Considering the Evidence, No Wonder the Court Upheld Canada's Regulation of Cigarette Advertising

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Considering the Evidence, No Wonder the Court Endorses Canada’s Restrictions on Cigarette Advertising

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The 2002 trial that assessed the constitutionality of Canada’s Tobacco Act involved new evidence of industry tactics in the 1990s, including the use of lifestyle advertising of sponsorships and the marketing of a new product that was falsely claimed to be “less irritating.” The author provides highlights from the legislative background, the document production, the trial testimony, and the judge’s decision.

For almost two decades, Canada’s Ministry of Health has attempted to regulate cigarette advertising and promotion. The first legislation enacted toward this end, the Tobacco Product Control Act (TCPA) of 1988, was ultimately declared unconstitutional by the Canadian Supreme Court in 1995. On the basis of the decision, Parliament drafted and enacted replacement legislation: the Tobacco Act of 1997. The industry challenged this act too, and the lengthy 2002 trial that assessed its constitutionality involved much new documentary evidence and ended with an endorsement of the law.

What follows are highlights from the legislative history, the documentary evidence, the trial testimony, and the trial court’s judgment. The highlights show the industry’s marketing practices, the judicial perspectives on the tobacco industry and the related public interest, and how these have evolved in the past decade. Of particular interest is new evidence about (1) industry persistence in appealing to young people; (2) the use of event sponsorship to meet this and other promotional goals; (3) package design to provide consumers “status redemption”; (4) the development and marketing of seemingly risk-reduced products; and (5) consumer ignorance, misinformation, and reliance on meaningless industry nomenclature, such as “light/mild.”

The Legislative History

The TCPA of 1988

Until 1988, when the TCPA was passed, no law in Canada had regulated cigarette advertising. Even the absence of cigarette advertisements from radio and television was not legislated. The TCPA disallowed conventional advertising, but a loophole allowed for lifestyle advertising of sponsorships in brand names, and the industry created new corporate entities for this purpose. Also prompt was the legal challenge to the TCPA by the Canadian tobacco industry (i.e., a three-firm oligopoly dominated by Imperial Tobacco [ITL] and including RJR-MacDonald [RJR] and the Phillip Morris affiliate Rothman’s Benson & Hedges [RBHI]). After a long process, in 1995 the Supreme Court of Canada declared the TCPA unconstitutional in a decision that was split five to four (RJR-MacDonald Inc. v. Canada [Attorney General] 1995).1

Although the Court found that Parliament had the right both to prohibit tobacco-product manufacturers from encouraging the Canadian public to consume tobacco products and to inform consumers about tobacco’s harmful effects, it disallowed the TCPA as overreaching in that it banned all communications. More specifically, the conclusions in law from the case, as read by another judge (JTI-MacDonald Corp. et al. v. Attorney General of Canada 2002),2 included the following: (1) Parliament can prohibit the advertising of tobacco products pursuant to its criminal

Note to readers: The editors of Journal of Public Policy & Marketing sent this article to the case’s named plaintiffs’ attorneys, inviting them or a designated author to prepare a possible companion piece. The attorneys informed the journal that they were contacting prospective authors. In the end, however, they chose not to submit a paper, noting that because the case is currently under appeal before the Quebec Court of Appeal, they deemed a response inappropriate. Nevertheless, in the spirit of providing a balanced presentation, a quote from their final response is as follows: “[It] may be of some help to your readers, in their search for some balance, to know that the Canadian tobacco manufacturers’ case, in essence, was that the Quebec’s Tobacco Act essentially repeats a virtually total prohibition of commercial speech, which had been ruled unconstitutional by the Supreme Court of Canada in a previous case. Your readers are as equipped as Professor Pollay to opine whether a ban of all advertising that ‘evokes an image or an emotion, positive or negative, about a style of living’ is or is not tantamount to a total ban. They are as equipped as he to opine whether a ban of any advertising that ‘might on reasonable grounds be construed as appealing to persons under 18 leaves the advertiser any safe grounds on which to advertise.’

