosen, especially given their accumulated experience in dealing with such questions. . . .
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> In drawing a distinction between legislation aimed at "mediating between different groups", where a lower standard of s. 1 justification may be appropriate, and legislation where the state acts as the "singular antagonist of the individual", where a higher standard of justification is necessary, the Court in Irwin Toy was drawing upon the more fundamental institutional distinction between the legislative and judicial functions that lies at the very heart of our political and constitutional system. Courts are specialists in the protection of liberty and the interpretation of legislation and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny. However, courts are not specialists in the realm of policy-making, nor should they be. This is a role properly assigned to the elected representatives of the people, who have at their disposal the necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups. In according a greater degree of deference to social legislation than to legislation in the criminal justice context, this Court

has recognized these important institutional differences between legislatures and the judiciary.

69 In my view, the considerations addressed by this Court in Irwin Toy and McKinney, supra, are applicable to the present cases. In enacting this legislation, Parliament was facing a difficult policy dilemma. On the one hand, Parliament is aware of the detrimental health effects of tobacco use, and has a legitimate interest in protecting Canadians from, and in informing them about, the dangers of tobacco use. Health underlies many of our most cherished rights and values, and the protection of public health is one of the fundamental responsibilities of Parliament. On the other hand, however, it is clear that a prohibition on the manufacture, sale or use of tobacco products is unrealistic. Nearly seven million Canadians use tobacco products, which are highly addictive. Undoubtedly, a prohibition of this nature would lead to an increase in illegal activity, smuggling and, quite possibly, civil disobedience. Well aware of these difficulties, Parliament chose a less drastic, and more incremental, response to the tobacco health problem. In prohibiting the advertising and promotion of tobacco products, as opposed to their manufacture or sale, Parliament has sought to achieve a compromise among the competing interests of smokers, non-smokers and manufacturers, with an eye to protecting vulnerable groups in society. Given the fact that advertising, by its very nature, is intended to influence consumers and create demand, this was a reasonable policy decision. Moreover, as I discussed above, the Act is the product of a legislative process dating back to 1969, when the first report recommending a full prohibition on tobacco advertising was published; see Report of the Standing Committee on Health, Welfare and Social Affairs on Tobacco and Cigarette Smoking, supra. In drafting this legislation, Parliament took into account the views of Canadians from many different sectors of society, representing many different interests. Indeed, the legislative committee responsible for drafting Bill C-51, which was subsequently adopted by Parliament as the Act, heard from 104 organizations during hearings in 1988 representing a variety of interests, including medicine, transport, advertising, smokers' rights, non-smokers' rights, and tobacco production.

70 Seen in this way, it is clear that the Act is the very type of legislation to which this Court has generally accorded a high degree of deference. In drafting this legislation, which is directed toward a laudable social goal and is designed to protect vulnerable groups, Parliament was required to compile and assess complex social science evidence and to mediate between competing social interests. Decisions such as these are properly assigned to our elected representatives, who have at their disposal the necessary resources to undertake them, and who are ultimately accountable to the electorate. As I observed in McKinney, supra, at p. 305:

> They are decisions of a kind where those engaged in the political and legislative activities of Canadian democracy have evident advantages over members of the judicial branch, as Irwin Toy, supra, at pp. 993-94, has reminded us. This does not absolve the judiciary of its constitutional obligation to scrutinize legislative action to ensure reasonable compliance with constitutional standards, but it does import greater circumspection than in areas such as the criminal justice system where the courts' knowledge and understanding affords it a much higher degree of certainty.

71 Turning now to the nature of the right infringed under the Act, it is once again necessary to place the appellants' claim in context. This Court has recognized, in a line of freedom of expression cases dating back to Edmonton Journal, supra, that, depending on its

nature, expression will be entitled to varying levels of constitutional protection. In Edmonton Journal, Wilson J. outlined the need for a contextual, as opposed to an abstract, approach to freedom of expression cases. She stated, at pp. 1355-56:

. . . a particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1.

In Rocket, supra, at pp. 246-47, McLachlin J. affirmed Wilson J.'s contextual approach:

While the Canadian approach does not apply special tests to restrictions on commercial expression, our method of analysis does permit a sensitive, case-oriented approach to the determination of their constitutionality. Placing the conflicting values in their factual and social context when performing the s. 1 analysis permits the courts to have regard to special features of the expression in question. As Wilson J. notes in Edmonton Journal v. Alberta (Attorney General), 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326, not all expression is equally worthy of protection. Nor are all infringements of free expression equally serious.

72 The source of the "sensitive, case-oriented approach" referred to by McLachlin J. in Rocket is this Court's more fundamental recognition that the right to freedom of expression is not absolute and cannot, in all cases, override other rights and values. 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. When state action places such values in jeopardy, this Court has been careful to subject it to a searching degree of scrutiny. However, when the form of expression placed in jeopardy falls farther from the "centre core of the spirit", this Court has ruled restrictions on such expression less difficult to justify. As Dickson C.J. observed in Keegstra, supra, at p. 760:

In my opinion, however, the s. 1 analysis of a limit upon s. 2(b) cannot ignore the nature of the expressive activity which the state seeks to restrict. While we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s. 2(b).

73 In cases where the expression in question is farther from the "core" of freedom of expression values, this Court has applied a lower standard of justification. For example, in Keegstra, where a majority of this Court ruled that a prohibition on hate speech under s.

319(2) of the Criminal Code, R.S.C., 1985, c. C-46, was a justifiable limitation on freedom of expression, Dickson C.J. found that this limited infringement was justified because hate propaganda was a form of expression that was only remotely related to "core" free expression values. He noted, at p. 766:

> . . . I am of the opinion that hate propaganda contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged. While I cannot conclude that hate propaganda deserves only marginal protection under the s. 1 analysis, I can take cognizance of the fact that limitations upon hate propaganda are directed at a special category of expression which strays some distance from the spirit of s. 2(b), and hence conclude that "restrictions on expression of this kind might be easier to justify than other infringements of s. 2(b)". . . .

74 This Court adopted a similar approach in R. v. Butler, 1992 CanLII 124 (SCC), [1992] 1 S.C.R. 452, where it found a prohibition upon publications whose dominant characteristic was the "undue exploitation of sex" under s. 163(8) of the Criminal Code, R.S.C., 1985, c. C-46, to be a justifiable infringement upon freedom of expression. In so ruling, this Court found it significant, at p. 500, that "the kind of expression which is sought to be advanced does not stand on an equal footing with other kinds of expression which directly engage the `core' of the freedom of expression values". The expression targeted by s. 163(8) was pornography, which is designed to promote sex for profit, and thus fell far from the "core" of freedom of expression values discussed by Dickson C.J. in Keegstra. The Court has adopted a similar approach with respect to prostitution, which was also accorded a lower level of protection in the Prostitution Reference, supra. In that case, Dickson C.J. stated, at p. 1136:

> When a Charter freedom has been infringed by state action that takes the form of criminalization, the Crown bears the heavy burden of justifying that infringement. Yet, the expressive activity, as with any infringed Charter right, should also be analyzed in the particular context of the case. Here, the activity to which the impugned legislation is directed is expression with an economic purpose. It can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression.

75 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. The sale of tobacco products in Canada generates enormous profits for the three companies who dominate the market (RJR, Imperial and Rothmans, Benson & Hedges Inc.). In 1992, for example, earnings from Imperial's operations alone reached $432,000,000 (Earnings from operations (Tobacco) in Note 31 (Segmented financial information) in "Notes to the Consolidated Financial Statements", at p. 48 of Imasco Annual Report 1992 and "Six Year Review" in Imasco Annual Report 1992, at pp. 52-53).

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 favorable 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. Taking into account both the nature of the right and the nature of the legislation in issue, I am satisfied that LeBel J.A. was correct in deciding that the Attorney General need only demonstrate that Parliament had a rational basis for introducing the measures contained in this Act. With these observations firmly in mind, I now proceed to an application of the proportionality test.

Proportionality

78 As I mentioned at the outset of my Charter discussion, the appellants rely heavily on Chabot J.'s factual findings in support of their argument that the measures employed under the Act are not proportional to the objective of reducing tobacco consumption. Briefly, Chabot J.'s principal factual findings at trial were as follows. With respect to a rational connection between the measures adopted under the Act and the objective of reducing tobacco consumption, he found, at p. 512, that "the connection which the state seeks to establish between health protection and tobacco advertising is tenuous and speculative" and,

at p. 513, that "[t]he virtual totality of the scientific documents in the state's possession at the time the Act was passed do not demonstrate that a ban on advertising would affect consumption". With respect to whether the measures impair rights as little as possible, Chabot J. concluded, at pp. 515-16, as follows:

To the extent that the purpose of the law is to eliminate any message constituting an inducement addressed to any Canadian citizen, the only means to achieve this is necessarily a total ban on such messages. To the extent that the purpose is to protect young people from inducements to smoke, a total ban on all advertising of any kind, directed at any audience, goes far beyond that purpose. Likewise, if the objective is to enhance Canadians' awareness of the harmful effects of cigarettes, the total ban on advertising is out of all proportion to the objective, while the imposition of unattributed messages goes beyond what was necessary to achieve the objective, all the more so as there is no impact study on the effectiveness of these unattributed messages as compared to messages attributed to the Department of National Health and Welfare.

Finally, with respect to the proportionality between effects and objectives, Chabot J. found, at p. 517, that the Act constituted "social engineering" which was an "extremely serious impairment of the principles inherent in a free and democratic society which is disproportionate to the objective of the [Act]".

79 In my view, Chabot J. erred in finding that there was insufficient evidence to satisfy the proportionality requirement, and the majority of the Court of Appeal was correct to interfere with his findings and reevaluate the evidence. It is, of course, well-established that an appellate court may only interfere with the factual findings of a trial judge where the trial judge made a manifest error and where that error influenced the trial judge's final conclusion or overall appreciation of the evidence; see Dorval v. Bouvier, 1968 CanLII 3 (CSC), [1968] S.C.R. 288; Lapointe v. Hôpital Le Gardeur, 1992 CanLII 119 (SCC), [1992] 1 S.C.R. 351, at p. 358. However, it is important to emphasize that the trial findings on which the appellants rely are not the type of factual findings that fall within the general rule of appellate "non-interference" discussed in these cases. The appellate "non-interference" rule reflects the traditional recognition that a trial judge is better placed than an appellate court to assess and weigh so-called "adjudicative" facts or, in John Hagan's terms, "who did what, where, when, how and with what motive or intent"; see John Hagan, "Can Social Science Save Us? The Problems and Prospects of Social Science Evidence in Constitutional Litigation" in Robert J. Sharpe, ed., Charter Litigation (1987), at p. 215. Fauteux J. explained the rationale for the non-interference rule in Dorval, supra, at p. 293, as follows:

[TRANSLATION] Because of the privileged position of the judge who presides at the trial, who sees and hears the parties and witnesses and who assesses their evidence, it is an established principle that his opinion is to be treated with the utmost deference by the appellate court, whose duty it is not to retry the case nor to interfere by substituting its own assessment of the evidence for that of the trial judge, except in the case of a clear error on the face of the reasons of the judgment appealed from.

However, the privileged position of the trial judge does not extend to the assessment of "social" or "legislative" facts that arise in the law-making process and require the legislature or a court to assess complex social science evidence and to draw general conclusions concerning the effect of legal rules on human behaviour. As Ann Woolhandler observes in "Rethinking the Judicial Reception of Legislative Facts" (1988), 41 Vand. L. Rev. 111, at pp.

114 and 123, conclusions of this nature are most accurately characterized as social or legislative facts because they involve predictions about the social effects of legal rules, which are invariably subject to dispute:

In contrast to adjudicative facts, legislative facts do not presume a pre-existing legal norm because by definition such facts are used to create law. A paradigmatic legislative fact is one that shows the general effect a legal rule will have, and is presented to encourage the decisionmaker to make a particular legal rule. There is less a sense that legislative facts are true or knowable because such facts are predictions, and, moreover, typically predictions about the relative importance of one factor in causing a complex phenomenon.

. . .

Legislative facts are predictions about the effects of legal rules and are by their nature disputable. The creation and reception of legislative facts will be governed by pre-existing presumptions about desirable effects and their causes. Legislative facts, moreover, cannot neutrally provide answers to legal questions because by definition legislative facts are used to make the rules that pose the questions. Although legislative facts provide information for the pragmatic balancing of desirable effects, these "facts" cannot tell us what effects are desirable, or how to weigh them.

80 In my view, the causal connection between tobacco advertising and consumption, or the lack thereof, is a paradigm example of a legislative or social fact. While a trial judge is in a privileged position with respect to adjudicative fact-finding, this is not the case with legislative or social fact-finding, where appellate courts and legislatures are as well placed as trial judges to make findings. Certainly, one does not have to be a trial judge to come to general conclusions about the effect of legal rules on human behaviour. Moreover, given the intimate relation that exists between legislative facts and the creation of legal rules, there is also a strong policy reason for suspending the non-interference rule with respect to legislative or social facts. As Brian G. Morgan notes in "Proof of Facts in Charter Litigation" in Charter Litigation, supra, at p. 186, the rigid application of that rule would deny appellate courts their proper role in developing legal principles of general application:

. . . where legislative and constitutional facts are considered and determined at the trial court level, it is important that reference to the traditional division between fact and law in fixing the scope of appellate review not lead the appellate court to treat as conclusive the findings of the trial judge. First, the traditional and accepted expertise of the trial court in determining adjudicative facts does not extend to the less familiar and inherently less certain task of determining legislative or constitutional facts. Secondly, unless the appellate courts retain sufficient discretion to review findings of the trial court on matters of legislative or constitutional facts, the appellate courts will be denied their proper role of developing principles in this area of the law to be applied in the multitude of individual cases which come before trial judges.

