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UMI
THE LEGAL AND POLITICAL EVOLUTION OF FEDERAL TOBACCO CONTROL LEGISLATION

by

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A thesis in conformity with the requirements for the degree of LL.M.
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ABSTRACT

This thesis analyzes the legal and political factors influencing the evolution of federal tobacco control legislation throughout the last century. This thesis takes a case study approach in order to demonstrate the inherent difficulties in enacting national tobacco control legislation to regulate tobacco products in two areas: (1) advertising and sponsorship; and (2) packaging and labelling. This thesis argues that the Charter poses the greatest legal barrier to positive legislative outcomes from the perspective of anti-smoking advocates. It is argued that notwithstanding the Charter constraints, the greatest barriers to enacting tobacco control legislation are political. For most of this century, public policy in this area has been shaped and controlled by pro-tobacco interest groups, resulting in too few tobacco control laws which enhance the greater public good. This thesis demonstrates that the evolution of federal tobacco control from symbolic legislation (early 1900s) to industry-self regulation (1960s to the 1980s) to government regulation (late 1980s to the present) has been the predictable outcome under a public choice analysis of the political process.
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For Dad – you would have been a proud father, not to mention a proud alumnus

and

For Papa – just to let you know, I did finally finish it!
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INTRODUCTION

Every year more than 45,000 Canadians die from tobacco-related illnesses. Smoking accounts for approximately 56% of all premature deaths among male smokers and 48% of all premature deaths among female smokers.\(^1\) The number of deaths attributable to smoking is more than deaths due to suicide, automobile accidents, HIV/AIDS and homicide combined.\(^2\) This makes cigarettes the single largest preventable cause of death in this country. Cigarettes, unlike other consumer products, are inherently hazardous and addictive. There are no safe cigarettes nor are there safe levels of consumption. Despite the fact that the health hazards of smoking are well known to the public, approximately 6.8 million Canadians still smoke.\(^3\) What is more troubling is the fact that the prevalence rate among teens and young adults has been increasing since the early 1990s.\(^4\) The health and social costs of smoking from premature mortality are undisputed, except by some tobacco manufacturers. Smoking also imposes economic costs on society, although quantifying the exact cost is difficult. One recent study has

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2 Ibid.


4 Ibid.
estimated that smoking cost Canadian society $15 billion dollars in 1991, including $2.5 billion in direct health care costs.5

This thesis takes the position that legislation is a key component of a comprehensive strategy to control and reduce tobacco consumption in Canada. All three levels of government have a role to play in enacting, implementing and enforcing tobacco control legislation across Canada. This thesis focuses primarily on the federal government’s role in enacting tobacco control legislation, although some commentary is provided in chapter 3 on provincial regulation of tobacco, for two main reasons. First, as this thesis will argue, federal legislation is necessary in order to set minimum standards for tobacco control which apply consistently throughout Canada and, second, that federal legislation is necessary in order to regulate the inter-provincial nature of tobacco advertising, promotion and sponsorship.

This thesis takes a case study approach in analyzing the federal government’s regulation of tobacco by focusing on how the federal government has regulated tobacco in two key areas: (1) tobacco advertising and sponsorship; and (2) tobacco packaging and labelling. These two areas of regulation have been selected because of their importance to the government’s overall strategy to control tobacco consumption. As this thesis will demonstrate, some of the most controversial political and legal battles in the tobacco control arena over the past thirty years have centered on issues surrounding the prohibition of tobacco advertising and sponsorship and the implementation of health information and warning labels on tobacco packages.

The federal government, despite the fact that it knew about the devastating health consequences associated with tobacco use since the mid 1960s, failed to enact any significant tobacco control legislation until the late 1980s. The federal government’s policy of non-intervention in the tobacco control arena came to an end when it passed the controversial Tobacco Products Control Act (the TPCA) in 1988. The TPCA has since been repealed and replaced by the Tobacco Act (1997). The purpose of this thesis is to analyze the legal and political factors which have influenced this slow evolution of federal tobacco control legislation throughout the last century.

This thesis will argue that the greatest barriers to enacting effective tobacco control legislation are political and not legal in nature. As this thesis will demonstrate, for most of this century public policy in the area of tobacco control has been shaped and controlled by pro-tobacco interest groups. Because interest groups lie at the core of the anti-smoking debate, this thesis employs a public choice theory of group behaviour in order to understand how the anti-smoking and pro-tobacco lobbies have influenced the evolution of tobacco control policy. Public choice theory can be characterized as the economic study of nonmarket decision making, or the application of economics to political science. According to this theory, the market for legislation is a badly functioning one. It yields too few laws that provide public goods and too many laws that benefit narrow interests without contributing to society’s overall welfare. This thesis argues that public choice theory can help us understand the political evolution of federal

\[\text{Sources:}\]


tobacco control policy and that this theory can be used as a means to help predict the future direction of tobacco control regulation in Canada.

The first chapter of this thesis begins by analyzing the health and socio-economic costs attributable to tobacco. It also explores the economic, social and moral justifications for tobacco regulation and argues that some form of government regulation of tobacco products is necessary in order to correct market failure which arises from inadequate consumer information about the risks of tobacco use; in order to protect youth from becoming addicted to tobacco; and in order to maximize social welfare by reducing the disproportionate harm caused by tobacco to certain socio-economic groups in Canada. The second chapter examines the evolution of federal tobacco control legislation from the early 1900s to the present day. In addition, this chapter examines the specific legislative measures contained in the Tobacco Act which regulate the advertising, sponsorship, labelling and packaging of tobacco products. The third chapter analyzes the role that the constitutional division of powers and the Charter of Rights and Freedoms have played in shaping the past and present federal tobacco control legislation. This analysis focuses on the Supreme Court of Canada’s 1995 decision in RJR-MacDonald Inc. v. A.G. (Canada). The fourth chapter analyzes whether legislative outcomes in the area of federal tobacco control are predictable from public choice theory. This thesis demonstrates that the slow evolution of federal tobacco control over the past century from symbolic legislation (early 1900s) to industry-self regulation (1960s to the 1980s) to government regulation (late 1980s to the present) has been the predictable outcome under a public choice
analysis of the political process. The final chapter examines some of the battles still to be fought between pro-health and pro-tobacco interest groups over the federal regulation of tobacco advertising, sponsorship, packaging and labelling. The thesis concludes by analyzing the keys to achieving successful policy outcomes in the area of tobacco control from the perspective of the pro-health lobby, taking into account the legal and political constraints discussed in this thesis which influence policy formation and legislative outcomes.

CHAPTER 1

THE IMPACT OF TOBACCO ON
HEALTH, THE ECONOMY AND SOCIETY

This chapter analyzes the health and socio-economic costs attributable to tobacco use and argues that these costs justify some form of government regulation of tobacco products. This chapter begins with a brief historical overview of tobacco use in Canada and looks specifically at the changes in prevalence of tobacco use between genders and among different socio-economic groups over the past century. The second part of this chapter explores in detail the health risks and disease consequences associated with the use of and exposure to tobacco smoke by both smokers and non-smokers. The third part of this chapter analyzes the economic costs to society as a result of tobacco use by Canadians over the last several decades. The final part of this chapter examines the social, moral and economic justifications for regulating tobacco products.

1. SMOKING BEHAVIOUR OF CANADIANS

1.1 Historical Overview

Cigarette smoking as a form of tobacco use has largely been a 20th century phenomenon. Almost all tobacco consumption before 1910 was consumed in pipes and cigars or as chewing tobacco and snuff. The per capita consumption of manufactured cigarettes increased gradually throughout the century, levelling off in the 1970s and


2 Ibid.
beginning to decline in the 1980s. The average number of cigarettes smoked per day dropped from 20.6 in 1981 to 18 cigarettes per day in 1996/97.

Before World War I, cigarette smoking was popular only among men. The prevalence rate among Canadian men increased dramatically during and subsequent to World War I, peaking in the mid 1960s. Among women, smoking rates peaked in the late 70s. Historically, adult men have always been more likely to smoke than adult women, but the differences in prevalence between the sexes have decreased significantly over time. In 1966, 54% of men smoked compared to 32% of women; however, by 1986, 31% of men smoked as compared to 26% of women.

1.2 Recent Trends in Smoking Prevalence Based on Gender, Age, Socio-Economic Status, Ethnicity and Region

Overall, smoking rates for adult Canadians (over 15 years) have declined significantly from 1965 to 1990, falling from 50% to 30%. By the 1990’s, the decline in

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5 Monograph 8, *supra* note 1.

6 Ferrence, *supra* note 3.


8 Ferrence, *supra* note 3 at 5-6.


the overall smoking prevalence among Canadians had begun to slow.  

The results of the latest National Population Health Survey conducted in 1996/97 found that 29%, or 6,764,000 million Canadians were current smokers, which was only a slight decline from the results observed in 1994/95. In 1996/97, more men still smoked than women (32% and 26% respectively). The only exception was among young adults aged 15 to 19, where the prevalence rate among women was substantially higher than among young men of the same age (31% versus 27%).

The significant decline in smoking prevalence during the time period 1965-1996 was largely a result of the reduction in smoking among men as their prevalence rate dropped from 61% in 1965 to 32% in 1996. The decline in smoking prevalence among women during the same time period was much slower. From 1965 to 1996, the prevalence rate among women declined from 38% to 26%.

Smoking prevalence among Canadian youth between the ages of 15 and 19 declined significantly during the 80s and early 90s dropping from a high of 46% in 1981

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12 Smoking Statistics, supra note 4. Note: From 1990 to 1995, the percentage of current smokers decreased only slightly from 30% to 27%; however, by 1995, the overall prevalence rate had risen again to 30.5%.


14 Ibid. at 1.2, 1.6.

15 Ibid. at 1.2.

16 Bondy, supra note 11 at 2-3. See also: NPHS, supra note 13 at 1.2. Note: From 1991 to 1996, the prevalence rate among men swung from a low of 29% in 1995 to a high of 32% in 1996.

17 Ibid. at 3-4.

18 NPHS, supra note 13 at 1.2. Note: The prevalence rate among women dropped from a high of 35% in 1981 to a low of 31% at the end of the decade. By 1990, the prevalence rate had reached a plateau of 28%. Over the next six years, the prevalence rate varied from a low of 26% in 1995 to a high of 30% by 1991.
to a low of 20% in 1991.\textsuperscript{19} Similarly, the prevalence rate for young women in this age category dropped from a high of 41% in 1981 to a low of 21% in 1990.\textsuperscript{20} However, since the early 90s, the prevalence rate among both men and women in this age group has risen steadily.\textsuperscript{21} By 1996/97, 27% of young men and 31% of young women were current smokers.\textsuperscript{22} In 1996/97, approximately 70% of Canadians who started smoking for the first time were under the age of 25.\textsuperscript{23}

When smoking first became popular in the 1920s, people in higher socio-economic groups, and people living in wealthier province such as Ontario and British Columbia, were the first to take up smoking.\textsuperscript{24} This trend has changed significantly over the years. Recent survey results confirm that smoking rates are highest among Canadians with lower incomes and education levels. In 1996/97, there were nearly twice as many current smokers in the lowest income adequacy group (38%) as there were in the highest income group (21%).\textsuperscript{25} 33% of Canadians with less than a secondary school education were current smokers, as compared with 23% of Canadians with a college or university education.\textsuperscript{26}

\begin{flushleft}
\footnotesize
\textsuperscript{19} Smoking Statistics, supra note 4.

\textsuperscript{20} Ibid.

\textsuperscript{21} Ibid.

\textsuperscript{22} NPHS, supra note 13 at 1.2.

\textsuperscript{23} Ibid. at 1.7.

\textsuperscript{24} Ferrence, supra note 3 at 3, 7.

\textsuperscript{25} NPHS, supra note 13 at 1.6.

\textsuperscript{26} Ibid.
\end{flushleft}
Within Canada, there are specific ethnic populations that have smoking rates that are significantly higher than the national average. Aboriginal peoples report the highest rates of smoking. According to the 1997 First Nations and Inuit Regional Health Survey, smoking rates among the First Nations and the Inuit were 62% and 72% respectively. Smoking rates are also higher than the national average among Francophones than among Anglophones. A 1996 survey found that 35% of Francophones across Canada smoke as compared with 26% of Anglophones and the national average of 27%.

2. THE IMPACT OF TOBACCO ON HEALTH

2.1 Nicotine Addiction

The adverse health effects associated with tobacco use have been the subjects of extensive scientific investigation since the 1950s. One of the primary health consequences associated with tobacco use is nicotine addiction. Nicotine, an alkaloid poison found in nature only in tobacco, is a powerful psychoactive drug that causes addiction by its effect on the brain and central nervous system. When a smoker inhales, he or she receives an

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immediate concentrated dose of nicotine. Within a short period of time, a new smoker becomes dependent on the relaxing and stimulating effects created by the nicotine. The pharmacological and behavioural processes that determine nicotine addiction are similar to those that determine addiction to drugs such as heroin and cocaine. The risk of becoming addicted to nicotine is between 33% and 50% of all new smokers.