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1Lamer C.J., Sopinka, McLachlin, Iacobucci, and Major JJ and La Forest, L’Heureux-Dubé, Gonthier and Cory JJ (dissenting).
2Province of Quebec, Superior Court, Judge André Denis, December 13, 2002.
law power; (2) there is a rational connection between the prohibition of advertising and the objective of the TPCA; (3) a law prohibiting lifestyle advertising would pass the minimal impairment test; (4) a law prohibiting advertising that targets children and teenagers would also pass the minimal impairment test; and (5) tobacco consumption is a sui generis problem that can be properly addressed only with an array of innovative and legislative responses (i.e., a comprehensive strategy).

In rejecting the TPCA, however, the Supreme Court was not concluding that advertising was of no consequence. In a view consistent with my own (Pollay 2000; Pollay and Lavack 1993), the Court left little doubt about the role and effects of advertising, as evidenced in the industry’s internal documents:

Perhaps the most compelling evidence concerning the connection between advertising and consumption can be found in the internal marketing documents prepared by the tobacco manufacturers themselves. Although the appellants [the tobacco firms] steadfastly argue that their marketing efforts are directly solely at maintaining and expanding brand loyalty among adult smokers, these documents show otherwise. In particular, the following general conclusions can be drawn from these documents: that tobacco companies are concerned about a shrinking tobacco market and recognize that an “advocacy thrust” is necessary to maintain the size of the overall market; the companies understand that, in order to maintain the overall numbers of smokers, they must reassure current smokers and make their product attractive to the young and to nonsmokers; they also recognize that advertising is critical to maintaining the size of the market because it serves to reinforce the social acceptability of smoking by identifying it with glamour, affluence, youthfulness, and vitality. (RJR-MacDonald Inc. v. Canada, 1997, p. 295)

The Tobacco Act of 1997

In 1997, in response to the 1995 Court opinion and its counsel, the Canadian Parliament passed the Tobacco Act. With respect to promotional communications, the purpose of the act was “to protect young persons and others from inducements to use tobacco products and the consequent dependence on them” (¶ 4b). The provisions prohibit advertisements that are “false, misleading, or deceptive or that are likely to create an erroneous impression about the characteristics, health effects, or health hazards” (¶ 20). Also prohibited are testimonials and endorsements, including “the depiction of a person, character, or animal, whether real or fictional” (¶ 21.2), and “lifestyle advertising or advertising that could be construed on reasonable grounds to be appealing to young persons” (¶ 22.3).

Following the suggestion of the Supreme Court, which had been using a distinction advanced in the industry’s argument against the predecessor TPCA, the Tobacco Act allows “information advertising or brand-preference advertising” (¶ 22.2) that “provides factual information to the consumer about ... a product and its characteristics; or ... the availability of price of a product or brand of product” (¶ 22.4). These are allowable in adult venues (e.g., bars) or controlled media (e.g., direct mail) or in media that in their reach target 85% adults (¶ 22.2). Thus, it is important to note that the Tobacco Act is not an advertising ban; it permits information dissemination to adult consumers. However, it inhibits communication to minors and forebids the types of uninformative image advertising that glamorize smoking, which the industry has been using for decades in Canada, the United States, and elsewhere (Pollay 1990, 1991).

The three Canadian tobacco companies sued were ITL, RJR (now JTI-MacDonald; it has since been sold to Japan Tobacco International), and RBH; these are historically affiliated with Brown & Williamson, R.J. Reynolds, and Philip Morris, respectively. The tobacco companies wanted the Tobacco Act and regulations adopted therein to be declared unconstitutional under the Canadian Charter of Rights and Freedoms, which is comparable to the U.S. Bill of Rights. The trial by judge of the consolidated case took place over six months from January 2002 to June 2002; closing arguments were in September, and the decision was rendered in December. The hearing involved 22 lawyers and generated nearly 10,000 pages of stenographic notes and 988 exhibits. My own role included two written reports (Pollay 2001, 2002) and eight days of trial testimony in which I entered volumes of corporate documents as evidence. I also observed the trial testimony of the tobacco plaintiffs’ two witnesses who represented advertising.