The United States Court of Appeals for the Fifth Circuit, in Dunagin v. City of Oxford, Mississippi, 718 F.2d 738 (1983) (en banc), cert. denied, 467 U.S. 1259 (1984), a case involving the constitutionality of a ban on liquor advertising, made the same point, at pp. 748-49, n. 8, in slightly more colourful terms:

There are limits to which important constitutional questions should hinge on the views of social scientists who testify as experts at trial. Suppose one trial judge sitting in one state believes a sociologist who has found no link between alcohol abuse and advertising, while another trial judge sitting in another state believes a psychiatrist who has reached the opposite conclusion. A similar situation actually occurred here. Should identical conduct be constitutionally protected in one jurisdiction and illegal in another? Should the fundamental principles of equal protection delivered in Brown v. Board of Education of Topeka, 347 U.S. 483, 74 S.Ct. 686, 96 L.Ed. 873 (1954), be questioned if the sociological studies regarding racial segregation set out in the opinion's footnote 11 are shown to be methodologically flawed? Should the constitutionality of the property tax as a means of financing public education, resolved in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), depend on the prevailing views of educators and sociologists as to the existence of a cost-quality relationship in education? Does capital punishment become cruel and unusual when the latest regression models demonstrate a lack of deterrence? The social sciences play an important role in many fields, including the law, but other unscientific values, interests and beliefs are transcendent.

Perhaps for these reasons, the Supreme Court's recent commercial speech and other relevant speech cases indicate that appellate courts have considerable leeway in deciding whether restrictions on speech are justified. In none of them did the Court rely heavily on fact findings of the trial court.

81 For the foregoing reasons, I conclude that an appellate court may interfere with a finding of a trial judge respecting a legislative or social fact in issue in a determination of constitutionality whenever it finds that the trial judge erred in the consideration or appreciation of the matter. As applied to these cases, I find that, apart from his specific findings with respect to the credibility of witnesses and the probative value of reports, Chabot J.'s factual findings concerning the connection between tobacco advertising and consumption are entitled to minimal deference by this Court. With this in mind, I proceed to the proportionality analysis.

Rational Connection

82 The first step in the proportionality analysis requires the government to demonstrate that the legislative means chosen under the Act are rationally connected to the objective of protecting public health by reducing tobacco consumption. As I explained in discussing the contextual nature of the s. 1 analysis, 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; see McKinney, supra, at pp. 282-85; Irwin Toy, supra, at p. 994; Butler, supra, at p. 502. Wilson J. summarized the standard of justification under the rational connection analysis in Lavigne v. Ontario Public Service Employees Union, 1991 CanLII 68 (SCC), [1991] 2 S.C.R. 211, at p. 291, as follows:

The Oakes inquiry into "rational connection" between objectives and means to attain them requires nothing more than a showing that the legitimate and important goals of the legislature are logically furthered by the means government has chosen to adopt.

83 I note at the outset that there is, without question, a rational connection between a prohibition on the distribution of free samples of tobacco products under s. 7 and the

protection of public health. Given the close correlation between price and demand in a free market economy, and the addictive nature of tobacco, it is self-evident that the availability of free tobacco will tend to increase consumption of that product. The appellants, however, base their argument principally upon the claim that there is no rational connection between the prohibition on advertising and promotion of tobacco products under ss. 4, 5, 6, and 8 and the objective of reducing tobacco consumption. In my view, the appellants' argument fails. 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.

84 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. A proportionate piece of a smaller pie is still a smaller piece. As the United States Court of Appeals for the Fifth Circuit, observed in Dunagin, supra, at p. 749:

> It is beyond our ability to understand why huge sums of money would be devoted to the promotion of sales of liquor without expected results, or continue without realized results. No doubt competitors want to retain and expand their share of the market, but what businessperson stops short with competitive comparisons? It is total sales, profits, that pay the advertiser; and dollars go into advertising only if they produce sales.

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.

85 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:

While a direct link between obscenity and harm to society may be difficult, if not impossible, to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs.

In reaching this conclusion, Sopinka J., at p. 502, relied heavily on the following statement by the Meese Commission in its report (Attorney General's Commission on Pornography, Final Report (1986), vol. 1, at p. 326), regarding the effects of pornography:

Although we rely for this conclusion on significant scientific empirical evidence, we feel it worthwhile to note the underlying logic of the conclusion. The evidence says simply that the images that people are exposed to bear a causal relationship to their behavior. This is hardly surprising. What would be surprising would be to find otherwise, and we have not so found. We have not, of course, found that the images people are exposed to are a greater cause of sexual violence than all or even many other possible causes the investigation of which has been beyond our mandate. Nevertheless, it would be strange indeed if graphic representations of a form of behaviour, especially in a form that almost exclusively portrays such behavior as desirable, did not have at least some effect on patterns of behavior.

86 In my view, a similar type of analysis is applicable here. In his 1989 report, Reducing the Health Consequences of Smoking -- 25 Years of Progress -- A report of the Surgeon General, supra, at p. 512, the Surgeon General of the United States conceded that there have been no "scientifically rigorous" studies that prove a causal link between advertising and promotion of tobacco products and consumption, and observed that "[g]iven the complexity of the issue, none is likely to be forthcoming in the foreseeable future" (pp. 512-13). However, he went on to make the following observation, at p. 513:

The most comprehensive review of both the direct and indirect mechanisms concluded that the collective empirical, experiential, and logical evidence makes it more likely than not that advertising and promotional activities do stimulate cigarette consumption. However, that analysis also concluded that the extent of influence of advertising and promotion on the level of consumption is unknown and possibly unknowable (Warner 1986b). This influence relative to other influences on tobacco use, such as peer pressure and role models, is uncertain. Although its effects are not wholly predictable, regulation of advertising and promotion is likely to be a prominent arena for tobacco policy debate in the 1990s. In part this reflects the high visibility of advertising and promotion; in part it reflects the perception that these activities constitute an influence on tobacco consumption that is amenable to government action. [Emphasis added.]

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.

87 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. In this respect, I find it significant that Chabot J. made specific reference in his reasons to only two pieces of evidence. First, he considered at length a 1989 report of the New Zealand Toxic Substances Board entitled Health or Tobacco: An End to Tobacco Advertising and Promotion (1989), where the Board had reviewed the effect of advertising restrictions in 33 countries, and had concluded that there was a correlation between the degree of restrictions imposed in each of these countries

and the relative decline in tobacco consumption. Chabot J. found the Report to be of no probative value on the following grounds, at p. 513:

With respect to the T.S.B. report, the court can only note that it contains serious methodological errors and a lack of scientific rigour which renders it for all intents and purposes devoid of any probative value. It is a report with an obvious point of view and its conclusions reflect that point of view. In this regard, the court agrees entirely with the analysis of the report made by RJR's counsel in his argument . . . and concludes that the T.S.B. report, as an extrinsic document, is of no probative value.

Chabot J. also rejected the evidence of Dr. Jeffrey Harris, a Crown witness, who had affirmed the accuracy of the Report's conclusions in his own report and in testimony at trial. In Chabot J.'s view, at p. 514, "the input data used by Dr. Harris were unreliable and . . . his methodology led necessarily to the desired result". As a result, Chabot J. held, at p. 514, that Dr. Harris's testimony and his report (also adduced as evidence) had "no probative value". However, apart from these two findings, Chabot J. made no other findings respecting the credibility of expert witnesses who testified at trial or the accuracy of the many reports adduced by the Attorney General. As such, it is apparent that Chabot J. disregarded a substantial amount of evidence that might otherwise have substantiated the government's belief in a rational connection. This evidence can be conveniently subdivided into three categories: internal tobacco marketing documents, expert reports, and international materials. I will review each of these in turn.

88 Perhaps the most compelling evidence concerning the connection between advertising and consumption can be found in the internal marketing documents prepared by the tobacco manufacturers themselves. Although the appellants steadfastly argue that their marketing efforts are directed solely at maintaining and expanding brand loyalty among adult smokers, these documents show otherwise. 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; they 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.

89 Many of these conclusions are borne out by a simple reading of an extensive marketing research study commissioned by Imperial Tobacco Ltd. in 1986, entitled Project Viking. In the introduction to the study, the authors refer to the fact that increasing numbers of smokers are quitting as a "problem". They also observe that, in light of these declining numbers, the tobacco companies must direct their marketing efforts towards "expanding the market, or at very least forestalling its decline". They then indicate the objectives of Project Viking, vol. I: A Behavioural Model of Smoking, which they describe as follows:

Background and Objectives

It is no exaggeration to suggest that the tobacco industry is under siege. The smoker base is declining, primarily as a function of successful quitting. And the characteristics of new smokers are changing such that the future starting level may be in question. There is a constant stream of anti-smoking publicity in the media. Not all of this is soundly supported,

but it gains legitimacy in the fact that there have been no responses from the tobacco industry in counterpoint.

Within this somewhat alarming view of the mid-term future, Imperial Tobacco is embarking on a proactive program. Perhaps for the first time, the mandate under consideration is not limited simply to maximizing the ITL franchises; it is now to include as well serious attempts to combat those forces aligned in an attempt to significantly diminish the size of the tobacco market in Canada.

This is the underpinning of Project Viking. There are, in fact, two components to the program, each having its own purposes, but also overlapping with the other in informational areas:

Project Pearl is directed at expanding the market, or at very least forestalling its decline. It examines attitudes and issues with the potential to be addressed via advocacy. It also looks at the needs of smokers specifically.

Project Day represents the tactical end by which ITL may achieve competitive gains within the market of today and in the future. Unmet needs of smokers that could be satisfied by new or modified products, products which could delay the quitting process, are pursued. [Emphasis added.]

As LeBel J.A. noted in the Court of Appeal, at p. 324, this document "indicates the objectives of the program: if not to expand the market, then at least to retain it, and also to preserve the company's market share". In Project Viking, vol. III: Product Issues, the need for an "advocacy thrust" is emphasized:

Unsuccessful Quitters are moved disproportionately by physical reactions and social forces to stop smoking (but health remains the most often specified reason). Short-term Quitters very often point to expense, which often will be a transient reason itself, not compelling enough to keep them out of the tobacco market. Health is also of major concern to them.

Strategically, it would seem that reducing quitting is the most viable approach. But it would also seem that a product solution may not be sufficient on its own. An advocacy thrust may be necessary; disaffected smokers do need some reassurance that they are not social pariahs. [Emphasis added.]

The report then goes on to refer to persons contemplating quitting, and states that "[t]he extent to which they can be reassured and satisfied has a major impact on the extension of a viable tobacco industry". Smokers are segmented into five groups (Project Viking, vol. II: An Attitudinal Model of Smoking, at pp. 31-35): "Smokers With a Disease Concern", "Leave Me Alone", "Pressured", "Seriously Like to Quit", "Not Enjoying Smoking/Smoking Less Now". With respect to the "Pressured" group, the report states, at p. 33, that they "deserve particular attention" as they are "most vulnerable to quitting and . . . in urgent need of reassurance and stroking".

90 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.

91 Apart from the emphasis on "reassuring" smokers, 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. For example, the 1978 "Business Plans of RJR-MacDonald Inc. and International Plans" identified as "Prime Prospects" new smokers entering the cigarette market who want the positive, masculine image of this product. Later, in a 1987 RJR-MacDonald Inc. document entitled "Export "A" Brand Long-Term Strategy", reference is made under the title "Whose Behaviour Are We Trying to Affect?" to "18-34; Emphasis 18-24 (new users)" and to "High school -- some post secondary education". It continues:

Psychographics:

Young adults who are currently in the process of establishing their independence and their position in society. They look for peer group acceptance in their brand selection, and may often be moderate or conservative in their choices. As young adults they look for symbols that will help to reinforce their independence and individuality.

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).

One of the other stated objectives, "Overall Marketing Objectives" in "Overall Market Conditions 1988", was as follows:

RE-ESTABLISH clear distinct images for ITL brands with particular emphasis on relevance to younger smokers. Shift resources substantially in favour of avenues that allow for the expression and reinforcement of these image characteristics. [Emphasis in original.]

That these companies are aware of the need to attract the young is also reinforced by the fact that, in 1977, Imperial commissioned a marketing research study entitled "Project 16" which focused on the smoking patterns of adolescents under the age of 17, and traced the manner in which adolescents are influenced by peer pressure and other societal factors to start smoking. A similar focus can be discerned from Imperial's "Fiscal '80 Media Plans" which outlines the target groups in 1980 for each of the company's brands. A weight was assigned to each target group to determine, by means of a computer, which magazines would be selected to place advertisements. This method maximized the advertising exposure for the desired target groups. 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.

92 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. This conclusion is given added force by a number of reports introduced at trial, to which Chabot J. made no reference, which attest to the causal connection between tobacco advertising and consumption. In a report entitled "The Functions and Management of Cigarette Advertising", Dr. Richard W. Pollay, an historian and marketing professor at the University of British Columbia, concluded that advertising and promotional activities serve to change people's perceptions, creating more positive attitudes and serve as a reinforcement for smokers and a temptation and teacher of tolerance for non-smokers. He stated:

The research and strategic thinking identifies the psychological needs, wants and interests of target, and leads to the creation of a strategic "positioning" of the products to offer them in ways that promise satisfactions relevant to the targets' personalities and preferences. For starter brands, images are created to communicate independence, freedom and peer acceptance to young targets. The advertising images portray smokers as attractive and autonomous, accepted and admired, athletic and at home in nature. For `lighter' brands directed at smokers with health concerns, ads image a sense of well being, harmony with nature, and a consumer's self image as intelligent.