2.2 Diseases and Illnesses Related to Tobacco Use

Cigarette smoke contains more than 4,000 chemicals, at least 50 of which have been identified as carcinogenic in humans or animals. The list of ingredients in tobacco smoke include: (1) Carbon Monoxide (CO): a colourless, odourless gas found in car exhaust. At high concentrations, CO starves the body of oxygen resulting in death. Prolonged exposure to low levels can lead to cardiovascular disease. (2) Tar: a sticky black residue containing hundreds of chemicals, some of which are classified as hazardous waste. (3) Ammonia: a caustic agent used in fertilizers and bathroom cleaners. Ammonia can increase susceptibility to viral illness and aggravate chronic respiratory conditions. (4) Hydrogen Cyanide: a colourless gas used in gas chambers. Short-term

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32 Ibid.

33 R. Cunningham, Smoke and Mirrors: The Canadian Tobacco War (Ottawa: IDRC Books, 1996) at 11. [hereinafter Smoke and Mirrors].

34 Facts, supra note 31.

35 Smoke and Mirrors, supra note 33 at 11.

36 Ibid. at p. 11-12.
exposure to this chemical can lead to headaches, dizziness, nausea and vomiting. (5)

Lead: a heavy metal. Severe lead poisoning can cause birth defects and learning disabilities in children. Other chemicals in cigarette smoke include acetone (used in paint strippers), mercury, cadmium (used in car batteries), formaldehyde, arsenic and toluen (used in industrial solvents). Human health is at serious risk when smokers and non-smokers are exposed to these substances over long periods of time.

There is overwhelming evidence that smoking is responsible for many cancers, including cancer of the lung, larynx, oral cavity, esophagus, bladder, kidney and cervix. It has also been established that cigarette smoking is a major cause of heart disease, manifested as fatal and nonfatal myocardial infarction and sudden cardiac death, stroke, atherosclerotic peripheral vascular disease, and chronic obstructive lung disease, which usually occurs in the form of chronic bronchitis and emphysema.

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38 Ibid. at 2.


40 Ibid. at 56.

41 Ibid. at 58.

42 Ibid. at 62-63.

43 Ibid.

Tobacco use is an important factor in a number of other health problems, including periodontal disease\textsuperscript{45}, low cardiovascular fitness\textsuperscript{46}, sleep fragmentation\textsuperscript{47}, cataracts\textsuperscript{48}, Graves' disease\textsuperscript{49}, premature aging of the skin\textsuperscript{50}, peptic ulcer disease\textsuperscript{51}, osteoporosis\textsuperscript{52} and decreased fertility in women.\textsuperscript{53}

The vast array of adverse health effects caused by smoking can also occur in people who smoke pipes and cigars and "light" cigarettes.\textsuperscript{54} Studies have shown that the mortality rate for lung cancer in those people who have smoked only cigars or pipes are significantly higher than in non-smokers, but lower than among those who have always smoked cigarettes.\textsuperscript{55} The lower risk of lung cancer among cigar smokers as compared to cigarette smokers is due to the lesser amount of tobacco smoked and the lower degree of


\textsuperscript{51} Health Consequences of Smoking 1989, \textit{supra} note 39 at 76.

\textsuperscript{52} \textit{Ibid.} at 76-77. See also: Hollenbach, \textit{et al}, "Cigarette Smoking and Bone Mineral Density in Older Men and Women" (1993) 83(9) Am J Public Health 1265.

\textsuperscript{53} D.D. Baird & A.J. Wilcox, "Cigarette Smoking Associated with Delayed Conception" (1985) 253(20) JAMA 2979.


\textsuperscript{55} Health Consequences of Smoking 1989, \textit{supra} note 39 at 50.
People who smoke “light” cigarettes may reduce their risk of developing lung cancer. They are still at great risk, however, for cardiac death and chronic lung diseases. Many smokers are unaware that “light” or “low-yield” cigarettes can yield the same amount of tar and nicotine as regular cigarettes depending on how the cigarette is smoked and the depth and duration of inhalation.

The risks of contracting smoking-related illnesses and diseases increase with the amount and duration of smoking. Therefore, youths who continue to smoke as adults are at great risk of developing more serious health problems in later life. Studies have shown that those people who begin to use tobacco as younger adolescents are among the heaviest users in adolescence and adulthood. Heavier users are more likely to experience tobacco-related health problems and are the least likely to quit smoking cigarettes or to stop using smokeless tobacco.

Young Canadians (age 15) who smoke are more than twice as likely to die before age 70 as are 15 year olds who never start to smoke. Health Canada estimates that

56 Ibid.


58 H. Klech, “Do Light Cigarettes Decrease the Risk of Smoking?” (1994) 144(22-23) Wien Med Wochenschr 573; See also: Ontario (Ministry of Health), Actions will Speak Louder than Words: Getting Serious About Tobacco Control in Ontario, Report to the Minister of Health submitted by her Expert Panel on the Renewal of the Ontario Tobacco Strategy, (February 1999), at 4.2.3. [hereinafter Actions Speak Louder than Words].


60 Ibid.
smoking will account for more than 50% of deaths before age 70 among today's 15 year old smokers. In contrast, about 6% will die prematurely because of traffic accidents, suicides, murders and HIV/AIDS combined.\textsuperscript{62}

Tobacco use can have serious health implications for women. Women who smoke and use birth control pills have a higher risk of heart attack, strokes and vascular complications.\textsuperscript{63} Women who smoke during pregnancy not only risk their health but also the health of their unborn baby as tobacco smoke has a direct and negative effect on the growth of the fetus. Studies have shown that the more a mother smokes during pregnancy, the lower the weight of the newborn infant. Babies with low birth weights are more likely to suffer adverse outcomes including stillbirth and the need for special treatment in neonatal intensive care units.\textsuperscript{64} Smoking also increases a woman's chance of having serious complications during childbirth, such as placental abruption and placenta previa.\textsuperscript{65}

\textsuperscript{61} M.J. Ashley, \textit{The Health Effects of Tobacco Use}. Prepared for the National Clearinghouse on Tobacco and Health by the Ontario Tobacco Research Unit, March 1995 at. 1. [hereinafter Health Effects].

\textsuperscript{62} \textit{Ibid}.


2.3 Diseases and Illnesses Related to Exposure to Environmental Tobacco Smoke

Exposure to environmental tobacco smoke (ETS), also known as “second-hand smoke” or “passive smoke,” has been linked to a variety of adverse health problems in smokers and nonsmokers. ETS is the most common and harmful form of indoor air pollution. In 1992, the U.S. Environmental Protection Agency (EPA) released its assessment of the health effects of ETS. The EPA identified ETS as a Group A carcinogen. The report estimated that every year ETS was responsible for 3,000 lung cancer deaths among American nonsmokers; 26,000 new asthma cases in children; up to 1,000,000 asthma exacerbations; and up to 300,000 cases of bronchitis and pneumonia in toddlers.

A 1997 California Environmental Protection Agency (Cal/EPA) report concluded that exposure to ETS is causally associated with a number of developmental, respiratory, carcinogenic and cardiovascular effects such as low birth weight, Sudden Infant Death Syndrome (SIDS), bronchitis and pneumonia in children, asthma induction and exacerbation in children, chronic respiratory symptoms in children, eye and nasal irritation in adults, middle ear infections in children, lung cancer, nasal cancer, heart disease mortality and acute and chronic coronary heart disease. The study also found

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68 Ibid.

69 Ibid.
evidence suggesting that ETS may be associated with a number of other health effects such as spontaneous abortion, adverse effects on cognition and behaviour, asthma exacerbation in adults, exacerbation of cystic fibrosis, and decreased pulmonary function and cervical cancer.\textsuperscript{71}

Since the Cal/EPA report was completed, additional studies have been published confirming the association between ETS exposure and increased risk of lung cancer and heart disease in nonsmokers. The International Agency for Research on Cancer (IARC) published a study demonstrating that nonsmokers exposed to ETS experienced a 16% elevation in the risk of developing lung cancer.\textsuperscript{72} A British study which examined 19 epidemiological studies on ETS and heart disease, found a 23% increased risk of heart disease in ETS-exposed non-smokers.\textsuperscript{73}

2.4 Smoking Attributed Mortality

Despite the decline in smoking prevalence among Canadians over the past thirty years, the smoking related mortality rate continues to rise. In 1991, the total number of smoking-attributed deaths in Canada was an estimated 45,064.\textsuperscript{74} By 1996, smoking accounted for 45,215 deaths, with cancers accounting for 17,703 deaths, cardiovascular


\textsuperscript{71} \textit{Ibid.} at ES-2-8.


diseases accounted for 17,762 deaths, and respiratory diseases for the remaining 9,498
deaths. Of the smoking related deaths in 1996, lung cancer caused 31% of male deaths
and 28% of female deaths. Ischemic heart disease was the second leading cause of
death, accounting for 22% of male and female deaths.

Researchers predict that smoking-attributed mortality rates would continue to rise
during the late 90s. Smoking-attributed deaths were estimated at 46,910 for the year
2000. The growth in smoking attributed mortality from 1991 to 2000 was attributed to
a 24% increase in smoking-related deaths among females and a 4% decrease among
males.

2.5 Health Benefits of Quitting

There is overwhelming scientific evidence that quitting smoking is the single
most effective thing that smokers can do to enhance the quality and length of their lives.
The simple fact is that people who quit smoking live longer than people who continue to
smoke. Those who quit before the age of 50 have only half the risk of dying in the next
15 years compared with those who continue to smoke. People who quit smoking reduce

Can 84 at 86.

75 M. Illing & M.J Kaiserman, “Mortality Attributable to Tobacco Use in Canada and its Regions, 1994 and

76 Ibid. at 112.

77 Ibid.

78 Ellison, supra note 74 at 84, 86.

Department of Health and Human Services, Public Health Service, Centers for Disease Control, Center for
Chronic Disease Prevention and Health Promotion, Office on Smoking and Health, 1990, at v. [hereinafter
Health Benefits of Smoking Cessation 1990].
their risk of developing serious health problems such as lung cancer, stroke, COPD, respiratory infections, peripheral artery occlusive disease, ulcers and abdominal aortic aneurysm. The extent to which a smoker's risk of premature death is reduced after quitting depends on a number of factors, such as the number of years of smoking, the number of cigarettes smoked per day and the presence or absence of disease at the time of quitting. The sooner a person quits smoking the better, but it is never too late to quit, as an older person can still reduce the risks to his or her health by quitting.

3. THE ECONOMIC COSTS OF TOBACCO USE

There have been two recent Canadian studies which have estimated the economic costs of substance abuse. The first study, conducted by Murray J Kaiserman, quantified the smoking-attributed costs for 1991. This study used a prevalence-based analysis to provide an estimate of excess mortality and morbidity attributable to smoking that included all health outcomes. In a prevalence-based model, the costs resulting from past and present substance abuse are determined for a given year, based on the prevalence

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80 Ibid. at vi. Note: A smoker can reduce his or her risk of dying of lung cancer after 10 years of abstinence.

81 Ibid. Note: Within one year of quitting, a former smoker reduces his or her risk of dying from ischaemic (coronary) heart disease by half. Fifteen years after quitting, a former smoker's risk is close to that of persons who have never smoked.

82 Ibid. Note: Smokers have twice the risk of dying from stroke than non-smokers. This risk returns to the level of never smokers within five to 15 years of quitting.

83 Ibid.

84 Ibid. at v.

85 Ibid. at xi.


87 Ibid. at 16.
of mortality, morbidity and other relevant factors for that year. The weakness in this type of model is that, by measuring costs in the present year, they reflect the historical use of a substance. This limitation is illustrated especially in the case of tobacco where there is a long delay period between smoking initiation and illness.

The Kaiserman study concluded that in 1991 smoking-attributable health care costs in Canada were $2.5 billion (CD). This represented about 3.8% of total health care spending. Additional smoking-attributable costs included $1.5 billion for residential care costs, $2 billion for workers’ absenteeism, $80 million due to fires and $10.5 billion in lost future earnings caused by premature death. This study is important because it quantifies both the economic benefits, as well as economic costs, associated with tobacco use. For instance, the study found that had there been a tobacco free society the smokers who died in 1991 and 1992 would have lived longer, on average, and ultimately would have cost society for such services as pensions, medical care and residential care. Kaiserman estimated these “avoided costs”, not including pensions, at $1.5 billion, with residential care costs accounting for about 55% and hospital costs for 39% of the total avoided costs. The study also found that the government collected

References:

89 Ibid.
90 Kaiserman, supra note 86 at 16.
91 Ibid.
92 Ibid. at 18.
93 Ibid.
94 Ibid.
$7.8 billion in the form of taxes from tobacco products. In other words, the government collected three times the amount of money in taxes than it had to pay out for smoking-attributed health care costs. Despite these economic benefits, the study concluded that overall smokers cost Canadian society more than they benefited society by $7.2 billion dollars in 1991 mainly because of loss of future income caused by premature deaths.

Single, Robson, Xie and Rehm conducted a major study in 1992 on the health, social and economic costs associated with the use of alcohol, tobacco and illicit drugs in Canada. In contrast to the Kaiserman study, this study employed a cost-of-illness (COI) approach. The costs used in this study included the major direct costs that were tangible, external costs of substance abuse (i.e. those costs borne by persons other than the consumer, including the consumer’s family). Certain minor internal costs were also included in the study (such as the private costs of drugs for treatment). This type of study has been criticized because it only estimates the costs of substance abuse and does not consider the economic benefits of substance abuse.