The Documents: 1990s Tactics

Targeting New Smokers

Despite the embarrassment of youth-targeting documents that were entered into evidence in the previous TPCA trial, targeting of “new smokers” or “the young” was still evident in documents from all the firms: “ITL has always focused its efforts on new smokers, believing that early perceptions tend to stay with them throughout their lives” (¶ 13), “The younger segment represents the most critical source of business to maintain volume and grow share in a declining market” (RJR-1339, 1989, 80118-3931), “New smokers are critical to continued growth in the market” (RJR-0299, 1989, 80144-1496), “A strong regular length business is key to attracting younger users and ensuring a healthy future franchise,” and “[T]he key 15–19 age group is a must for RBH.”

Many documents discuss minors and/or refer to “starters,” the “starter smoker segment,” or “entry-level users.” Historically...
ically the most successful at capturing youth, and consequently the dominant firm, ITL continued its youth-oriented research on Generation Y (i.e., 13–19 year olds [ITL-329, 1993]) and the attitudes and lifestyle of teenagers (i.e., 13–17 year olds [ITL-271, 1994]). The RJR affiliate knew that "When young consumers first experiment with smoking they are prone to select a brand which they perceive as having an image which is 'mainstream, youthful'. ... Most claimed that they started when they were around 14 to 16 years of age. A few (more often males) started as young as 10" (RJR-0088, 1994, 80093-9376). The motivations of young people were discussed in detail and included experimentation, self-esteem (e.g., appearing "cool, mature, sophisticated, in control"), trying to fit in, coping, and rebellion (e.g., "doing something that parents/authority figures would not approve; image with peer group as a renegade, daring, anti-establishment") (RJR-0088, 1994, 80093-9359, 80093-9360).

It is not surprising that brand positioning statements reflect the values and interests of young people. For example, "Belvedere is the young, fun, and sociable brand that offers smooth, full-flavored smoking satisfaction to contemporary young men and women.... I am active, energetic, and enjoy socializing with others but I am not a leader.... Part of the young crowd, I'm not rebellious but resist being told what I am and what I want."* As in the United States, RJR was tailoring the market leader's ability to coral new, young smokers with their images of independence; the leaders were Marlboro in the United States and Player's in Canada. Thus, for the 1990s, RJR planned to "aggressively address the new smoker."*13

Image Is Everything

Cigarettes are virtually indistinguishable from one another, except for image illusions. As ITL's marketing vice president testified at the TPCA, "So the discrimination in product terms, pure blind product terms, without any packaging or name around it is very limited.... It's very difficult for people to discriminate, blind tested. Put it in a package and put a name on it, and then it has a lot of product characteristics."*14 This has been known for decades: "In a market with minimal product differentiation, advertising becomes a disproportionately important part of the marketing mix" and "without easily perceptible product differentiation (except for extremes) consumer choice is influenced almost entirely by imagery factors."*15

Cigarettes Are a Badge Product

Cigarettes are known as a badge product because they provide consumers, especially young consumers, with a token for communicating their identity. "In the cigarette category brand image is everything. The brand of cigarettes a person smokes is their identity. Cigarettes tell others who they are as a person. There is a strong emotional connection to the brand, the image it projects about the smoker, not only to themselves but to others" (RBH-00391, 1996, p. 2).

Sponsorships and Lifestyle Marketing

Sponsorship is just another form of lifestyle advertising to create brand imagery. Companies accomplish associative marketing through sponsorships because they provide "image advertising potential," which, for example, enabled RJR to "alter a brand's image" (RJR-0708, 1996). The Phillip Morris affiliate believed that "borrowed imagery" acquires the perceived personality of the sponsored sport (RBH-00232, 1990, p. 5). In agreement, ITL stated: "Depending on the event sponsored, the company appears young, self-assured, master of itself, classical, adventurous, etc." (ITL-491, 1990). Until just recently, ITL promoted its youth brand by advertising its sponsorship of various extreme sports (Dewhirst 2004).

