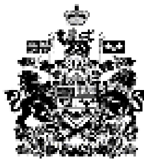

SUPREME COURT OF CANADA

CITATION: Canada (Attorney General) *v.* JTI-Macdonald Corp., [2007] 2 S.C.R. 610, 2007 SCC 30

DATE: 20070628
DOCKET: 30611

BETWEEN:

Attorney General of Canada
Appellant / Respondent on cross-appeal
and
JTI-Macdonald Corp.
Respondent / Appellant on cross-appeal

AND BETWEEN:

Attorney General of Canada
Appellant / Respondent on cross-appeal
and
Rothmans, Benson & Hedges Inc.
Respondent / Appellant on cross-appeal

AND BETWEEN:

Attorney General of Canada
Appellant / Respondent on cross-appeal
and
Imperial Tobacco Canada Ltd.
Respondent / Appellant on cross-appeal
- and -
Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General for Saskatchewan and Canadian Cancer Society
Interveners

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

REASONS FOR JUDGMENT: (paras. 1 to 142)	McLachlin C.J. (Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ. concurring)

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canada (attorney general) *v.* jti-macdonald corp.

Attorney General of Canada *Appellant/Respondent on cross-appeal*

v.

JTI-Macdonald Corp. *Respondent/Appellant on cross-appeal*

and

Attorney General of Canada *Appellant/Respondent on cross-appeal*

v.

Rothmans, Benson & Hedges Inc. *Respondent/Appellant on cross-appeal*

and

Attorney General of Canada *Appellant/Respondent on cross-appeal*

v.

Imperial Tobacco Canada Ltd. *Respondent/Appellant on cross-appeal*

and

Attorney General of Ontario, Attorney General of Quebec,
Attorney General of New Brunswick,

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Attorney General of Manitoba,
Attorney General of British Columbia,
Attorney General for Saskatchewan and
Canadian Cancer Society *Interveners*

Indexed as: Canada (Attorney General) *v.* JTI-Macdonald Corp.

Neutral citation: 2007 SCC 30.

File No.: 30611.

2007: February 19; 2007: June 28.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for quebec

Constitutional law – Charter of Rights – Freedom of expression – Advertising and promotion of tobacco – Whether limits imposed on tobacco manufacturers' freedom of expression by provisions of Tobacco Act and Tobacco Products Information Regulations justified – Canadian Charter of Rights and Freedoms, ss. 1, 2(b) – Tobacco Act, S.C. 1997, c. 13, ss. 18, 19, 20, 22, 24, 25 – Tobacco Products Information Regulations, SOR/2000-272.

In 1995, in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, the Court struck down provisions of the *Tobacco Products Control Act* that broadly prohibited all advertising and promotion of tobacco products, subject to specific

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exceptions, and required that unattributed warning labels be affixed on tobacco product packaging. In response to the Court's decision, Parliament enacted the *Tobacco Act* and the *Tobacco Products Information Regulations*. The scheme of the new legislation, in broad terms, involves permitting information and brand-preference advertising, while forbidding lifestyle advertising and promotion, advertising appealing to young persons, and false or misleading advertising or promotion. In addition, the size of mandatory and attributed health warnings on packaging is increased from 33 percent to 50 percent of the principal display surfaces. The appellant tobacco manufacturers challenged the new legislation, alleging that some provisions limited their right to freedom of expression under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* and that those limits were not justified under s. 1 of the *Charter*. More specifically, they challenged (1) the provisions' effect on funded scientific publications, (2) the provisions dealing with false and erroneous promotion, (3) the provisions relating to advertising appealing to young people, (4) the ban on lifestyle advertising, (5) the ban on sponsorship promotion and (6) the requirement regarding health warning labels. The trial judge determined that the impugned provisions were constitutional and dismissed the manufacturers' actions. The Quebec Court of Appeal upheld most of the scheme, but found parts of some of the provisions to be unconstitutional. The Attorney General of Canada appealed the findings of unconstitutionality, and the tobacco manufacturers cross-appealed on some of the provisions held to be constitutional.

Held: The appeals should be allowed and the cross-appeals dismissed.

Properly construed, ss. 18 and 19 of the *Tobacco Act* permit the publication of legitimate scientific works sponsored by the tobacco manufacturers and do not unjustifiably restrict the manufacturers' right to freedom of expression. These sections,

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as applied to scientific works, are ambiguous. Although the primary object of s. 18 is "product placement" directed at consumers, s. 18(2)(*a*), read literally and in combination with the definition of "promotion" in s. 18(1) and the general prohibition in s. 19, would effect a broad ban on funded scientific works. Such a reading would fit neither the scheme of ss. 18 and 19 nor Parliament's goals. To bring the reference to "scientific work" in s. 18(2)(*a*) into harmony with the purpose and wording of s. 18 as a whole, the word "promotion" in s. 18 should be read as meaning commercial promotion directly or indirectly targeted at consumers. Read in this way, ss. 18 and 19 do not prevent the publication of legitimate scientific works funded by tobacco manufacturers. However, a manufacturer would be prohibited from paying for a particular brand to be included in a commercial scientific work directed at consumers, and this limit on free expression would be saved under s. 1 of the *Charter*. [49-57]

Section 20 of the *Tobacco Act*, which bans "false, misleading or deceptive" promotion, as well as promotion "likely to create an erroneous impression about the characteristics, health effects or health hazard of the tobacco product or its emissions", clearly infringes the guarantee of freedom of expression. However, the ban, and more specifically the ban on promotion "likely to create an erroneous impression", are justified under s. 1. This phrase is directed at promotion that, while not literally false, misleading or deceptive in the traditional legal sense, conveys an erroneous impression about the effects of the tobacco product, in the sense of leading consumers to infer things that are not true. It represents an attempt to cover the grey area between demonstrable falsity and invitation to false inference that tobacco manufacturers have successfully exploited in the past. Parliament's objective of combating the promotion of tobacco products by half-truths and by invitation to false inference constitutes a pressing and substantial objective, and prohibiting such forms of promotion is rationally connected

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to Parliament's public health and consumer protection purposes. The ban on promotion "likely to create an erroneous impression" is not overbroad or vague, but rather falls within a range of reasonable alternatives. Finally, the impugned phrase meets the requirement of proportionality of effects. The objective is of great importance, nothing less than a matter of life or death for millions of people who could be affected, and the evidence shows that banning advertising by half-truths may help reduce smoking. The expression at stake — the right to invite consumers to draw an erroneous inference as to the healthfulness of a product that, on the evidence, will almost certainly harm them — is of low value. [58-69]

Section 22(2) of the *Tobacco Act* permits information and brand-preference advertising in certain media and certain locations, but s. 22(3) bans "advertising that could be construed on reasonable grounds to be appealing to young persons". This limit on free expression imposed by s. 22(3), properly interpreted, is justified under s. 1 of the *Charter*. Section 22(3) requires the prosecution in a given case to prove that there are reasonable grounds to believe that the advertisement of a tobacco product at issue could be appealing to young persons, in the sense that it could be particularly attractive and of interest to young persons, as distinguished from the general population. This interpretation yields a common meaning for the French and English versions of s. 22(3) and is consistent with Parliament's stated purpose of preventing young people in particular from taking up smoking and becoming addicted to tobacco. This purpose is pressing and substantial, and a ban on advertising appealing to young persons is rationally connected to it. Further, s. 22(3), properly interpreted, satisfies the minimal impairment requirement. The provision does not impose a total ban on advertising. Information and brand-preference advertising is permitted, provided that it is not done in places that young persons are likely to frequent or in publications not addressed to

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adults, and provided that it is not lifestyle advertising or advertising that there are reasonable grounds to believe that it could be appealing to young people as a group. Given the sophistication and subtlety of tobacco advertising practices in the past, Parliament cannot be said to have gone further than necessary in blocking advertising that might influence young persons to start smoking. Lastly, s. 22(3) meets the requirement of proportionality of effects. The prohibited speech is of low value, and the beneficial effects of the ban for young persons and for society at large may be significant. Moreover, the vulnerability of the young may justify measures that privilege them over adults in matters of free expression. [70-95]

The ban on "lifestyle advertising" in s. 22(3), properly interpreted, also constitutes a justified limit on free expression. The first part of the definition of lifestyle advertising in s. 22(4), which, combined with s. 22(3), removes advertising that associates a product with a way of life from the broad ambit of s. 22(2), is unproblematic. As for the phrase "or evokes a positive or negative emotion about or image of, a way of life", it is aimed at precluding arguments that to constitute lifestyle advertising, there must be a link, on the face of the advertisement, between the tobacco product and a way of life. However, this phrase should be interpreted in a way that leaves room for true information and brand-preference advertising, which s. 22(2) permits. Furthermore, the words "such as one that includes glamour, recreation, excitement, vitality, risk or daring" are to be read as illustrations of lifestyle advertising. As with the other challenged provisions, the pressing and substantial nature of Parliament's objective is beyond challenge. The sophistication and subtlety of lifestyle advertising are reflected in the means Parliament has chosen to deal with it, and there is a rational connection between this provision and Parliament's objective. Minimal impairment is also established. True information and brand-preference advertising

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continues to be permitted under s. 22(2). Such advertising crosses the line when it associates a product with a way of life or uses a lifestyle to evoke an emotion or image that may, by design or effect, lead more people to become addicted or lead people who are already addicted to increase their tobacco use. Lastly, the proportionality of the effects is clear. The suppressed expression is of low value compared with the significant benefits in lower rates of consumption and addiction that the ban may yield. [96-116]

Sponsorship promotion, which is subject to a general ban under s. 24 of the *Tobacco Act*, is essentially lifestyle advertising in disguise. For the same reasons as for the prohibition of lifestyle advertising, this clear limit on expression is justified under s. 1. The specific prohibition on using corporate names in sponsorship promotion and on sports or cultural facilities, which is set out in ss. 24 and 25 of the Act, is also justified. The evidence establishes that as restrictions on tobacco advertising tightened, manufacturers increasingly turned to sports and cultural sponsorship as a substitute form of lifestyle promotion. Placing a tobacco manufacturer's name on a facility is one form such sponsorship takes, and the aim of curbing such promotion justifies imposing limits on free expression. The rational connection element is made out, because placing a corporate name on a list of sponsors or on a sports or cultural facility may promote the use of tobacco in a number of ways. Even where there is no overt connection between the corporate name and the brand name of a tobacco product, the corporate name may serve to promote the sale of the tobacco product. Given the nature of the problem, and in view of the limited value of the expression in issue compared with the beneficial effects of the ban, the proposed solution is proportional. [117-129]

The requirement in the *Tobacco Products Information Regulations* that the government's health warnings occupy at least 50 percent of the principal display surfaces

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of packages infringes s. 2(*b*) of the *Charter*, but the infringement is justified under s. 1. Parliament's goal, notably to inform and remind potential purchasers of the product of the health hazards it entails, is pressing and substantial. The evidence as to the importance and effectiveness of such warnings establishes a rational connection between Parliament's requirement for warnings and its objects of reducing the incidence of smoking and of the disease and death it causes. Regarding minimal impairment, the requirement for warning labels, including their size, falls within a range of reasonable alternatives. The reasonableness of the government's requirement is supported, notably, by the fact that many countries require warnings at least as large as Canada's. Finally, the benefits flowing from larger warnings are clear, while the detriments to the manufacturers' expressive interest in creative packaging are small. [130-140]

Cases Cited

Applied: *R. v. Oakes*, [1986] 1 S.C.R. 103; **referred to:** *RJR-MacDonald Inc. v. Canada (Attorney-General)*, [1995] 3 S.C.R. 199; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *R. v. Zundel*, [1992] 2 S.C.R. 731; *R. v. Lucas*, [1998] 1 S.C.R. 439; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *RJR—MacDonald Inc. v. Canada (Attorney-General)*, [1994] 1 S.C.R. 311.

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Radiation Emitting Devices Act, R.S.C. 1985, c. R-1, s. 5(1).

Tobacco Act, S.C. 1997, c. 13, ss. 4, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 43, 47, 49, 50.

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Tobacco Products Information Regulations, SOR/2000-272, ss. 2, 3, 4, 5.