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95 Ibid. at 19. Note: In 1991, smokers spent $10.45 billion on tobacco products of which 75% went to government (approximately $7.8 billion) in the form of taxes.

96 Ibid. at 18. Note: This study concluded that smokers costs society $15 billion while contributing $7.8 billion in taxes.


98 Ibid.

99 Ibid.

100 Choi. supra note 88.
The Single et al study found that tobacco accounted for $9.56 billion in costs, or $336 per capita.\textsuperscript{101} Loss productivity due to illness and premature death accounted for more than $6.8 billion of these costs. Direct health care costs due to smoking accounted for the remaining $2.67 billion.\textsuperscript{102} The study also found that policy costs, which include all the costs for prevention, research and law enforcement, for tobacco accounted for less than 1% of the total economic costs of tobacco.\textsuperscript{103}

Despite the different methodologies employed by these two studies, it is important to note that both studies arrived at roughly similar estimates for the direct costs to health care attributable to smoking. The Kaiserman study concluded that direct health care costs in 1991 were $2.5 billion in 1991. Similarly, the Single study found that health care costs in 1992 were $2.67 billion.

There have also been a number of international studies which have calculated the economic impact of smoking on society. One recent Dutch report published in the Journal of Epidemiological and Community Health refutes the economic argument that people who smoke are less of a burden on the health care system than non-smokers because they die early.\textsuperscript{104} This study argues that while non-smokers live longer, they also spend less time sick and disabled than smokers. Therefore, eliminating smoking will not only extend life and result in an increase in the number of years lived without disability, but it will also compress the disability to a shorter period. The study found that disability-free years

\textsuperscript{101} Single, supra note 97.

\textsuperscript{102} Ibid.

\textsuperscript{103} Ibid.

increase more than overall life expectancy for non-smokers which implies that years in poor health are being replaced by years in good health.

4. THE CASE FOR REGULATING TOBACCO PRODUCTS

4.1 Market Failure in the Tobacco Market

A market outcome will not be efficient if consumers in that market greatly underestimate the risks of their activity. Some law and economics scholars argue that regulation of cigarettes and other tobacco products is unwarranted because consumers are well aware of the risks of smoking. For example, American economist, W. Kip Viscusi, who has studied the nature of consumer information regarding cigarette risks, argues that people on average tend to overestimate the health risks of smoking when responding to survey questionnaires about the health hazards of smoking. Other scholars refute this position by pointing to evidence that consumers are not truly informed about the risks of smoking. There are several reasons why consumers may not be adequately informed about the risks of smoking or, even if they are adequately informed, they do not act rationally in relation to this information.

First, consumers may fail to apply generalized perceptions of risk to themselves. Many scholars question surveys such as those compiled by Viscusi showing that

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107 Hanson, supra note 105 at 1183. See also: A.R. Klien, “Tobacco Policy and the States: A Response to Professor Viscusi” 29 Cumb. L. Rev. 577 at 578.

consumers inflate the health risks of smoking arguing that consumers do not always apply risk perceptions to themselves because of “third-person effect” or “optimism bias.”

For example, social psychologist Martin Fishbein has criticized the use of general questions in smoking surveys stating that:

"Although a person may believe that "smoking increases the chances of lung cancer", this will have little influence on his or her smoking decision if he or she also believes that "My smoking is not increasing my chance of getting lung cancer".

In other words, smokers believe their own personal risks of smoking are significantly lower than the general risks of smoking. What is more troubling about this finding is that the evidence indicates that heavier smokers and young smokers are the most likely to underestimate the risks of smoking to themselves. This is important because between 70% to 80% of all new smokers are teenagers or young adults.

Second, even if consumers do know the generic health risks associated with smoking, nevertheless, they do not have adequate information about the risks of individual brands and types of cigarettes. In the absence of this information, smokers assume that all cigarettes are equally risky, which removes any incentive for


111 Hanson, ibid. at 1187.

112 Ibid. at 1188.

113 NPHS, supra note 13 at 1.7 Note: This survey found that between 1994/95 and 1996/97, 329,000 Canadians aged 15 and over started smoking for the first time and that 70% of these new smokers were under the age of 25.

114 Hanson, supra note 105 at 1188.
manufacturers to compete on safety by investment in development of less dangerous products. Even if manufacturers chose to invest in developing safer products, consumers may still underestimate the risks of some of the relatively risky brands of cigarettes and overestimate the risks of relatively safe brands. For instance, survey evidence indicates that smokers perceive low-tar cigarettes to be safer than regular cigarettes.\textsuperscript{115} As discussed in section 2.2 of this chapter, there is evidence that “light” or “mild” cigarettes are not safer than regular cigarettes.\textsuperscript{116} Consumers may not fully understand the health risks associated with these types of cigarettes because they are not well informed. If consumers were truly well educated about the brand specific health risks of cigarettes, then manufacturers would have an incentive to make their cigarettes actually safer, rather than just making them seem safer to the consumer.

Third, consumers underestimate the risk of cigarettes relative to other products and choices.\textsuperscript{117} For instance, a smoker may decide to keep smoking because he or she believes that smoking will help reduce weight and reduce stress. If the smoker believes that the risks of obesity or stress are greater or comparable to the risks of smoking, then the smoker’s decision is misinformed. There have been numerous studies which suggest that consumers misestimate the relative risks of cigarettes.\textsuperscript{118} The fact that smokers make

\textsuperscript{115} Ibid. at 1189.

\textsuperscript{116} Also see: M. Kennedy, “Tobacco Firms Knew “Light” Cigarettes Not Healthier: Report Linked to Deep-Lung Cancer” Ottawa Citizen (November 1999).

\textsuperscript{117} Hanson, supra note 105 at 1191.

poor health relative risk estimates means that even if they have accurate information about the risks of smoking particular brands of cigarettes, this may not prevent them from smoking too much. In other words, unless smokers understand that gaining ten pounds from quitting smoking is healthier than continuing to smoke, they will may not make appropriate risk calculations.

Fourth, consumers are not fully informed about the addictive nature of cigarettes. As discussed in section 2.1 of this chapter, tobacco products are highly addictive because of the nicotine found naturally in tobacco leaves. Despite the overwhelming scientific evidence to the contrary, cigarette manufacturers have, until very recently, challenged this fact. Tobacco manufacturers point to statistics that show that approximately 50% of all smokers eventually quit. The problem with this survey data is that it is cumulative over long periods of time. In reality, only a very small number of people who try to quit smoking do so on the first try. From an economic perspective, if a rational actor believes cigarettes are non-addictive, he or she will likely frame the decision to smoke as a comparison between the marginal benefit of one cigarette (or pack of cigarettes) and its marginal cost. A new smoker who assumes that smoking is nonaddictive (or who is more likely to underestimate the likelihood that he or she will become addicted) may make an inefficient choice to smoke. These smokers will underestimate the costs of their

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119 Hanson, supra note 105 at 1191.
119 Ibid.
120 Ibid.
121 Klien, supra note 107 at 579.
122 NPHS, supra note 13 at 1.8.
123 Hanson, supra note 105 at 1198.
decision to smoke given the unanticipated real costs of quitting, believing falsely that whilst others may become trapped by cigarette addiction they will be somehow different or special and be able to avoid this pitfall.\textsuperscript{124}

Some economists have also argued that regulation of tobacco products is unwarranted because the net external "benefits" of smoking (for example the savings from foregone pension and the health care savings that occur when smokers die young) outweigh the net external "costs" of smoking. As this chapter has demonstrated, many harms caused by cigarettes and other tobacco products are not internalized in smokers themselves but are instead externalized to third parties. For example, smokers impose cost of treatment for illnesses caused by exposure to environmental tobacco smoke and the health care costs associated with treating children who are born to mothers who smoke during pregnancy. In addition, family and friends of sick or deceased smokers incur emotional costs which economists tend to dismiss because it is hard to quantify these intangible costs. In other words, the tobacco market may not work efficiently if the costs associated with tobacco use include not only the medical costs but also the harm that cigarettes impose on society.\textsuperscript{125}

4.2 Social and Moral Grounds for Regulating Tobacco

Although regulation of tobacco products can be justified on efficiency grounds, it can also be justified on non-economic grounds. First, regulation of tobacco products is justified in order to protect individuals, especially minors, from the harmful consequences of tobacco use. Society generally recognizes that adolescent decision-

\textsuperscript{124} \textit{Ibid.} at 1199.
making capacity is limited and, therefore, restricts young people's freedom to make certain choices by imposing age restrictions on activities such as drinking, marriage, driving or giving medical consent. Although regulation of tobacco may restrict an individual's freedom to choose to be a smoker or not, it is justified in light of the high prevalence rate among young men and women (27% and 31% receptively) and in light of the fact that the addictive nature of tobacco makes a decision to smoke as a youth very difficult to reverse later in life.

Tobacco regulation can also be justified in order to redress the social harm caused by smoking to certain groups in society. As discussed in section 1.2 of this chapter, smoking prevalence is highest among lower socio-economic groups, and among some ethnic populations such as native Canadians and Francophones. The fact that more people in these socio-economic groups are likely to be smokers means that they are more likely to suffer from the harmful health consequences related to tobacco use and exposure discussed in section 2 of this chapter. Regulation of tobacco products which aims to reduce smoking prevalence is justified to the extent that it enhances social welfare by addressing the societal inequalities associated with tobacco consumption.

5. SUMMARY

Regulation of tobacco products can be justified on both economic and non-economic grounds. From an economic perspective, the large negative externalities produced by cigarettes, together with consumer information problems, create a prima

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125 See also: Klein, supra note 107 at 579.

126 NPHS, supra note 13 at 1.2.
facie case for regulating cigarettes. In addition, regulation can be justified in order to achieve the paternalistic goal of protecting youth from the harmful consequences of tobacco and in order to maximize social welfare by reducing the disproportionate harm caused by tobacco to certain socio-economic groups in Canada. Considering the enormous social costs of tobacco use outlined in this chapter, one might expect tobacco products to be highly regulated by the federal government. As discussed in the next chapter, government regulation of tobacco products has been a relatively recent occurrence. The next chapter will explore the history of federal regulation of tobacco regulation over the last century and, specifically, examine the extent of tobacco product regulation in two areas: (1) advertising and sponsorship and (2) packaging and labelling.
CHAPTER 2
FEDERAL TOBACCO CONTROL LEGISLATION

At present, the *Tobacco Act* (1997)\(^1\) is the federal government’s central piece of tobacco control legislation. It replaced the *Tobacco Products Control Act* (1988)\(^2\) which was struck down by the Supreme Court of Canada in 1995 on constitutional grounds. The purpose of the *Tobacco Act* is to “provide a legislative response to a national public health problem of substantial and pressing concern”, arising from the use of tobacco products, by protecting young persons and others from inducements to use tobacco products and the consequent dependence on them, by protecting the health of young persons by restricting access to tobacco products and by enhancing public awareness of the health hazards of using tobacco products.\(^3\) The means chosen by the government to achieve these objectives include restricting how tobacco products are advertised and promoted, regulating how tobacco products are packaged and labelled and restricting youth access to tobacco products. A central theme throughout this thesis is that the measures contained in the *Tobacco Act*, which regulate the advertising, sponsorship, labelling and packaging of tobacco products, are inadequate and should be strengthened and extended in order to achieve the government’s stated objectives. However, as will be demonstrated in chapters 3 to 4, there are legal and political factors which constrain the government’s ability to enact more stringent and effective tobacco control legislation relating to these case studies areas.


\(^3\) *Tobacco Act*, supra note 1, s. 4.
The purpose of this chapter is to place the current federal legislation in its historical context. This is accomplished, in the first part of this chapter, by tracing the history of federal regulation from the early 1900s to the present day. The focus of the second part of this chapter shifts to examining the specific legislative measures contained in the *Tobacco Act*, and the regulations enacted thereunder, which regulate the advertising, sponsorship, labelling and packaging of tobacco products. In order to analyze both the strengths and the limitations of the current legislation, the *Tobacco Act* is comparing and contrasting it with its predecessor – the repealed *Tobacco Products Control Act*.

1. **HISTORY OF FEDERAL REGULATION**

1.1 **1900 - World War II**

During the early 1900s until the start of World War I, the tobacco debate in Parliament focused on the issue of cigarette prohibition. From 1903 to 1908, the House of Commons debated several resolutions supporting the prohibition of cigarettes, but none became law. In 1908, the Minister of Justice, Allen Aylesworth, introduced Bill 173, the *Tobacco Restraint Act*. This *Act* prohibited the sale of tobacco products to persons under the age of 16. It remained in force, but unamended, for 86 years. It was finally replaced in 1994 by the *Tobacco Sales to Young Persons Act*.

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4 R. Cunningham, *Smoke and Mirrors: The Canadian Tobacco War* (Ottawa: IDRC Books, 1996) at 33-34. [hereinafter Smoke and Mirrors]. Note: In 1903, the House of Commons approved a resolution supporting a ban on cigarette, but no law was passed. In the same year, Minister of Justice Charles Fitzpatrick introduced a bill containing amendments to the *Criminal Code*, which included a provision banning the sale of tobacco to persons under 18. The tobacco provision was dropped at Committee stage. In 1904, the House of Commons approved a resolution to ban cigarettes. Bill 128 received second reading and Committee approval, but it failed to pass third reading by the end of the Parliamentary session.