. . .

Advertising and promotional activities and communication serve to induce many changes in the public's perceptions, creating: more positive attitudes toward smoking and smokers; less consciousness and fear of any unhealthy consequences of smoking; a stronger self-image among smokers; more confidence of some social support for smoking; and perceptions that smoking is a cultural commonplace to be taken for granted. To smokers it is a reminder and reinforcer, while to non-smokers it is a temptation and a teacher of tolerance. [Emphasis added.]

Similarly, in a report entitled "Effects of Cigarette Advertising on Consumer Behavior", Dr. Joel B. Cohen, a professor of marketing at the University of Florida, observed, at p. 44, that tobacco advertising targets both non-smokers and the young, who are particularly vulnerable to advertising techniques:

There is ample documentation as to the effectiveness of cigarette advertising. Cigarette advertising achieves essential communications goals that are almost universally agreed to increase the likelihood of purchase, and it does so for deliberately targeted groups including adolescent males and females and health concerned smokers. Both of these groups are particularly vulnerable to the types of appeals used.

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. ["Only" emphasized in original; other emphasis added.]

In yet another report, entitled "A Report on the Special Vulnerabilities of Children and Adolescents", supra, at pp. 17-18, Dr. Michael J. Chandler, a psychologist, concluded that the

cognitive and socio-emotional immaturities of both children and adolescents makes them vulnerable to the influence of cigarette advertising because they lack the ability to evaluate the messages being presented:

> . . . it is an essential truism that tobacco companies cannot maintain their current levels of profit unless they can successfully entice new generations to smoke cigarettes. Whether by accident or design, existing cigarette advertising practices appear strategically tailored to accomplish this questionable initiation process.
>
> It is too early, of course, to calculate the real effects of eliminating the public advertising and promotion of tobacco products. Such a ban can be expected, however, to reduce the numbers of young persons who eventually do choose to smoke.

93 The views expressed in these reports are not, of course, definitive or conclusive. Indeed, there is currently a lively debate in the social sciences respecting the connection between advertising and consumption, a debate that has been carried on for years and will no doubt persist well into the near future. However, these reports attest, at the very least, to the existence of what LeBel J.A. called a "body of opinion" supporting the existence of a causal connection between advertising and consumption. Included in this "body of opinion" are a significant number of international health organizations, which support prohibitions on advertising as a viable strategy in the battle against tobacco consumption. In May 1986, for example, the Thirty-ninth World Health Assembly adopted Resolution WHA39.14, urging member states to fight tobacco consumption through a variety of measures including "the progressive elimination of those socio-economic, behavioural, and other incentives which maintain and promote the use of tobacco" and "prominent health warnings which might include the statement that tobacco is addictive, on cigarette packets and containers of all types of tobacco products". In May 1990, the Forty-third World Health Assembly adopted Resolution WHA43.16 urging "progressive restrictions and concerted action to eliminate eventually all direct and indirect advertising, promotion and sponsorship concerning tobacco" and stating that it was "encouraged" by "recent information demonstrating the effectiveness of tobacco control strategies, and in particular . . . comprehensive bans and other legislative restrictive measures to control effectively direct and indirect advertising, promotion and sponsorship concerning tobacco". In July 1993, the Economic and Social Council of the United Nations adopted Resolution 1993/79 expressly urging governments to maximize their efforts to reduce tobacco consumption through the adoption of multifaceted approaches. In 1989, the European Council adopted Directive 89/552/EEC banning broadcast advertising of tobacco products. One month later, the Council adopted Directive 89/622/EEC (amended 92/41/EEC) requiring health warnings on tobacco products packaging. From 1990 to 1992, the European Commission submitted proposals for Council Directives which would ban all direct and indirect advertising of tobacco products (90çC 116ç05; 91/C 167/03; 92/C 129/04). It is also significant that by 1990, over 40 countries had adopted measures to restrict or prohibit tobacco advertising. Tobacco advertising is fully prohibited by law in Australia, New Zealand, France, Portugal, Norway, Finland, Iceland, Singapore and Thailand, among other countries. Among those countries that have instituted substantial restrictions on tobacco advertising are Austria, Belgium, West Germany, Ireland, the Netherlands, Spain and Sweden.

94 On the basis of the foregoing evidence, I conclude that there is a rational connection between the prohibition on advertising and consumption under ss. 4, 5, 6 and 8 of the Act and the reduction of tobacco consumption. I am comforted in this conclusion by the fact that a

number of American courts have also recognized the existence of a rational connection between advertising and consumption. I note that in Central Hudson Gas & Electric Corp. v. Public Service Commission of New York, 447 U.S. 557 (1980), at p. 569, the Supreme Court of the United States found an "immediate connection between advertising and demand for electricity" and therefore a direct link between the ban on advertising and the state interest in conservation. The court continued:

Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order.

Similarly, in Oklahoma Telecasters Ass'n v. Crisp, 699 F.2d 490 (1983), at p. 501, (rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984)), the Court of Appeals for the Tenth Circuit observed that "the record does not demonstrate that Oklahoma's laws have any direct effect on the consumption of alcohol" but concluded:

. . . prohibitions against the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages and their attendant problems. The entire economy of the industries that bring these challenges is based on the belief that advertising increases sales. We therefore do not believe that it is constitutionally unreasonable for the State of Oklahoma to believe that advertising will not only increase sales of particular brands of alcoholic beverages but also of alcoholic beverages generally. The choice of the Oklahoma legislature, and its people with respect to the constitutional provision, is not unreasonable, and does directly advance Oklahoma's interest in reducing the sale, consumption, and abuse of alcoholic beverages.

This "common-sense" approach to causation was also applied in Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) (finding that a ban on highway billboards was reasonably related to highway safety despite a lack of evidence in the record demonstrating this connection); Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) (finding that a ban on casino advertising was rationally connected to the government objective to reduce demand for gambling despite a lack of evidence on the record); and Dunagin, supra, (finding that a ban on alcohol advertising directly advanced the legislative goal of reducing alcohol consumption despite a lack of evidence).

Minimal Impairment

95 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). According to the appellants, there is no need to prohibit brand preference or informational advertising because both are targeted solely at smokers, and serve a beneficial function by promoting consumer choice.

96 In my view, the appellants' argument fails for the same reasons that I have discussed throughout my s. 1 analysis. The relevance of context cannot be understated in s. 1 balancing, particularly at the minimal impairment stage. This Court has on many occasions stated that the degree of required fit between means and ends will vary depending upon both the nature of the right and the nature of the legislation. As Dickson C.J. stated in the Prostitution Reference, supra, at p. 1136:

> When a Charter freedom has been infringed by state action that takes the form of criminalization, the Crown bears the heavy burden of justifying that infringement. Yet, the expressive activity, as with any infringed Charter right, should also be analyzed in the particular context of the case.

Thus, the minimal impairment requirement does not impose an obligation on the government to employ the least intrusive measures available. Rather, it only requires it to demonstrate that the measures employed were the least intrusive, in light of both the legislative objective and the infringed right. As Sopinka J. noted in Butler, supra, at pp. 504-5:

> In determining whether less intrusive legislation may be imagined, this Court stressed in the Prostitution Reference, supra, that it is not necessary that the legislative scheme be the "perfect" scheme, but that it be appropriately tailored in the context of the infringed right. . . . [Emphasis in original.]

97 Taking into account the legislative context, it is my view that the measures adopted under the Act satisfy the Oakes minimal impairment requirement. It must be kept in mind that the infringed right at issue in these cases is the right of tobacco corporations to advertise the only legal product sold in Canada which, when used precisely as directed, harms and often kills those who use it. As I discussed above, I have no doubt that Parliament could validly have employed the criminal law power to prohibit the manufacture and sale of tobacco products, and that such a prohibition would have been fully justifiable under the Charter. There is no right to sell harmful products in Canada, nor should there be. Thus, in choosing to prohibit solely the advertisement of tobacco products, it is clear that Parliament in fact adopted a relatively unintrusive legislative approach to the control of tobacco products. Indeed, the scope of conduct prohibited under the Act is narrow. Under the Act, tobacco companies continue to enjoy the right to manufacture and sell their products, to engage in public or private debate concerning the health effects of their products, and to publish consumer information on their product packages pertaining to the content of the products. The prohibition under this Act serves only to prevent these companies from employing sophisticated marketing and social psychology techniques to induce consumers to purchase their products. This type of expression, which is directed solely toward the pursuit of profit, is neither political nor artistic in nature, and therefore falls very far from the "core" of freedom of expression values discussed by this Court in Keegstra, supra.

98 Furthermore, there was ample evidence introduced by the Attorney General at trial demonstrating that a full prohibition of tobacco advertising is justified and necessary. In enacting this legislation, Parliament came to the conclusion that all advertising stimulates consumption and that a full prohibition upon advertising is therefore necessary to reduce consumption effectively. Parliament reached this conclusion only after many years of careful study and reflection. As I mentioned in my discussion of the criminal law power, the

measures adopted under the Act were the product of an intensive 20-year public policy process, which involved extensive consultation with an array of national and international health groups and numerous studies, and educational and legislative programs. Over the course of this 20-year period, the government adopted an incremental legislative approach by experimenting with a variety of less intrusive measures before determining that a full prohibition on advertising was necessary. As early as 1969, the Standing Committee of Health and Welfare and Social Affairs recommended a full prohibition in its Report of the Standing Committee on Health, Welfare and Social Affairs on Tobacco and Cigarette Smoking, supra, at pp. 52-53, suggesting the following legislative solution:

One year from enactment of legislation

--Complete elimination of free distribution of cigarettes and of all coupon and premium schemes.

--No cigarette advertising on television or radio before 10 p.m.

--Warning on all cigarette packages and cartons, in all cigarette advertising and promotional materials and on all cigarette vending machines.

--Government-authorized statements of tar and nicotine levels on all cigarette packages and cartons, in all cigarette advertising and promotional materials and on all cigarette vending machines.

Two years from enactment of legislation

--Prohibition of cigarette advertising on television and radio.

--Prohibition of other than simple brand name advertisements in remaining media.

Four years from enactment of legislation

--Complete elimination of all cigarette promotional activities.

Although the Standing Committee recommended a full prohibition upon tobacco advertising within four years, Parliament refrained from instituting a full prohibition and chose instead to implement a variety of lesser legislative measures. Since 1969, for example, the Department of National Health and Welfare has introduced and supported many educational programmes and many research and health promotion organizations; see, e.g., Health and Welfare Canada, National Program to Reduce Tobacco Use: Orientation Manuals & Historical Perspective, supra; Health and Welfare Canada, "Directional paper of the national program to reduce tobacco use in Canada", supra. Parliament has also sought to combat tobacco use by preventing the sale of tobacco to young persons (Tobacco Sales to Young Persons Act), restricting smoking in workplaces and public places (Non-smokers' Health Act) and by increases in tobacco taxes. However, despite all these efforts, it was apparent by 1989 that close to one-third of Canadians continued to smoke and that the decline in the numbers of smokers in Canada since 1969 had been neither rapid nor substantial. Faced with this distressing statistic, and with the seeming ineffectiveness of the measures adopted up to that time, Parliament had more than reasonable grounds for concluding that the more

robust measures adopted under the Act were both necessary and a logical next step in the policy process.

99 The reasonableness of Parliament's decision to prohibit tobacco advertising has been amply borne out by parallel developments in the international community before and after the passage of the Act. It is of great significance, in my view, that over 20 democratic nations have, in recent years, adopted complete prohibitions on tobacco advertising similar to those adopted under the Act, including Australia, New Zealand, Norway, Finland and France. It is also of significance that the constitutionality of full advertising prohibitions have been upheld by the French Conseil constitutionnel (Décision No. 90-283 DC (Jan. 8, 1991) declaring the Loi no 91-32 relative à la lutte contre le tabagisme et l'alcoolisme, which prohibits all direct and indirect tobacco advertising), to be constitutionally valid and by American courts (upholding full prohibitions on alcohol advertising and gambling advertising as a reasonable limitation on freedom of expression under the United States Constitution in Central Hudson, supra; Oklahoma Telecasters, supra; Metromedia, supra; Posadas, supra; Dunagin, supra). The decisions of the American courts, which have traditionally been jealous guardians of the right to freedom of expression, are particularly instructive in this context because they demonstrate that the adoption of a full prohibition upon tobacco advertising is perceived as neither novel nor radical in other democratic nations. Given the background of the legislation and the overwhelming acceptance by other democratic countries of this type of prohibition as a reasonable means for combatting the serious evils flowing from the sale and distribution of tobacco products, it seems difficult to argue that the impugned legislation is not a reasonable limit on the appellants' rights demonstrably justified in a free and democratic society under s. 1 of the Charter.

100 Thus, in my view, there was more than enough evidence adduced at trial to justify the government's decision to institute a full prohibition on advertising and promotion. In their argument before this Court, the appellants made much of the fact that, during the course of the trial, a certificate was issued by the Clerk of the Privy Council pursuant to s. 39 of the Canada Evidence Act, R.S.C. 1985, c. C-5, stating that certain documents requested by the appellants, many of which were departmental memoranda sent to the Minister of Health and Welfare, constituted "confidence[s] of the Queen's Privy Council for Canada". As a result of the objection taken by the Privy Council, all references in the requested documents to an unidentified and alternative policy option were blacked out. The appellants speculate that this mysterious policy option was less intrusive than the measures adopted under the Act and argue on this basis that a full prohibition on advertising was not the only option available to the government.