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Hogg, Peter W., Allison A. Bushell Thornton and Wade K. Wright. "*Charter* Dialogue Revisited — Or 'Much Ado About Metaphors'" (2007), 45 *Osgoode Hall L.J.* 1.

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APPEALS and CROSS-APPEALS from judgments of the Quebec Court of Appeal (Beauregard, Brossard and Rayle JJ.A.), [2005] Q.J. No. 11174 (QL), 2005 QCCA 725, (*sub nom. Imperial Tobacco Canada Ltée v. Canada (Procureure générale)*), and [2005] R.J.Q. 2018, 260 D.L.R. (4th) 224, [2005] Q.J. No. 10915 (QL), 2005 QCCA 726, (*sub nom. JTI-Macdonald Corp. v. Canada (Attorney General)*), and [2005] Q.J. No. 11175 (QL), 2005 QCCA 727, (*sub nom. Rothmans, Benson & Hedges Inc. v. Canada (Procureure générale)*), reversing in part a decision of Denis J., [2003] R.J.Q. 181, 102 C.R.R. (2d) 189, [2002] Q.J. No. 5550 (QL). Appeals allowed and cross-appeals dismissed.

Claude Joyal, *Bernard Mandeville* and *Maurice Régnier*, for the appellant/respondent on cross-appeal.

Douglas C. Mitchell, *Georges R. Thibaudeau* and *Catherine McKenzie*, for the respondent/appellant on cross-appeal JTI-Macdonald Corp.

Steven I. Sofer and *Rachel Ravary*, for the respondent/appellant on cross-appeal Rothmans, Benson & Hedges Inc.

Simon V. Potter, *Gregory B. Bordan* and *Sophie Perreault*, for the respondent/appellant on cross-appeal Imperial Tobacco Canada Ltd.

Robin K. Basu and *Mark Crow*, for the intervener the Attorney General of Ontario.

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Dominique A. Jobin and *Caroline Renaud*, for the intervener the Attorney General of Quebec.

Gaétan Migneault, for the intervener the Attorney General of New Brunswick.

Cynthia Devine, for the intervener the Attorney General of Manitoba.

Craig Jones and *Jonathan Penner*, for the intervener the Attorney General of British Columbia.

Thomson Irvine, for the intervener the Attorney General for Saskatchewan.

Julie Desrosiers and *Robert Cunningham*, for the intervener the Canadian Cancer Society.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Overview

1 These appeals concern the constitutionality of Canada's laws on tobacco advertising and promotion, under the *Tobacco Act*, S.C. 1997, c. 13, and the *Tobacco Products Information Regulations*, SOR/2000-272 ("*TPIR*"). The main issue is whether

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the limits certain provisions impose on freedom of expression are justified as reasonable under s. 1 of the *Canadian Charter of Rights and Freedoms*.

2 The case pits tobacco manufacturers against the Attorney General of Canada, who is supported by a number of provincial Attorneys General and the Canadian Cancer Society. The tobacco manufacturers, at this stage of the litigation, challenge six aspects of the legislative and regulatory scheme: (1) its effect on funded scientific publications; (2) its provisions dealing with false and erroneous promotion; (3) its provisions relating to advertising appealing to young persons; (4) its ban on lifestyle advertising; (5) its ban on sponsorship promotion; and (6) its regulatory requirement that health warning labels occupy 50 percent of tobacco packaging.

3 The trial judge, Denis J., upheld the provisions as constitutional ((2003), 102 C.R.R. (2d) 103). The Quebec Court of Appeal upheld most of the scheme, but found parts of some of the provisions to be unconstitutional ([2005] Q.J. No. 11174 (QL), 2005 QCCA 725, and 260 D.L.R. (4th) 224, [2005] Q.J. No. 10915 (QL), 2005 QCCA 726, and [2005] Q.J. No. 11175 (QL), 2005 QCCA 727). The Attorney General of Canada appeals the findings of unconstitutionality to this Court, and the tobacco manufacturers cross-appeal on some of the provisions that the Court of Appeal held constitutional.

4 I conclude that properly interpreted, the legislative and regulatory provisions at issue do not unjustifiably infringe s. 2(*b*) of the *Charter* and should be upheld, for the reasons that follow.

II. Background

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5 Before analyzing the six disputed aspects of the legislative and regulatory scheme, it is necessary to set the stage by discussing the historical background of the legislation and its social and legal contexts.

6 In 1995, this Court struck down the advertising provisions of the *Tobacco Products Control Act* (S.C. 1988, c. 20): *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199. This Act broadly prohibited all advertising and promotion of tobacco products, subject to specific exceptions, and required affixing unattributed warning labels on tobacco product packaging. The majority of the Court in that case held that the provisions limited free expression and that the government had failed to justify the limitations under s. 1 of the *Charter*. In particular, the government, by failing to show that less intrusive measures were not available, had failed to establish that the limits met the requirement of minimal impairment developed in *R. v. Oakes*, [1986] 1 S.C.R. 103 (McLachlin J., at paras. 163 and 165, and Iacobucci J., at para. 191). While the majority agreed that s. 1 justification on issues such as this does not require scientifically precise proof, it found that the absence of virtually any proof was fatal to the government's case. The trial judge had found that the requirements for justification were not met on the evidence. The majority concluded that on the record before it, there was no basis to interfere with the trial judge's conclusion.

7 In response to the Court's decision in *RJR*, Parliament enacted the *Tobacco Act* and *Regulations* at issue on these appeals. The scheme of the new legislation, in broad terms, involved permitting information and brand-preference advertising, while forbidding lifestyle advertising and promotion, advertising appealing to young persons, and false or misleading advertising or promotion. In addition, the size of mandatory and attributed health warnings on packaging was increased from 33 percent to 50 percent of the principal display surfaces. In general, the new scheme was more restrained and

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nuanced than its predecessor. It represented a genuine attempt by Parliament to craft controls on advertising and promotion that would meet its objectives as well as the concerns expressed by the majority of this Court in *RJR*.

8 The government's response to the inevitable challenge to the new scheme, when it came, also reflected the Court's decision in *RJR*. The government presented detailed and copious evidence in support of its contention that where the new legislation posed limits on free expression, those limits were demonstrably justified under s. 1 of the *Charter*.

9 Parliament was assisted in its efforts to craft and justify appropriately tailored controls on tobacco advertising and promotion by increased understanding of the means by which tobacco manufacturers seek to advertise and promote their products and by new scientific insights into the nature of tobacco addiction and its consequences. On the findings of the trial judge in the present case, tobacco is now irrefutably accepted as highly addictive and as imposing huge personal and social costs. We now know that half of smokers will die of tobacco-related diseases and that the costs to the public health system are enormous. We also know that tobacco addiction is one of the hardest addictions to conquer and that many addicts try to quit time and time again, only to relapse.

10 Moreover, the international context has changed since 1995. Governments around the world are implementing anti-tobacco measures similar to and, in some cases, more restrictive than Canada's. The *WHO Framework Convention on Tobacco Control* (2003), 2302 U.N.T.S. 229, which Canada ratified in 2004, mandates a comprehensive ban on tobacco promotion, subject to state constitutional requirements. The Convention, with 168 signatories and 148 parties, is one of the most widely embraced of multilateral

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treaties. Domestically, governments now widely accept that protecting the public from second-hand smoke is a legitimate policy objective. Many provinces have banned smoking in enclosed public places, and some are legislating to recover health care costs from tobacco manufacturers and to restrict tobacco promotion even further than the federal *Tobacco Act*. The tobacco industry has been criticized for its use of "light" and "mild" cigarette designations, which the manufacturers agreed in 2006 to discontinue following an investigation by the Competition Bureau.

11 None of these developments remove the burden on the Crown to show that limitations on free expression imposed by the legislation are demonstrably justified in a free and democratic society, as required by s. 1 of the *Charter*. The mere fact that the legislation represents Parliament's response to a decision of this Court does not militate for or against deference: P. W. Hogg, A. A. Bushell Thornton and W. K. Wright, "*Charter* Dialogue Revisited — Or 'Much Ado About Metaphors'" (2007) 45 *Osgoode Hall L.J.* 1, at pp. 47-48. The legal template set out in *Oakes* and *RJR* remains applicable. However, when that template is applied to the evidence adduced by the government in this case more than a decade later, different conclusions may emerge. *RJR* was grounded in a different historical context and based on different findings supported by a different record at a different time. The *Tobacco Act* must be assessed in light of the knowledge, social conditions and regulatory environment revealed by the evidence presented in this case.

III. The Evidence

12 The trial judge's findings of fact are worth examining in detail; the key points are as follows.

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13 Some 45,000 Canadians die from tobacco-related illnesses every year. By this measure, smoking is the leading public health problem in Canada.

14 Most smokers begin as teenagers, between the ages of 13 and 16. Tobacco advertising serves to recruit new smokers, especially adolescents. It is completely unrealistic to claim that tobacco advertising does not target people under 19 years of age. Recent tobacco advertising has three objectives: reaching out to young people, reassuring smokers (to discourage quitting), and reaching out to women.

15 Tobacco contains nicotine, a highly addictive drug. Some 80 percent of smokers wish they could quit but cannot. However, new smokers, especially young people, are often unaware of (or tend to deceive themselves about) the possibility of addiction. Tobacco companies have designed cigarettes to deliver increased levels of nicotine.

16 The percentage of Canadians who smoke fell from 35 percent to 24 percent between 1985 and 2000. The percentage of smokers fell in every age group except 15- to 19-year-olds.

17 The manufacturers admitted that they produce almost all of the cigarettes sold in Canada, and that their businesses are profitable despite the fact that cigarettes are heavily taxed. They also admitted to spending substantial sums promoting their respective brands.

IV. The Legislative and Regulatory Scheme

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18 The purposes of the *Tobacco Act* are "to provide a legislative response to a national public health problem of substantial and pressing concern ..." and, more particularly, "to protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases"; "to protect young persons and others from inducements to use tobacco products and the consequent dependence on them"; " to protect the health of young persons by restricting access to tobacco products"; and "to enhance public awareness of the health hazards of using tobacco products": s. 4(*a*), (*b*), (*c*) and (*d*) (see Appendix A, setting out relevant portions of the Act).

19 The *Tobacco Act* seeks to accomplish these purposes by targeting "the four Ps" of tobacco marketing: product, price, point of sale and promotion. These appeals deal only with the fourth "P" — promotion — which is regulated under Part IV of the Act. In addition to the provisions impugned in these appeals, Part IV prohibits celebrity endorsements, regulates the distribution of branded accessories and non-tobacco products, prohibits sales promotions such as rebates, prizes and free samples, and regulates the retail display of tobacco products. The government chose the current structure of the legislation after extensive public consultation and after considering a number of alternatives.

20 Restrictions on tobacco advertising are a valid exercise of Parliament's criminal law power: *RJR*. However, the regulatory offences created by the *Tobacco Act* are not true crimes and are punishable on a strict liability basis: see *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154. Violations of the promotion provisions carry serious penalties: fines of up to $300,000 per day and/or imprisonment for up to two years (ss. 43 and 47). A tobacco company can be convicted of a separate offence for

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each day the violation continues (s. 49). Directors and officers can be convicted for offences committed by corporations (s. 50).

21 The basic structure of the limitations on advertising and promotion, along with the manufacturers' objections to them, may be described as follows.

1. *Promotion*

22 The starting point is a general prohibition on promoting tobacco products, except as authorized by the Act or regulations:

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

"Promotion" is defined in s. 18. The basic definition is broad:

> **18.** (1) In this Part, "promotion" means a representation about a product or service by any means, whether directly or indirectly, including any communication of information about a product or service and its price and distribution, that is likely to influence and shape attitudes, beliefs and behaviours about the product or service.