Few Smokers Are "Convertible"

The badge-product effect of advertising in meeting the identity needs of young people seems to be more important than any effect it may have on brand switching. "Advertising seems to have no direct effect on brand choice except during the launch of a new brand in encouraging trial. Indirectly, advertising is very important in communicating brand imagery" (ITL-317, 1998, p. 7). "Loyalty to cigarette brands remains very strong. ... Only 3% of all smokers are considered 'convertable.'" (RJR-1418, 1995, p. 2410).

Brand Switchers Include Starters

Despite the small proportion of brand switchers, for years cigarette firms have argued that brand switching is both the only aim and the only effect of industry advertising. Any merit that this claim has may lie in the odd definition of brand switching, which completely eliminates the distinction between switchers and starters: "When we talk about a switcher we are talking about someone who has been smoking his usual brand for less than 12 months. This definition includes starters (did not smoke before) and smokers that had no regular or particular previous brand."*16

Illusions of Comparative Healthfulness

Of the few smokers who do switch in any year, many are seeking "healthier" products, but they do so naively and rely primarily on deceptive nomenclature such as "light" or "mild." "Sensitivity to personal health risk generates a range of responses including attempts to quit, consumption rationing, and moves (real or perceived) to a lower T & N [tar and nicotine] count. Among those who move 'down' some are aware of a specific T & N count but many are not, relying more on nomenclature" (RBH-0022334, 1991, p. 5). "It is also important to note that consumer knowledge of pack data on deliveries is generally accepted as very low."*17 "The idea of 'Light' was a much more comfortable way for the consumer[s] to rationalize their brand choice versus physical attributes (lower tar, special filters) they did not want to fully understand" (RBH-003824, 1996, p. 3). Because there are no standards, conventions, or consistency in use of the terminology to describe cigarettes, consumers


*17File #AA 0199, Box #GU 0560, HC Request #180, 1988, p401039648.
are confused. "There are no regulated 'tar' bands or structures, nor maximum levels, in Canada. Manufacturers use descriptors such as mild, light, extra light, ultra light ... as they decide, usually for brand positioning reasons."18

In addition to these descriptors, cigarette brand imagery connotes comparative healthfulness through devices such as the use of white or pale colors, advertising images of sports-related activity and/or pure and pristine environments, the absence of visible smoke, and even the package design. For example, a particular research project studied packages for "light and healthy designs." Consumer feedback included the following: "How bad could it be in a nice pack like that? Somehow it doesn't seem so harmful."19 The study also found that "package design can make inferential statements that, in relative terms, the brand is a more clean and healthy alternative. The amount of white space makes a major contribution in this regard" (JTJ-1677, p. 24).

Packaging "Status Redemption"

Because smoking is increasingly disallowed in public spaces, and new graphic warnings in Canada make the health risks of smoking more visible and salient, smokers are "unusually interested in more socially appealing, status-redeeming packaging."20 They desired this in order to combat their feeling "guilty, conspicuous, humiliated, second-class,... like a leper, like an outcast.... Direct antidotes ... make the smoker feel carefree, discreet, confident, first-class, feeling healthy, [and] feeling sociable."21

The Trial: Industry Witnesses and Evidence

Although advertising is central to both the industry’s marketing efforts and the legislation in question, the industry presented few experts on the topic. The industry presented no academics and relied on two witnesses: a U.K. publisher of advertising trade data and the output of the World Advertising Research Center, Michael Waterson, and a senior tobacco marketing executive with 25 years of experience, Ed Ricard.

Michael Waterson

Waterson testified the following to support his written opinions: "(1) Advertising of branded goods does not have any impact on overall levels of consumption of the product; (2) There is no commonly accepted definition of the term 'lifestyle advertising' either among professionals or among academics in the field; (3) The empirical evidence does not demonstrate any correlation between changes in consumption patterns of tobacco products and the presence or absence of advertising bans or restrictions" (Evidence P-36, p. 2).

The first opinion demands some evidence because it is implausible on its face. Waterson presented no corporate documents, analysis of tobacco industry data, or analysis of other data. Instead, he offered quotations in which no aggregate effects of advertising were noted, without consideration of the methodological weaknesses or the generalizability of these to tobacco, given different industries, jurisdictions, and time periods. Many case histories he published on the World Advertising Research Center Web site contradict this opinion, including case histories from Canada and efforts focused on primary demand, such as egg or milk marketing (for more information, see http://www.warc.com). The judge ultimately found that Waterson’s opinion is "inconsistent with other evidence in the record and defies common sense" (JTJ-MacDonald Corp. et al. v. Attorney General of Canada 2002, ¶ 115).