101 Although I believe the appellants have raised a legitimate concern with respect to the effect of governmental claims to confidentiality in constitutional cases, I cannot accept that the resort by the government to Cabinet confidentiality in this context is fatal to this legislation. The appellants are right to argue that claims to confidentiality have the effect of withholding from the factual record evidence relating to available governmental options and thus compromise the ability of courts in some cases to evaluate the constitutionality of governmental actions properly. For the same reasons, the appellants are also right to argue that the exercise of this power will at times undermine attempts by the government to justify legislation under the Charter. The onus is on the government to establish minimal impairment and in this context it is difficult to understand why it could not make the information available. It is right to say, however, that during the course of the litigation the appellants studiously refrained from taking the steps that could have been taken to obtain the

information available. It is significant that the appellants failed to challenge the Certificate issued by the Clerk of the Privy Council, as they were clearly entitled to do under s. 39 of the Canada Evidence Act; see, e.g., Canadian Assn. of Regulated Importers v. Canada (Attorney General), reflex, [1992] 2 F.C. 130 (C.A.); Canada (Attorney General) v. Central Cartage Co., reflex, [1990] 2 F.C. 641 (C.A.). That said, the responsibility was ultimately that of the government, and in acting as it did, it put this Court in the difficult position of having to speculate about the contents of documents.

102 The real answer to the appellants' contention, however, is that such speculation cannot, in my view, displace the overwhelming evidence that the prohibition was a reasonable one. Even if it were true that the government was considering a less intrusive option prior to adopting the Act, I do not accept that this in any way undermines the Attorney General's argument that the Act minimally impairs the appellants' rights in light of the legislative objective. A partial prohibition on advertising would only have been required under the Charter if it had been clear to Parliament that some forms of advertising do not stimulate consumption, and that a full prohibition would accordingly be overbroad. However, the Attorney General demonstrated convincingly at trial that Parliament had a reasonable basis for believing, after 20 years of research and legislative experimentation, that all tobacco advertising stimulates tobacco consumption. As I explained in my rational connection discussion above, it is reasonable to conclude that all advertising stimulates consumption because all advertising serves to place tobacco products in the public eye and to give these products legitimacy, particularly among the young. Indeed, the appellants' emphasis in their own marketing documents on the colour and "look" of tobacco packages demonstrates that the companies themselves recognize that even purely "informational" advertising has an important effect on consumption.

103 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" in Proceedings of the 5th World Conference on Smoking and Health (1983).

104 Thus, it appears that Parliament had compelling reasons for rejecting a partial prohibition on advertising and instituting a full prohibition. In this light, it would be highly artificial for this Court to decide, on a purely abstract basis, that a partial prohibition on advertising would be as effective as a full prohibition. In my view, this is precisely the type of "line drawing" that this Court has identified as being within the institutional competence of legislatures and not courts. The Court made this clear in Irwin Toy, supra, where it stated, at p. 990, that the government should be given "a margin of appreciation to form legitimate objectives based on somewhat inconclusive social science evidence". In Irwin Toy, this Court found ss. 248 and 249 of the Consumer Protection Act, R.S.Q., c. P-40.1, which prohibited

the use of commercial advertising directed at persons under 13 years of age, to be an infringement of s. 2(b) of the Charter, but upheld the legislation under s. 1. The Court there observed that there was conflicting social science evidence on whether the appropriate legislative line was to be drawn at 13 years of age or a younger age and, at p. 990, observed:

If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another.

The Court decided that the government's choice of 13 years as the cutoff line was reasonable in light of the available evidence, and thus concluded, at p. 999:

While evidence exists that other less intrusive options reflecting more modest objectives were available to the government, there is evidence establishing the necessity of a ban to meet the objectives the government had reasonably set. This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups.

105 This Court adopted a similar deferential approach in Edwards Books and Art Ltd., supra, in deciding that ss. 2(1) and 3(4) of the Retail Business Holidays Act, R.S.O. 1980, c. 453, which prohibited retail stores with more than seven employees or more than 5,000 square feet of retail space from carrying on business on Sundays, was a justifiable infringement of freedom of religion under s. 1 of the Charter because it provided a mandatory day of rest for workers who would otherwise be vulnerable to pressure from employers. In that case, the appellants, a group of large retail store owners, argued that the legislature had failed to adduce sufficient evidence demonstrating that the legislation minimally impaired their rights under the Charter. In particular, they argued that the legislature had not adduced evidence justifying the exemption for owners of retail stores with less than eight employees. In addressing their claim, Dickson C.J. first observed, at p. 769, that the state had adduced only one Ontario Law Reform Commission report (the 1970 Report on Sunday Observance Legislation) in support of the distinctions drawn in the legislation, and that the Report was over 15 years old. Despite the lack of evidence on the record, however, Dickson C.J. concluded that the legislature was entitled to a degree of deference in fashioning the legislative means to accomplish that goal. While observing that other legislative options were conceivable, including a Sabbatarian exemption, which would have impaired the rights of retail owners to a lesser degree, Dickson C.J. stated, at p. 782, that "[t]he courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line". He concluded, at p. 783:

I should emphasize that it is not the role of this Court to devise legislation that is constitutionally valid, or to pass on the validity of schemes which are not directly before it, or to consider what legislation might be the most desirable.

I concurred with Dickson C.J. in that case, and stressed, at p. 795, that it was necessary, in that context, to give the legislature "room to manoeuvre" in fashioning legislation designed to mediate between different social interests and to protect vulnerable groups. My approach was later accepted by this Court in R. v. Schwartz, 1988 CanLII 11 (SCC), [1988] 2 S.C.R. 443, at pp. 488-89; Andrews, supra, at pp. 184-86, 197-98; and Cotroni, supra, at p. 1495.

106 In my view, the Court's approach in Edwards Books and Irwin Toy is directly applicable to the present cases. Tobacco consumption is a multifaceted problem which requires intervention from a variety of public authorities on a number of different fronts. Parliament has adopted an incremental solution by prohibiting advertising without, at the same time, prohibiting the consumption, manufacture or sale of tobacco. In so doing, it has chosen a policy approach that strives to balance the rights of tobacco smokers and manufacturers against the legitimate public health concerns arising from tobacco addiction including, most importantly, the special vulnerabilities of young Canadians. In my view, it is not the role of this Court to substitute its opinion for that of Parliament concerning the ideal legislative solution to this complex and wide-ranging social problem. As McLachlin J. observed in Committee for the Commonwealth of Canada v. Canada, 1991 CanLII 119 (SCC), [1991] 1 S.C.R. 139, at p. 248:

> . . . some deference must be paid to the legislators and the difficulties inherent in the process of drafting rules of general application. A limit prescribed by law should not be struck out merely because the Court can conceive of an alternative which seems to it to be less restrictive.

107 In reaching the conclusion that the Act satisfies the Oakes minimal impairment criterion, I am well aware of the statements of this Court in Ford, supra, and Rocket, supra, to the effect that a complete prohibition on a type of expression will be more difficult to justify than a partial prohibition. In my view, however, these decisions are fully distinguishable from the present cases. Once again, I emphasize the importance of context in the minimal impairment analysis. In Rocket, this Court found that a prohibition on advertising by dentists under s. 37(39) and (40) of Regulation 447 of the Health Disciplines Act, R.R.O. 1980, was an infringement of s. 2(b) and could not be justified under s. 1. McLachlin J. began her s. 1 analysis by observing, at p. 247, that restrictions on freedom of expression may be easier to justify in some contexts than others:

> The expression limited by this regulation is that of dentists who wish to impart information to patients or potential patients. Their motive for doing so is, in most cases, primarily economic. Conversely, their loss, if prevented from doing so, is merely loss of profit, and not loss of opportunity to participate in the political process or the `marketplace of ideas', or to realize one's spiritual or artistic self-fulfilment: see Irwin Toy, supra, at p. 976. This suggests that restrictions on expression of this kind might be easier to justify than other infringements of s. 2(b).

Despite her recognition of the importance of context, however, McLachlin J. struck down the legislative provision on the ground that it did not minimally impair the right to freedom of expression. She noted that the expression in question, the advertisement of dentistry services, had social value in the measure that it gave consumers access to information that would enable them to make informed health care choices. To the extent that the impugned legislative provision denied consumers such information, she observed, such an infringement could not lightly be dismissed. She stated, at p. 250:

> It is easy to think of examples of expression not falling within the exceptions which should clearly be permitted. For example, it is conceded that dentists should be able to advertise their hours of operation and the languages they speak, information which would be useful to the public and present no serious danger of misleading the public or undercutting professionalism.

She then stated, at p. 251:

. . . the value served by free expression in the case of professional advertising is not purely the enhancement of the advertiser's opportunity to profit, as was the case in Irwin Toy. The public has an interest in obtaining information as to dentists' office hours, the languages they speak, and other objective facts relevant to their practice -- information which s. 37(39) prohibits dentists from conveying by advertising.

108 It appears, then, that the contextual basis for McLachlin J.'s decision was that s. 37(39) of the Regulation 447 of the Health Disciplines Act operated to prohibit many aspects of advertising by dentists that serve to promote public health (i.e., advertising of hours of operation, language spoken and other aspects relating to their practice). No such argument can be made with respect to tobacco advertising. This type of expression serves to promote an activity which, in contrast to dentistry, is inherently dangerous and has no redeeming public health value. Indeed, the contrast with Rocket could not be more striking. Making an informed choice about dentists serves to promote health by allowing patients to seek out the best care; making an informed choice about tobacco simply permits consumers to choose between equally dangerous products. Although the appellants argue that informational advertising allows smokers to make informed health choices by giving them information about tobacco product content, and thereby permitting them to choose tobacco products with lower tar levels, 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; see e.g. the Report of the Surgeon General of the United States, Reducing the Health Consequences of Smoking -- 25 Years of Progress -- A report of the Surgeon General, supra, at pp. 315-16, 664-65; Dr. Richard W. Pollay, "The Functions and Management of Cigarette Advertising", supra, at pp. 28-29; Report of Dr. Joel B. Cohen, "Effects of Cigarette Advertising on Consumer Behavior", supra, at pp. 41-42. Moreover, the appellants' argument, weak on an evidentiary level, is further undermined by the fact that consumers can still, under the Act, obtain product and health information at the point of sale and on the tobacco package (ss. 5 and 9).

109 A similar contrast can be drawn between the present cases and Ford, supra. In Ford, supra, this Court found that ss. 58, 69 and 205 to 208 of the Quebec Charter of the French Language, R.S.Q., c. C-11, which required public signs, posters and commercial advertising to be in the French language only, infringed s. 2(b) of the Canadian Charter of Rights and Freedoms and could not be justified under s. 1. The Court based this decision principally on the observation, at p. 780, that the prohibition was overbroad and thus did not satisfy the minimal impairment requirement:

. . . whereas requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French "visage linguistique" in Quebec and therefore justified under the Quebec Charter and the Canadian Charter, requiring the exclusive use of French has not been so justified.

110 However, there are two crucial distinctions between Ford and the present cases. First, although the infringed expression in Ford fell, as in the present cases, within the category of commercial expression, the nature and scope of the expression in these cases are quite different. While, in these cases, the Act prohibits only tobacco advertising, in Ford, the law

prohibited all non-French commercial expression in Quebec. It was therefore much broader in scope than the prohibition under the Act. Moreover, while the Act prohibits expression that has little or no connection with "core" freedom of expression values, the commercial expression in Ford was intimately connected with such core values. The impugned law in that case represented an attempt by the government of Quebec to eradicate the commercial use in public of any language other than French. Given the close historical relationship between language, culture and politics in Canada, it cannot seriously be denied that the implications of this prohibition extended well beyond the commercial sphere and impacted upon the dignity of all minority language groups in Quebec. Indeed, the Court in Ford, supra, at p. 748, recognized this fact when it quoted with approval from Reference re Manitoba Language Rights, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721, at p. 744, where the Court stated:

> The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity.... Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.

In my view, it cannot seriously be argued that the "dignity" of the three large corporations whose rights are infringed in these cases is in any way comparable to that of minority group members dealt with in Ford.

111 A second important distinction between Ford and the present cases relates to the quantity of evidence adduced to satisfy the minimal impairment requirement. In Ford, no evidence was adduced to show why the exclusion of all languages other than French was necessary to achieve the objective of protecting the French language and reflecting the reality of Quebec society. Indeed, the Court in that case stated, at p. 779:

> The section 1 and s. 9.1 [of the Quebec Charter] materials do not, however, demonstrate that the requirement of the use of French only is either necessary for the achievement of the legislative objective or proportionate to it. That specific question is simply not addressed by the materials. Indeed, in his factum and oral argument the Attorney General of Quebec did not attempt to justify the requirement of the exclusive use of French. He concentrated on the reasons for the adoption of the Charter of the French Language and the earlier language legislation, which, as was noted above, were conceded by the respondents.

By contrast, as I discussed above, the Attorney General in the present cases submitted a substantial body of documentation, drawn from national and international sources, to demonstrate that a full prohibition is rational and can be justified in a free and democratic society. I conclude that sufficient evidence was adduced to justify the Attorney General's submission.

Proportionality Between the Effects of the Legislation and the Objective

112 The third part of the proportionality analysis requires a proportionality between the deleterious and the salutary effects of the measures; see Dagenais v. Canadian Broadcasting Corp., 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835, at pp. 890-91. For the reasons I have given with respect to both the nature of the legislation and the nature of the right infringed in these cases, it is my view that the deleterious effects of this limitation, a restriction on the rights of tobacco companies to advertise products for profit that are inherently dangerous and harmful, do not outweigh the legislative objective of reducing the number of direct inducements for Canadians to consume these products.