23 Section 18(2) creates exceptions to this general prohibition. The first is an exception for representations of tobacco products in works of art or science, provided no consideration is given for the use or depiction in the work, production or performance: s. 18(2)(*a*). The second is an exception for "a report, commentary or opinion in respect of a tobacco product ...", provided no consideration is given by a manufacturer or retailer for a reference to a tobacco product: s. 18(2)(*b*). The third exception, which does not

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concern us here, is for promotion within the tobacco industry: s. 18(2)(*c*). The manufacturers argue that the prohibition on depiction of tobacco products in scientific works if consideration is given prevents them from funding and publishing scientific research on tobacco products.

2. *Specific Prohibitions: False Promotion; Lifestyle Advertising; Advertising Appealing to Young Persons*

24 Having broadly prohibited promotion subject to the specific exceptions within s. 18(2) and other provisions of the Act or regulations, the legislation goes on to make a number of specific prohibitions.

25 The first is a broad blanket prohibition against false or deceptive promotion of tobacco products:

> **20.** No person shall promote a tobacco product by any means, including by means of the packaging, that are false, misleading or deceptive or that are likely to create an erroneous impression about the characteristics, health effects or health hazards of the tobacco product or its emissions.

The manufacturers argue that this prohibition is impermissibly vague and overbroad, because it forbids not only false or deceptive promotion (terms that have a recognized legal meaning), but goes on to prohibit anything "likely to create an erroneous impression about the characteristics" and health risks of tobacco products.

26 The legislation also prohibits testimonials and endorsements (s. 21), which the manufacturers do not challenge. Prohibitions affecting packaging and display (ss. 23, 24, 25 and 26) are similarly not challenged (with the exception of mandatory health warnings on packaging).

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27 In s. 22(1), the Act prohibits advertisements that depict "a tobacco product, its package or a brand element". However, in s. 22(2), it goes on to carve out an exception from this prohibition for information and brand-preference advertising in publications addressed and mailed to identified adults, in publications with an adult readership of not less than 85 percent, or in signs in places not frequented by young persons.

28 The effect of s. 22(2) is to allow information or brand-preference advertising of tobacco products in publications and venues where adults will constitute the principal audience. However, presumably because Parliament was concerned that such advertising could still reach young people (for example, because publications with an 85 percent adult readership may nevertheless be read by large numbers of young persons), or could cross the line into lifestyle advertising, it further qualified this already restricted form of advertising:

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

"Lifestyle advertising" is defined in s. 22(4) as "advertising that associates a product with, or evokes a positive or negative emotion about or image of, a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring". No definition is provided of what might be appealing to young persons. The manufacturers argue that the prohibitions on lifestyle advertising and advertising appealing to young persons are vague and overbroad, and thus unconstitutional.

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29 The disputed phrases referring to lifestyle advertising and advertising appealing to young persons reappear in s. 27, which prevents the use of brand elements of tobacco products on non-tobacco products.

3. *Sponsorships*

30 Section 24 of the *Tobacco Act* forbids the display of tobacco brand elements or manufacturers' names in any promotion "that is used, directly or indirectly, in the sponsorship of a person, entity, event, activity or permanent facility". Section 25 forbids display of brand elements or manufacturers' names on any "permanent facility", if this associates the element or name with a sports or cultural event or activity. The manufacturers challenge these prohibitions on sponsorships. They argue first that the general ban on promotion is not justified and, alternatively, that if it is, the specific ban on the use of corporate names, as distinguished from brand elements, is overbroad, and thus unconstitutional.

4. *Warnings on Packaging*

31 Finally, the new regulations (the *TPIR*, Appendix B) increase the required size of warning labels on packaging from 33 percent to 50 percent of the principal display surfaces (s. 5(2)(*b*)). The manufacturers object to the increase, arguing that the warnings infringe their freedom of expression and that the government has not shown the increase in size to be justified.

V. <u>Analysis</u>

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32 Before turning to the challenged provisions in more detail, it may be helpful to discuss the main principles that guide the analysis of their constitutionality.

33 The manufacturers challenge the disputed provisions on the ground that they infringe or limit their right to freedom of expression under s. 2(*b*) of the *Charter*. The government concedes this infringement, except in the case of the increase in size of the warning labels, but says the limits on the right are justified under s. 1 of the *Charter*.

34 Section 2(*b*) of the *Charter* provides:

> **2.** Everyone has the following fundamental freedoms:
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> . . .
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> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

When the *Charter* was adopted, the question arose of whether the free expression guarantee extended to commercial expression by corporations. This Court ruled that it did: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927. The Court premised this conclusion on an examination of the values protected by the free expression guarantee: individual self-fulfilment, truth seeking and democratic participation. It concluded that, given the Court's previous pronouncements that *Charter* rights should be given a large and liberal interpretation, there was no sound reason for excluding commercial expression from the protection of s. 2(*b*). It noted that commercial speech may be useful in giving consumers information about products and providing a basis for consumer purchasing decisions: *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 766-67.

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35 The main issue with respect to the challenged provisions is whether the government has shown them to be "demonstrably justified in a free and democratic society" under s. 1 of the *Charter*, which provides:

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

36 This engages what in law is known as the proportionality analysis. Most modern constitutions recognize that rights are not absolute and can be limited if this is necessary to achieve an important objective and if the limit is appropriately tailored, or proportionate. The concept of proportionality finds its roots in ancient and scholastic scholarship on the legitimate exercise of government power. Its modern articulations may be traced to the Supreme Court of Germany and the European Court of Human Rights, which were influenced by earlier German law: A. Barak, "Proportional Effect: The Israeli Experience" (2007), 57 *U.T.L.J.* 369, at pp. 370-371). This Court in *Oakes* set out a test of proportionality that mirrors the elements of this idea of proportionality — first, the law must serve an important purpose, and second, the means it uses to attain this purpose must be proportionate. Proportionality in turn involves rational connection between the means and the objective, minimal impairment and proportionality of effects. As Dickson C.J. stated in *Oakes*, at p. 139:

> There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are

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> responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance". [Emphasis deleted.]

37 The broad objective of the limitations on freedom of expression at issue in this case is to deal with the public health problem posed by tobacco consumption by protecting Canadians against debilitating and fatal diseases associated with tobacco consumption. More particularly, the Act seeks to enhance public awareness of the health hazards of using tobacco products and to protect the health of young people by restricting access to tobacco products: s. 4. An objective will be deemed proper if it is for the realization of collective goals of fundamental importance: P. W. Hogg, *Constitutional Law of Canada*, (loose-leaf ed.), vol. 2 at p. 38-22; *Oakes*, at p. 136. In the words of *Oakes*, the objective must be "pressing and substantial".

38 As discussed in *RJR*, determining the objective of a statute for the purposes of the proportionality analysis may be difficult. Statutes may have different objectives, at different levels of abstraction. The broader and more expansive the objective, the harder it may be to show that the means adopted to promote it impair rights minimally. In this case, Parliament has stated its overall objective broadly: protecting the health of Canadians and responding to a national public health problem. No one disputes the importance of this objective. But Parliament has also stated its objectives more narrowly, linking the broader purpose to the objective of the particular provisions at issue, for example protecting young persons and others from inducements to use tobacco and enhancing public awareness of the health hazards of using tobacco. By defining its objective with such precision, Parliament has taken care not to overstate it or exaggerate its importance: *RJR*, at para. 144.

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39 This brings us to the other side of the proportionality analysis — the means by which Parliament has chosen to pursue its objective. Here those means involve a limitation on free expression which is protected by the Constitution. To pass muster, the means must be rationally connected to the objective, impair the right in a minimal, tailored fashion, and be proportionate or balanced in effect. Whether these requirements are met must be assessed in relation to the particular restriction imposed.

40 Few cases have foundered on the requirement of rational connection. That, however, does not mean that this step is unimportant. The government must establish that the means it has chosen are linked to the objective. At the very least, it must be possible to argue that the means may help to bring about the objective. This was a problem in *RJR*, where the trial judge found that while the government had completely banned commercial advertising, it had not established that pure information or brand-preference advertising was connected to an increase in consumption. In the current Act, Parliament sought to avoid this difficulty by permitting information and brand-preference advertising, subject to exceptions.

41 Deference may be appropriate in assessing whether the requirement of rational connection is made out. Effective answers to complex social problems, such as tobacco consumption, may not be simple or evident. There may be room for debate about what will work and what will not, and the outcome may not be scientifically measurable. Parliament's decision as to what means to adopt should be accorded considerable deference in such cases.

42 The means must not only be rationally connected to the objective; they must be shown to be "minimally impairing" of the right. The means must be carefully tailored

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to the objective. Parliament is entitled to pursue its objective, but in doing so, it must impair the rights of Canadians as little as possible.

43 Again, a certain measure of deference may be appropriate, where the problem Parliament is tackling is a complex social problem. There may be many ways to approach a particular problem, and no certainty as to which will be the most effective. It may, in the calm of the courtroom, be possible to imagine a solution that impairs the right at stake less than the solution Parliament has adopted. But one must also ask whether the alternative would be reasonably effective when weighed against the means chosen by Parliament. To complicate matters, a particular legislative regime may have a number of goals, and impairing a right minimally in the furtherance of one particular goal may inhibit achieving another goal. Crafting legislative solutions to complex problems is necessarily a complex task. It is a task that requires weighing and balancing. For this reason, this Court has held that on complex social issues, the minimal impairment requirement is met if Parliament has chosen one of several reasonable alternatives: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Irwin Toy*.

44 The minimal impairment analysis in this case will also be coloured by the relationship between constitutional review and statutory interpretation. Before engaging in constitutional review, the law must be construed. This may have a critical effect at the stage of minimal impairment, where overbreadth is alleged. The process of interpretation may resolve ambiguity in favour of a more limited meaning. This may only be done in cases of real ambiguity in the statute. In cases of ambiguity, therefore, claims of overbreadth may be resolved by appropriate interpretation: *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 32.

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45 The final question is whether there is proportionality between the *effects* of the measure that limits the right and the law's *objective*. This inquiry focuses on the practical impact of the law. What benefits will the measure yield in terms of the collective good sought to be achieved? How important is the limitation on the right? When one is weighed against the other, is the limitation justified?

46 Although cases are most often resolved on the issue of minimal impairment, the final inquiry into proportionality of effects is essential. It is the only place where the attainment of the objective may be weighed against the impact on the right. If rational connection and minimal impairment were to be met, and the analysis were to end there, the result might be to uphold a severe impairment on a right in the face of a less important objective.

47 As will be seen, this case, while argued mainly on the basis of minimal impairment, engages concerns relating to proportionality of effects. The potential benefits of decreasing tobacco use and discouraging young people from becoming addicted to it are high. On the other hand, a number of the deleterious effects on the right arguably fall at the low end of the spectrum of free expression. (The alleged ban on publication of scientific research is an exception.) When commercial expression is used, as alleged here, for the purposes of inducing people to engage in harmful and addictive behaviour, its value becomes tenuous.

48 Against this background, I turn more specifically to the challenged provisions of the legislative and regulatory scheme.

1. *Publication of Manufacturer-Sponsored Scientific Works*

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49 As mentioned previously, s. 19 of the Act sets out a general ban on the promotion of tobacco products, subject to specific exceptions. Section 18(2) excludes some forms of promotion from this ban, including "literary, dramatic, musical, cinematographic, scientific, educational or artistic" works that "use or depict" tobacco products, so long as no consideration is given for the use or depiction of the tobacco product.

50 The manufacturers argue that this exception is not broad enough to exempt the publication of legitimate scientific research. If they sponsor research, they will be giving consideration for it. This bars them from publishing the results of legitimate scientific research. For example, research carried out by a tenured professor under a grant from a tobacco manufacturer, producing results that are favourable to (and hence "promoting") a tobacco product, could not, they claim, even be published in a peer-reviewed journal.

51 The trial judge, Denis J., held that s. 18 is confined to commercial promotion and that this does not restrict legitimate scientific research. However, the Court of Appeal, *per* Beauregard J.A., held that the ss. 18 and 19 did impose a restriction on publication of scientific research, and went on to find them an unjustified intrusion on the right of free expression. To correct the situation, the Court of Appeal ordered that the exclusion from the exemption of works for which consideration is given, as applied to scientific works, should be read out of s. 18(2).