Despite the passage of the Tobacco Restraint Act, anti-smoking advocates continued to press for stronger tobacco control legislation. In 1914, the House of Commons set up the Select Committee on Cigarette Evils to consider whether cigarettes should be banned outright or whether there were alternative ways to restrict cigarettes. The Committee held public hearings and heard from many groups but, in the end, it made no policy recommendations.\(^8\)

Public support for the prohibition of cigarettes dwindled after the outbreak of World War I.\(^9\) During the War, cigarettes were sent overseas to the troops as an act of patriotism. Many of these soldiers returned home to Canada as smokers, which helped boost the image of cigarette smoking and contributed to its rise in popularity among Canadian men.\(^10\) At the same time as cigarettes were gaining in popularity, a number of important studies were being published in the United States and in Europe which linked tobacco smoking with cancer.\(^11\) The health concerns being raised by the medical

\(^6\) Smoke and Mirrors, ibid. at 35.


\(^8\) Smoke and Mirrors, supra note 4 at 37-38.

\(^9\) Ibid. at 39.

\(^10\) Ibid. Note: The total number of cigarettes consumed in Canada per year in Canada rose from 87 million in 1896 to 2.4 billion in the 1920s.

community were largely overshadowed by other world events, such as the commencement of World War II in 1939.\textsuperscript{12}

\section*{1.2 1950s – mid 1980s}

In the years following War II, the medical evidence linking smoking to cancer and other serious diseases continued to mount. In the 1950s, several key studies found a link between smoking and lung cancer.\textsuperscript{13} In 1954, the federal Department of Health and Welfare initiated its own study of the health effects of smoking.\textsuperscript{14}

During the 1960s, support began to grow slowly for the federal regulation of tobacco. In 1963, the Minister of Health and Welfare, Judy La Marsh, announced that the government would hold a national conference on smoking. La Marsh also acknowledged in the House of Commons that smoking was a contributory cause of lung cancer and that it may also be associated with chronic bronchitis and coronary heart disease.\textsuperscript{15} Following the conference, the government announced a five year, $600,000 antismoking budget to finance research and health programs.\textsuperscript{16} On January 11, 1964, the U.S. Surgeon General's

\begin{footnotes}
\item[\textsuperscript{12}]\textit{Smoke and Mirrors, supra} note 4 at 41. Note: During the War tobacco was once again sent overseas to the troops by various groups, including the Canadian Red Cross, the Knights of Columbus, the Canadian Legion and the YMCA.

\item[\textsuperscript{13}]National Institute of Health: Smoking and Tobacco Control, \textit{Changes in Cigarette-related Disease Risks and their Implication for Prevention and Control}, NIH Publication No. 97-4213 (February 1997), Monograph 8 online: http://www.rex.nci.nih.gov/NCI_MONOGRAPHS/MONO8/M8-Ch.1.pdf (date accessed: 8 January 2000). [hereinafter Monograph 8]. Note: The first major prospective study was started in Great Britain in 1951 by Sir Richard Doll and Sir Austin Bradford Hill. The first U.S. prospective study was initiated in 1952 by E. Cuyler Hammond and Daniel Horn.

\item[\textsuperscript{14}]\textit{Smoke and Mirrors, supra} note 4 at 291. Note: The program was arranged through the Canadian Cancer Institute. An important study of the smoking behaviour and causes of death of Canadian veterans commenced in 1956. The results of this study, released in 1963, found that the group of cigarette smokers had 52% more deaths than the group of nonsmokers.

\item[\textsuperscript{15}][\textit{Ibid.}] at 49.

\item[\textsuperscript{16}][\textit{Ibid.}] at 50.
\end{footnotes}
Report on smoking and health was released. This landmark report concluded that cigarette smoking was a cause of lung and laryngeal cancer in men and a suspect cause in women, and the most important cause of chronic bronchitis. In the same year, the Canadian tobacco industry announced it would restrict their advertising under a voluntary code.

In 1963, following La Marsh's statement in the House of Commons, MP Barry Mather (NDP) introduced Bill C-75, a private member's bill that would have regulated the labelling, packaging and advertising of cigarettes. This bill was never passed. Over the next 10 years, more than 20 private members bills, which proposed to regulate tobacco products, were introduced in to the House of Commons. By 1967, the NDP and Conservatives were pressuring the Liberals to introduce legislation to restrict tobacco advertising and to refer all existing private member's bills on tobacco to the House of Commons Standing Committee on Health, Welfare and Social Affairs. The government agreed to refer all bills to the Committee. In 1968, the government established an all-party committee, which was chaired by Liberal MP Dr. Gaston Isabelle.

in its brief to the Committee, the tobacco industry argued that the statistical link between smoking and disease was not yet sufficiently proven to warrant government

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18 CMTC, "Canadian Advertising Code" (June 16, 1964).

19 Smoke and Mirrors, supra note 4 at 52.

20 Ibid. at 51-52.
interference. The industry also opposed advertising restrictions arguing that manufacturers only competed for market share and did not seek to increase overall sales and that the ban would not work. As for health warnings, the industry claimed they would be counterproductive because they would encourage rebellious youth to smoke instead of discouraging them. The tobacco industry would still be making these same arguments 20 years later to government, to the courts and to the public.

The Committee, in its report known as the Isabelle Report, rejected the industry’s position. In response to the industry’s position on the relationship between smoking and health issue, the Committee wrote:

"The Committee has satisfied itself that cigarette smokers have a higher incidence of disease, disability and death because they smoke... The onus would appear to be on those who seriously doubt this conclusion to refute it with consistent and solid evidence derived from research not criticism and speculation. In the Committee’s view such evidence does not appear to exist and since it has not been brought forward there is no basis for a controversy as some would suggest. To delay corrective action to await such evidence would be contrary to the public interest."

The Committee submitted comprehensive regulatory proposals to Parliament which included the following: a total advertising ban, warning labels on packages, setting

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22 Smoke and Mirrors, supra note 4 at 57.

23 Ibid.


maximum levels for tar and nicotine, and restricting the location of cigarette vending machines.26

Over the next couple years, the Cabinet debated whether tobacco control legislation was required to regulate tobacco manufacturers. By 1970, the Cabinet had agreed to enact legislation to prescribe maximum levels of tar, nicotine and other ingredients, to prohibit incentive promotions and to prohibit advertising in the electronic media and newspapers.27 At the same time, Cabinet had decided to require that the level of tar, nicotine and other toxic emissions be displayed on tobacco packages and advertising. These regulations were never passed.28 In June 1971, Health Minister John Munro introduced Bill C-248, the Cigarette Products Act. This Act would have enacted most of the key recommendations contained in the Isabelle Report; however, Bill C-248 was never debated, and it died on the order paper.29 On September 21, 1971, the tobacco industry agreed to stop advertising on radio and television, to carry warning labels and set maximum tar and nicotine yields and to cease poster and billboard advertising in the immediate vicinity of schools.30

26 Ibid. See also: Tobacco Timeline, supra note 11; National Clearinghouse on Tobacco and Health, "Chronology of Events in Tobacco Control, Canada", online: National Clearinghouse on Tobacco and Health http://www.cctic.ca (date accessed 4 October 1999). [hereinafter Chronology].

27 Ibid. at 58.

28 Ibid. at 59. Note: These regulations would have been under the Hazardous Products Act.

29 Ibid.

From 1972 to 1977, the Liberal government introduced no new tobacco control legislation. The only tobacco control legislative introduced in this time period was a private member’s bill. Bill C-242, *An Act for the Relief of Non-Smokers in Transit*, received 2nd reading and support from the House Leader of each party. It failed, however, to make it past 3rd reading. In 1975, the tobacco industry amended its voluntary code in an attempt to address some of the government’s concerns with how tobacco products were advertised, promoted, labelled and packaged. The code now covered roll-your own tobacco; prohibited advertising of sponsored events in broadcast media and the use of direct mail; mandated the placement of average tar and nicotine yields on tobacco packages and print advertisements; and required package warnings, as well as warnings on displays in print advertising and point-of-sale advertising, to include the phrase “avoid inhaling.”

### 1.3 Late 1980s – 2000

In the late 1980s, the federal government enacted, for the first time since the passage of the *Tobacco Restraint Act* in 1908, several important pieces of tobacco control legislation. Bill C-204, the *Non-Smokers’ Health Act*, which was introduced as a private member’s bill in 1986 by New Democrat MP Lynn McDonald, proposed to restrict smoking in federally regulated workplaces, as well as on common carriers under federal

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31 Smoke and Mirrors, *supra* note 4 at 61.

32 *Ibid.* at 60. This *Act* would have restricted smoking in federally regulated carriers.


jurisdiction. The bill passed second reading and was sent to Committee, where it was debated for nine months. It received third reading in May 1988. The Non-Smokers' Health Act received Royal Assent in June 1988, but it was not proclaimed until a year later, on June 19, 1989.

By the mid-80s the government was under pressure from health groups who were lobbying for legislation to ban tobacco advertising. In 1986, the Non-Smokers' Rights Association (NSRA) had released a report which detailed violations by the tobacco industry of its voluntary marketing code. Health Minister Jake Epp concluded that the voluntary code was not an adequate tool to curtail tobacco advertising and that federal legislation was required to address the problem. In April 1987, the Health Minister introduced Bill C-51, An Act to Prohibit the Advertising and Promotion and Respecting the Labelling and Monitoring of Tobacco Products. Bill C-51, renamed the Tobacco Products Control Act, passed third reading in the House of Commons on May 31, 1988 and received Royal Assent on June 28, 1988.

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35 Smoke and Mirrors, supra note 4 at 71. Note: The bill placed tobacco under the Hazardous Products Act. This meant that all advertising and sales would have been prohibited except what was permitted by regulation. The bill passed Committee stage with the proviso that the prohibition on advertising would be dropped if Bill C-51 was passed.

36 Ibid. at 76.

37 Non-Smoker's Health Act, R.S. 1985, c. 15 (4th Supp.). See also: Smoke and Mirrors, supra note 4 at 62.


39 Smoke and Mirrors, supra note 4 at 70.

40 Chronology, supra note 26.

41 Ibid. See also: Smoke and Mirrors, supra note 4 at 76.
When Bill C-51, the Tobacco Products Control Act (TPCA), came into force on January 1, 1989, it marked the first time that federal legislation regulated the advertising, promoting, labelling, packaging and manufacturing of tobacco products. The purpose of the Act was to protect the health of Canadians from the detrimental health effects caused by tobacco consumption. The purpose section of the TPCA is as follows:

3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular, (a) to protect the health of Canadians in light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases; (b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and (c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

In 1989, Senate Bill S-6, An Act to amend the Tobacco Restraint Act and to amend the Tobacco Products Control Act, and Bill C-27, An Act to amend the Non-Smokers' Health Act, were debated in Parliament. Senate Bill S-6 would have raised the fines for selling tobacco products to youth under the age of 18, and it would have made it an offence to operate a tobacco vending machine. This bill passed first reading, but the motion for second reading was defeated. Bill C-27 made technical amendments to Bill C-204, including the clarification of terms and the provision of enforcement procedures. It passed third reading and was received Royal Assent in June 1989.

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42 Tobacco Products Control Act, supra note 2.

43 Ibid. s. 3.

44 Chronology, supra note 26.

45 Ibid.
Shortly after the passage of the TPCA, the three Canadian tobacco manufacturers, Rothmans Benson and Hedges Inc., Imperial Oil Ltd., and RJR-MacDonald Inc., launched court actions challenging the constitutionality of the TPCA.\textsuperscript{46} The Quebec Superior Court began hearing the Imperial Oil and RJR-MacDonald actions in September 1989.\textsuperscript{47} While this litigation was pending in the courts, the government enacted regulations which required tobacco manufacturers to print health warnings on cigarette packages.\textsuperscript{48} In 1990, these regulations were revised to include tougher and more prominent health warnings on tobacco packages.\textsuperscript{49} They were to have taken effect on June 1, 1991, but were delayed pending the outcome of the trial court’s decision.\textsuperscript{50}

On July 16, 1991, Justice Chabot, of the Quebec Superior Court ruled that the sections of the TPCA, which banned tobacco advertising and mandated health warnings that were not attributed to Health Canada, violated the tobacco companies’ freedom of expression.\textsuperscript{51} In light of this decision, the government decided not to proceed with the

\textsuperscript{46} Smoke and Mirrors, \textit{supra} note 4 at 78. Note: Rothmans Benson and Hedges filed its statement of claim in the Federal Court of Canada on July 20, 1988; Imperial Oil Ltd. and RJR-MacDonald Inc. each filed separate actions in Quebec Superior Court on September 1, 1988. The legal dispute focused on the Imperial Oil and RJR-MacDonald actions, which were heard together.

\textsuperscript{47} Chronology, \textit{supra} note 26.

\textsuperscript{48} Smoke and Mirrors, \textit{supra} note 4 at 100-101.

\textsuperscript{49} \textit{Ibid.} at 103. Note: The revised regulations would have included warnings about addiction and environmental tobacco smoke. The warnings were required to cover the top quarter of the front and back of the package and had to be printed in black and white. In addition, the manufacturers had to include an inset in the packages with more health information.

\textsuperscript{50} \textit{Ibid.} at 104.

revised regulations. The government appealed, and on January 15, 1993, the Quebec Court of Appeal reversed the trial court's judgment. Imperial Oil and RJR MacDonald were granted leave to appeal this decision to Supreme Court of Canada.