The second opinion, regarding no common definition of lifestyle advertising, was accepted but is a small point: The legal operationalization of the concept would ultimately be explicated on a case-by-case basis, as is common in legal practice.

The third opinion, regarding the effects or lack thereof of restrictions on cigarette advertising, is the most central to the case and the most amenable to empirical evidence, albeit it is far from an easy question because transnational comparisons are needed. Waterson presented no corporate documents of his clients, nor did he cite the most recent scholarly literature from the National Bureau of Economic Research (NBER) on international econometric analyses of this issue (Saffer and Chaloupka 2000). The NBER’s analysis concluded that limited or partial regulation of cigarette advertising (e.g., the absence of radio and television advertisements in the United States) is of little consequence because the industry readily compensates for this by media budget adjustments, but more comprehensive sets of restrictions have a demonstrable effect on consumption.

Waterson presented a list of many countries with one data point per country: the change in per-capita consumption between 1975 and 2000 (Exhibit P-36). Waterson marked with asterisks the countries that had restrictions on advertising in 2000, without considering the nature or extent of the restrictions or the timing of when they began. Even though Waterson appeared as an expert in statistics, he performed no statistical analysis on the small data set, such as locating the median or means for the two identified types of countries: countries with and without advertising restrictions in 2000. On visual inspection only, Waterson determined that there was no relationship between the asterisks and the extent of change in the per-capita consumption estimates.

Ed Ricard

Ed Ricard, the executive witness, presented corporate documents to display the sophisticated, in-depth studies that profile smokers and their needs.22 He also stated that each share point of the Canadian market represents Can$20 million net

18File #HB 0040, Box #XMA 0341 Q, HC Request #220, 1993, p.20200796.
profits per year, which spurred ITL to gain more than its existing 70% market share.

**Cigarette Advertisements as Consumer “Information”: The Testimony**

To advance the argument that the regulation of cigarette advertising was dysfunctional, denying consumers information and frustrating the marketing of truly new and improved products, the industry offered the case history of Player’s Premiere, a 1997 new product sold with the claim of “reduced irritation.” This specific case history had not been a focus of attention in my own reports, nor elsewhere in the attorney general’s defense, and was attended to only because the industry tabled the topic through Ricard’s trial testimony. The relevant industry documents were reviewed in the midst of trial to assess the validity of Ricard’s assertions: (1) that product development preceded the development of the promises made in advertising; (2) that Player’s Premiere was indeed a new and improved “less irritating” product; (3) that communications about Premiere were informative and accurate, not “an illusion”; and (4) that the marketplace failure of Premiere was due to the regulatory restraints on its promotion.

**Crafting High-Technology Brand Imagery**

As is shown in Figure 1, the advertising execution to convey “less irritating” credibly for Player’s Premiere was candidly discussed at trial. The blueprint background was chosen “to bring in the notion of technology and engineering.” In addition, an arrow pointing to the cutaway rendering of the filter and the package was “presented in a way that it looks like an icon on a computer screen,” as was the text presenting “the inside story.” The image elements alluded to “new technology, and it speaks to being able to do things that we’ve never been able to do before.” The advertising copy mentions less or reduced irritation repeatedly, indicating that the claim is based on research, and refers to a “unique filter” with “dispersion qualities of granular semolina” and “beads of charcoal. An effective natural filtering agent.” In the product-development documents, this was described as using the “specialty gap filter” as a “communications tool” to provide “tangible credibility” for the promise of less irritation.