52 A ban on the publication of all sponsored scientific work, if that is what the Act requires, is difficult to justify. Even if it could be argued that such a ban meets the

rational connection test on the basis that sponsored research might produce results that could encourage tobacco consumption, such a ban would likely not minimally intrude on the right of free expression. The possibility of sponsoring scientific work on tobacco could, to be sure, be abused. For example, tobacco companies could pay for scientific studies that are deceptive or misleading, or the publication of which is aimed at teenagers. But these concerns, it might be argued, do not justify a wholesale ban on publishing scientific works; they can and should be specifically targeted. Nor, arguably, would a total ban on sponsored scientific works satisfy the requirement of proportionality of effects. The benefits of publishing legitimate scientific research are likely to outweigh any detriment to Parliament's goals. The expressive activity of publishing scientific research is valuable, and prohibitions on it have an impact on the right to free expression in a serious manner. By contrast, the beneficial effect of the ban could be tenuous. However it is viewed, the manufacturers assert, the ban unjustifiably restricts their right of freedom of expression. Potentially valuable expression is restricted, to no good or proportionate end.

53 The question remains, however: do the provisions, properly interpreted, impose a total ban on sponsored scientific research? In my view, the answer to this question is no. Properly construed, ss. 18 and 19 permit the publication of legitimate scientific works sponsored by the tobacco manufacturers.

54 I begin with the proposition that these sections, as applied to scientific works, are ambiguous. It is not clear, on the face of the words, what Parliament intended. Section 18 is oddly drafted. Read literally, s. 18(2)(*a*), in combination with the definition in s. 18(1) and the prohibition in s. 19, would effect a broad ban on scientific works. Such a reading seems misplaced. It fits neither the scheme of ss. 18

and 19 nor Parliament's goals. The primary object of s. 18 is "product placement" directed at consumers, such as the practice of a tobacco manufacturer paying a studio to have its brand of cigarettes appear in a film. Although the Attorney General claims that the same concerns about "product placement" arise in regard to scientific works, it is hard to see why this would lead to a ban on all legitimate, funded scientific work.

55 Confronted with a statutory provision that, read literally, seems to make no sense, the court should ask whether the section can be interpreted in a manner that fits the context and achieves a rational result. This flows from the modern approach to statutory interpretation, as expressed by Driedger in a passage often quoted by this Court:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
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> (*Sharpe*, at para. 33, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87)

56 The Attorney General of Canada urges a purposive interpretation of s. 18 that confines "promotion" to commercial promotion. This was the approach of the trial judge, Denis J., who held that only commercial promotion targeting consumers was caught by s. 18 (at para. 341). Read in this way, ss. 18 and 19 do not prohibit the publication of legitimate scientific research, because it is neither commercial nor aimed at consumers. On the other hand, a manufacturer would be prohibited from paying for a particular brand to be included in a commercial scientific work directed at consumers. Such a limit on free expression would, however, be saved under s. 1 of the *Charter*; rational connection, minimal impairment and proportionality of effects would be clearly

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established. This interpretation brings the reference to "scientific work" in s. 18(2)(*a*) into harmony with the purpose and wording of s. 18 as a whole.

57 I conclude that "promotion" in s. 18 should be read as meaning commercial promotion directly or indirectly targeted at consumers.

2. *False Promotion*

58 Section 20 bans "false, misleading or deceptive" promotion, as well as promotion "likely to create an erroneous impression about the characteristics, health effects or health hazards of the tobacco product or its emissions".

59 The trial judge upheld this provision, on the basis that it did not violate the s. 2(*b*) guarantee of freedom of expression. The Court of Appeal, *per* Beauregard J.A., held that the words "likely to create an erroneous impression" were vague and overbroad and thus could not be justified as a reasonable limit on free expression under s. 1. The court ordered the offending phrase struck from s. 20.

60 Section 20 clearly infringes the guarantee of freedom of expression. The *Charter* is content-neutral and protects the expression of both truths and falsehoods. Consequently, the regulation of falsehoods must be justified under s. 1 of the *Charter*. See *R. v. Zundel*, [1992] 2 S.C.R. 731; *R. v. Lucas*, [1998] 1 S.C.R. 439.

61 The s. 1 inquiry into the justification of the ban imposed by s. 20 of the Act must be set in the factual context of a long history of misleading and deceptive advertising by the tobacco industry. The creative ability of the manufacturers to send

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positive messages about a product widely known to be noxious is impressive. In recent years, for example, manufacturers have used labels such as “additive free” and “100% Canadian tobacco” to convey the impression that their product is wholesome and healthful. Technically, the labels may be true. But their intent and effect is to falsely lull consumers into believing, as they ask for the package behind the counter, that the product they will consume will not harm them, or at any rate will harm them less than would other tobacco products, despite evidence demonstrating that products bearing these labels are in fact no safer than other tobacco products. The wording chosen by Parliament in s. 20 and its justification must be evaluated with this context in mind. Parliament’s concern was to combat misleading false inferences about product safety and to promote informed, enlightened consumer choice.

62 The specific objection is to the phrase “or that are likely to create an erroneous impression” in s. 20. The manufacturers argue that this phrase is overbroad and vague, and introduces subjective considerations. How, they ask, can they predict what is “likely to create an erroneous impression”? The words false, misleading or deceptive, used as legal terms, generally refer to objectively ascertainable facts. If “likely to create an erroneous impression” adds something to “false, misleading or deceptive”, as presumably was Parliament’s intent, what is it?

63 The answer is that the phrase “likely to create an erroneous impression” is directed at promotion that, while not literally false, misleading or deceptive in the traditional legal sense, conveys an erroneous impression about the effects of the tobacco product, in the sense of leading consumers to infer things that are not true. It represents an attempt to cover the grey area between demonstrable falsity and invitation to false inference that tobacco manufacturers have successfully exploited in the past.

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64 The industry practice of promoting tobacco consumption by inducing consumers to draw false inferences about the safety of the products is widespread. This suggests that it is viewed by the industry as effective. Parliament has responded by banning promotion that is "likely to create an erroneous impression". This constitutes a limit on free expression. The only question is whether the limit is justified under s. 1 of the *Charter*.

65 Parliament's objective of combating the promotion of tobacco products by half-truths and by invitation to false inference constitutes a pressing and substantial objective, capable of justifying limits on the right of free expression. Prohibiting such forms of promotion is rationally connected to Parliament's public health and consumer protection purposes.

66 The impugned phrase does not impair the right of free expression more than is necessary to achieve the objective. The words false, misleading or deceptive do not do the work assigned to the additional phrase, "likely to create an erroneous impression". Nor is it easy to find narrower words that would accomplish that task. The exact wording of the impugned phrase appears in the English version of Art. 11(1)(a) and 13(4)(a) of the *WHO Framework Convention on Tobacco Control*. The French version uses almost identical wording. The Convention mandates the use of such language in parties' national law, subject to the application of domestic constitutional principles. At least three other Canadian statutes use similar wording: the *Food and Drugs Act*, R.S.C. 1985, c. F-27, s. 5(1); the *Radiation Emitting Devices Act*, R.S.C. 1985, c. R-1, s. 5(1); the *Animal Pedigree Act*, R.S.C. 1985, c. 8 (4th Supp.), s. 64. These examples lend weight to the conclusion that the ban on promotion "likely to create an erroneous

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impression" is not overbroad or vague, but on the contrary, falls within a range of reasonable alternatives.

67 I would reject the manufacturers' claim that the French wording "*susceptible de créer une fausse impression*" is significantly broader than the English "likely to create an erroneous impression". "*Susceptible*" is not equivalent to the English "susceptible"; it is often used as the equivalent of "likely", including in the *WHO* Convention. When the English and French versions of the statute are considered together, the meaning is clear.

68 Finally, the impugned phrase meets the requirement of proportionality of effects. On the one hand, the objective is of great importance, nothing less than a matter of life or death for millions of people who could be affected, and the evidence shows that banning advertising by half-truths and by invitation to false inference may help reduce smoking. The reliance of tobacco manufacturers on this type of advertising attests to this. On the other hand, the expression at stake is of low value — the right to invite consumers to draw an erroneous inference as to the healthfulness of a product that, on the evidence, will almost certainly harm them. On balance, the effect of the ban is proportional.

69 I conclude that the ban on false promotion, and particularly on promotion "likely to create an erroneous impression", is justified under s. 1 of the *Charter* as a reasonable limit on free expression and that s. 20 of the *Tobacco Act* is constitutional.

3. *Advertising and Promotion Appealing to Young Persons*

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70 The *Tobacco Act* uses three particular means of protecting young persons from tobacco advertising and promotion. The first consists of the placement restrictions, found in s. 22(2). The second is a ban on advertising that "could be construed on reasonable grounds to be appealing to young persons", found in s. 22(3). The third is a ban on the use of tobacco brand elements on non-tobacco products that are "associated with young persons or could be construed on reasonable grounds to be appealing to young persons": s. 27(*a*). The manufacturers challenge the second of these measures, the ban on advertising that "could be construed on reasonable grounds to be appealing to young persons": s. 22(3).

71 The structure of the scheme at issue, broadly put, is this. As mentioned previously, s. 22(2) permits information and brand-preference advertising in certain media and certain locations. Brand-preference advertising is broadly defined as "advertising that promotes a tobacco product by means of its brand characteristics". Brand characteristics arguably may include elements that are directed at young persons. To remove these elements, s. 22(3) of the Act claws them back. The result is to ban this type of advertising.

72 There is no doubt that this ban limits free expression and thus infringes s. 2(*b*) of the *Charter*. The only question is whether the ban is justified under s. 1 of the *Charter*. I conclude that it is.

73 Once again, the analysis must begin by interpreting s. 22(3). Again, the question is what Parliament intended the section to mean. In this case, the task of interpretation is challenging. The language used, whether in English or in French, is not

without difficulty. To complicate matters, the two versions can be read as imparting different nuances.

74 The courts below struggled with these difficulties. The trial judge, Denis J., began by rejecting the tobacco industry's evidence that tobacco advertising does not target youth, and is directed only at brand-switching among adults. He found that much of the industry's advertising is in fact aimed at youth, and that persuading teenagers to take up smoking was a calculated and deliberate industry advertising strategy. He went on to hold that the phrases "reasonable grounds", "could be" and "appealing to young persons" are well understood and sufficient to allow a judge in a particular case to decide if a violation had been made out.

75 The Court of Appeal divided on the constitutionality of the provision. The majority (Brossard and Rayle JJ.A.) upheld it. Like the trial judge, they took the test to be whether the words are capable of interpretation by a tribunal. They held that they were. They emphasized that on this matter, a great deal of deference must be accorded to Parliament's choice. Parliament, in their view, has the right to be draconian when it comes to children and youth. The offence, they noted, is not criminal but regulatory. The ban is aimed at protecting a vulnerable group. When the importance of the objective is compared with the lack of value of the expression constrained, there can be no doubt that it is proportionate, in their view. The courts, in these circumstances, must defer to Parliament.

76 Beauregard J.A. dissented. In his view, the provision is overbroad. It is not enough that a judge be able to apply the section; in addition, it must permit the tobacco manufacturers to know what is allowed and what is not allowed. It must be possible to

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distinguish between what is appealing to young persons and is banned, and what is appealing to adults and is permitted. Because this line cannot be drawn, the effect, in the view of Beauregard J.A., is to make this a total ban on all information and brand-preference advertising, contrary to the clear purport of s. 22(2). The remedy, in his view, was to strike from s. 22(3) the phrase "or advertising that could be construed on reasonable grounds to be appealing to young persons".

77 The manufacturers attribute two vices to the provision banning advertising that could be appealing to youth: vagueness and overbreadth. The two are related. The manufacturers' main point is that the provision offers insufficient guidance for them to know when they might be running afoul of the law. The manufacturers' argument strongly resembles a s. 7 "vagueness" argument. However, since s. 7 is not at issue in this case, it is appropriate to deal with this under s. 1, either as a lack of a "limit prescribed by law" or as a lack of minimal impairment. As Sopinka J. stated in *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at pp. 94-95 (cited with approval by a unanimous Court in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 56):

> Vagueness can have constitutional significance in at least two ways in a s. 1 analysis. A law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. ... In these circumstances, there is no "limit prescribed by law" and no s. 1 analysis is necessary as the threshold requirement for its application is not met. The second way in which vagueness can play a constitutional role is in the analysis of s. 1. A law which passes the threshold test may, nevertheless, by reason of its imprecision, not qualify as a reasonable limit. Generality and imprecision of language may fail to confine the invasion of a *Charter* right within reasonable limits. In this sense vagueness is an aspect of overbreadth.