The Unattributed Health Message Requirement

113 I now turn to the appellants' final argument, namely, that s. 9 of the Act constitutes an unjustifiable infringement of their freedom of expression by compelling them to place on tobacco packages an unattributed health message. I agree, to use Wilson J.'s phrase, that if the effect of this provision is "to put a particular message into the mouth of the plaintiff, as is metaphorically alleged to be the case here", the section runs afoul of s. 2(b) of the Charter; see Lavigne, supra, at p. 267. This view had earlier been adopted by the whole Court in Slaight Communications Inc. v. Davidson, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038. There a labour arbitrator had, inter alia, required an employer, by way of remedy for unjustly dismissing an employee, to provide a letter of recommendation consisting only of uncontested facts found by the arbitrator. Speaking for the Court on this point, Lamer J. (as he then was) stated, at p. 1080: "freedom of expression necessarily entails the right to say nothing or the right not to say certain things".

114 I add that I do not accept the distinction sought to be drawn by the Attorney General that here the statement is one of fact, not of opinion. Whatever merit this distinction may have in other contexts, the line here is too fine to warrant the distinction. I thus have no difficulty holding that the health message is expression as that term is understood in s. 2(b).

115 I have, however, more fundamental problems accepting the appellants' contention that their s. 2(b) right was infringed by the requirement that a prescribed health warning must be placed on tobacco packages. It must be remembered that this statement is unattributed and I have some difficulty in seeing, in the context in which it was made, that it can in any real sense be considered to be attributed to the appellants. Simply because tobacco manufacturers are required to place unattributed warnings on their products does not mean that they must endorse these messages, or that they are perceived by consumers to endorse them. In a modern state, labelling of products, and especially products for human consumption, are subject to state regulation as a matter of course. It is common knowledge amongst the public at large that such statements emanate from the government, not the tobacco manufacturers. In this respect, there is an important distinction between messages directly attributed to tobacco manufacturers, which would create the impression that the message emanates from the appellants and would violate their right to silence, and the unattributed messages at issue in these cases, which emanate from the government and create no such impression. 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. This is not really an expression of opinion by the person in control of the facility or the construction site. It is rather a requirement imposed by the government as a condition of participating in a regulated activity.

116 Even if I were of the view that there was an infringement, I am firmly convinced that it is fully justifiable under s. 1. Once again, I stress the importance of context in the s. 1 analysis. The appellants are large corporations selling a product for profit which, on the basis of overwhelming evidence, is dangerous, yet maintain the right to engage in "counterspeech"

against warnings which do nothing more than bring the dangerous nature of these products to the attention of consumers. Given that the objective of the unattributed health message requirement is simply to increase the likelihood that every literate consumer of tobacco products will be made aware of the risks entailed by the use of that product, and that these warnings have no political, social or religious content, it is clear that we are a long way in this context from cases where the state seeks to coerce a lone individual to make political, social or religious statements without a right to respond. I believe a lower level of constitutional scrutiny is justified in this context. These cases seem to me to be a far more compelling situation than Slaight, supra, where a majority of the Court held the infringement there was justified under s. 1. The Charter was essentially enacted to protect individuals, not corporations. It may, at times it is true, be necessary to protect the rights of corporations so as to protect the rights of the individual. But I do not think this is such a case, and I again draw inspiration from the statement of Dickson C.J. in Edwards Books, supra, at p. 779, that the courts must ensure that the Charter not become simply an instrument "of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons".

117 In my view, the requirement that health warnings must be unattributed is also proportional to the objective of informing consumers about the risks of tobacco use. Unattributed warnings are rationally connected to this objective because they increase the visual impact of the warning. It is not difficult to see that bold unattributed messages on a tobacco package (such as, for example, "SMOKING CAN KILL YOU") are more striking to the eye than messages cluttered by subtitles and attributions. Moreover, the attribution of the warnings also tends to dilute the factual impact of the messages. As Brossard J.A. observed, at p. 383:

> . . . it seems to me to leap to the eye that an "attributed" message can quickly become meaningless, or even ridiculous.

As an example, the message that is supposed to come from the "Surgeon-General" remains a message imputed to an abstract entity or a political body which obviously cannot by simple decree make something hazardous that otherwise would not be. This, it seems to me, rationally weakens and attenuates the message.

These considerations are particularly relevant with respect to Parliament's goal of protecting children, who constitute the largest single group of new smokers every year in this country. In a report submitted at trial ("A Report on the Special Vulnerabilities of Children and Adolescents", supra) Dr. Michael J. Chandler observed that adolescents are apt to disregard or disobey messages from perceived authority figures. On this basis, he concluded that attributed warnings would be less effective in deterring adolescents from smoking. He stated, at p. 19:

> Adolescents are predisposed, as a function of their persistent cognitive immaturity, to view public disagreements between "experts" as evidence that everything is simply a matter of subjective opinion, and a licence to "do their own thing". A warning by Health and Welfare Canada on a publicly advertised product would provide them with just the sort of evidence they feel is required to justify doing whatever impulsive thing occurs to them at the moment.

118 Thus, although the unattributed health warning requirement precludes large corporations from disseminating on their product packages the view that tobacco products are not harmful, I believe that any concern arising from this technical infringement of their rights is easily outweighed by the pressing health concerns raised by tobacco consumption. As noted by Dickson C.J. in Edwards Books, supra, at p. 759, the Charter does not require the elimination of "minuscule" constitutional burdens, and legislative action that increases the costs of exercising a right need not be prohibited if the burden is "trivial" or "insubstantial". In these cases, the only cost associated with the unattributed warning requirement is a potential reduction in profits. In my view, this is a cost that manufacturers of dangerous products can reasonably be expected to bear, given the health benefits of effective health warnings. As I stated in Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission), 1990 CanLII 135 (SCC), [1990] 1 S.C.R. 425, at pp. 506-7:

> In a modern industrial society, it is generally accepted that many activities in which individuals can engage must nevertheless to a greater or lesser extent be regulated by the state to ensure that the individual's pursuit of his or her self-interest is compatible with the community's interest in the realization of collective goals and aspirations.

Disposition

119 I would dismiss the appeals with costs. I would answer the constitutional questions as follows:

1 Is the Tobacco Products Control Act, S.C. 1988, c. 20, wholly or in part within the legislative competence of the Parliament of Canada as being a law enacted for the peace, order and good government of Canada pursuant to s. 91 of the Constitution Act, 1867; as being enacted pursuant to the criminal law power in s. 91(27) thereof; or otherwise?

Answer:The Tobacco Products Control Act is wholly within the legislative competence of Parliament and is validly enacted pursuant to the criminal law power in s. 91(27) of the Constitution Act, 1867. It is not necessary to consider whether Parliament may validly enact the Act under its power to make laws for the peace, order and good government of Canada.

2 Is the Tobacco Products Control Act wholly or in part inconsistent with the right of freedom of expression as set out in s. 2(b) of the Canadian Charter of Rights and Freedoms and, if so, does it constitute a reasonable limit on that right as can be demonstrably justified pursuant to s. 1 thereof?

Answer: The Act is inconsistent with s. 2(b) of the Charter, but constitutes a reasonable limit to that right under s. 1 thereof.

The following are the reasons delivered by

120 SOPINKA J. -- I agree with Justice Major that the impugned legislation is not validly enacted under the criminal law power. In other respects, I concur in the reasons of Justice McLachlin.

The following are the reasons delivered by

121 CORY J. (dissenting) 2 -- Although I am in accordance with the reasons and conclusions of Justice La Forest, I am also in agreement with the reasons of Justice Iacobucci in so far as they declare a suspension of invalidity for one year.

The following is the judgment delivered by

122MCLACHLIN J. -- At issue in these cases is the validity of the Tobacco Products Control Act, S.C. 1988, c. 20 (the "Act"), a law which imposes a ban on all advertising of tobacco products in the Canadian media and requires tobacco manufacturers to print unattributed health warnings on the packages of all tobacco products.

123 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.

124 The second issue is whether the ban and warning requirements violate the Canadian Charter of Rights and Freedoms. The Charter guarantees free expression, a guarantee which has been held to extend to commercial speech such as advertising: see Ford v. Quebec (Attorney General), 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712; Irwin Toy Ltd. v. Quebec (Attorney General), 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927; and Rocket v. Royal College of Dental Surgeons of Ontario, 1990 CanLII 121 (SCC), [1990] 2 S.C.R. 232. I agree with La Forest J. that the prohibition on advertising and promotion of tobacco products constitutes a violation of the right to free expression as the Attorney General conceded. 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": Slaight Communications Inc. v. Davidson, 1989 CanLII 92 (SCC), [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.

125 The only remaining question is whether these infringements of the right of free expression are saved under s. 1 of the Charter, as being reasonable and "demonstrably justified in a free and democratic society". Acknowledging that the evidence of justification is problematic, La Forest J. concludes that it nevertheless suffices to justify the infringement of the right of free expression, given the importance of the legislative goal, the context of the law and the need to defer to Parliament on such an important and difficult issue. With respect, I cannot agree. I share the trial judge's view that the Attorney General of Canada has failed to establish justification under s. 1 for ss. 4, 8 and 9 of the Act, those provisions which impose a total advertising ban, prohibit trade mark usage on articles other than tobacco products and mandate the use of unattributed health warnings on tobacco packaging. Because I do not believe that these provisions are severable from ss. 5 and 6 of the Act, which pertain to restrictions on promotion and trade mark usage, I find ss. 4, 5, 6, 8, and 9 to be invalid, leaving the remainder of the Act intact except in so far as it relates to the invalid provisions.

1 The Test for Justification under Section 1 of the Charter

(a) The Wording of Section 1

126 I agree with La Forest J. that "[t]he appropriate `test' . . . in a s. 1 analysis is that found in s. 1 itself" (para. 62). The ultimate issue is whether the infringement is reasonable and "demonstrably justified in a free and democratic society". The jurisprudence laying down the dual considerations of importance of objective and proportionality between the good which may be achieved by the law and the infringement of rights it works, may be seen as articulating the factors which must be considered in determining whether a law that violates constitutional rights is nevertheless "reasonable" and "demonstrably justified". If the objective of a law which limits constitutional rights lacks sufficient importance, the infringement cannot be reasonable or justified. Similarly, if the good which may be achieved by the law pales beside the seriousness of the infringement of rights which it works, that law cannot be considered reasonable or justified. While sharing La Forest J.'s view that an overtechnical approach to s. 1 is to be eschewed, I find no conflict between the words of s. 1 and the jurisprudence founded upon R. v. Oakes, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103. The latter complements the former.

127 This said, there is merit in reminding ourselves of the words chosen by those who framed and agreed upon s. 1 of the Charter. First, to be saved under s. 1 the party defending the law (here the Attorney General of Canada) must show that the law which violates the right or freedom guaranteed by the Charter is "reasonable". In other words, the infringing measure must be justifiable by the processes of reason and rationality. The question is not whether the measure is popular or accords with the current public opinion polls. The question is rather whether it can be justified by application of the processes of reason. In the legal context, reason imports the notion of inference from evidence or established truths. This is not to deny intuition its role, or to require proof to the standards required by science in every case, but it is to insist on a rational, reasoned defensibility.

128 Second, to meet its burden under s. 1 of the Charter, the state must show that the violative law is "demonstrably justified". The choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. This reinforces the notion inherent in the word "reasonable" of rational inference from evidence or established truths.

129 The bottom line is this. While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning. The task is not easily discharged, and may require the courts to confront the tide of popular public opinion. But that has always been the price of maintaining constitutional rights. No matter how important Parliament's goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail.

(b) The Factors to be Considered under Section 1

130 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.

(c)Applying the Oakes Factors -- Context, Deference to Parliament, Standard of Proof and the Trial Judge's Findings

131 Having set out the criteria determinative of whether a law that infringes a guaranteed right or freedom is justified under s. 1, La Forest J. offers observations on the approach the courts should use in applying them.

132 His first point is that the Oakes test must be applied flexibly, having regard to the factual and social context of each case. I agree. The need to consider the context of the case has been accepted since Wilson J. propounded it in Edmonton Journal v. Alberta (Attorney General), 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326. This "sensitive, case-oriented approach" was affirmed in Rocket, supra, which also concerned a law limiting advertising. There I wrote at pp. 246-47:

While the Canadian approach does not apply special tests to restrictions on commercial expression, our method of analysis does permit a sensitive, case-oriented approach to the determination of their constitutionality. Placing the conflicting values in their factual and social context when performing the s. 1 analysis permits the courts to have regard to special features of the expression in question. As Wilson J. notes in Edmonton Journal v. Alberta (Attorney General), 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326, not all expression is equally worthy of protection. Nor are all infringements of free expression equally serious.

133 That the s. 1 analysis takes into account the context in which the particular law is situate should hardly surprise us. The s. 1 inquiry is by its very nature a fact-specific inquiry. In determining whether the objective of the law is sufficiently important to be capable of overriding a guaranteed right, the court must examine the actual objective of the law. In determining proportionality, it must determine the actual connection between the objective and what the law will in fact achieve; the actual degree to which it impairs the right; and whether the actual benefit which the law is calculated to achieve outweighs the actual seriousness of the limitation of the right. In short, s. 1 is an exercise based on the facts of the law at issue and the proof offered of its justification, not on abstractions.