There were a number of important events that occurred in the period following the Court of Appeal's decision. First, in February 1993, the government introduced Bill C-111, the Tobacco Sales to Young Persons Act. This Act raised the minimum age for purchasing tobacco products to 18, and it restricted the location of vending machines. Second, in 1994, the federal government and five provincial governments significantly reduced cigarette taxes in order to combat the problem of tobacco smuggling. Subsequently, the price of cigarettes fell to 1980 levels. Third, new health regulations came into effect in September 1994, which required tobacco packages to contain tougher health warning.

In November 1994, the Supreme Court of Canada heard the appeal from Imperial Oil and RJR MacDonald. The court released its decision on September 21, 1995.

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52 Smoke and Mirrors, supra note 4 at 104.


54 Smoke and Mirrors, supra note 4 at 82.

55 Tobacco Sales to Young Persons Act, S.C. 1993, c. 5.

56 Chronology, supra note 26. See also: Smoke and Mirrors, supra note 4 at 130, 298.


58 Smoke and Mirrors, supra note 4 at 82.
reversing, by a narrow five-to-four majority, the Court of Appeal’s decision. The court held that sections 4, 8 and 9, which dealt with advertising, trademarks and labelling violated the manufacturers’ freedom of expression. Sections 5 and 6 of the TPCA, which dealt with retail displays, promotion and sponsorships, could not be clearly separated from the other infringing sections and were declared of no force or effect.

The next chapter is devoted to analyzing the Supreme Court of Canada’s decision in RJR-MacDonald, as well as the lower courts’ decisions, in order to determine how the division of powers and the Charter of Rights and Freedoms constrain Parliament’s ability to regulate tobacco products.

On December 11, 1995, the federal government, under Health Minister Diane Marleau, introduced a discussion paper entitled, Tobacco Control: A Blueprint to Protect the Health of Canada. This document outlined the government’s proposals for new legislation governing the manufacture and sale of tobacco products. In 1996, following several months of consultation and Cabinet deliberations, Health Minister David Dingwall introduced Bill C-71, An Act to regulate the manufacture, sale, labelling and promotion of tobacco products, to make consequential amendments to another Act and to

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60 Ibid.


62 Ibid.
repeal certain Acts. The Bill C-71, the Tobacco Act, was passed through Parliament in relatively short order, receiving Royal Assent on April 25, 1997. The new Act also repealed the Tobacco Products Control Act and Tobacco Sales to Young Persons Act.

The purpose of the Tobacco Act, as stated in s. 4, is very similar to that of its predecessor, the TPCA. The Act's objectives are to protect the health of Canadians from the “numerous debilitating and fatal diseases” associated with tobacco use; to protect young persons and others from inducements to use tobacco products and the consequent dependence on them; and to enhance public awareness of the health hazards of using tobacco products. Unlike the TPCA, the Tobacco Act adds the following objective: “to protect the health of young persons by restricting access to tobacco products.” In order to fulfill these objectives, the Act restricts tobacco advertising and sponsorship; grants the government’s power over the way cigarettes are manufactured, packaged and sold; and expands the government’s powers to restrict youth access to tobacco products. How the new measures contained in the Tobacco Act, which relate specifically to advertising, sponsorship, packaging and labelling restrictions, differ from those contained in the TPCA will be the subject of the second part of this chapter.

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63 History and Legislative Summary, supra note 61 at 1.
64 Tobacco Act, supra note 1.
65 Ibid. ss. 64, 65.
66 Ibid. s. 4.
67 Ibid. s. 4 (a), (b) and (d).
68 Ibid. s. 4 (c).
On April 21, 1997, the tobacco manufacturers filed a motion for a temporary and permanent stay of the Tobacco Act. Grenier J. denied the stay on the grounds that the Act was not identical to the TPCA and, therefore, it could not be automatically deemed to be unconstitutional. Immediately following the passage of the Tobacco Act, the tobacco manufacturers launched a constitutional challenge in Quebec Superior Court. The discovery process commenced in March 2000, and a trial date is expected to be set this summer.

In 1998, the government passed Bill C-42, An Act to Amend the Tobacco Act. This controversial bill contained amendments to the restrictions on sponsorships contained in s. 24 of the Tobacco Act. In February of the same year, Senator Colin Kenny introduced Bill S-13, The Tobacco Industry Responsibility Act. The bill’s purpose was to reduce the use of tobacco products by Canadian youth. It would have established a $120 million dollar per year Canadian Anti-Smoking Youth Foundation, funded by a 50 cent tax on a carton of cigarettes. The bill passed unanimously through the Senate, but was ruled procedurally out of order after first reading in the House of Commons in December 1998. In April 2000, Senator Kenny introduced into the Senate a new bill

69 Rothmans, Benson & Hedges Inc. c. Canada (Procureur General), [1997] A.Q. no. 1261 (Que. Sup. Ct.)

70 Ibid. See also: On Smokes and Oakes, supra note 59 at 665-696.

71 Telephone interview with Francois Choquette at the Bureau of Tobacco Control (28 March 2000) [Tel: (613) 941-8524]. Note: The Canadian Cancer Society was granted intervener status in Rothmans, Benson & Hedges Inc. c. Canada (Procureur General), [1997] A.Q. no. 2901 (Que. Sup. Ct.).


which incorporates all the principles of Bill C-13. Bill C-20 passed second reading in the Senate on May 9, 2000 and has proceeded to Committee stage.

In February 1999, the government enacted regulations pursuant to the Tobacco Act. The Tobacco (Access) Regulations restricts how cigarettes are advertised in retail stores, and the Tobacco (Seizure and Restoration) Regulations gives inspectors powers to seize tobacco products. Health Canada is currently in the process of drafting regulations to regulate the promotion, labelling and reporting of tobacco products.

2. CASE STUDIES

In order to analyze the political and legal factors which have influenced the evolution of federal tobacco control legislation, it is necessary first to understand the ways in which the Tobacco Act (1997) is both similar to and different from the Tobacco Products Control Act (1988). To this end, this section compares and contrasts the measures contained in the Tobacco Act with those contained in the Tobacco Products Control Act as they relate specifically to the regulation of tobacco advertising, sponsorship, packaging and labelling.

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75 Tobacco (Seizure and Restoration) Regulations, S.O.R./99-94. [hereinafter Tobacco (Seizure and Restorations) Regulations]; Tobacco (Access) Regulations, S.O.R./99-93. [hereinafter Tobacco Access Regulations]. Note: The following section of the Tobacco Act allows for the seizure of tobacco products:

39(1) During an inspection under this Act, an inspector may seize any tobacco product or other thing by means of which or in relation to which the inspector believes on reasonable grounds that this Act has been contravened.

2.1 Advertising and Sponsorship

Prior to the coming into force of the Tobacco Products Control Act on January 1, 1989, there was no federal legislation regulating how tobacco manufacturers advertised or promoted their products. Up until this point, tobacco manufacturers voluntarily restricted their advertising through their voluntary code. The key provision of the TPCA was s. 4(1) and (2), which prohibited the advertisement, by publication, broadcast or otherwise, of any tobacco product for sale in Canada. The prohibition on advertising did not apply with respect to the distribution for sale of publications imported into Canada or the retransmission of radio or television broadcasts originating outside of Canada, as long as those advertisements were not intended primarily for the purpose of promoting the sale of tobacco products in Canada. As will be discussed in chapter 3, the Supreme Court of Canada’s decision struck down s. 4 of the Act in 1995.

Section 6 of the TPCA dealt with the promotion of tobacco products through sponsorships. This section stipulates that the full name of a name of a manufacturer or importer of tobacco products may be used in a representation to the public that promotes a cultural or sporting event, but prohibits the use of brand names in such representation unless the use of a brand name is required by contract made before January 25, 1988. Where a contract required the use of a brand name, then the value of such contributions made by the manufacturer or importer towards cultural or sporting activities and events

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77 Smoke and Mirrors, supra note 4 at 68-71.
78 TPCA, supra note 2, s. 4(1), 4(2).
79 Ibid. s. 4(3), 4(4).
80 RJR-MacDonald (SCC), supra note 59.
were frozen at 1987 levels. Although the Supreme Court of Canada in *RJR-MacDonald* found that s. 6 was not unconstitutional, the court held that this section could not be severed from the other infringing sections and was therefore of no force or effect.

Prior to the *RJR-MacDonald* decision in 1995, tobacco manufacturers circumvented the sponsorship restrictions contained in s. 6 by establishing "shell" corporations, such as Players's Ltd. and du Maurier Ltd. The manufacturers used these corporations to sponsor sports and cultural events. There were no financial restrictions on how much tobacco companies could spend on sponsoring events in this manner. Between 1987 and 1996, tobacco companies increased their spending on sponsorships of sports and cultural events in Canada six fold from $10 million to $60 million.

The *Tobacco Act* (1997) restricts the promotion of tobacco products by limiting advertising and sponsorships in Part IV, s. 22-25. In light of the Supreme Court of Canada's decision in *RJR-MacDonald* these restrictions had to be drafted in such a way as to ensure that they did not unjustifiably infringe the tobacco companies' freedom of

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81 TPCA, *supra* note 2, s. 6(2), 6(2).
82 *Ibid.* s. 6(1)
84 *Ibid.* s. 6(2).
85 *RJR-MacDonald* (SCC), *supra* note 59.
86 Smoke and Mirrors, *supra* note 4 at 98. Note: For example, “Player's Ltd. Racing” was permitted under the Act, whereas, “Players Racing” or “Player’s Light Racing” was not permitted.
88 *Tobacco Act*, *supra* note 1, ss. 22-25.
expression. As a result, the Act contains very different provisions in respect to advertising and sponsorship than the TPCA (1989).

Unlike s. 4 of the TPCA, the Tobacco Act does not ban all commercial advertising. Rather, s. 22 of the Act prohibits the promotion of a tobacco product by means of an advertisement but allows for “information advertising” or “brand-preference advertising.” The Act, however, only allows information advertising or brand-preference advertising that is in a publication sent by mail and addressed to an adult who is identified by name; in a publication that has an adult readership of not less than 85%; and on signs in a place where young persons are not permitted by law. Lifestyle advertising, or advertising that could be construed on reasonable grounds to be appealing to young persons, is still prohibited. The Act defined “lifestyle advertising” 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.”

The Tobacco Act stipulates that the government can make regulations with respect to the advertising of tobacco products. The options for regulating the advertising of tobacco products have been released in a consultation document entitled, Options for

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99 Ibid. s. 22(1)(2). Note: Information advertising means advertising that provides factual information to the consumer about (a) a product and its characteristics; or (b) the availability or price of a product or brand of product. Brand-preference advertising means advertising that promotes a tobacco product by means of its brand characteristics.

90 Ibid. s. 22(1), 22(2)(a), (b), (c).

91 Ibid. s. 22(3).

92 Ibid. s. 22(4).

93 Ibid. s. 22(2), 33(a), (b).
Tobacco Promotions Regulations. The consultation paper proposes to enact regulations which would address practices related to the advertising, packaging and retail display of tobacco products, as well as retail availability of signs.

The provisions of the Tobacco Act that restrict promotion through tobacco sponsorship are set out in s. 24. The use of a tobacco brand element to sponsor a person, entity, event, activity or facility in association with young persons or in association with a way of life such as such as one that includes glamour, recreation, excitement, vitality, risk or daring is permitted subject to the restrictions contained in s. 24(2) and (3). Section 24(2) states that the display of a tobacco product-related brand element is permitted only within the bottom 10% of the display surface of any promotional material, and only on material that: (1) is displayed at the event; (2) is sent by direct mail to adults; (3) in a publication whose readership is at least 25% adult; and (4) in a place where people under 18 are not allowed to enter by law (i.e. bars). The use of tobacco brand elements to promote events which are not youth-oriented is permitted without restrictions.

When the Tobacco Act first came into force on April 25, 1997, the restrictions on tobacco sponsorships described in s. 24(2) and (3) were to have come into force on

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94 Health Canada, Options for Tobacco Promotions Regulations (Consultation Paper) (Ottawa 1999) at s. 3.2.


96 Tobacco Act, supra note 1, s. 24(1)(a), (b).

97 Ibid. s. 24(2).

98 Ibid. s. 24(3)(a), (b).

99 Ibid. s. 24(4).
October 1, 1998. The Act was subsequently amended by Bill C-42, which provided for a five-year phased in transition period towards a prohibition of tobacco sponsorship promotions. For the next three years, sponsorship is permitted freely on the site of events only, and off-site subject to the restrictions set out in s. 24(2) and (3). On October 1, 2003, at the end of the five-year period, s. 24 will ban all tobacco sponsorships.

Bill C-42 also amended s. 25 of the Act, which dealt with permanent facilities. Prior to being amended, this section allowed a tobacco product-related brand element, which was part of the name of a permanent facility to appear on the facility in accordance with the regulations. Section 25(1) now prohibits the display of 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.

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100 Ibid. s. 66.

101 Bill C-42, supra note 72, s. 1-5.

102 Ibid. s. 66(2)(b), S.C. 1998, c. 38, s. 4, not in force until October 1, 2000, Act, s. 5(3).

s. 66(2)(b) - If a tobacco product-related brand element was displayed, at any time between January 25, 1996 and April 25, 1997, in promotional material that was used in the sponsorship of an event or activity that took place in Canada, subsections 24(2) and (3) do not apply until (b) October 1, 2003 in relation to the display referred to in paragraph (a) on the site of the event or activity for the duration of the event or activity or for any other period that may be prescribed.