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78 It is thus clear that both overbreadth and vagueness can be considered in determining whether a limit on free expression is justified under s. 1 of the *Charter*, although the two concepts raise distinct considerations. Overbreadth is concerned with whether the provision on its face catches more expression than necessary to meet the legislator's objective. The criticism is not that the words are unclear, but that while clear, they go too far. Vagueness, by contrast, focuses on the generality and imprecision of the language used. The argument is that because the language is vague and unclear, it may be applied in a way that in fact goes beyond the legislator's stated goals. A citizen, corporate or otherwise, who wishes to stay within the law may have no choice but to err on the side of caution. The result may be that the citizen says less than is required in fact to accomplish the state's object. Indeed, confronted by vague bans on speech, the prudent citizen may be reduced to saying nothing at all. Like clear language that casts the statutory net too broadly, overbreadth by reason of vagueness goes to the heart of the requirement of minimal impairment.

79 It follows from this that two things must be shown in order to refute a claim of vagueness and overbreadth: first, the provision must give adequate guidance to those expected to abide by it; and second, it must limit the discretion of state officials responsible for its enforcement. While complete certainty is impossible, and some generalization is inevitable, the law must be sufficiently precise to provide guidance for legal debate: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606. The trial judge and the majority in the Court of Appeal emphasized the need for flexibility and the impossibility of achieving absolute certainty, but Beauregard J.A. correctly insisted as well on the principle of providing citizens with substantive notice in order to guide their conduct. To ask only whether a trial judge will be able to apply the impugned law when a case comes before him or her provides an inadequate response to the concern that the

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law may in the future be applied in an overbroad way. In effect, it defers the critical question of actual overbreadth to another day.

80 Against this background, I turn to the task of interpreting s. 22(3). As stated, the aim is to ascertain the intention of Parliament. To do this, one considers the words used in their legal and social context. One seeks a common meaning between the English and French texts. And throughout, one is guided by Parliament's objective, or purpose. On the matter at issue, Parliament could not have made its purpose clearer than it has in the *Tobacco Act*. It is, quite simply, "to protect young persons and others from inducements to use tobacco products and the consequent dependence on them": s. 4(*b*).

81 A number of phrases in the ban on advertising appealing to young people are, at first blush, problematic: "could be construed", "on reasonable grounds" and "appealing to young persons" are, viewed individually, far from precise. However, it is the global intention that we must seek.

82 The first striking aspect of s. 22(3) is its insistence on "reasonable grounds" for concluding that the advertising is within the prohibited designation. The English version uses the phrase "that could be construed on reasonable grounds". The French version uses a different grammatical construction but picks up the same idea: "*dont il existe des motifs raisonnables de croire*" (for which there are reasonable grounds to believe). The English construction is unusual. The French, however, is one familiar to the law. "Reasonable grounds to believe" is a common concept, particularly in criminal law. I conclude that the common meaning of this part of the provision is reasonable grounds to believe that the advertising in question falls within the prohibition. This is an objective standard, and one with clear legal content.

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83 The more difficult aspect of the wording is the use of the conditional "could be" or "*pourrait*" in the provision. "Reasonable grounds to believe" in the criminal context is generally used with the factual, indicative tense; the person making the assessment must have reasonable grounds for the belief in question. Section 22(3) is different. The English version uses "could be construed on reasonable grounds". This suggests that there should be reasonable grounds, but that the person making the assessment would not need to be as certain of their actual existence as would be the case in the criminal context. The French version uses a different construction altogether. The conditional "*pourrait*" in the French version does not describe the activity of assessing or construing the grounds, as in the English version, but rather the character of the prohibited advertising: "*qu'elle pourrait être attrayante pour les jeunes*", i.e. that it could be appealing to young persons.

84 Again, I find the French version more helpful. The suggestion in the English version that there be reasonable grounds but that the person assessing them need not be entirely certain about them seems to involve a contradiction in terms. If reasonable grounds exist, it is hard to imagine how one could be in doubt about them. The French version avoids this difficulty: one must have reasonable grounds to conclude that the advertising "could be" appealing to young persons. This captures the idea that the reasonable grounds exist but that there may be doubt about whether in fact young persons would find the advertising appealing. Read thusly, the phrase serves the purpose of relieving the prosecutor of proving that a particular advertisement in fact was appealing to one or more young persons. All that is required is that the evidence establish that the advertising could be appealing to young persons.

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85 This leaves the phrase "appealing to young persons". In the English version, "appealing" could arguably be read as a verb, in the sense of "making an appeal to", although its adjectival sense of something that is "attractive [and] of interest" appears to be more natural (*Canadian Oxford Dictionary* (2nd ed. 2004), at p. 61). In French, the phrase "*attrayante*" is clearly adjectival — the question is whether the advertisement could be "*attrayante*" or appealing to young persons. I conclude that "appealing" must be read as an adjective in English as well.

86 The last part of the puzzle is what Parliament intended by singling out advertising appealing "to young persons". Could this include all advertising, even advertising that is primarily appealing to adults, on the theory that such advertising could also be appealing to some young persons? Or did Parliament intend to confine the exception carved out from the broader permission for information and brand-preference advertising to advertising that is particularly appealing to young persons?

87 In my view, the only reasonable conclusion is the latter. Parliament had already said, in s. 22(2), that information and brand-preference advertising was permitted in appropriate places. The purpose of s. 22(3) is to protect a narrower subset of consumers whose particular tastes cannot be reflected in advertising. To read "could be appealing to young persons" as including all advertising would defeat this purpose and render s. 22(2) meaningless. Moreover, the words "to young persons" must be assumed to have been included for a purpose. To read them as extending to everyone also renders them meaningless. The rule that the legislator does not speak in vain suggests that this interpretation should be rejected: *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831. Finally, reading s. 22(3) as confined to advertising

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particularly appealing to young persons is consistent with Parliament's purpose of preventing young people from taking up smoking and becoming addicted to tobacco.

88 For these reasons, I conclude that s. 22(3) must be read as creating a ban for information and brand-preference advertising that could be appealing to a particular segment of society, namely young people. In order to establish this element, the prosecutor must show that the advertisement in question could be attractive to young people, as distinguished from the general adult population.

89 At the end of this exercise in interpretation, we arrive at a common meaning for the French and English versions of s. 22(3), which is consistent with Parliament's stated purpose of preventing young persons in particular from taking up smoking. Section 22(3), thus interpreted, requires the prosecution in a given case to prove that there are reasonable grounds to believe that the advertisement of a tobacco product at issue could be appealing to young persons, in the sense that it could be particularly attractive and of interest to young persons, as distinguished from the general population.

90 Having established the meaning of s. 22(3), I turn to the question of whether the incursion on free expression that it represents has been shown to be a reasonable limit demonstrably justified in a free and democratic society under s. 1 of the *Charter*.

91 It is not disputed that Parliament's objective of preventing young people from being tempted to take up tobacco use and consequently becoming addicted is pressing and substantial. Nor is there doubt that a ban on advertising appealing to young persons is rationally connected to this goal.

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92 The manufacturers' claims that the provision is not minimally impairing by reason of vagueness and overbreadth, however, require close consideration. I cannot endorse the view of Rayle J.A. that [TRANSLATION] "in the context of the protection of children, the minimal impairment branch of the section 1 test is not relevant" (para. 341). However, I conclude that s. 22(3), construed as I have suggested, is not vague. It does not impose a total ban on advertising. Information and brand-preference advertising is permitted, provided that it is not done in places that young persons are likely to frequent or publications not addressed to adults, and provided that it is not lifestyle advertising (considered below) or advertising that there are reasonable grounds to believe that it could be appealing to young people as a group.

93 Is the ban on advertising that could appeal to young persons overbroad? Does it go farther than necessary to accomplish Parliament's purpose? It might be argued that it is enough to confine advertising to information and brand-preference and to impose placement restrictions, and that the further limit imposed by s. 22(3) is unnecessary. But this argument overlooks the breadth of Parliament's definition of brand-preference advertising, which may well permit advertising targeted at young persons. Information, too, can be packaged in many ways. These realities, coupled with the possibility that young persons may see or read that material permitted by the placement restrictions, justify a specific restriction on material that could be appealing to young persons. Brand-preference advertising is permitted in publications sent by mail to an identified adult (s. 22(2)(*a*)) or with an adult readership of at least 85 percent (s. 22(2)(*b*)). These publications may nevertheless be read by young persons. The purpose of s. 22(3), in this context, is to prevent advertising in these publications that "could be" appealing to young people, as opposed to the general adult population. Section 22(3)

simply forbids presenting this type of advertising in a way that could have a particular appeal to young persons. Given the sophistication and subtlety of tobacco advertising practices in the past, as demonstrated by the record in this case, Parliament cannot be said to have gone farther than necessary in blocking advertising that might influence young persons to start smoking.

94 Finally, s. 22(3) meets the requirement of proportionality of effects. The prohibited speech is of low value. Information about tobacco products and the characteristics of brands may have some value to the consumer who is already addicted to tobacco. But it is not great. On the other hand, the beneficial effects of the ban for young persons and for society at large may be significant. The placement restrictions may mean that the majority of people seeing the advertising prohibited by s. 22(3) are adults. The restrictions may impose a cost in terms of the information and brand-preference advertising they may be able to receive. But that cost is small; all that is prohibited is advertising that could be specifically appealing to young people. Moreover, the vulnerability of the young may justify measures that privilege them over adults in matters of free expression. Thus in *Irwin Toy*, at p. 982, the Court upheld a stipulation that the late hour of advertising did not create a presumption that it was not aimed at children, with the observation that such a stipulation "makes clear that children's product advertising, if presented in a manner aimed to attract children, is not permitted even if adults form the largest part of the public likely to see the advertisement."

95 I conclude that the limit on free expression imposed by s. 22(3), properly interpreted, is justified as reasonable under s. 1 of the *Charter*.

4. *Lifestyle Advertising*

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96 Section 22(3) carves out from permitted information and brand-preference advertising under s. 22(2) two types of advertising: advertising that could appeal to young persons, just considered, and lifestyle advertising.

97 Section 22(4) defines lifestyle advertising as follows:

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

98 It is agreed that this provision infringes the s. 2(*b*) guarantee of freedom of expression. The manufacturers, however, argue that it is overbroad and ask that it be struck down. Alternatively, they ask that the definition of lifestyle be restricted to the lifestyles specifically referred to in s. 22(4).

99 The trial judge, Denis J., detailed the industry practice of using appeals to various lifestyles as a means of selling tobacco products. Different lifestyles are directed to different segments of the population. Women and young persons rank high among those targeted by this type of advertising. The advertising is highly sophisticated. Some associate a product with a romanticized lifestyle, such as the cowboy image of the "Marlboro man". Other advertising may evoke elements of a more ordinary lifestyle, for example, the image of a cup of coffee or a bath, coupled with a cigarette. Sometimes the cigarette disappears altogether; only the bath or cup of coffee is shown, connected discreetly with a particular brand name. Denis J. upheld the ban on lifestyle advertising on the basis that despite its references to images and emotions, it was sufficiently clear to permit a court to interpret it in a particular case.

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100 The Court of Appeal divided on the issue. The majority (Brossard and Rayle JJ.A.) upheld the ban. Parliament, in its view, was justified in employing a broad definition in order to cover creative forms of advertising that might not fit within a more traditional definition of lifestyle advertising. In dissent, Beauregard J.A. argued that it may be impossible to advertise certain products without evoking a positive or negative emotion about a lifestyle already associated with those products.

101 I conclude that properly interpreted, the ban on lifestyle advertising in s. 22(3) constitutes a reasonable and demonstrably justified limit on the right of free expression.