134 However, while the impugned law must be considered in its social and economic context, nothing in the jurisprudence suggests that the contextual approach reduces the obligation on the state to meet the burden of demonstrating that the limitation on rights imposed by the law is reasonable and justified. Context is essential in determining legislative objective and proportionality, but it cannot be carried to the extreme of treating the challenged law as a unique socio-economic phenomenon, of which Parliament is deemed the

best judge. This would be to undercut the obligation on Parliament to justify limitations which it places on Charter rights and would be to substitute ad hoc judicial discretion for the reasoned demonstration contemplated by the Charter.

135 Related to context is the degree of deference which the courts should accord to Parliament. It is established that the deference accorded to Parliament or the legislatures may vary with the social context in which the limitation on rights is imposed. For example, it has been suggested that greater deference to Parliament or the Legislature may be appropriate if the law is concerned with the competing rights between different sectors of society than if it is a contest between the individual and the state: Irwin Toy, supra, at pp. 993-94; Stoffman v. Vancouver General Hospital, 1990 CanLII 62 (SCC), [1990] 3 S.C.R. 483, at p. 521. However, such distinctions may not always be easy to apply. For example, the criminal law is generally seen as involving a contest between the state and the accused, but it also involves an allocation of priorities between the accused and the victim, actual or potential. The cases at bar provide a cogent example. We are concerned with a criminal law, which pits the state against the offender. But the social values reflected in this criminal law lead La Forest J. to conclude that "the Act is the very type of legislation to which this Court has generally accorded a high degree of deference" (para. 70). This said, I accept that the situation which the law is attempting to redress may affect the degree of deference which the court should accord to Parliament's choice. The difficulty of devising legislative solutions to social problems which may be only incompletely understood may also affect the degree of deference that the courts accord to Parliament or the Legislature. As I wrote in Committee for the Commonwealth of Canada v. Canada, 1991 CanLII 119 (SCC), [1991] 1 S.C.R. 139, at p. 248, "some deference must be paid to the legislators and the difficulties inherent in the process of drafting rules of general application. A limit prescribed by law should not be struck out merely because the Court can conceive of an alternative which seems to it to be less restrictive".

136 As with context, however, care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the Charter places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.

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

sense to what is known, even though what is known may be deficient from a scientific point of view: see Snell v. Farrell, 1990 CanLII 70 (SCC), [1990] 2 S.C.R. 311.

138 In summary, while I agree with La Forest J. that context, deference and a flexible and realistic standard of proof are essential aspects of the s. 1 analysis, these concepts should be used as they have been used by this Court in previous cases. They must not be attenuated to the point that they relieve the state of the burden the Charter imposes of demonstrating that the limits imposed on our constitutional rights and freedoms are reasonable and justifiable in a free and democratic society.

139 I come finally to a fourth general matter discussed by La Forest J. -- the degree of deference which appellate courts should accord to the findings of the trial judge under s. 1 of the Charter analysis. The trial judge in these cases concluded that the proportionality test was not met. He based this conclusion on findings that the evidence failed to establish any of the three requirements for proportionality under s. 1.

140 As a general rule, courts of appeal decline to interfere with findings of fact by a trial judge unless they are unsupported by the evidence or based on clear error. This rule is based in large part on the advantage afforded to the trial judge and denied to the appellate court of seeing and hearing the witnesses. La Forest J. concludes that this rule does not apply to the findings of the trial judge in these cases, because those findings were not "adjudicative facts" but rather were "legislative facts".

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

142 Against this background, I return to the cases at bar and the factors for s. 1 justification discussed in Oakes.

(d) The Objective of the Limit on Free Expression

143 The question at this stage is whether the objective of the infringing measure is sufficiently important to be capable in principle of justifying a limitation on the rights and freedoms guaranteed by the constitution. Given the importance of the Charter guarantees, this is not easily done. To meet the test, the objective must be one of pressing and substantial importance.

144 Care must be taken not to overstate the objective. The objective relevant to the s. 1 analysis is the objective of the infringing measure, since it is the infringing measure and nothing else which is sought to be justified. If the objective is stated too broadly, its importance may be exaggerated and the analysis compromised. As my colleague has noted, the Tobacco Products Control Act 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, although the significance of the targeted decrease in consumption is reduced by the government's estimate that despite the ban, 65 percent of the Canadian magazine market will contain tobacco advertisements, given that the ban applies only to Canadian media and not to imported publications.

145 I digress at this point to note that I do not share La Forest J.'s view (para. 66) that the trial judge erred in observing (at p. 491) that "much of the expert scientific evidence relating to the effects of tobacco on health . . . was . . . irrelevant to the case and . . . served . . . to colour the debate unnecessarily". The trial judge was simply pointing out that much of the evidence focused on a larger problem than that targeted by the legislation at issue. The critical question is not the evil tobacco works generally in our society, but the evil which the legislation addresses.

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.

(e) Proportionality

(i) Findings of the Trial Judge reflex, (1991), 82 D.L.R. (4th) 449

147 The trial judge held that the impairment of rights effected by the law had not been shown to be proportionate to the objective of reducing tobacco use by eliminating advertising in Canadian media and requiring unattributed health warnings on tobacco packaging. In his view, none of the three requirements for proportionality under s. 1 had been established.

148 The first requirement is that there be a rational connection between the objective of reducing tobacco consumption and the advertising ban. Chabot J. found that the Attorney General for Canada had failed to establish on a balance of probabilities that a rational connection exists between the full prohibition on advertising and the objective of reducing tobacco consumption, describing "the connection which the state seeks to establish between health protection and tobacco advertising" as "tenuous and speculative" (p. 512). He stated (at p. 513): "[t]he virtual totality of the scientific documents in the state's possession at the time the Act was passed do not demonstrate that a ban on advertising would affect consumption".

149 The second requirement of proportionality is that the law impair the protected right as little as reasonably possible. In other words, the infringement on the right of free expression must go no further than reasonably required to achieve the legislative goal, in these cases the reduction of tobacco use caused by advertising and the absence of package warnings. The trial judge observed, at pp. 515-17, that the Attorney General had adduced no evidence that a complete ban would reduce tobacco consumption more than a partial ban, or that unattributed health warnings would be more effective than attributed health warnings. As a result, he found that the Attorney General had failed to meet the burden upon it of showing that the infringements of rights were carefully tailored to the legislative objective.

150 The third requirement is proportionality between the objective of the law and the limits it imposes on constitutionally guaranteed rights. Here too, Chabot J. ruled that the state had not discharged the onus upon it. In his view, the law constituted "social engineering" and "an extremely serious impairment of the principles inherent in a free and democratic society". This effect he found (at p. 517) to be "disproportionate to the objective of the [Act]".

151 To what extent should this Court defer to the trial judge's findings? As discussed earlier, this depends on whether the findings relate to purely factual matters or whether they relate to complex social science evidence from which it is difficult to draw firm factual and scientific conclusions. In the cases at bar, the trial lasted more than one year and a massive amount of evidence was adduced through experts and through documentary evidence on which the experts were examined. I agree with La Forest J. that it would be wrong to discard completely the trial judge's findings in these cases with respect to the credibility of witnesses and with respect to the defective methodology used in compiling the data for certain reports. In my view, Chabot J. was in a stronger position than are appellate courts to make such determinations, having listened to extensive testimony from experts on both sides of the debate. On the other hand, it may be that less deference should be accorded to the trial judge's finding that the complete ban on advertising was not rationally connected to the aim of reducing advertising-induced consumption. Much of the evidence adduced on this point was social science evidence predictive of human behaviour from which it was difficult to draw firm factual conclusions. In assessing this evidence Chabot J. erred in failing to consider factors which could suggest as a matter of logic or reason that there was, on a balance of probabilities, a rational connection between the objective and the means chosen.

152 With respect to the minimal impairment element of the proportionality analysis, I accept Chabot J.'s finding that the impugned provisions mandating a complete ban and unattributed package warnings do not minimally impair the right to free expression. Under the minimal impairment analysis, Chabot J. did not rely on problematic social science data, but on the fact that the government had adduced no evidence to show that less intrusive regulation would not achieve its goals as effectively as an outright ban. Nor had the government adduced evidence to show that attributed health warnings would not be as effective as unattributed warnings on tobacco packaging.

(ii) Rational Connection

153 As a first step in the proportionality analysis, the government must demonstrate that the infringements of the right of free expression worked by the law are rationally connected to the legislative goal of reducing tobacco consumption. It must show a causal connection between the infringement and the benefit sought on the basis of reason or logic. To put it

another way, the government must show that the restriction on rights serves the intended purpose. This must be demonstrated on a balance of probabilities.

154 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: R. v. Keegstra, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697, at pp. 768 and 777; R. v. Butler, 1992 CanLII 124 (SCC), [1992] 1 S.C.R. 452, at p. 503. As Sopinka J. wrote of the causal link between obscenity and harm to society in Butler, at p. 502:

> While a direct link between obscenity and harm to society may be difficult, if not impossible, to establish, it is reasonable to presume that exposure to images bears a causal relationship to changes in attitudes and beliefs.

155 The trial judge in the cases at bar found that the government had not established a rational connection between the advertising ban and unattributed warnings and a reduction in tobacco use in the first, scientific sense. The only direct or scientific evidence offered of the link between advertising bans and smoking reduction consisted of a report of the New Zealand Toxic Substances Board entitled Health or Tobacco: An End to Tobacco Advertising and Promotion (1989), which reviewed the effect of advertising restrictions in 33 countries and concluded that there was a correlation between the degree of restrictions imposed in each country and decline in tobacco use and of the evidence of Dr. Jeffrey Harris, affirming the accuracy of the New Zealand Report. The trial judge, after lengthy consideration, rejected this evidence. The report was found, at p. 513, to contain serious methodological errors which rendered it "for all intents and purposes devoid of any probative value". As for Dr. Harris, the trial judge found, at p. 514, that he used unreliable input data and a methodology which "led necessarily to the desired result". As noted above, these findings relating to the credibility of witnesses and the soundness of various methodological approaches fall within the scope of the trial judge's traditional and accepted expertise of weighing and evaluating competing expert testimony. They have not been seriously challenged. No reason has been cited for interfering with them. We may therefore take it that there was no direct evidence of a scientific nature showing a causal link between advertising bans and decrease in tobacco consumption.

156 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.

157 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?

158 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. For example, the Court was referred to an Imperial Tobacco Ltd. ("Imperial") document, Project Viking, vol. I: A Behavioural Model of Smoking, a market research study carried out to determine an advertising strategy for the company. The report suggests that advertising should be directed to "expanding the market, or at the very least, forestalling its decline" by proactively recruiting new smokers and reassuring present smokers who might otherwise quit in response to vigorous anti-smoking publicity. 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.

159 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 which is mandated by s. 8 of the Act. There is no causal connection based on direct evidence, nor is there, in my view, a causal connection based in logic or reason. It is hard to imagine how the presence of a tobacco logo on a cigarette lighter, for example, would increase consumption; yet, such use is banned. I find that s. 8 of the Act fails the rational connection test.

(iii) Minimal Impairment

160 As the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. 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: see Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), 1990 CanLII 105 (SCC), [1990] 1 S.C.R. 1123, at pp. 1196-97; R. v. Chaulk, 1990 CanLII 34 (SCC), [1990] 3 S.C.R. 1303, at pp. 1340-41; Ramsden v. Peterborough (City), 1993 CanLII 60 (SCC), [1993] 2 S.C.R. 1084, at pp. 1105-06. On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.

161 The trial judge, as we have seen, was troubled by the fact that the government had presented no evidence showing that a less comprehensive ban on advertising would not have been equally effective, or that an attributed warning would not have been equally effective as an unattributed one.

162 I turn first to the prohibition on advertising contained in s. 4 of the Act. It is, as has been observed, complete. It bans all forms of advertising of Canadian tobacco products while explicitly exempting all foreign advertising of non-Canadian products which are sold in Canada. 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. Smoking is a legal activity yet consumers are 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.

163 As this Court has observed before, it will be more difficult to justify a complete ban on a form of expression than a partial ban: Ramsden v. Peterborough (City), supra, at pp. 1105-06; Ford v. Quebec (Attorney General), supra, at pp. 772-73. The distinction between a total ban on expression, as in Ford where the legislation at issue required commercial signs to be exclusively in French, and a partial ban such as that at issue in Irwin Toy, supra, is relevant to the margin of appreciation which may be allowed the government under the minimal impairment step of the analysis. In Rocket, supra, the law imposed a complete advertising ban on professionals seeking to advertise their services. I concluded that while the government had a pressing and substantial objective, and while that objective was rationally connected to the means chosen, the minimal impairment requirement was not met since the government had exceeded a reasonable margin of appreciation given the need for consumers to obtain useful information about the services provided. A full prohibition will only be constitutionally acceptable under the minimal impairment stage of the analysis where the government can show that only a full prohibition will enable it to achieve its objective. Where, as here, no evidence is adduced to show that a partial ban would be less effective than a total ban, the justification required by s. 1 to save the violation of free speech is not established.

164 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.

165 These considerations suggest that the advertising ban imposed by s. 4 of the Act may be more intrusive of freedom of expression than is necessary to accomplish its goals. Indeed, Health and Welfare proposed less-intrusive regulation instead of a complete prohibition on advertising. Why then, did the government adopt such a broad ban? The record provides no answer to this question. The government presented no evidence in defence of the total ban, no evidence comparing its effects to less invasive bans.

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.