103 Ibid. s. 66(2)(a), S.C. 1998, c. 38, s. 4, in force on October 1, 1998.

s. 66(2)(a) - If a tobacco product-related brand element was displayed, at any time between January 25, 1996 and April 25, 1997, in promotional material that was used in the sponsorship of an event or activity that took place in Canada, subsections 24(2) and (3) do not apply until (a) October 1, 2000 in relation to the display of a tobacco product-related brand element in promotional material that is used in the sponsorship of that event or activity or of a person or entity participating in that event or activity.

104 Ibid. s. 24, S.C. 1998, c. 38, s. 1, not in force until October 1, 2003, Act, s. 5(1). Note: Section 24 will be replaced by the following:

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.

105 Ibid. s. 25, amended by S.C. 1998, c. 38, s. 2.
related brand element or the name of a tobacco manufacturer on a permanent facility if the tobacco product-brand element or name is associated with a sports or cultural event or activity. An exception to this prohibition is made in s. 25(2). This section states that a tobacco product-related brand element may appear on the facility until October 1, 2003 if the tobacco product-related brand element appeared on the facility on the day on which the Act came into force.

The Act also gives the government the power to require manufacturers to disclose particulars of their tobacco product-related brand elements and promotional activities. Under the TPCA, reporting requirements had been imposed as part of the Tobacco Products Control Regulations (TPCR). As a result of the Supreme Court of Canada's decision in RJR-Macdonald, only s. 17 to 20 of the TPCR continue to be in force. The Proposed Tobacco (Reporting) Regulations would replace these sections of the TPCR and expand the current tobacco industry reporting requirements to include more information on ingredients, emissions, research, sales and marketing on cigarettes and other classes of tobacco products. Pursuant to these proposed Regulations, manufacturers or importers of tobacco products would be required to report on

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106 Ibid, s. 25(1).
107 Ibid, s. 25(2).
108 Ibid, s. 33(h).
109 TPCR (1993), supra note 57, at s. 17-20. Note: These sections of the TPCR require tobacco manufacturers to provide the Minister with sales reports for the prescribed classes of tobacco products.
110 Department of Health, Proposed Tobacco (Reporting) Regulations, Canada Gazette Part 1 (January 22, 2000). [hereinafter Proposed Tobacco (Reporting) Regulations]. Note: Revised regulations were published in the Canada Gazette on April 1, 2000. In June 2000 the House of Commons Standing Committee on Health unanimously supported these regulations as proposed. On June 8, 2000 the House of Commons
promotional activities on a brand-by-brand, province-by-province basis. This means that copies of all promotional materials and facsimiles of signs and programs used or displayed on the sites of sponsored events or activities would have to be provided to Health Canada.111

2.2 Labelling and Packaging

Prior to the coming into force of the TPCA on January 1, 1989, there was no federal legislation that regulated how tobacco products were labelled. Up until this time, tobacco manufactures voluntarily printed health messages and included information on tar concentrations on cigarette packages.112 The TPCA gave the federal government, for the first time, the authority to regulate how tobacco products were labelled.

Section 9 of the TPCA prohibited tobacco manufacturers from selling a tobacco product unless the package containing the tobacco product displayed “messages pertaining to the health effects of the product and a list of toxic constituents of the product and, where applicable, of the smoke produced from its combustion indicating the quantities of those constituents present.”113 If required by regulation, manufacturers had to place a leaflet furnishing information about the health effects of the tobacco product inside the package containing the product.114 In addition, tobacco products were

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113 TPCA, supra note 2, s. 9(1)(a).

114 Ibid. s. 9(1)(b). Note: Section 17(g) of the TPCA gave the government the power to require leaflets providing health information to be placed inside packages of a tobacco product and to prescribe their content, form and manner of placement in those packages.
permitted to feature only the product name, brand name and any trademarks of the tobacco products; the health messages and list of toxic constituents; and the label as required by the Consumer Packaging and Labelling Act; and the stamp and information required by the Excise Act. This section did not allow the health messages to be attributed to Health Canada.

The TPCA gave the government the power to adopt regulations prescribing the content, position, configuration, size and prominence of the health messages. The Tobacco Products Control Regulations, which were published in the Canada Gazette Part II in December 1988, required cigarette manufacturers to display, in rotation, one of four warning messages. These messages had to be printed in contrasting colours, on the bottom 20% of the principal display panel. Manufacturers were also required to print information regarding tar, nicotine and carbon monoxide levels on the package’s side panel.

The regulations required that messages be displayed in “contrasting colours”, but for many cigarette brands, the colour combinations blended into the overall package design. This made it difficult for the message to be read, thereby reducing the intended

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115 Ibid, s. 9(2).

116 See generally: RJR-MacDonald (SCC), supra note 59. Note: The Supreme Court of Canada found that the unattributed health warnings required on tobacco packages did not minimally impair the tobacco manufacturers’ freedom of expression.

117 Ibid, s. 17(f).

118 Tobacco Products Control Regulations, S.O.R./89-21 at s. 11. [hereinafter TPCR (1989)]. Note: Tobacco packages were required to carry one of the following health warnings: (i) Smoking reduces life expectancy; (ii) Smoking is the major cause of lung cancer; (iii) Smoking is a major cause of heart disease; and (iv) Smoking during pregnancy can harm the baby.

119 Ibid, s. 11.
impact of the health message.120 As a result of this problem, Health Minister Perrin Beatty announced revisions to the regulations in 1990.121 These proposed new regulations required that packages of cigarettes and roll-your-own tobacco contain one of eight rotated health warning messages, including one on addiction and environmental tobacco smoke. These health warnings had to be printed in black and white text or white on black text, and they had to cover the top 25% of the front and back of cigarette packages and 25% of all six sides of a carton. The regulations also required that cigarette packages contain inserts, which would provide consumers with additional information on the health risks of smoking. These regulations were never adopted as a result of the decision of the Quebec Superior Court in July 1991, which found the TPCA to be unconstitutional.122

After the Court of Appeal overturned the lower court decision, the new Health Minister Benoit Bouchard went ahead with revising the regulations. The revised regulations, which came into force in September 1994 were similar to the regulations proposed by Beatty with the following exceptions.123 The warnings, which were required to cover the top 25% of the front and back of the cigarette and roll-your-own packages, had to be surrounded by a border. This border had the effect of increasing the size of the warning from 25% to between 33% and 39%, depending on the package size. The health warning messages included one on addiction and two dealing with environmental tobacco

120 Smoke and Mirrors, supra note 4 at 102.
121 Ibid.
122 Ibid. at 102.
123 TPCR (1993), supra note 57, s. 17. Also see: Smoke and Mirrors, supra note 4 at 105.
The message, "cigarettes are addictive and cause lung cancer, emphysema and heart disease" had to appear on cigarette cartons. The warning had to cover 25% of all six sides of the carton, surrounded by a border. The warning had to be printed in black lettering on a white background. Manufacturers had to list, under the heading toxic constituents, the level of tar, nicotine and carbon monoxide found in cigarette smoke. The regulations also authorized the Governor in Council to require leaflets providing health information to be placed inside packages of tobacco products.

As will be discussed further in the next chapter, the Supreme Court of Canada struck down the labelling requirements set out in s. 9 of the TPCA. Following the Supreme Court of Canada's decision in 1995, tobacco manufacturers voluntarily continued to print health warnings on cigarette packages. The Tobacco Act gives the government new and expanded powers to restrict how cigarettes are labelled and packaged. Pursuant to s. 15 of the Act, manufacturers or retailers cannot sell a tobacco product unless the package displays the information required by regulations about the product and its emissions, and about the health hazards and health effects arising from the smoke.

Ibid. s. 4. Note: This section stated that every tobacco package must display one of the following messages: (i) Cigarettes are addictive; (ii) Tobacco smoke can harm your children; (iii) Cigarettes cause fatal lung disease; (iv) Cigarettes cause cancer; (v) Cigarettes cause strokes and heart disease; (vi) Smoking during pregnancy can harm your baby; (vii) Tobacco smoke causes fatal lung disease in non-smokers; (viii) Cigarette smoking can kill you.

Ibid.

Ibid. s. 17(g).

RJR-MacDonald (SCC), supra note 59. The majority ruled that the government had failed to demonstrate that attributed health warnings would be less effective than unattributed health warnings.

use of the product or from its emissions. Tobacco manufactures or retailers, if required by regulations, are required to provide a leaflet that displays the information required by the regulations about a tobacco product and its emissions and about the health hazards and health effects arising from the use of the product and from its emissions. The Act permits this information to be attributed to a “prescribed person or body if the attribution is made in the prescribed manner.”

The government has the power to make regulations respecting the information that must appear on packages and in leaflets. On March 29, 1997, the Tobacco (Labelling and Reporting) Regulations were published in the Canada Gazette Part I. These regulations, which would have continued the labelling requirements of the Tobacco Products Control Regulations, were never adopted. Instead, Health Canada decided to take time to research and review the labelling requirements before proceeding. On January 18, 1999, the Minister of Health announced the release of a consultation document entitled, Proposed New Labelling Requirements for Tobacco Products. After consulting with stakeholders, Health Canada published the Proposed

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129 Tobacco Act, supra note 1, s. 15(1).
130 Ibid, s. 15(2).
131 Ibid, s. 15(3).
132 Ibid, s. 17.
133 Tobacco (Labelling and Reporting) Regulations, (C. Gaz. 1997 I). [hereinafter Tobacco (Labelling and Reporting) Regulations].
Tobacco Products Information Regulations, as a Notice of Intent, in the Canada Gazette Part I on January 22, 2000.136

The proposed Regulations requires manufacturers to display health warnings and disease information messages and to disclose the level of toxic emissions and other constituents on the package of tobacco products.137 Specifically, the Regulations require manufacturers and importers to ensure that every package and carton of cigarettes, tobacco sticks, cigarette tobacco, leaf tobacco, kretexs, bidis, pipe tobacco, cigars or smokeless tobacco display a prescribed health warning on 50% of the principal display surface.138 There will be 16 new health messages for cigarette packages; eight new health messages for pipe tobacco and cigars (other than those cigars that are individually wrapped); eight new health messages for individually wrapped cigars; and four new health messages on smokeless tobacco.139 The new messages address four key topics: addiction, diseases, the influence on children, and second-hand smoke.140 The health warning messages that appear on tobacco packages, with the exception of smokeless tobacco and individually wrapped cigars, will include both text and colour graphics. The

136 Proposed Tobacco Products Information Regulations, supra note 134. Note: Revised regulations were published in the Canada Gazette on April 1, 2000. In June 2000, the House of Commons Standing Committee on Health unanimously supported these regulations as proposed. On June 8, 2000 the House of Commons approved the regulations, and they became law on June 26, 2000. See: Tobacco Products Information Regulations, SOR 2000/272 (June 26, 2000).


138 Ibid. at 134.

139 Ibid.

140 Proposed New Labelling Requirements for Tobacco Products, supra note 135.
proposed graphic warnings include a photo of a damaged brain, a photo of cancerous lung tumour and a limp cigarette.\textsuperscript{141}

Manufacturers and importers of tobacco products, other than smokeless tobacco, are required to display on their product one of 16-health information messages. For slide packages, the message will be displayed either on the back of the slide or on a leaflet. For all other packages, a leaflet is required.\textsuperscript{142} Information about the toxic emissions (tar, nicotine, carbon monoxide, benzene, hydrogen cyanide and formaldehyde) will be displayed on all packages of cigarettes, kreteks, bidis, tobacco sticks, small cigars, and cigarette tobacco and leaf tobacco must be displayed on the side of the package. For smokeless tobacco, information about the toxic constituents (nicotine, lead, nitrosamines) must be displayed on either one side or on the bottom of the package.\textsuperscript{143} Tobacco manufacturers and importers are permitted to attribute the information required by the proposed Regulations to Health Canada.\textsuperscript{144}

3. SUMMARY

This chapter has demonstrated that the health consequences associated with tobacco use or exposure have been well known to Canadian governments since the mid 1960s. As the first section of this chapter has illustrated, despite the federal government’s knowledge about the national public health problem created by tobacco, the government failed to enact tobacco control legislation, with the exception of the outdated and

\textsuperscript{141} Ibid.

\textsuperscript{142} Proposed Tobacco Product Information Regulations, supra note 134 at 151.

\textsuperscript{143} Ibid.

\textsuperscript{144} Ibid. at 152.
ineffective Tobacco Restraint Act, until the late 1980s. Finally, in 1988, the federal government passed the Tobacco Products Control Act (TPCA), which became the cornerstone of its strategy to control tobacco consumption in Canada.