**“Honesty and Straightforwardly”?**

Ricard ended his testimony by reacting to my written opinion that cigarette advertising was uninformative and “instead has relied on pictures of health and images of intelligence and has misled consumers into believing filtered products in general, and low tar products in specific, to be safer than other forms.” As did the editorial cartoonist in Figure 2, I compared this cultivation of consumers to a farmer’s cultivation of mushrooms: “Keep them in the dark and feed them lots of bullshit.” Ricard was indignant and stated the following:

[The success of ITL has come about by] “fully and completely understanding what it is that consumers are looking for, how it is exactly that they perceive the various brands on the market, and by telling them specifically what it is that they will be getting from our products. And it’s the fact that we deliver on the claim that has had us grow our market share.... I take very seri-

ous exception to that [bull shit statement].... [It is] our ability to be able (sic) to develop products and communicate them honestly and straightforwardly, exactly what it is that they can expect, that has allowed us to grow our market share.”

**Cigarette Advertisements as Consumer “Information”: The Evidence**

**The Proof Is in the Puffing**

In stark contrast to the expectation created by the advertising claim, the Premiere product sold did not deliver on being less irritating. Indeed, Premiere was not less irritating, despite five years of product development, and ITL knew this. When Premiere launched in 1997, test markets found that fewer than 20% of tasters judged the product to be less irritating, and a greater proportion found it to be more irritating. Results were even more striking for people whose perceptions remained unbiased by advertising exposure to the filter “concept.” Of these people, the number of consumers who reported more irritation outnumbered consumers who reported less irritation by nearly three to one. The consumer perceptions were consistent with the lab assessments that the smoke of Premiere contained even greater quantities of irritating substances than benchmark standards.24 The judge found that ITL “commissioned no medical or scientific studies to back its claims” (JTI-MacDonald Corp. et al. v. Attorney General of Canada 2002, ¶ 124).

The documentary evidence demonstrates that Ricard’s testimony misrepresented every key aspect of the Premiere case history. First, the communications that promised less irritation were well developed and fine-tuned long before it was found that a product delivered on its promise. Second, the product sold did not deliver on its promise of being less irritating. Third, the advertising and related promotional activities for Player’s Premiere were extensive, relying on a high-technology image and the “tangible credibility” of a “unique” filter, yet they were intentionally vague and uninformative about the causes of irritation or degree of improvement delivered (consider “half the calories”). Fourth, Player’s Premiere failed in the marketplace despite extensive advertising and retail support because it was an inferior product that did not live up to its promise (for details on the product and its development, see Pollay and Dewhurst 2003).

**The Court’s Judgment**

Without comment, the following are verbatim excerpts pertaining to this industry, its marketing practices, the previously cited evidence, and the related law.25

**On Health and the Public Interest**

“The industry has known for 50 years that cigarettes cause lung cancer and are hazardous to health but have never thought it

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23 Testimony of Ed Ricard, 8 (January 24, 2002), p. 1699.
necessary to warn consumers about this. The industry has always known that light cigarettes are as damaging to health as regular cigarettes but has nevertheless mounted a subtle marketing plan that leads smokers to infer that they should smoke light cigarettes if they are concerned about their health. The industry has always known that filtered cigarettes are as dangerous as unfiltered ones and that smokers unconsciously change the way they smoke to satisfy their need for nicotine, this despite all their marketing efforts claiming the opposite.

"The launch of the Player's Premiere brand of cigarettes, supposedly less irritating to the throat, is nothing more than a massive marketing ploy that purports to give consumers what they want but offers, in fact, a product that is no different from ordi-
nary cigarettes. The evidence shows that no cigarette causes less throat irritation than another. Although the tobacco companies deny it, their marketing efforts target new smokers, especially adolescents, through advertising deliberately designed to have this effect. Advertising is also aimed at other target groups: women, blue-collar workers, etc....

“The evidence shows that the typical heavy smoker is male, undereducated, economically disadvantaged, and has low self-esteem. The evidence also shows that the typical new smoker is an adolescent. It is interesting to note that from 1985 to 2000, the percentage of people who smoke fell for all age groups, except 15- to 19-year-olds. In short, the evidence leads to one inescapable conclusion: The smoker always comes out the loser....

