

UP IN SMOKE: CANADA'S TOBACCO PRODUCTS CONTROL ACT DECLARED UNCONSTITUTIONAL

by

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On July 26th, 1991, Mr. Justice Jean-Jude Chabot of the Superior Court of the province of Quebec declared that the *Act to prohibit the advertising and promotion and respecting the labelling and monitoring of tobacco products*, S.C. 1988, c. 20 (also known under its short title: *Tobacco Products Control Act*), was *ultra vires* the Parliament of Canada as being a matter within the jurisdiction of provincial Legislatures pursuant to Section 92 of the *Constitution Act, 1867*; the Court also declared the *Tobacco Products Control Act* to be contrary to paragraph 2(b) of the *Canadian Charter of Rights and Freedoms*.

This decision is the result of a motion brought against the Attorney General of Canada by two tobacco manufacturers, RJR MacDonald Inc. and Imperial Tobacco Ltd., following the adoption of the *Tobacco Products Control Act* by the Canadian Parliament.

The *Tobacco Products Control Act* came into force on January 1st, 1989. Its stated purpose is to provide a "legislative response to a national public health problem" (Section 3) 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."

To reach this objective, the *Tobacco Products Control Act* forbids the advertising of tobacco products in Canada but creates an exception for "the distribution for sale of publications imported into Canada or the retransmission of radio or television broadcasts originating outside Canada" (Section 4). It also provides that retailers may expose tobacco products for sale in their place of business but may not post signs indicating the brand names or trademarks of these products (Section 5). The *Tobacco Products Control Act* also

provides that, inter alia, a manufacturer or importer of tobacco products may use its full name to sponsor cultural or sporting events but may not mention its products (Section 6); a distributor may not distribute tobacco products without consideration (Section 7); a manufacturer or importer of tobacco products may not apply a trade-mark which appears on a tobacco product to any other article (Section 8). Finally, the Act prohibits the sale of tobacco products without various "health indicators" imposed by regulation (Section 9) and empowers the Government to adopt such regulation (Section 17). After a review of the *Tobacco Products Control Act*, the Court came to the conclusion that the Act did not regulate tobacco products (despite its short title) but rather the advertising of tobacco products.

RJR MacDonald Inc. and Imperial Tobacco Ltd. first argued in attacking the constitutional validity of the *Tobacco Products Control Act* that it constituted legislation within the jurisdiction of provincial Legislatures (as opposed to that of the Canadian Parliament). Indeed, paragraphs 2(13) and 92(16) of the *Constitution Act, 1867* provide that "(i)n each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject" ... "Property and Civil Rights in the Province" and "Generally all Matters of a merely local or private Nature in the Province", matters which, in the petitioners' view, covered the *Tobacco Products Control Act*. In short, RJR MacDonald Inc. and Imperial Tobacco Ltd.'s first argument related to a question of jurisdiction.

The Attorney General of Canada responded by stating that the Canadian Parliament did have the constitutional authority to adopt the *Tobacco Products Control Act*: Parliament could curtail acts deemed dangerous for the health of Canadians as a remedy for a national problem, pursuant to its exclusive powers in criminal matters under paragraph 91(27) of the *Constitution Act, 1867* and its residual powers relating to "Peace, Order and Good Government".

In order to determine the constitutional qualification of the *Tobacco Products Control Act* (did it fall within the jurisdiction of the Canadian Parliament or of the provincial Legislatures?), the Court analyzed the object and effect of the Act and concluded that it eliminated nearly all forms of advertising and promotion of a product legally manufactured and sold throughout Canada; the protection of public health was considered by the Court to be a remote and indirect objective. Furthermore, the Court determined that the advertising of tobacco products did not constitute *per se* a danger for public health (based on the logic that the word "dog" never bit anyone!). Inasmuch as the *Tobacco Products Control Act* did not relate to the repression of an "evil" deemed prejudicial to the State, its citizens or the goods situated therein, the Court concluded that the advertising of a commonly used product did not constitute a subject of Criminal Law.

Concerning the Canadian Parliament's residual powers relating to "Peace, Order and Good Government", the Court made reference to the decision of the Privy Council in *Attorney General of Ontario vs. Canada Temperance Federation* (1946) A.C. 193 at pp. 205-206: "In their Lordship's opinion, the true test must be found in the real subject matter of the legislation: if it is such that it goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole (...) then it will fall within the competence of the Dominion Parliament as a matter affecting the peace, order and good government of Canada, though it may in another aspect touch on matters specially reserved to the provincial legislatures. War and pestilence, no doubt, are instances; so, too, may be the drink or drug traffic, or the carrying of arms".

In the Court's opinion, the *Tobacco Products Control Act* did not concern public health or even the regulation, fabrication, importation or sale of tobacco products but only the advertising and promotion of these products. For these reasons, the Court concluded that the *Tobacco Products Control Act* did not fall within the competence of the Canadian Parliament as a matter affecting the Peace, Order and Good Government of Canada.

The Court agreed with RJR MacDonald Inc. and Imperial Tobacco Ltd. that the *Tobacco Products Control Act* was *ultra vires* the Parliament of Canada as being a matter falling within the competence of provincial Legislatures pursuant to paragraphs 92(13) and 92(16) of the *Constitution Act, 1867*.