102 As with the other provisions challenged in these appeals, the first task is one of interpretation. Some background may be helpful. In *RJR*, the majority agreed that on the evidence presented in that case, a prohibition on lifestyle advertising (but not information and brand-preference advertising) could have been considered minimally impairing (*per* McLachlin J., at para. 164; *per* Iacobucci J., at para. 191). This was based on the understanding that lifestyle advertising invariably seeks to increase overall tobacco consumption, not just to inform existing smokers.

103 The Attorney General of Canada asserts that s. 22 is Canada's response to the "guidelines" of the Court. However, the *Tobacco Act* departs in important respects from the template discussed in *RJR*, making direct comparisons inconclusive.

104 First, the Act defines "lifestyle" differently than did the discussion in *RJR*. The definition of lifestyle advertising alluded to in *RJR* was broad, unencumbered by the references to "glamour, recreation, excitement, vitality, risk or daring" found in the Act.

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Moreover, the Court in *RJR* focused on advertising that "associates" a product with a way of life, and made no references to advertising that "evokes a positive or negative emotion about or image of" a way of life, as found in the *Tobacco Act*.

105 Second, the *Tobacco Act* defines brand-preference advertising more broadly than the Court did in *RJR*. In *RJR*, brand-preference advertising was restricted in that it had to be aimed only at existing smokers, inducing them to switch brands, and was restricted to colour, design and package appearance (*per* La Forest J., relying on the definition used in the Court of Appeal ([1993] R.J.Q. 375, 102 D.L.R. (4th) 289), *per* Brossard J.A.). The *Tobacco Act*, by contrast, simply defines brand-preference advertising as "advertising that promotes a tobacco product by means of its brand characteristics". This means that the window for permissible advertising opened by s. 22(2) is broader than it would have been had the narrower *RJR* definition of brand preference been adopted.

106 These differences mean that direct comparisons cannot be made between the lifestyle provisions of the *Tobacco Act* and the impact of *RJR*'s conclusions on brand preference on the scope of lifestyle advertising. The majority's approval of brand-preference advertising in *RJR* was premised not only on different evidence, but on different definitions of pivotal concepts. The broad space s. 22(2) allows for permitted advertising must be taken into account in determining whether the claw-back in s. 22(3) is overbroad. It follows that the Attorney General's argument that s. 22(3) must be valid because it represents Parliament's response to the "guidelines" the Court offered in *RJR* oversimplifies the matter. Our focus must be on the structure and wording of the *Tobacco Act*, not on what was said in *RJR* on different facts and different definitions of the central concepts.

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107 How, then, is lifestyle advertising in s. 22(3) to be construed? First, the scheme of s. 22 as a whole must be considered. We start with the fact that s. 22(2) permits information and brand-preference advertising. Information advertising is relatively clear: it consists of factual information about the product. This does not exclude, however, the possibility that information may be so presented that it evokes a lifestyle. Brand-preference advertising under the Act is even broader. As noted above, the Act did not adopt the narrow concept of brand-preference advertising set forth in *RJR*. Rather, it adopted a definition of "advertising that promotes a tobacco product by means of its brand characteristics". As the Canadian Cancer Society argues, the concept of a "brand" is associated with a lifestyle; in marketing, brands are intangible images, usually associated with particular lifestyles.

108 After broadly permitting information and brand-preference advertising under s. 22(2), the Act goes on to claw back lifestyle advertising as described in s. 22(4). In other words, s. 22(2) permits advertising that is associated with a way of life, as well as advertising that evokes images and emotions, but s. 22(3) removes this permission.

109 The first part of the definition of lifestyle advertising in s. 22(4) is unproblematic. Combined with s. 22(3), it removes advertising that associates a product with a way of life from the broad ambit of s. 22(2) . This exclusion, discussed in *RJR*, is well understood. The next phrase, however, presents difficulties: "or evokes a positive or negative emotion about or image of, a way of life". What does this add? Beauregard J.A. argued that any advertisement that evokes an image or emotion about a way of life must necessarily "associate" a product with that way of life.

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110 We must, however, attempt to find a meaning for this phrase, on the rule that the legislator does not speak in vain: *Carrières Ste-Thérèse*. That meaning emerges from an appreciation of the problem Parliament was tackling in relation to lifestyle advertising. The express provision that lifestyle advertising need only evoke an emotion or image may be seen as aimed at precluding arguments that to constitute lifestyle advertising, there must be a link, on the face of the advertisement, between the tobacco product and a way of life. While advertising that associates a tobacco product with a way of life will arguably evoke an emotion or an image, it is not clear that advertising evoking an emotion or an image will invariably associate a tobacco product with a lifestyle. A lifestyle image in an advertisement might be aimed at evoking an emotion or image which subliminally evokes a particular tobacco product, for example. Charged with an offence, the advertiser might raise the defence that the advertisement did not "associate" the lifestyle with the product, arguing that there is no evidence of a link between the product and the lifestyle in the advertisement. The phrase "or evokes a positive or negative emotion about or image of, a way of life" would defeat such an argument. It is true that "associates" can be read as including even subliminal or subtle influences. But it can also be read more narrowly. Expressly including lifestyle advertising that evokes emotions and images makes it clear that even advertising that does not appear on its face to connect a lifestyle with a tobacco product is prohibited if it subliminally connects a tobacco product with a lifestyle.

111 The phrase "evokes a positive or negative emotion or image" should not, however, be read so broadly as to encompass every perceptual impression. It should be interpreted in a way that leaves room for true information and brand-preference advertising, which s. 22(2) permits. This brings to mind the definition of brand-preference advertising used in *RJR*, which was confined to existing smokers and

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restricted to the colour, design and appearance of the packaging. It is possible to argue that a colour or image evokes an emotion in some highly abstract, artistic sense. Parliament, however, was concerned with emotions and images that may induce people to start to use or to increase their use of tobacco. Parliament used these terms in the context of its purpose — to prevent the increase of tobacco consumption through advertising and to confine permissible advertising to hard, factual data directed to confirmed smokers. The provision should be construed accordingly.

112 The reference to "positive or negative" emotion poses a further difficulty. One would expect lifestyle advertising to evoke a positive emotion about the lifestyle and the use of the product. However, it is not beyond the ingenuity of advertisers to rely on negative emotions to subtly persuade. A lifestyle depiction that sends messages of non-smokers being left out of the crowd or being seen as unsophisticated comes to mind.

113 Finally, what is the effect of qualifying "way of life" in s. 22(3) with the words, "such as one that includes glamour, recreation, excitement, vitality, risk or daring"? The words "such as" indicate that "way of life" is not limited by the terms that follow. Rather, they are to be read as illustrations of lifestyle advertising.

114 Read in this way, the prohibition on lifestyle advertising is reasonable and demonstrably justified under s. 1 of the *Charter*. As with the other challenged provisions, the pressing and substantial nature of Parliament's objective is beyond challenge. The record is replete with examples of lifestyle advertisements promoting tobacco products. It amply establishes the power of such advertisements to induce non-smokers to begin to smoke and to increase tobacco consumption among addicted smokers. It also establishes the sophistication and subtlety of such advertising. Lifestyle advertising spans the spectrum from the bold association of the Marlboro man with

cowboy culture to the subtle suggestion emerging from a cup of coffee or a bath scene that evokes tobacco use through learned prior imagery.

115 The sophistication and subtlety of lifestyle advertising are reflected in the means Parliament has chosen to deal with it. A ban on lifestyle advertising must catch not only clear associations, but subtle subliminal evocations. Hence the inclusion of advertising that "evokes a positive or negative emotion or image." There is a rational connection between this provision and Parliament's objective. Minimal impairment is also established. True information and brand-preference advertising continues to be permitted under s. 22(2). Such advertising crosses the line when it associates a product with a way of life or uses a lifestyle to evoke an emotion or image that may, by design or effect, lead more people to become addicted or lead people who are already addicted to increase their tobacco use. Finally, the proportionality of the effects is clear. The suppressed expression — the inducement of increased tobacco consumption — is of low value, compared with the significant benefits in lower rates of consumption and addiction that the ban may yield.

116 The challenge of dealing with today's sophisticated advertising of tobacco products is not insignificant. The distinction between information and brand-preference advertising directed to market share, on the one hand, and advertising directed to increased consumption and new smokers, on the other, is difficult to capture in legal terms. Parliament in its wisdom has chosen to take the task on. Properly interpreted, the law it has adopted meets the requirements of justification under s. 1 of the *Charter*.

5. *Sponsorships*

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117 Tobacco manufacturers have a long tradition of sponsoring sporting and cultural events and facilities as a means of promoting their product and, they would argue, acting as good corporate citizens. Parliament, in the *Tobacco Act*, has chosen to ban the promotion of these sponsorships. The question is whether that ban is constitutional.

118 Section 24 of the Act bans the display of tobacco-related brand elements or names in promotions that are used, directly or indirectly, in the "sponsorship of a person, entity, event, activity or permanent facility". Section 25 goes further and prohibits the display of tobacco-related brand elements or names on a permanent facility, if the brand elements or names are thereby associated with a sports or cultural event or activity. Together, these sections mean that tobacco manufacturers are not permitted to use their brand elements or names to sponsor events, nor to put those brand elements or names on sports or cultural facilities.

119 Two questions arise for consideration. The first is whether the general ban on sponsorship is constitutional. Since it clearly limits freedom of expression under s. 2(*b*) of the *Charter*, the only issue is whether it has been shown to be justified under s. 1 of the *Charter*.

120 The trial judge, Denis J., correctly held that sponsorship promotion is essentially lifestyle advertising in disguise. If lifestyle advertising is prohibited, sponsorship provides an alternative means for tobacco companies to associate their products with glamour, recreation, etc. The Court of Appeal unanimously upheld this conclusion, going so far as to state that ss. 24 and 25 were possibly redundant as they are but particular applications of the ban on lifestyle advertising.

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121 The prohibition of sponsorship promotion is rationally connected to the legislative goal for the same reasons as for the prohibition on lifestyle advertising. Similarly, since the ban on lifestyle advertising is accepted as minimally impairing, so is the ban on sponsorship. A finding of minimal impairment is reinforced by the fact that Parliament phased in the ban over five years so that it would not have a disruptive impact. I would also note that, contrary to their assertions, the manufacturers are not prohibited from sponsoring anything; they are only prohibited from using the fact of their sponsorship to gain publicity.

122 The second question, the use of corporate names in sponsorship, is more complicated. The majority of the Court of Appeal found that this ban constituted an unjustified intrusion on free expression, and declared inoperative the words "or the name of a tobacco manufacturer" in ss. 24 and 25, thereby allowing the use of corporate names in sponsorship promotion and on facilities, except if the corporate name refers, directly or indirectly, to a tobacco brand name (Brossard and Rayle JJ.A.).

123 In the view of the majority, a corporate name in an event program or on a building might not evoke or promote a product, raising concerns of rational connection. (It may be noted that the final order entered is narrower than the reasons for judgment and is confined to company names that are not used as brand names.)

124 Beauregard J.A. dissented, arguing that the only reason a corporation would affix its name to a building would be to evoke that brand or name of the product, and that therefore the ban was justified.

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125 I agree with Beauregard J.A. that the prohibition on using corporate names in sponsorship promotion and on sports or cultural facilities is justified.

126 Parliament's objective, once again, is clearly pressing and substantial. As found by Denis J., the evidence establishes that as restrictions on tobacco advertising tightened, manufacturers increasingly turned to sports and cultural sponsorship as a substitute form of lifestyle promotion. Placing a tobacco manufacturer's name on a facility is one form such sponsorship takes. The prohibition on sponsorship by means of names on facilities in s. 25 only applies to facilities used for sports or cultural activities, not for all facilities. The aim of curbing such promotion justifies imposing limits on free expression.