“Faced with this evidence, the tobacco companies decided not to present any evidence to the contrary.” (¶ 233–35, 237–39, 242–44, 245)

**On Advertising and Sponsorship**

“In light of the evidence, the Court is convinced that sponsorship is merely an extension of conventional advertising that has been adapted to suit new needs and often resorts to more subtle and sophisticated marketing principles. All sponsorships necessarily relate to a lifestyle associated with the sponsored activity, a lifestyle that is then associated with a brand of cigarettes. To prohibit advertising while allowing sponsorship would render the first measure useless....

“Much of the evidence introduced by the tobacco companies concerned their claim that the definition of ‘lifestyle’ advertising contemplated in the Act is unintelligible and so overbroad as to effectively prohibit all advertising. First, we should bear in mind that it was the tobacco companies themselves who suggested to the Court of Appeal and the Supreme Court that ‘lifestyle’ advertising and advertising ‘directed at children’ should be prohibited.... Second, the evidence shows that the tobacco companies know very well what ‘lifestyle’ advertising is, as a large proportion of their advertising associates cigarettes with a lifestyle. The industry’s voluntary code refers to ‘lifestyle’ advertising.” (¶ 290–93, 307–308, 364–66)

**Conclusions of Fact**

“Fact: Nicotine is powerfully addictive. This is not mere conjecture. It is a fact....

“Fact: [T]here is incontrovertible evidence that advertising and sponsorship encourage people, especially adolescents, to consume tobacco products. Advertising is designed to reassure smokers and relies on associating cigarettes with a positive lifestyle....

“Fact: [T]he supposedly less-irritating cigarette is merely the creation of a tobacco company’s marketing department; filters allow every single carcinogenic gas contained in cigarette smoke to pass through; and there is no such thing as a ‘light’ or ‘healthier’ cigarette....

“Fact: [T]obacco companies have been aware of these facts for a long time, in some cases for over 50 years, and have always denied them or refused to disclose them to consumers.” (¶ 524, 527, 528, 530)

**Balancing Competing Considerations**

“The subject is clearly a sensitive one and difficult to deal with. The debate pits two fundamental values against each other: freedom of expression versus the protection of public health.... The issues at stake are difficult ones that require us to plot a course between two perils: demagoguery on one side and naïveté on the other.” (¶ 7, 515)

“[T]he tobacco companies’ freedom to praise the merits of cigarettes cannot be accorded the same constitutional protection as the right to freely express political, cultural or scientific ideas.... Unless one wishes to live in a dream world, it is important to look closely at how the tobacco companies have used their freedom of expression up to now and at the effects their messages have had on the health and lives of consumers.” (¶ 248–49)

“The tobacco companies are in a particularly difficult position. They sell a harmful product and know it. They have the right to sell it because outright prohibition would be unrealistic. They offer no evidence to rebut the claimed ill effects of cigarettes because there is none. Their evidence respecting the effects of advertising was unconvincing. They are trying to save an industry in inevitable decline. They have every right to do so. Their rights, however, cannot be given the same legitimacy as the government’s duty to protect public health. Parliament is seek-
ing to prohibit tobacco advertising, with a few specific exceptions. This is part of a worldwide trend, one that is far from unreasonable. The evidence at trial compels the Court to exercise the degree of deference [to Parliament] that common sense would dictate. Therefore, this Court dismisses plaintiffs' [tobacco industry's] actions.

**Discussion and Conclusion**

Tobacco is a relentless industry: All firms candidly discussed the targeting of young people in their documents, even when similar older documents were surfaced in court to their embarrassment. There was little obvious effort to clean up their act: not even policies to revert to euphemisms with more ambiguity and thus deniability. The firms also continued to offer reassurances to consumers through product marketing (e.g., light, mild, less irritating), despite no evidence that this reassurance is warranted (Pollay and Diewhirst 2001). As economists repeatedly inform, the compulsion to seek profit dominates moral considerations, if there are any. When the public interest is jeopardized, the checks and balances to this relentless self-interest must come from competition and/or regulation. Regulation is all the more called for in small oligopolies such as tobacco that have an anticompetitive history of repeated interfirm collusion and cooperation.