As chapter 3 will discuss in more detail, in 1995 the Supreme Court of Canada struck down the TPCA because it violated the Charter of Rights and Freedoms. The federal government enacted the Tobacco Act to replace the defunct TPCA. As the second section of this chapter had illustrated, the current legislation is less stringent than the TPCA in several key ways. First and foremost, the Tobacco Act does not prohibit all tobacco advertising, as did the TPCA. Rather, the Tobacco Act bans only lifestyle advertising, while permitting brand preference and informational advertising to continue. Second, the Tobacco Act allows tobacco manufacturers to attribute the mandatory health warnings to Health Canada. The legal constraints that have influenced the redrafting of the federal government's tobacco control legislation in this manner are the subject of the next chapter. Chapter 3 argues that because of these limitations, the Tobacco Act, as it deals with advertising and labelling of tobacco products, is less effective in meeting the objectives of the Act.
CHAPTER 3

LEGAL FACTORS INFLUENCING LEGISLATIVE OUTCOMES

This chapter analyzes the role that the constitutional division of powers and the Charter of Rights and Freedoms have played in shaping the past and present federal tobacco control legislation. This analysis focuses on the Supreme Court of Canada’s 1995 decision in RJR-MacDonald Inc. v. A.G. (Canada),\(^1\) which is important for two main reasons. First, this decision determined that the federal government does in fact have the jurisdiction to regulate tobacco and second, it established the parameters within which federal tobacco control legislation would have to fall in order to respect the tobacco manufacturers’ Charter protected rights. The first part of this chapter examines the lower courts’ and the Supreme Court of Canada’s decision in RJR-MacDonald in order to illustrate the divergent opinions of all three courts on both the division of powers and the Charter issues raised by this case. This chapter will demonstrate that the courts’ decisions reflect the larger social and political debate over the extent to which tobacco represents a “unique socio-economic phenomenon”, which justifies government regulation of the manufacture, sale, labelling and promotion of tobacco products. The second part of this chapter analyzes how the Supreme Court of Canada’s decision affects Parliament’s ability to regulate tobacco within the framework of the Constitution.

1. RJR-MACDONALD INC. V. ATTORNEY GENERAL (CANADA)

1.1 Division of Powers

These proceedings began with two separate motions for declaratory judgments before the Quebec Superior Court. The first issue the courts had to review was whether the TPCA (1989)\(^2\) fell within the legislative competence of the Parliament of Canada under s. 91 of the Constitution Act, 1867, either as criminal law or under the peace, order and good government clause.\(^3\) On the division of powers issue, RJR-MacDonald sought a declaration that the TPCA was wholly *ultra vires* the Parliament of Canada; whereas, Imperial sought the same order with respect to ss. 4, 5, 6 and 8 of the TPCA.\(^4\)

The two motions were heard together by Chabot J. of the Quebec Superior Court. Chabot J. found that the pith and substance of the TPCA was the control of advertising and promotion carried on by a particular industry.\(^5\) As a result, Chabot J. held that the


\(^3\) The Constitution Act, 1867 (U.K.), 30 & 31 Vict., c.3, s. 91. [hereinafter Constitution 1867].

Note: Section 91 of the Act starts as follows:

91. It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons, to make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces...

This section goes on to state that for greater certainty exclusive federal jurisdiction is extended to a list of 30 enumerated sub-headings, including s. 91(27), criminal law.

\(^4\) RJR-MacDonald (SCC), *supra* note 1 at 10. See TPCA, *supra* note 2. Note: The sections of the TPCA under review were as follows: Section 4 prohibits the advertisement of tobacco products; Section 5 regulates retail displays of tobacco products in retail establishments and vending machines; Section 6 prohibits the use of brand names in representations to the public that promotes a cultural or sporting event; Section 7 prohibits the free distribution of tobacco products; Section 8 prohibits the use of a tobacco trade mark on any article other than a tobacco product, and prohibits the use and distribution of tobacco trade marks in advertising for products other than tobacco products; and Section 9 prohibits tobacco manufacturers from selling their products unless they displayed on the package containing the product unattributed messages describing the health effects of the product as well as a list of the product's toxic constituents and the quantity of these constituents.

\(^5\) RJR-MacDonald Inc. v. Canada (Attorney General) (1991), 82 D.L.R. (4\(^{th}\)) 449 (Que. S.C.) at 467-468. [hereinafter RJR-MacDonald (SC)]
TPCA could not be upheld under either the federal criminal power or the peace order and good government clause.\(^6\) Chabot J. concluded that the TPCA was not valid criminal law because it was not addressed directly to the “evil” against which it was aimed (i.e. tobacco consumption).\(^7\) He observed that the objective of promoting public health could only be an indirect and remote objective of the TPCA.\(^8\) With respect to the federal government’s peace order and good government power, Chabot J. concluded that the TPCA did not satisfy the “national dimensions” test\(^9\) because there was “no evidence that the advertisement of tobacco products had attained a stage of pestilence in Canada which would give it the required character and degree of singleness, distinctiveness and indivisibility which would distinguish it clearly from matters of provincial interest.”\(^10\) Chabot J. also found that there was no evidence of a provincial inability to control tobacco advertising.\(^11\)

The Quebec Court of Appeal reversed the trial court’s decision on the ground that the TPCA was intra vires Parliament under the peace order and good government clause.\(^12\) Writing for a unanimous court, Brossard J.A. (with LeBel, Rothman J.J.A. concurring) found that the pith and substance of the legislation was in relation to the

\(^6\) Ibid. at 475.

\(^7\) Ibid.

\(^8\) Ibid. at 468.


\(^10\) RIR-MacDonald (SC), supra note 5 at 475.

\(^11\) Ibid. at 478.
protection of public health. This finding, however, did not resolve the constitutional issue since the area of public health, which is not specifically referred to in ss. 91 or 92 of the Constitution Act, 1867, has been interpreted as being primarily a matter of provincial jurisdiction.

In considering whether the TPCA was a valid exercise of the federal criminal law power, Brossard J.A. found it significant that although the TPCA made the advertising and promotion of tobacco products illegal, the "real evil" the legislation was designed to combat, tobacco consumption, continued to be legal in Canada. Turning to the issue of whether the TPCA fell within the federal government's power to legislate for the peace, order and good government of Canada, Brossard J.A. concluded that "there is no doubt that the problem of tobacco use is a matter of national concern or national dimension." Brossard J.A., disagreeing with Chabot J., found that the TPCA met the "provincial inability test" because of the interprovincial nature of communications.

On appeal to the Supreme Court of Canada, the majority of the court (per La Forest J., Lamer C.J.C., L'Heureux-Dube, Gonthier, Cory, McLachlin and Iacobucci JJ.

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13 RJR-MacDonald (CA) at 338-339.

14 Note: The Constitution Act, s. 91(11) grants the Parliament of Canada jurisdiction over: "Quarantine and the establishment and maintenance of marine hospitals" Pursuant to s. 92(27) of the Constitution Act, provincial governments have authority concerning: "The establishment, maintenance, and management of hospitals, asylums, charities, and eleemosynary institutions in and for the province, other than marine hospitals"

15 Ibid. at 341-342.

16 Ibid. at 349.

17 Ibid. at 350-31. For a discussion on the inter-provincial scope of tobacco advertising and sponsorship see Chapter 3, section 2.1 at p. 93.
concurring) held that the TPCA constituted a valid exercise of the federal criminal law power pursuant to s. 91(27) of the Constitution Act. La Forest, J., writing for the majority of the court on the issue of jurisdiction, held that the TPCA was, "in pith and substance, criminal law". According to La Forest J., the penalty sections accompanying the prohibitions in ss. 4, 5, 6, 8 and 9 created a prima facie indication the TPCA was criminal law. The crucial question was whether the TPCA also had an underlying criminal purpose. La Forest J. found that "the evil targeted by Parliament is the detrimental health effects caused by tobacco consumption." The majority of the court concluded that Parliament could validly employ the criminal law to prohibit tobacco manufacturers from inducing Canadians to consume these products and to increase public awareness of the hazards of their use. According to La Forest J., Parliament’s decision to criminalize tobacco advertising and promotion was a valid exercise of the federal government’s criminal law power for the following reasons:

[[I]t is clear that Parliament could, if it chose, validly prohibit the manufacture and sale of tobacco products under the criminal law power on the ground that these products constitute a danger to public health. Such a prohibition would be directly analogous to the prohibition on dangerous drugs and unsanitary foods or poisons

18 RJR-MacDonald (SCC), supra note 1 at 44.

19 Ibid. at 24.

20 See Tobacco Act, S.C. 1997 c. 13, c. T-11.5, assented to April 25, 1997. [hereinafter Tobacco Act]. Note: The enforcement provisions in the TPCA are found in ss. 11 to 16. These sections confer upon the Minister the power to designate a “tobacco product inspector” with powers of inspection, search and seizure, analysis, detention of things seized and forfeiture. The offences and punishments for contravention of the TPCA are set out in ss. 18 and 19.

21 RJR-MacDonald (SCC), supra note 1 at 25.

22 Ibid. at 25.

23 Ibid. at 25.

24 Ibid. at 28.
mentioned earlier, which quite clearly fall within the federal criminal law power. In my view, once it is accepted that Parliament may validly legislate under the criminal law power with respect to the manufacture and sale of tobacco products, it logically follows that Parliament may also validly legislate under that power to prohibit the advertising of tobacco products and sales of products without health warnings. In either case, Parliament is legislating to effect the same underlying criminal law purpose: protecting Canadians from harmful and dangerous products.25

Having found that the TPCA was a valid exercise of the federal criminal law, the majority of the court did not find it necessary to consider whether the Act fell under the federal power to legislate for the peace, order and good government of Canada.26

In dissent, Major J. (Sopinka J. concurring), found that except for the mandatory health warnings, the TPCA could not be upheld as valid criminal legislation.27 According to Major J., the “Act is too far removed from the injurious or undesirable effects of tobacco use to constitute a valid exercise of Parliament’s criminal law power. Legislation prohibiting all advertising of a product which is both legal and licensed for sale throughout Canada lacks a typically criminal purpose and is ultra vires Parliament under s. 91(27) of the Constitution Act.”28 Major J. concluded that “tobacco advertising is in itself not sufficiently dangerous or harmful to justify criminal sanctions” and, therefore, “it is beyond Parliament’s competence to criminalize this type of speech where Parliament has declined to criminalize the underlying activity of tobacco use.”29

25 Ibid. at 37.
26 Ibid. at 44.
27 Ibid. at 108, 115.
28 Ibid. at 112.
29 Ibid. at 113.
1.2 Charter of Rights and Freedoms

RJR-MacDonald and Imperial pleaded that ss. 4, 5, 6, 8, 9 of the TPCA were inconsistent with the guarantee of freedom of expression found in s. 2(b) of the Charter of Rights and Freedoms. The trial judge held that the legislation violated the guarantee to freedom of expression found in s. 2(b) of the Charter and that it could not be justified as a reasonable limit under s. 1. Chabot J. held that while the TPCA's objectives were pressing and substantial, the limits placed on the companies' freedom of expression were not proportional to its objectives. The evidence failed to establish that a ban on tobacco advertising would result in a decline of tobacco consumption and, therefore, the restrictions imposed by the TPCA had no rational connection to the legislation's objectives. As for the unattributed health warnings, Chabot J. held that s. 9 infringed the companies' freedom of expression because that right included the right to remain silent.

The Attorney General conceded before the Court of Appeal that the prohibition on advertising and promotion under the TPCA constituted a violation of the appellants' right to freedom of expression. The majority of the Quebec Court of Appeal (LeBel J.A., Rothman J.A. concurring) held that although the impugned sections of the TPCA violated

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30 RJR-MacDonald (SC), supra note 5 at 492.

31 Ibid. at 515.

32 Ibid. at 468.

33 Ibid. at 518.

freedom of expression, they could be justified as a reasonable limit under s. 1.\textsuperscript{35}

Dissenting in part, Brossard J.A. found that the advertising ban could not be justified under s. 1 but found that the ban may have been upheld if it had been restricted to lifestyle advertising.\textsuperscript{36} The court was unanimous in finding that the health warnings and the prohibition on the free distribution of tobacco products were justified under s. 1 of the Charter.\textsuperscript{37}

The Supreme Court of Canada decision focused primarily on whether these infringements of the right of free expression were saved by s. 1 of the Charter, as being reasonable and "demonstrably justifiable in a free and democratic society."\textsuperscript{38} The majority of the court (per McLachlin J., Sopinka and Major JJ. concurring) found that ss. 4, 8, and 9 of the TPCA violated s. 2(b) of the Charter and could not be justified under s. 1.\textsuperscript{39} Iacobucci J. (with Lamer C.J.C. concurring), agreed with Justice McLachlin's reasons and disposition of this appeal; however, he differed with respect to her s. 1 analysis and proposed remedy.\textsuperscript{40} A majority also found that ss. 5 and 6, which dealt with restrictions on promotions and trademark usage, could not be severed from the other infringing sections of the TPCA.\textsuperscript{41} As a result, ss. 4, 5, 6, 8 and 9 were declared to be of

\begin{footnotes}
\item \textsuperscript{35}RJR-MacDonald (CA), supra note 12.
\item \textsuperscript{36}Ibid.
\item \textsuperscript{37}Ibid.
\item \textsuperscript{38}RJR-MacDonald (SCC), supra note 1 at 88.
\item \textsuperscript{39}Ibid. at 104.
\item \textsuperscript{40}Ibid. at 105.
\item \textsuperscript{41}Ibid. 104.
\end{footnotes}
no force or effect by virtue of s. 52 of the *Constitution Act, 1982*.\(^{42}\) The remaining provisions of the TPCA, including s. 7, were deemed constitutional and permitted to stand.\(^{43}\)

The minority decision, written by La Forest J. (with L’Heureux-Dube, Gonthier and Cory JJ concurring) held that the prohibitions on advertising and promotion constituted an infringement of freedom of expression under s. 2(b), but they could be justified under s. 1.\(^{44}\) The minority did not find, however, that the unattributed health warning requirement constituted a violation of s. 2(b).