127 Nor is the means chosen to achieve the objective disproportionate. The element of rational connection is made out. Placing a corporate name on a list of sponsors or on a sports or cultural facility may promote the use of tobacco in a number of ways. This is clear when the corporate name is connected with the brand name of a tobacco product. (The appellant argued that all the respondents have brand names that include portions of their corporate names; the respondents did not contradict this.) But even where there is no overt connection between the corporate name and the brand name of a tobacco product, the corporate name may serve to promote the sale of the tobacco product. Connections may be established in a variety of ways. The corporate name may, without referencing a brand name, nevertheless contain a reference to tobacco. Or the corporate name may have historically been associated with tobacco. The evidence established the tobacco industry's practice of using shell corporations as an element in brand identification. Associations between the parent company and the shell company may persist in the public mind. As a result, the corporate name in the sponsorship

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promotion or on the building or facility may evoke a connection with the shell company and its brand.

128 Given the nature of the problem, and in view of the limited value of the expression in issue compared with the beneficial effects of the ban, the proposed solution — a total ban on the use of corporate names in sponsorship promotion, or on sports or cultural facilities — is proportional. And in view of the limited value of the expression in issue compared with the beneficial effects of the ban, proportionality of effects is established.

129 I conclude that the impugned sponsorship provisions are a reasonable limit justified under s. 1 of the *Charter.*

6. *Health Warning Labels*

130 The regulations pursuant to the Act (the *TPIR*) increased the minimum size of the mandatory health warnings on tobacco packaging from 33 percent under the old Act to 50 percent of the principal display surfaces. The question is whether this constitutes an infringement of s. 2(*b*) and, if so, whether that infringement is justified.

131 The question of whether the mandatory warning requirement infringes s. 2(*b*) is not easily answered. The Attorney General argues that s. 2(*b*) is not infringed, claiming that it neither deprives the manufacturers of a vehicle for communicating their message, nor limits the form of expression. He relies on *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, at pp. 279-80, where Wilson J. stated: "If a law does not really deprive one of the ability to speak one's mind or does not

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effectively associate one with a message with which one disagrees, it is difficult to see how one's right to pursue truth, participate in the community, or fulfil oneself [the values protected by s. 2(*b*)] are denied." The regulations under the *TPIR* permit the manufacturers to present the health warnings, not as their messages, but as messages from Health Canada. The manufacturers still have half the package to convey such messages as they choose, and they are not confined to a particular size or style of package that might inhibit that ability. As a result, the Attorney General argues, the manufacturers have not shown that they are prevented from conveying messages of their choice on their packaging. Not having discharged this burden, they have not established a breach of their freedom of expression, he concludes.

132 However, this Court has taken a broad view of "expressive activity" for s. 2(*b*) cases. In *Irwin Toy*, the Court went so far as to say that parking a car could be an expressive activity. In *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1184, Lamer J. stated that in some circumstances, silence could constitute expressive activity. To hold that minor restrictions or requirements with respect to packaging violate the s. 2(*b*) guarantee of freedom of expression might be to trivialize the guarantee. However, the requirement that manufacturers place the government's warning on one half of the surface of their package arguably rises to the level of interfering with how they choose to express themselves. I therefore conclude that s. 2(*b*) is infringed by the warning requirements in general, and specifically the requirement that 50 percent of the principal display surfaces of the package be devoted to the warnings.

133 This leaves the question of whether the infringement is justified as a reasonable limit under s. 1 of the *Charter*. I conclude that it is.

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134 Parliament's objective in requiring that a large part of packaging be devoted to a warning is pressing and substantial. It is to inform and remind potential purchasers of the product of the health hazards it entails. This is designed to further Parliament's larger goal of discouraging tobacco consumption and preventing new smokers from taking up the habit. The importance of warnings is reinforced by the trial judge's finding that consumers and the general public are not well informed on the dangers of smoking.

135 The evidence as to the importance and effectiveness of such warnings establishes a rational connection between Parliament's requirement for warnings and its objectives of reducing the incidence of smoking and of the disease and death it causes. In the course of the previous proceedings dealing with the ban on tobacco advertising, this Court unanimously held that "both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society": *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, *per* Sopinka and Cory JJ., at p. 353; see also *RJR*, McLachlin J., at para. 158. A mass of evidence in the intervening years supports this conclusion.

136 If further evidence were required of the rationality of Parliament's requirement that warnings occupy 50 percent of product packaging, it is supplied by the manufacturers' response to the increase from 33 percent to 50 percent of the principal display surfaces. The evidence reveals that they saw the increase as a threat and sought to meet it by devising counter-strategies to minimize the overall impact of the warnings.

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137 Regarding minimal impairment, the question is whether the requirement for warning labels, including their size, falls within a range of reasonable alternatives. The manufacturers argue that the increase from 33 percent to 50 percent of the package cannot be justified. However, the evidence established that bigger warnings may have a greater effect. Parliament is not required to implement less effective alternatives: *RJR*, at paras. 160 and 163.

138 The reasonableness of the government's requirement is supported by the fact that Australia, Belgium, Switzerland, Finland, Singapore and Brazil require warnings at least as large as Canada's, and the minimum size in the European Union is 48 percent of the package. The *WHO Framework Convention* stipulates that warning labels "should" cover at least 50 percent and "shall" cover at least 30 percent of the package.

139 Finally, proportionality of effects is established. The benefits flowing from the larger warnings are clear. The detriments to the manufacturers' expressive interest in creative packaging are small.

140 I conclude that the requirement that 50 percent of the principal display surfaces be devoted to a warning of the health hazards of the product is a reasonable measure demonstrably justified in our society and is constitutional under s. 1 of the *Charter*.

VI. Conclusion

141 I conclude that the impugned provisions of the *Tobacco Act* and the *Tobacco Products Information Regulations*, properly interpreted, are constitutional in their entirety. I would therefore allow the Attorney General's appeals, dismiss the

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manufacturers' cross-appeals and restore the order of the trial judge. Costs are awarded to the Attorney General of Canada in this Court and in the Court of Appeal.

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142 The constitutional questions are answered as follows:

1. Do ss. 18, 19, 20, 22, 24 and 25 of the *Tobacco Act*, S.C. 1997, c. 13, in whole or in part or through their combined effect, infringe s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

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

Answer: Yes.

3. Do the provisions of the *Tobacco Products Information Regulations*, SOR/2000-272, governing the size of the mandatory messages infringe s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

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

Answer: Yes.

APPENDIX A

Tobacco Act, S.C. 1997, c. 13

[PURPOSE
Purpose of Act]

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

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

Loi sur le tabac, L.C. 1997, ch. 13

[OBJET
Santé publique]

4. La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave et d'envergure nationale et, plus particulièrement :

a) de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant, de façon indiscutable, un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;

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

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

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

[PART IV
PROMOTION
Definition of "promotion"]

18. (1) In this Part, "promotion" means a representation about a product or service by any means, whether directly or indirectly, including any communication of information about a product or service and its price and distribution, that is likely to influence and shape attitudes, beliefs and behaviours about the product or service.

[Application]

(2) This Part does not apply to

(*a*) a literary, dramatic, musical, cinematographic, scientific, educational or artistic work, production or performance that uses or depicts a tobacco product or tobacco product-related brand element, whatever the mode or form of its expression, if no consideration is given directly or indirectly for that use or depiction in the work, production or performance;

(*b*) a report, commentary or opinion in respect of a tobacco product or a brand of tobacco product if no consideration is given by a manufacturer or retailer, directly or indirectly, for the reference

b) de préserver notamment les jeunes des incitations à l'usage du tabac et du tabagisme qui peut en résulter;

c) de protéger la santé des jeunes par la limitation de l'accès au tabac;

d) de mieux sensibiliser la population aux dangers que l'usage du tabac présente pour la santé.

[PARTIE IV
PROMOTION
Définition de « promotion »]

18. (1) Dans la présente partie, « promotion » s'entend de la présentation, par tout moyen, d'un produit ou d'un service — y compris la communication de renseignements sur son prix ou sa distribution—, directement ou indirectement, susceptible d'influencer et de créer des attitudes, croyances ou comportements au sujet de ce produit ou service.

[Application]

(2) La présente partie ne s'applique pas :

a) aux œuvres littéraires, dramatiques, musicales, cinématographiques, artistiques, scientifiques ou éducatives — quels qu'en soient le mode ou la forme d'expression — sur ou dans lesquelles figure un produit du tabac ou un élément de marque d'un produit du tabac, sauf si un fabricant ou un détaillant a donné une contrepartie, directement ou indirectement, pour la représentation du produit ou de l'élément de marque dans ces œuvres;

b) aux comptes rendus, commentaires et opinions portant sur un produit du tabac ou une marque d'un produit du tabac et relativement à ce produit ou à cette marque, sauf si un fabricant ou un

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to the tobacco product or brand in that report, commentary or opinion; or

(*c*) a promotion by a tobacco grower or a manufacturer that is directed at tobacco growers, manufacturers, persons who distribute tobacco products or retailers but not, either directly or indirectly, at consumers.

[Prohibition]

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

[False promotion]

20. No person shall promote a tobacco product by any means, including by means of the packaging, that are false, misleading or deceptive or that are likely to create an erroneous impression about the characteristics, health effects or health hazards of the tobacco product or its emissions.

[Testimonials or endorsements]

21. (1) No person shall promote a tobacco product by means of a testimonial or an endorsement, however displayed or communicated.

[Depiction of person]

(2) For the purposes of subsection (1), the depiction of a person, character or animal, whether real or fictional, is considered to be a testimonial for, or an endorsement of, the product.

[Exception]

(3) This section does not apply to a trade-mark that appeared on a tobacco

détaillant a donné une contrepartie, directement ou indirectement, pour la mention du produit ou de la marque;

c) aux promotions faites par un tabaculteur ou un fabricant auprès des tabaculteurs, des fabricants, des personnes qui distribuent des produits du tabac ou des détaillants, mais non directement ou indirectement auprès des consommateurs.

[Interdiction]

19. Il est interdit de faire la promotion d’un produit du tabac ou d’un élément de marque d’un produit du tabac, sauf dans la mesure où elle est autorisée par la présente loi ou ses règlements.

[Promotion trompeuse]

20. Il est interdit de faire la promotion d’un produit du tabac, y compris sur l’emballage de celui-ci, d’une manière fausse ou trompeuse ou susceptible de créer une fausse impression sur les caractéristiques, les effets sur la santé ou les dangers pour celle-ci du produit ou de ses émissions.

[Attestations et témoignages]

21. (1) Il est interdit de faire la promotion d’un produit du tabac, y compris sur l’emballage de celui-ci, au moyen d’attestations ou de témoignages, quelle que soit la façon dont ils sont exposés ou communiqués.

[Représentation]

(2) Pour l’application du paragraphe (1), la représentation d’une personne, d’un personnage ou d’un animal, réel ou fictif, est considérée comme une attestation ou un témoignage.

[Exception]

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product for sale in Canada on December 2, 1996.

[Advertising]

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

[Exception]

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

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

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

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

[Lifestyle advertising]

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

[Definitions]

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

["brand-preference advertising"

(3) Le présent article ne s'applique pas aux marques de commerce qui figurent sur un produit du tabac en vente au Canada le 2 décembre 1996.

[Publicité]

22. (1) Il est interdit, sous réserve des autres dispositions du présent article, de faire la promotion d'un produit du tabac par des annonces qui représentent tout ou partie d'un produit du tabac, de l'emballage de celui-ci ou d'un élément de marque d'un produit du tabac, ou qui évoquent le produit du tabac ou un élément de marque d'un produit du tabac.

[Exception]

(2) Il est possible, sous réserve des règlements, de faire la publicité — publicité informative ou préférentielle — d'un produit du tabac :

a) dans les publications qui sont expédiées par le courrier et qui sont adressées à un adulte désigné par son nom;

b) dans les publications dont au moins quatre-vingt-cinq pour cent des lecteurs sont des adultes;

c) sur des affiches placées dans des endroits dont l'accès est interdit aux jeunes par la loi.

[Publicité de style de vie]

(3) Le paragraphe (2) ne s'applique pas à la publicité de style de vie ou à la publicité dont il existe des motifs raisonnables de croire qu'elle pourrait être attrayante pour les jeunes.

[Définitions]

(4) Les définitions qui suivent s'appliquent au présent article.