RJR MacDonald Inc. and Imperial Tobacco Ltd. also argued that the *Tobacco Products Control Act* violated the rights guaranteed by Section 2(b) of the *Canadian Charter of Rights and Freedoms*, namely the freedom of expression and that such violation could not be justified in a free and democratic society, in accordance with Section 1 of the *Charter*. (It is to be noted that Section 1 of the *Canadian Charter of Rights and Freedoms* - which forms part of the Canadian Constitution - guarantees "the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society").

The Attorney General of Canada replied that the promotion of tobacco products was a threat to the health of Canadians and did not constitute an activity protected by the *Charter's* freedom of expression clause; alternatively and subsidiarily, the Attorney General pleaded that, in the event such activity was protected by paragraph 2(b) of the *Charter*, the Act constituted a reasonable limit "prescribed by law as can be demonstrably justified in a free and democratic society", pursuant to Section 1 of the *Charter*.

The Court reminded the parties of the steps that must be taken when analyzing a case of alleged violation of freedom of expression: 1) the Court must determine whether the plaintiff's activity falls within the sphere of conduct protected by the guarantee; 2) the Court must then determine whether the purpose or effect of the legislation in issue is to restrict freedom of expression; and 3) if the two previous questions are answered affirmatively, the Court must determine if the statute is justified under Section 1 of the *Charter*.

On the first question, the Court referred to the words of Mr. Justice Lamer of the Supreme Court of Canada in *Reference Re Criminal Code, Sections 193 and 195.1 (1)(c) thereof*, (1990) 1 S.C.R. 1123 at p. 1186: "It is sufficient to here reiterate that all content of expression is protected while the set of forms that will not receive protection is narrow and includes direct attacks by violent means on the physical liberty and integrity of another person." The Court therefore concluded that RJR MacDonald Inc. and Imperial Tobacco Ltd.'s commercial activities, consisting in the advertising of its products, fell within the sphere of conduct protected by the guarantees of Section 2(b) of the *Charter*.

On the second question, the Court held that it was plainly evident that the *Tobacco Products Control Act* restricted freedom of expression.

On the third question of determining whether the *Tobacco Products Control Act* was justified under Section 1 of the *Charter*, the Court followed the test set out by the Supreme Court of Canada in *Her Majesty the Queen vs. Oakes*, (1986) 1 S.C.R. 103 and applied same to the legislation under review. The test is as follows: 1) "the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be of sufficient importance to warrant overriding a constitutionally protected right or freedom"; 2) "once a sufficiently significant objective is recognized, then the party invoking Section 1 must show that the means chosen are reasonable and demonstrably justified. This involves a form of proportionality test"; 3) "even if an objective is of sufficient importance and the proportionality test (is) satisfied, it is still possible that, because of the severity of the deleterious effect of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve".

On the matter of the importance of the Government objective, the Court noted the Act's stated purposes at Section 3, namely providing a legislative response to the problem of tobacco use. Despite the *Tobacco Products Control Act's* noted differences between its stated purposes and its real concern, the Court concluded that the State has sufficient scientific

information justifying a legislative response to the problem of tobacco use and its effect on the health of Canadians: at this point, the Court did not need to evaluate the actual measures enacted by the State against tobacco use.

On the matter of the proportionality test, the Court referred to the words of Mr. Justice McIntyre of the Supreme Court of Canada in *Andrews vs. Law Society of British Columbia* (1989) 1 S.C.R. 143 at p. 184 and indicated that the Court "must examine the nature of the right, the extent of its infringement, and the degree to which the limitation furthers the attainment of the desirable goal embodied in the legislation". To meet this test and weigh the competing set of values involved, the Court reminded the parties that commercial expression, such as the petitioners' advertising, "which ... protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy". (*Ford vs. Attorney General of Quebec* (1988) 2 S.C.R. 712 at p. 767 (S.C.C.)).

The Court further noted that the *Tobacco Products Control Act* did not establish distinctions between various forms of advertising (such as persuasive advertisement or life-style advertisement) or between segments of the population in need of protection (such as young people): the Government legislation suppressed all forms of advertising and promotion of a product legally used and sold throughout Canada. It was further noted that the petitioners' advertising was not violent, hateful or false. The Court concluded that the *Tobacco Products Control Act* in its pre-sent state constituted a form of censorship and social engineering incompatible with the essence of a free and democratic society.

The Court identified another problem with the *Tobacco Products Control Act*: by its legislation, the State was trying to model the thoughts, beliefs and conduct of its citizens in accordance with the model preferred by it. Finally, the Court considered the exceptions provided for advertising in imported publications, among others, as revealing a defect in the legislation's rationality and questioned the seriousness of the State's goal.

For these reasons, again siding with RJR MacDonald Inc. and Imperial Tobacco Ltd., the Court considered that the *Tobacco Products Control Act* violated the rights guaranteed in paragraph 2(b) of the *Canadian Charter of Rights and Freedoms* and did not meet the proportionality test under Section 1 of the *Charter*.

The Attorney General of Canada has announced its intention to appeal this decision.

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