167 Not only did the government present no evidence justifying its choice of a total ban, it also presented no argument before us on the point. The appellants argued that there were undisclosed alternatives to a complete ban. The Attorney General's factum offered no response. Instead, the Attorney General contented himself with the bland statement that a complete ban is justified because Parliament "had to balance competing interests" somehow. Its response to the minimal impairment argument is not evidence, but a simple assertion that Parliament has the right to set such limits as it chooses:

> . . . Parliament was certainly entitled to conclude that nothing short of the means it designed would meet the public health objectives set out in s. 3 of the [Act]. The Act is a justified preventative health measure. Parliament has the ability to set the exact limits of this measure. [Emphasis added.]

168 My colleague La Forest J., while recognizing that the government's refusal to release the documents puts this Court in a difficult position given that the onus is on the government to make out minimal impairment, nonetheless concludes that the legislation is minimally impairing based on the importance of the legislative objective and the legislative context. With respect, I cannot agree. Even on difficult social issues where the stakes are high, Parliament does not have the right to determine unilaterally the limits of its intrusion on the rights and freedoms guaranteed by the Charter. The Constitution, as interpreted by the courts, determines those limits. Section 1 specifically stipulates that the infringement may not exceed what is reasonable and "demonstrably justified in a free and democratic society", a test which embraces the requirement of minimal impairment, and places on the government the burden of demonstrating that Parliament has respected that limit. This the government has failed to do, notwithstanding that it had at least one study on the comparative effectiveness of a partial and complete ban. In the face of this omission, the fact that full bans have been imposed in certain other countries and the fact that opinions favouring total bans can be found, fall short of establishing minimal impairment.

169 La Forest J. supports his conclusion that Parliament should be permitted to choose such measures as it sees fit by contrasting the importance of Parliament's objective with the low value of the expression at issue. This way of answering the minimal impairment requirement raises a number of concerns. First, to argue that the importance of the legislative objective justifies more deference to the government at the stage of evaluating minimal impairment, is to engage in the balancing between objective and deleterious effect contemplated by the third stage of the proportionality analysis in Oakes. While it may not be of great significance where this balancing takes place, care must be taken not to devalue the need for demonstration of minimum impairment by arguing the legislation is important and the infringement of no great moment.

170 Second, just as care must be taken not to overvalue the legislative objective beyond its actual parameters, so care must be taken not to undervalue the expression at issue. Commercial speech, while arguably less important than some forms of speech, nevertheless should not be lightly dismissed. For example, in Rocket, supra, this Court struck down restrictions on dental advertising on the ground that the minimal impairment requirement had not been met. The Health Disciplines Act, R.S.O. 1980, c. 196, prohibited forms of advertising which far from being unprofessional, might have benefited consumers and contributed to their health. The same may be said here. Tobacco consumption has not been banned in Canada. Yet the advertising ban deprives those who lawfully choose to smoke of information relating to price, quality and even health risks associated with different brands. It is no answer to suggest, as does my colleague, (para. 108) that the tobacco companies have failed to establish the true benefits of such information. Under s. 1 of the Charter, the onus rests on the government to show why restrictions on these forms of advertising are required.

171 Third, in finding that the commercial speech here at issue is entitled "to a very low degree of protection under s. 1" (para. 75) and that "an attenuated level of s. 1 justification is appropriate in these cases" (para. 77), La Forest J. places a great deal of reliance on the fact that the appellants are motivated by profit. I note that the same may be said for many business persons or corporations that challenge a law as contrary to freedom of expression. While this Court has stated that restrictions on commercial speech may be easier to justify than other infringements, no link between the claimant's motivation and the degree of protection has been recognized. Book sellers, newspaper owners, toy sellers -- all are linked by their shareholders' desire to profit from the corporation's business activity, whether the expression sought to be protected is closely linked to the core values of freedom of expression or not. In my view, motivation to profit is irrelevant to the determination of whether the government has established that the law is reasonable or justified as an infringement of freedom of expression.

172 It remains to consider whether the requirement that the warning be unattributed pursuant to s. 9 of the Act fails to meet the minimum impairment requirement of proportionality. The appellant corporations contend that a warning similar to that used in the United States, which identifies the author as the Surgeon General, would be equally effective while avoiding the inference some may draw that it is the corporations themselves who are warning of the danger. They object not only to being forced to say what they do not wish to say, but also to being required to do so in a way that associates them with the opinion in question. This impairs their freedom of expression, they contend, more than required to achieve the legislative goal.

173 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 and whether it was necessary to prevent the appellants from placing on their packaging any information other than that allowed by the regulations.

174 As with the advertising ban, it was for the government to show that the unattributed warning, as opposed to an attributed warning, was required to achieve its objective of reducing tobacco consumption among those who might read the warning. Similarly, it was for the government to show why permitting tobacco companies to place additional information on tobacco packaging, such as a statement announcing lower tar levels, would defeat the government's objective. This it has failed to do. Again, my colleague La Forest J.

responds (para. 116) with the belief that "a lower level of constitutional scrutiny is justified in this context". For the reasons given with respect to the advertising ban, I respectfully disagree.

(iv)Proportionality Between the Effects of the Legislation and the Objective

175 Having found the requirement of minimum impairment is not satisfied for ss. 4 and 9 of the Act, it is unnecessary to proceed to the final stage of the proportionality analysis under s. 1 -- balancing the negative effects of the infringement of rights against the positive benefits associated with the legislative goal. A finding that the law impairs the right more than required contradicts the assertion that the infringement is proportionate. Neither the fact that commercial expression may be entitled to a lesser degree of protection than certain other forms of expression, nor the importance of reducing tobacco consumption, even to a small extent, negate this proposition. Freedom of expression, even commercial expression, is an important and fundamental tenet of a free and democratic society. If Parliament wishes to infringe this freedom, it must be prepared to offer good and sufficient justification for the infringement and its ambit. This it has not done.

2 Remedy

176 I have found ss. 4, 8 and 9 of the Tobacco Products Control Act 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. I would consequently hold that ss. 4, 5, 6, 8, and 9 are inconsistent with the Charter and hence are of no force or effect by reason of s. 52 of the Constitution Act, 1982.

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, together with the remaining provisions of the Act which deal with reporting, enforcement, regulations and offences and punishment, in so far as these sections operate in relation to provisions other than those declared invalid.

178 This leaves the question of costs. The appellant Imperial has been successful in these appeals. The appellant RJR-MacDonald has been substantially successful. Having requested that the whole of the Tobacco Products Control Act be struck down, it has succeeded in having a significant portion of it struck down. I would allow the appeals with costs to both appellants.

The following are the reasons delivered by

179 IACOBUCCI J. -- These appeals concern the constitutional legitimacy of the Tobacco Products Control Act, S.C. 1988, c. 20 (the "Act"), a federal statute which effectively establishes a total ban on cigarette advertising in Canada.

180 The appellants submit that there are two alternative grounds that support the constitutional invalidity of the Act: (1) that it is ultra vires the powers accorded to Parliament by s. 91 of the Constitution Act, 1867; and (2) that it infringes the appellants' right to freedom of expression in a manner that does not constitute a reasonable limit under s. 1 of the Canadian Charter of Rights and Freedoms.

181 My colleague Justice La Forest details at length the reasons why the Act is properly enacted pursuant to the federal power over criminal law (s. 91(27)). I find myself in full agreement with him in this regard. I also agree with his approach to appellate court intervention on legislative or social facts as found by a trial judge.

182 I diverge, however, with La Forest J. on the Charter issue; specifically, I do not believe that the Act minimally impairs the appellants' s. 2(b) Charter rights. More broadly, I also have reservations about the somewhat attenuated minimal impairment analysis propounded by La Forest J. As I noted in my reasons in Egan v. Canada, 1995 CanLII 98 (SCC), [1995] 2 S.C.R. 513, unduly diluting the s. 1 principles from their original form cast in R. v. Oakes, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, and related cases causes me concern in so far as it creates a risk that Charter violations will be too readily justified and, as a result, Charter values too easily undercut. In this respect, I find myself generally attracted to Justice McLachlin's reasons and disposition in this appeal. Nevertheless, although I concur with many of her general conclusions, I differ somewhat with her s. 1 analysis and proposed remedy and therefore prefer to express my own reasons.

183 The two principal issues underlying the Charter analysis in these appeals are: (1) whether the Act is rationally connected to its goal of protecting Canadians from the health risks associated with tobacco use and, if so, (2) whether the legislation attains this rationally connected goal in a manner that minimally impairs the appellants' infringed Charter rights.

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

185 Clarifying the standard upon which rational connection analysis ought to proceed is of great importance in appeals such as these, in which there is extremely lengthy yet generally inconclusive scientific evidence. In short, Chabot J. found much of the scientific evidence to be suspect and was of the mind that the Act was "social engineering". With respect, this latter proposition is one which I cannot accept. Consequently, I am reluctant to associate the reasons of this Court with those of Chabot J. and agree with La Forest J. in this respect in concluding that the trial judge's determination that the Act is not rationally connected to its legislative goal ought to be overturned. I should now like to turn to minimal impairment aspects.

186 Minimal impairment analysis requires this Court to consider whether the legislature turned its mind to alternative and less rights-impairing means to promote the legislative goal in question. In these appeals, I am concerned by the fact that the Attorney General of Canada chose to withhold from the factual record evidence related to the options it had considered as alternatives to the total ban it chose to put in place. It is no answer to this conduct to suggest, as my colleague La Forest J. does, that part of the responsibility for this incomplete factual record lies with the appellants, purportedly owing to the fact that their counsel did not pursue every conceivable legal avenue in order to attempt to secure the publication of the undisclosed documents. I am reluctant to permit the justification of a conceded constitutional violation because of the inability of a party to the litigation to have pursued all possible avenues to obtain the non-disclosed information. These cases are of wide public interest constitutional litigation in which the government should remain non-adversarial and make full disclosure. Without this requirement, courts will be constrained to decide the

constitutionality of legislation without full information. In any event, the burden of proof at the s. 1 stage lies solely with the government.

187 I underscore that the rights violation in these cases does not involve the prohibition of the sale or consumption of tobacco. It involves the total ban on the advertising of tobacco products. I do not believe that the jurisprudence supports La Forest J.'s conclusion that the impugned Charter right, in these cases s. 2(b), is minimally impaired because the government chose not to pursue a course of conduct (i.e., prohibiting tobacco products) which bears no relevance to s. 2(b), especially when it is clear that this alternative was never, by the government's own admission, feasible or viable.

188 In my opinion, the question in these appeals is not whether a partial prohibition (the lesser rights-impairing approach) would be acceptable only if there were information establishing that some forms of advertising do not stimulate consumption. On the contrary, it is the total prohibition (the full rights-impairing option) that is only constitutionally acceptable if information is provided that such a total prohibition is necessary in order for the legislation to achieve a pressing and substantial goal. When, as in the case at bar, the evidence is unclear whether a partial prohibition is as effective as a full prohibition, the Charter requires that the legislature enact the partial denial of the implicated Charter right. In the absence of the discharge of this evidentiary burden (which is to be wholly borne by the government), the least rights-impairing option is to be preferred. Although tobacco advertising as a whole certainly affects consumption, the evidence is unclear whether all types of tobacco ads affect consumption. I believe that some attention must be paid to whether the legislature endeavoured to differentiate the harmful advertising from the benign advertising before it decided to ban all advertising or sought to identify whether, as claimed by the appellants, informational and brand-name advertising do not have the effects that the Act seeks to curb.

189 I agree with La Forest J. that a contextual approach must be taken to s. 1 analysis, and, when reduced to its essence, the impugned right in this case amounts to the ability of tobacco companies to advertise -- solely for the purposes of financial profit -- a product with known deleterious effects to public health. 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 CanLII 19 (SCC), [1988] 2 S.C.R. 712; Rocket v. Royal College of Dental Surgeons of Ontario, 1990 CanLII 121 (SCC), [1990] 2 S.C.R. 232; Irwin Toy Ltd. v. Quebec (Attorney General), 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927.

190 Section 9 of the Act (obliging the placing of unattributed health messages on cigarette packages) raises similar concerns. I find that this provision trenches upon s. 2(b) and is unjustifiable under s. 1 and I agree with McLachlin J. in this respect. The question here is whether the reduction of tobacco consumption can be equally advanced by adopting the less intrusive remedy of governmentally attributed warnings or whether such a method would only yield results more modest than the full rights-impairing approach presently adopted by s. 9. Given the evidence before this Court, I am inclined to opt for the lesser rights-impairing approach.

191 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.

192 In the end, I would allow these appeals, with costs throughout to the appellants. For the reasons set out above, ss. 4, 5, 6, 8, and 9 of the Act should be struck. However, I am of the mind, for the reasons I advanced in Egan, supra, that this, too, is the appropriate case for a suspensive declaration of invalidity of one year. I thus disagree with McLachlin J. in terms of the remedy. Immediately striking down the legislation would permit the tobacco companies the untrammelled ability to advertise until minimally impairing legislation is drafted; the suspensive veto would permit the government to design such legislation while the status quo remains in force. In my view, that is warranted in light of the deleterious effects of tobacco products on those who use them and on society generally.

The following are the reasons delivered by

193 MAJOR J. -- I agree with Justice McLachlin's disposition of these appeals but disagree that Parliament may impose an advertising ban on tobacco products, trade marks, and brand names under its criminal law power.

194 I agree with Justice La Forest that Parliament could prohibit the sale of tobacco products without printed health warnings under its criminal law power but that is not the issue in these appeals.

195 It is undisputed that Parliament may legislate with respect to hazardous, unsanitary, adulterated and otherwise dangerous foods and drugs pursuant to its power to legislate in the field of criminal law.