The best evidence was almost ignored: A basic issue in this case is whether the proposed restrictions on advertising would indeed advance the public health by affecting smoking rates. Although this had already been judicially accepted as "rationally connected," thereby justifying the legislative intent, there is recently published empirical work that is relevant and sophisticated in character (Saffer and Chaloupka 2002). Saffer and Chaloupka's (2002) international econometric analysis demonstrates a nonlinear effect of tobacco marketing restrictions (i.e., that partial and modest regulations are of little import, given industry accommodations) but that more substantial and comprehensive sets of restrictions are impactful. It is not surprising that the industry fought vigorously to persuade the court not to rely on this evidence, first published by NBER. The industry characterized it as shoddy, completely unreliable, and misleading and as advocacy disguised as science. In this attack, the industry used criteria for exactitude its own expert did not meet. However, the industry did not offer a better analysis of this or other data to offer a competing interpretation of the international experience. The NBER study was ultimately entered as only one of many items of extrinsic evidence and thus was not cross-examined or mentioned in the court's judgment.

Only modest expert evidence pertaining to advertising was marshaled to support the industry's arguments in the trial. This was not because of the lack of lawyers, time, or funds to pursue the industry's best strategy. Nor was there a lack of intellectual allies: In the past, the industry has employed many university-based consultants and contract researchers from marketing and advertising, including Roger Blackwell, Jean Boddewyn, Jack Calfie, Ronald Faber, Lucy Henke, Sid Levy, Claude Martin, Timothy Meyer, Richard Mizerski, Tom O'Guinn, Leonard Reid, Debra Ringold, Richard Semenik, and Scott Ward (Pollay 1997). Perhaps it is more difficult now to recruit such people to endure cross-examination. Corporate documents that detail the firms' marketing practices and insights are inconsistent with the tobacco lawyers' arguments, so their advertising and marketing experts historically have not used many, if any, industry documents as a foundation for testimony. As more documents become readily available, even to nonexperts, at Web sites, this omission is suspicious and easily construed as a willful blindness that destroys an expert's credibility.

The industry seems willing to defraud its consumers, the court, and apparently even its own lawyers. The corporate documents for Player's Premiere expose misleading advertising to entice and deceive consumers, which is deserving of the marketplace failure it ultimately experienced. Because this case history was not the subject of attention until the industry tabled it, it is puzzling why its competent lawyers would volunteer it to the court, unless they were not at the time aware that the background documents would expose a fraud. In any event, the offer of the Premiere case history to the court as evidence of the loss of consumer benefit backfired badly.

Instead of informative explication, the advertisements relied on the repeatedly researched associative imagery of computer graphics, blueprint tonality, and the cavity filter, depicted in cutaway renderings that exposed its contents. I described this impressive looking but ineffective filter as a "gimmick" in trial testimony, and the judge volunteered the French translation of "ruse." It might also be termed a "ploy," "gambit," "device," "stratagem," "artifice," "con- trivance," or "trick." Whatever the terminology, as Shakespeare might have said, a ruse by any other name would smell as foul.

Cigarette promotion yields little or no public benefit. The potential role of promotion and advertising as a source of information, producing a net public benefit by enabling better-informed decision making and a more efficient marketplace, is not now realized in the specific case of tobacco marketing. Consumers are confused about filter efficacy. After years of advertising for filtered-cigarette products, typical consumers have misplaced faith that products sold with terms such as "light," "mild," and "low tar" are meaningfully safer than products without such descriptors. They rely on this nomenclature and are largely ignorant of further information. To date, cigarette promotion and advertising have used lifestyle portrayals to create brand images and personalities that recruit starters and reassure and retain prequitters rather than provide either product or health information to enhance consumer knowledge and decision making.

Canada's Tobacco Act was upheld by the trial court as constitutional, given the volumes of amplifying evidence and the legal contexts such as previous decisions and the Charter of Rights and Freedoms. It is not known whether the higher courts will concur with the trial court, but the drafting of this legislation, the arguments defending it, and the trial court's judgments all rely heavily on the Canadian Supreme Court's judgment striking down the previous law. If upheld, the only marketing communications that will be allowable for this industry will be ones that contain information: This can create better-informed consumers. It also is not known whether the industry is willing to so advertise and risk the results, but outside of the industry, better-informed consumers should be widely welcomed.
References