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« *publicité préférentielle* »]

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

[« publicité de style de vie »
“*lifestyle advertising*”]

« publicité de style de vie » Publicité qui associe un produit avec une façon de vivre, tels le prestige, les loisirs, l’enthousiasme, la vitalité, le risque ou l’audace ou qui évoque une émotion ou une image, positive ou négative, au sujet d’une telle façon de vivre.

[“information advertising”
« *publicité informative* »]

“information advertising” means advertising that provides factual information to the consumer about

(*a*) a product and its characteristics; or

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

[« publicité informative »
“*information advertising*”]

« publicité informative » Publicité qui donne au consommateur des renseignements factuels et qui porte :

a) sur un produit ou ses caractéristiques;

b) sur la possibilité de se procurer un produit ou une marque d’un produit ou sur le prix du produit ou de la marque.

[“lifestyle advertising”
« *publicité de style de vie* »]

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

[« publicité préférentielle »
“*brand-preference advertising*”]

« publicité préférentielle » Publicité qui fait la promotion d’un produit du tabac en se fondant sur les caractéristiques de sa marque.

[Packaging]

23. No person shall package a tobacco product in a manner that is contrary to this Act or the regulations.

[Emballage]

23. Il est interdit d’emballer un produit du tabac d’une manière non conforme à la présente loi et aux règlements.

[Prohibition — sponsorship promotion]

24. No person may display a tobacco product-related brand element or the name of a tobacco manufacturer in a promotion that is used, directly or indirectly, in the sponsorship of a person, entity, event, activity or permanent facility.

[Interdiction — promotion de commandite]

24. Il est interdit d’utiliser, directement ou indirectement, un élément de marque d’un produit du tabac ou le nom d’un fabricant sur le matériel relatif à la promotion d’une personne, d’une entité, d’une manifestation, d’une activité ou d’installations permanentes.

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[Prohibition — name of facility]

25. No person may display a tobacco product-related brand element or the name of a tobacco manufacturer on a permanent facility, as part of the name of the facility or otherwise, if the tobacco product-related brand element or name is thereby associated with a sports or cultural event or activity.

[Accessories]

26. (1) Subject to the regulations, a manufacturer or retailer may sell an accessory that displays a tobacco product-related brand element.

[Promotion]

(2) No person shall promote an accessory that displays a tobacco product-related brand element except in the prescribed manner and form and in a publication or place described in paragraphs 22(2)(*a*) to (*c*).

[Non-tobacco product displaying tobacco brand element]

27. No person shall furnish or promote a tobacco product if any of its brand elements is displayed on a non-tobacco product, other than an accessory, or is used with a service, if the non-tobacco product or service

(*a*) is associated with young persons or could be construed on reasonable grounds to be appealing to young persons; or

(*b*) is associated with a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring.

[Interdiction — élément ou nom figurant dans la dénomination]

25. Il est interdit d'utiliser un élément de marque d'un produit du tabac ou le nom d'un fabricant sur des installations permanentes, notamment dans la dénomination de celles-ci, si l'élément ou le nom est de ce fait associé à une manifestation ou activité sportive ou culturelle.

[Accessoires]

26. (1) Sous réserve des règlements, le fabricant ou le détaillant peut vendre, à titre onéreux, un accessoire sur lequel figure un élément de marque d'un produit du tabac.

[Promotion]

(2) Il est interdit de faire la promotion d'accessoires sur lesquels figure un élément de marque d'un produit du tabac sauf selon les modalités réglementaires et dans les publications ou les endroits mentionnés aux alinéas 22(2)*a*) à *c*).

[Articles associés aux jeunes ou à un style de vie]

27. Il est interdit de fournir ou de promouvoir un produit du tabac si l'un de ses éléments de marque figure sur des articles autres que des produits du tabac — à l'exception des accessoires — ou est utilisé pour des services et que ces articles ou ces services :

a) soit sont associés aux jeunes ou dont il existe des motifs raisonnables de croire qu'ils pourraient être attrayants pour les jeunes;

b) soit sont associés avec une façon de vivre, tels le prestige, les loisirs, l'enthousiasme, la vitalité, le risque ou l'audace.

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[Exception — tobacco product]

28. (1) Subject to the regulations, a person may sell a tobacco product, or advertise a tobacco product in accordance with section 22, if any of its brand elements is displayed on a non-tobacco product, other than an accessory, or used with a service, if the non-tobacco product or service does not fall within the criteria described in paragraphs 27(*a*) and (*b*).

[Autres articles]

28. (1) Sous réserve des règlements, il est possible de vendre un produit du tabac ou d'en faire la publicité conformément à l'article 22 dans les cas où l'un de ses éléments de marque figure sur des articles autres que des produits du tabac — à l'exception des accessoires — ou est utilisé pour des services qui ne sont pas visés par les alinéas 27*a*) ou *b*).

[Exception — non-tobacco product]

(2) Subject to the regulations, a person may promote a non-tobacco product, other than an accessory, that displays a tobacco product-related brand element, or a service that uses a tobacco product-related brand element, to which section 27 does not apply.

[Promotion]

(2) Sous réserve des règlements, il est possible de promouvoir des articles autres que des produits du tabac — à l'exception des accessoires — portant un élément de marque d'un produit du tabac ou des services utilisant un tel élément qui ne sont pas visés à l'article 27.

[Sales promotions]

29. No manufacturer or retailer shall

(*a*) offer or provide any consideration, direct or indirect, for the purchase of a tobacco product, including a gift to a purchaser or a third party, bonus, premium, cash rebate or right to participate in a game, lottery or contest;

(*b*) furnish a tobacco product without monetary consideration or in consideration of the purchase of a product or service or the performance of a service; or

(*c*) furnish an accessory that bears a tobacco product-related brand element without monetary consideration or in consideration of the purchase of a product or service or the performance of a service.

[Promotion des ventes]

29. Il est interdit au fabricant et au détaillant

a) d'offrir ou de donner, directement ou indirectement, une contrepartie pour l'achat d'un produit du tabac, notamment un cadeau à l'acheteur ou à un tiers, une prime, un rabais ou le droit de participer à un tirage, à une loterie ou à un concours;

b) de fournir un produit du tabac à titre gratuit ou en contrepartie de l'achat d'un produit ou d'un service ou de la prestation d'un service;

c) de fournir un accessoire sur lequel figure un élément de marque d'un produit du tabac à titre gratuit ou en contrepartie de l'achat d'un produit ou d'un service ou de la prestation d'un service.

[Retail display of tobacco products]

[Autorisation]

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30. (1) Subject to the regulations, any person may display, at retail, a tobacco product or an accessory that displays a tobacco product-related brand element.

[Signs]

(2) A retailer of tobacco products may post, in accordance with the regulations, signs at retail that indicate the availability of tobacco products and their price.

[Communication media]

31. (1) No person shall, on behalf of another person, with or without consideration, publish, broadcast or otherwise disseminate any promotion that is prohibited by this Part.

[Exception]

(2) Subsection (1) does not apply to the distribution for sale of an imported publication or the retransmission of radio or television broadcasts that originate outside Canada.

[Foreign media]

(3) No person in Canada shall, by means of a publication that is published outside Canada, a broadcast that originates outside Canada or any communication other than a publication or broadcast that originates outside Canada, promote any product the promotion of which is regulated under this Part, or disseminate promotional material that contains a tobacco product-related brand element in a way that is contrary to this Part.

[Report to Minister]

30. (1) Sous réserve des règlements, il est possible, dans un établissement de vente au détail, d'exposer des produits du tabac et des accessoires portant un élément de marque d'un produit du tabac.

[Affiches]

(2) Il est possible pour un détaillant, sous réserve des règlements, de signaler dans son établissement que des produits du tabac y sont vendus et d'indiquer leurs prix.

[Médias]

31. (1) Il est interdit, à titre gratuit ou onéreux et pour le compte d'une autre personne, de diffuser, notamment par la presse ou la radio-télévision, toute promotion interdite par la présente partie.

[Exception]

(2) Le paragraphe (1) ne s'applique pas à la distribution en vue de la vente de publications importées au Canada ou à la retransmission d'émissions de radio ou de télévision de l'étranger.

[Usage des médias étrangers]

(3) Il est interdit à toute personne se trouvant au Canada de faire la promotion, dans une publication ou une émission provenant de l'étranger ou dans une communication, autre qu'une publication ou une émission, provenant de l'étranger, d'un produit à la promotion duquel s'applique la présente partie ou de diffuser du matériel relatif à une promotion contenant un élément de marque d'un produit du tabac d'une manière non conforme à la présente partie.

[Renseignements]

32. Every manufacturer shall provide the Minister, in the prescribed manner and within the prescribed time, with the prescribed information about any promotion under this Part.

32. Le fabricant est tenu de transmettre au ministre les renseignements exigés par les règlements, dans les délais et selon les modalités réglementaires, sur les promotions visées par la présente partie.

APPENDIX B

Tobacco Products Information Regulations, SOR/2000-272

[APPLICATION]

[Retail sale]

2. These Regulations apply to tobacco products that are for retail sale in Canada.

[GENERAL]

[Must be legible]

3. (1) Any written information that is required by these Regulations to be displayed shall be displayed

(*a*) in both official languages, in the same manner; and
(*b*) in a manner that ensures that the information is legible and prominently displayed.

[Health warnings and health information]

(2) Health warnings and health information shall

(*a*) except for those set out in subsections 5(4) to (6), be obtained from the Minister and reproduced from electronic images obtained from the electronic files used by the Minister to generate the source document; and
(*b*) be adapted to meet the requirements of paragraph 5(2)(*b*).

[Colour and clarity]

(3) All health warnings and health information shall be reproduced

(*a*) in a colour that is as close as possible to the colour in which they are set out in the source document; and
(*b*) as clearly as possible taking into consideration the method of printing used by the manufacturer.

[Attribution]

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4. (1) If a manufacturer attributes information that, in accordance with these Regulations, must be displayed, the manufacturer shall do so by displaying only the following under the information, in the same colour as the text of the information and in Universal type in a pitch that is not greater than the smallest pitch used in the attributed information:

(*a*) if the information is in English, the phrase "Health Canada"; and

(*b*) if the information is in French, the phrase "Santé Canada".

[Removal of attribution]

(2) Every manufacturer that does not attribute a health warning or health information may remove the attribution contained in the electronic files obtained under paragraph 3(2)(*a*).

[HEALTH WARNINGS]

[Obligation to display]

5. (1) Subject to subsections (4) to (6), every manufacturer of bidis, cigarettes, cigarette tobacco, kreteks, leaf tobacco, chewing tobacco, snuff, tobacco stricks, or pipe tobacco, other than pipe tobacco described in section (6), shall display the applicable health warnings for the tobacco product on every package of the tobacco product that they manufacture, in accordance with this section.

[Manner of display]

(2) The health warnings must

(*a*) be displayed in English on one principal display surface and in French on the other principal display surface;
(*b*) occupy at least 50% of the principal display surfaces and be positioned parallel to the top edge of the package, towards the top part of the package as much as possible while satisfying the requirements of paragraph (*c*), and in the same direction as the other information that is on the package; and
(*c*) be displayed on a principal display surface in a manner that ensures that none of the words of the warning will be severed when the package is opened; and
(*d*) be selected, except in the case of bidis, chewing tobacco and snuff, from the formats provided by the Minister for each health warning and based on the shape of the space as determined in accordance with paragraph (*b*).

Appeals allowed and cross-appeals dismissed, with costs.

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Solicitor for the appellant/respondent on cross-appeal: Attorney General of Canada, Montréal.

Solicitors for the respondent/appellant on cross-appeal JTI-Macdonald Corp.: Irving Mitchell Kalichman, Westmount.

Solicitors for the respondent/appellant on cross-appeal Rothmans, Benson & Hedges Inc.: McCarthy Tétrault, Montréal.

Solicitors for the respondent/appellant on cross-appeal Imperial Tobacco Canada Ltd.: Ogilvy Renault, Montréal.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Sainte-Foy.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

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Solicitor for the intervener the Attorney General for Saskatchewan: Attorney General for Saskatchewan, Regina.

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