196 It follows that Parliament can require manufacturers to place warnings on tobacco products which are known to have harmful effects on health. Manufacturers of tobacco products are under a duty to disclose and warn of the dangers inherent in the consumption of tobacco products. Failure to place warnings on tobacco products can validly constitute a crime, a "public wrong" which merits proscription and punishment and ought to be suppressed as "socially undesirable conduct" (R. v. Morgentaler, 1993 CanLII 74 (SCC), [1993] 3 S.C.R. 463, at p. 488). Section 9 of the Tobacco Products Control Act, S.C. 1988, c. 20 ("the Act"), falls within Parliament's power under s. 91(27) of the Constitution Act, 1867.

197 However, I do not agree that Parliament under its criminal law power is entitled to prohibit all advertising and promotion of tobacco products and restrict the use of tobacco

trademarks as provided for in ss. 4, 5, 6, 8 and 9 of the Act. In Labatt Breweries of Canada Ltd. v. Attorney General of Canada, 1979 CanLII 190 (SCC), [1980] 1 S.C.R. 914, the test should be one of substance, not form, and excludes from the criminal jurisdiction legislative activity not having the prescribed characteristics of criminal law. It is not always easy to determine whether legislation comes within the purview of Parliament's criminal law power. Cory J. described this difficulty in Knox Contracting Ltd. v. Canada, 1990 CanLII 71 (SCC), [1990] 2 S.C.R. 338, at p. 347:

As a point of commencement, it may be helpful to consider what constitutes criminal law. While, like a work of art, it is something that may be easier to recognize than define, some guidelines have been established.

Cory J., at p. 348, then referred to the reasons of Rand J. in Reference re Validity of Section 5(a) of the Dairy Industry Act, 1948 CanLII 2 (SCC), [1949] S.C.R. 1 (the Margarine Reference), which he found to be a "very helpful definition of criminal law" and referred with approval to the dissenting reasons in R. v. Hauser, 1979 CanLII 13 (SCC), [1979] 1 S.C.R. 984, per Dickson J. (as he then was) at p. 1026:

Head 27 of s. 91 of the British North America Act empowers Parliament to make substantive laws prohibiting, with penal consequences, acts or omissions considered to be harmful to the State, or to persons or property within the State.

The approach taken by this Court in Knox Contracting, supra, provides a solid foundation for defining the scope of Parliament's criminal law power.

198 In discussing the Margarine Reference, Professor Hogg notes that legislation which merely contains a prohibition and a consequent penalty cannot be upheld as a valid exercise of Parliament's criminal law power unless the legislation also addresses a "typically criminal public purpose" (Constitutional Law of Canada (3rd ed. 1992), at p. 18-5). The "typically criminal public purpose" can be determined in part by considering whether the act or omission is sufficiently harmful to the state, or to persons or property within the state to warrant the exercise of Parliament's criminal law power.

199 In Boggs v. The Queen, 1981 CanLII 39 (SCC), [1981] 1 S.C.R. 49, it was held to be beyond Parliament's criminal power to impose criminal sanctions for infractions of a variety of provincial regulations such as failure to pay insurance premiums, civil judgments, taxes and licence fees. Licence suspensions are not related to the owner's ability to drive or to public safety on the highways, and hence criminal penalties flowing from their breach are ultra vires Parliament. Although Parliament's power to legislate in the field of criminal law is broad, it is subject to constitutional limits.

200 A definitive and all-encompassing test to determine what constitutes a "criminal offence" remains elusive but the activity which Parliament wishes to suppress through criminal sanction must pose a significant, grave and serious risk of harm to public health, morality, safety or security before it can fall within the purview of the criminal law power. While there is a range of conduct between the most and less serious, not every harm or risk to society is sufficiently grave or serious to warrant the application of the criminal law.

201 The heart of criminal law is the prohibition of conduct which interferes with the proper functioning of society or which undermines the safety and security of society as a whole.

Reference re Alberta Statutes, 1938 CanLII 1 (SCC), [1938] S.C.R. 100, held that a crime is a public wrong involving a violation of the public rights and duties to the whole community, considered as a community, in its social aggregate capacity. Matters which pose a significant and serious risk of harm or which cause significant and serious harm to public health, safety or security can be proscribed by Parliament as criminal.

202 Consequently, lesser threats to society and its functioning do not fall within the criminal law, but are addressed through non-criminal regulation, either by Parliament or provincial legislatures, depending on the subject matter of the regulation.

203 The regulation of manipulative children's advertising was upheld as intra vires the province in Irwin Toy Ltd. v. Quebec (Attorney General), 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, even though the impugned legislation contained sanctions that included fines and possible imprisonment. While manipulative children's advertising exposes society to some harms, those harms are not sufficient to attract the sanction of the criminal law. In the same way, we must consider whether the ban on tobacco advertising is essentially a regulatory matter within provincial competence, or whether tobacco advertising truly constitutes criminal conduct, a public wrong which Parliament is entitled to punish as harmful, socially undesirable conduct violative of public rights and duties.

204 Sopinka J. in Morgentaler, supra, stated that to find a valid exercise of Parliament's criminal law power, the presence of a criminal public purpose or object is pivotal. I agree that criminal law is not frozen in time. Parliament can decriminalize what once was thought criminal, and can also criminalize conduct which was not part of the criminal law at the time of Confederation. I disagree that affinity with a traditional criminal law concern has no part to play in the analysis, whether the conduct proscribed by Parliament has an affinity with a traditional criminal law concern is a starting point in determining whether a particular matter comes within federal criminal competence. Cases such as Morgentaler, supra, and Knox Construction, supra, demonstrate that courts will often look for an affinity with a traditional criminal law concern, or affinity with activities historically recognized as criminal, to determine whether a certain exercise of legislative power falls within the field of criminal law.

205 In Devine v. Quebec (Attorney General), 1988 CanLII 20 (SCC), [1988] 2 S.C.R. 790, at p. 811, the Court noted that the prohibition on the use of language in and of itself did not have an affinity with some traditional criminal law concern such as morality or public order.

206 Parliament has the power to make certain kinds of speech criminal, such as sedition and obscenity. These types of speech have an affinity with traditional criminal law concerns. These two examples are not determinative, but demonstrate the presence of a typically criminal public purpose where the speech in question causes serious harm or a serious risk of harm to society. In contrast, it is difficult to see how tobacco advertising causes the same type of harm.

207 In his reasons, La Forest J. states that the "evil targeted by Parliament is the detrimental health effects caused by tobacco consumption" (para. 30). McLachlin J. writes that "[c]are must be taken not to overstate the objective" (para. 144). I endorse her conclusion that, if the objective is stated too broadly, its importance may be exaggerated and the analysis compromised.

208 The objective of the advertising ban and trade mark usage restrictions, as stated by McLachlin J., is to prevent Canadians from being persuaded by advertising and promotion to use tobacco products. I respectfully disagree with La Forest J. that this type of persuasion constitutes criminal conduct.

209 Tobacco advertising and promotion may encourage some people to start or to continue to smoke. For that reason, it is viewed by many as an undesirable form of commercial expression. I do not disagree that it may be an undesirable form of expression, but is this undesirability sufficient to make such expression criminal? Does tobacco advertising pose a significant, grave and serious danger to public health? Or does it simply encourage people to consume a legal but harmful product? I cannot agree that the commercial speech at issue poses such a significant, grave and serious danger to public health to fall within the purview of the federal criminal law power. In my opinion, the Act is too far removed from the injurious or undesirable effects of tobacco use to constitute a valid exercise of Parliament's criminal law power. Legislation prohibiting all advertising of a product which is both legal and licensed for sale throughout Canada lacks a typically criminal public purpose and is ultra vires Parliament under s. 91(27) of the Constitution Act, 1867. Such advertising can hardly be considered to be a public wrong involving a violation of public rights and duties to the whole community, the type of conduct that Parliament is entitled to proscribe and punish as harmful and socially undesirable under its criminal law power.

210 Parliament could have criminalized tobacco use, but has chosen not do so for a variety of reasons. The Act does not directly address the injurious or undesirable effects of tobacco use. La Forest J., in response to this concern, notes that in some circumstances Parliament has criminalized ancillary activities without criminalizing the core activity itself, and that this Court has upheld such measures as a valid exercise of the criminal law power. With respect, the cases cited by La Forest J. --Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), 1990 CanLII 105 (SCC), [1990] 1 S.C.R. 1123 (solicitation for the purposes of prostitution and the operation of bawdy houses) and Rodriguez v. British Columbia (Attorney General), 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519 (prohibition on assisted suicide) -- concern matters which have traditionally been subject to criminal sanctions. Moreover, the "ancillary" activities proscribed in the above two examples pose significant and serious dangers in and of themselves.

211 It is well known that crime often follows in the wake of prostitution and its related activities. It is also well known that assisted suicide can engender all manner of evils, not the least of which is involuntary euthanasia. Hence the criminalization of solicitation of prostitution where prostitution itself is legal, or the criminalization of assisted suicide where suicide itself is legal does not provide a useful analogy to the criminalization of tobacco advertising where tobacco consumption is legal. The fact that the "ancillary" activities in the Prostitution Reference and in Rodriguez of themselves pose serious risks of harm to society makes the analogy less than compelling.

212 Since Parliament has chosen not to criminalize tobacco use, it is difficult to understand how tobacco advertising can somehow take on the character of criminal activity. The Act does not deal in any way with the regulation or prohibition of dangerous products or drugs. The underlying "evil" of tobacco use which the Act is designed to combat remains perfectly legal. Tobacco advertising is in itself not sufficiently dangerous or harmful to justify criminal

sanctions. In my view, it is beyond Parliament's competence to criminalize this type of speech where Parliament has declined to criminalize the underlying activity of tobacco use.

213 On a final note, La Forest J. addressed the exemptions contained within the Act, most notably the exemption for foreign periodicals. He concluded that notwithstanding the exemptions, tobacco advertising still constitutes criminal law. I disagree. La Forest J. cites a number of cases, such as Morgentaler v. The Queen, 1975 CanLII 8 (SCC), [1976] 1 S.C.R. 616, and R. v. Furtney, 1991 CanLII 30 (SCC), [1991] 3 S.C.R. 89, for the proposition that exemptions in criminal legislation do not take away from the legislation's criminal character. While exemptions do not necessarily take a statute out of criminal law, broadly based exemptions are a factor which may lead a court to conclude that the proscribed conduct is not truly criminal. Both Morgentaler (dealing with abortion) and Furtney (dealing with gambling) involved conduct which has traditionally been viewed as criminal. The exemptions could not be described as "broadly based". For example, the Criminal Code only allowed abortions to be performed in limited circumstances and under strict conditions and guidelines. While the legislation may not have been applied uniformly at hospitals throughout the country, Parliament could still validly decide that abortion in general was criminal and could only be performed in hospitals in accordance with statutory requirements.

214 In Furtney, unrestricted and unregulated gambling could be seen as engaging a typically criminal public purpose because of the harm to society that often flows from gambling and its related activities. The fact that properly licensed and regulated gambling, such as bingo, could be exempted from the criminal law did not take away from the criminal public purpose engaged by the general prohibition on gambling. The exemptions discussed in the above two cases are limited in nature and the scope of activities that remained criminalized still engaged a typically criminal public purpose.

215 In these appeals, McLachlin J. notes that despite the advertising ban, 65 percent of the Canadian magazine market will contain tobacco advertisements, given that the ban applies only to Canadian media and not to imported publications. The exemptions for advertising cannot be seen as being limited in nature because most Canadians will be exposed to advertising for tobacco products in newspapers, magazines and so forth. It is hard to understand how the respondent on the one hand claims that nothing short of a total ban will accomplish the goal of reducing tobacco consumption while at the same time the Act allows a very significant amount of advertising to enter the country. It is difficult to imagine how tobacco advertising produced by the United States or other countries and distributed in Canada through publications somehow becomes criminal when produced and distributed by Canadians. The broadly based exemptions contained in the Act, combined with the fact that the Act does not engage a typically criminal public purpose, leads to the conclusion that the prohibitions on advertising cannot be upheld as a valid exercise of Parliament's criminal law power.

216 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. While Parliament's desire to limit tobacco advertising may be desirable, its power to do so cannot be found in s. 91(27) of the Constitution Act, 1867.

217 In the Court of Appeal (1993 CanLII 3500 (QC CA), (1993), 102 D.L.R. (4th) 289), Brossard J.A. held at p. 352 that the Act fell within the federal parliament's power to legislate

for the "peace, order and good government" of Canada as the Act met national dimensions. I agree. Inasmuch as the legislations fails in any event for the reasons of McLachlin J., it is unnecessary to come to any conclusion on this point.

Appeals allowed, LA FOREST, L'HEUREUX-DUBÉ, GONTHIER and CORY JJ. dissenting. The first constitutional question dealing with the legislative competence of Parliament to enact the legislation under the criminal law power or for the peace, order and good government of Canada should be answered in the positive. With respect to the second constitutional question, ss. 4 (re advertising), 8 (re trade mark use) and 9 (re unattributed health warnings) of the Act are inconsistent with the right of freedom of expression as set out in s. 2(b) of the Charter and do not constitute a reasonable limit on that right as can be demonstrably justified pursuant to s. 1 thereof. La Forest, L'Heureux-Dubé, Gonthier and Cory JJ. would find that they constitute a reasonable limit. Given that ss. 5 (re retail displays) and 6 (re sponsorships) could not be cleanly severed from ss. 4, 8 and 9, all are of no force or effect pursuant to s. 52 of the Constitution Act, 1982.

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1- See Erratum [1995] 4 S.C.R. iv
2- See Erratum [1995] 4 S.C.R. iv