Both La Forest J. and McLachlin J. commenced their analysis of s. 1 by addressing a number of preliminary issues such as the appropriate factual and social context of the analysis; the appropriate degree of deference to Parliament; the appropriate standard of proof; and the appropriate level of deference to the trial judge’s findings, as discussed further below. The differences between the minority and majority decisions in respect to these issues were crucial to how they applied the proportionality requirements to the TPCA and, ultimately, their conclusions on whether the impugned sections of the TPCA were justifiable as reasonable limits under s. 1 of the *Charter*.

**Section 1 - The Oakes Test**

The minority and majority decisions agreed that the criteria that must be satisfied in order to establish that an infringement is reasonable and justifiable are set out in *R. v.*

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\(^{42}\) *Ibid.*

\(^{43}\) *Ibid.* Note: Section 7, which prohibited the free distribution of tobacco products and the offering of cash rebates, gifts, contests, games or lotteries as promotional incentives for sale, was not struck down.

\(^{44}\) *Ibid.* at 46.
Oakes (1986). \(^{45}\) The first requirement is that the objective of the law limiting the Charter right or freedom must be of sufficient importance to warrant overriding it. \(^{46}\) Second, the means chosen to achieve the objective must be proportionate to the objective and the effect of the law. In order to determine proportionality, the court considers whether the measures chosen are rationally connected to the objective; whether they impair the guaranteed right or freedom as little as reasonably possible (minimal impairment); and whether there is an overall proportionality between the deleterious effects of the measures and the salutary effects of the law.

**Applying the Oakes Factors – Context, Deference to Parliament, Standard of Proof and Deference to the Trial Judge**

(a) **Context**

Writing in dissent, La Forest J. stated that “the s. 1 inquiry is an unavoidable normative inquiry, requiring the courts to take into account both the nature of the infringed right and the specific values and principles stated upon which the state seeks to justify the infringement.” \(^{47}\) He affirmed that the Oakes requirements must be “applied flexibly, having regard to the specific factual and social context of each case,” and warned against an overly formalistic approach to s. 1 justification. \(^{48}\) In discussing the appropriate contextual analysis under s. 1, La Forest J. also concluded that “the nature and scope of the health problems raised by tobacco consumption are highly relevant to

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\(^{46}\) RJR-MacDonald (SCC), *supra* note 1 at 89.

\(^{47}\) Ibid. at 46.

\(^{48}\) Ibid.
the s. 1 analysis, both in determining the appropriate standard of justification and in weighing the relevant evidence."

La Forest J. went on to state the following:

"[I]t is essential to keep in mind that tobacco addiction is a unique, and somewhat perplexing, phenomenon. Despite the growing recognition of the detrimental health effects of tobacco use, close to a third of the population continues to use tobacco products on a regular basis. At this point, there is no definitive scientific explanation for tobacco addiction, nor is there a clearly understood causal connection between advertising, or any other environmental factor, and tobacco consumption. This is not surprising. One cannot understand the causal connection between advertising and consumption, or between tobacco and addiction, without probing deeply into the mysteries of human psychology."\textsuperscript{50}

La Forest J. stated that "clear evidence does exist of the detrimental social effects of tobacco consumption."\textsuperscript{51} Although the majority decision agreed with La Forest J. on the importance of context in determining legislative objective and proportionality, McLachlin J. found that context "cannot be carried to the extreme of treating the challenged law as a unique socio-economic phenomenon, of which Parliament is deemed the best judge."\textsuperscript{52}

In my opinion, the weakness with the majority's analysis is their failure to understand that tobacco is a unique socio-economic phenomenon. As discussed previously in chapter 1, cigarettes, unlike other consumer products, are inherently hazardous, addictive and deadly. The people most likely to become addicted to cigarettes are young teenagers who belong to lower socio-economic groups or ethnic groups, such as native Canadians or Francophones. The tobacco manufacturers' internal marketing documents confirm that they use advertising as a cornerstone of their strategy to expand

\textsuperscript{49} ibid. at 49.

\textsuperscript{50} ibid.

\textsuperscript{51} ibid.

\textsuperscript{52} ibid. at 91.
their market by attracting new young smokers. It is this “unique socio-economic phenomenon” which makes tobacco control a complex legal and political issue for the federal government in its capacity as a supplier of public policy. The majority’s decision, which found that the advertising prohibition could not be upheld under s. 1 of the Charter, was the most striking illustration of this point. As will be discussed in more detail below, the majority of the court struck down the complete prohibition on advertising on the grounds that there was no evidence adduced to show that a partial ban on advertising would be less effective than a total ban. What the court failed to appreciate, however, was the extent to which all advertising, including informational and brand preference advertising, serves to legitimize tobacco products in the eyes of consumers. In addition, the majority drew a distinction between lifestyle advertising and other forms of advertising when the evidence before the court, in particular evidence from countries which had instituted partial prohibitions on tobacco advertising, indicated that making such a distinction between kinds of tobacco advertising was difficult, if not impossible.

(b) Defe rence to Parliament

As for the issue of the degree of deference that courts should afford Parliament, La Forest J. concluded the following:

“[t]he Act is the very type of legislation to which the court has generally accorded a high degree of deference. In drafting this legislation, which is directed toward a laudable social goal and is designed to protect vulnerable groups, Parliament was required to compile and assess complex social science evidence and to mediate between competing social interests. Decisions such as these are properly assigned

53 Note: For a discussion of the various internal marketing documents introduced at trial see: La Forest’s decision at *Ibid.* RJR-MacDonald (SCC), *ibid.* at 67.
to our elected representatives, who have at their disposal the necessary resources to undertake them, and who are ultimately accountable to the electorate."\(^{54}\)

Despite the fact that the majority recognized that the TPCA was concerned with balancing competing rights between different sectors of society, it was cautious about extending the same degree of deference to Parliament as La Forest J. had argued was justifiable.\(^{55}\) McLachlin J. stated that "deference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable."\(^{56}\)

La Forest J., while advocating a high degree of deference for legislation such as the TPCA, was not suggesting that this absolved the judiciary of its constitutional obligation to scrutinize legislative action and to ensure reasonable compliance with constitutional standards. Citing a passage from his judgment in *McKinney*\(^{57}\), La Forest J. noted that there are decisions of a kind where those engaged in the political and legislative activities of Canadian democracy have advantages over the members of the judicial branch and that this imports "greater circumspection than in areas such as the criminal justice system where the courts' knowledge and understanding affords it a much higher degree of certainty."\(^{58}\) I agree with La Forest J. that it is appropriate in this case to accord a higher degree of deference to Parliament to design legislation to protect the public health. As will be discussed in chapter 4, the TPCA reflected a delicate political balancing of interests between pro-health and pro-tobacco groups and, for this reason, it

\(^{54}\) *Ibid.* at 53.
was exactly the kind of legislation that should be subject to a lesser degree of judicial scrutiny.

(c) Standard of Proof

The minority and majority decisions disagreed on the standard of proof required for a s. 1 analysis. According to La Forest J., the government did not have to demonstrate a rational connection according to a civil standard of proof. Rather, the government only had to demonstrate that it had a reasonable basis for believing that a rational connection existed between the legislative means chosen under the Act and the objective of protecting public health by reducing tobacco consumption. La Forest J. concluded that an attenuated level of s. 1 justification was appropriate in this case because of the nature of the right and the nature of the legislation in issue. La Forest J. explained this point earlier in his reasons:

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

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55 Ibid. at 91-92.
56 Ibid. at 92.
58 RJR-MacDonald (SCC), supra note 5 at 53.
59 Ibid. at 61.
60 Ibid. at 66-61.
61 Ibid. at 55.
In contrast, McLachlin J. found that the s. 1 jurisprudence had established that “a civil standard of proof on a balance of probabilities at all stages of the proportionality analysis is more appropriate.”

(d) Deference to the Trial Judge

In discussing the appropriate degree of deference to the findings of the trial judge, La Forest J. cited the well established rule that the appellate court may only interfere with the factual findings of a trial judge where the trial judge made a manifest error and where that error influenced the trial judge’s final conclusion or overall appreciation of the evidence. In this case, however, La Forest J. noted that the “the trial findings on which the appellants rely are not the type of factual findings that fall within the general rule of appellate “non-interference” discussed in these cases.” La Forest J. went on to comment that “the privileged position of the trial judge does not extend to the assessment of “social” or “legislative” facts that arise in the law-making process and require the legislature or court to assess complex social science evidence and to draw general conclusions concerning the effect of legal rules on human behaviour.” McLachlin J., agreeing in part with La Forest J., stated that “while appellate courts are not bound by the trial court’s findings in respect to social science evidence, they should remain sensitive to

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62 Ibid. at 92.


64 Ibid.

65 Ibid.
the fact that the trial judge has had the advantage of hearing competing expert testimony first hand. 66

Section 1 - Pressing and Substantial Objective

The first step in the Oakes analysis is to determine whether the objective of the law limiting the Charter right or freedom is sufficiently important to warrant overriding it. Both the minority and majority decisions agreed that the goal of the legislation was pressing and substantial. 67 La Forest J., however, took a broad view of the objectives of the TPCA. He noted that "Parliament clearly intended to protect public health by reducing the number of inducements for Canadians to consume tobacco, and by educating Canadians about the health risks entailed in its consumption." 68 McLachlin J., on the other hand, was cautious about taking this approach and warned that "care must be taken not to overstate the objective." 69 According to her, the objective that was relevant to the s. 1 analysis, "is the objective of the infringing measure." 70 She concluded that the objective of the advertising ban and trademark usage restrictions "must be to prevent people in Canada from being persuaded by advertising and promotion to use tobacco products." 71 Similarly, the objective of the mandatory package warning "must be to discourage people who see the package from tobacco use." 72

66 Ibid. at 93.
67 Ibid. at 48.
68 Ibid.
69 Ibid. at 93.
70 Ibid.
71 Ibid. at 94.
72 Ibid.
Section 1 - Proportionality Analysis

The next step in the Oakes analysis is to determine whether the means chosen to achieve the objective are proportionate to the objective and the effect of the law.

(a) Rational Connection

The first step in the proportionality analysis is for the government to demonstrate that the infringements of the right of freedom of expression were rationally connected to the legislative goal of reducing tobacco consumption. Both the minority and majority decisions recognized the inherent problems of trying to establish causation where the legislation is directed at changing human behaviour, as in the case of the TPCA. The social science evidence submitted to support the government’s position that the advertising prohibition and unattributed health warnings requirement reduced tobacco consumption was, by its very nature, inconclusive. The Surgeon General of the United States observed in his 1989 report on smoking that the reason there is no scientific evidence that proves definitively whether advertising and promotion increases the level of tobacco consumption is because of the complexity of the issue. As noted by La Forest J., the issue is complex for the following reason:

“One cannot understand the causal connection between advertising and consumption, or between tobacco and addiction, without probing deeply into the mysteries of the human psychology. Many of the workings of the human mind,

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73 Ibid. at 96.

and the causes of human behaviour, remain hidden to our understanding and will no doubt remain so for quite some time.”

Both McLachlin J. and La Forest J. agreed that where the causal relationship is not scientifically measurable, the court can still find a causal connection between the infringement and benefit sought on the basis of reason or logic, without insisting on direct proof of a relationship between the infringing measure and the legislative objective. La Forest J. concluded, after a thorough review of the evidence, including internal tobacco marketing documents, expert reports, and international materials, that there was sufficient evidence to conclude that there was a rational connection between the prohibition on advertising and consumption under ss. 4, 5, 6 and 8 of the TPCA and the reduction of tobacco consumption.

After reviewing La Forest J’s reasons, McLachlin J. found that all the evidence taken together was sufficient “to establish on a balance of probabilities a link based on reason between certain forms of advertising, warnings and tobacco consumption.” McLachlin J. agreed with La Forest J. that tobacco companies would not spend great sums of money on advertising unless it increased tobacco consumption. However, she was not prepared to extend this same logic to other forms of tobacco promotion. McLachlin J. found that s. 8, which prohibited the use of a tobacco trademark on articles other than tobacco products, did not satisfy the causal connection test based on either

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75 RJR-MacDonald (SCC), ibid. at 49.

76 Ibid. at 62, 97.

77 Ibid. at 70.

78 Ibid. at 98.
direct or indirect evidence.\textsuperscript{79} In her reasons, McLachlin J. stated that it is "hard to imagine how the presence of a tobacco logo on a cigarette lighter, for example, would increase consumption; yet, such use is banned."\textsuperscript{80}

Once again, the majority’s decision reflects a lack of understanding of how and why cigarette manufacturers market their products. The purpose of s. 8 was to prevent tobacco manufacturers from circumventing a ban on tobacco advertising by placing their trademarks on articles such as lighters, jackets and t-shirts. Tobacco companies would not spend money on advertising, which includes this type of product promotion, if it simply promoted brand loyalty. As La Forest J. noted several times in his reasons, "all advertising stimulates consumption because all advertising serves to place tobacco products in the public eye and to give these products legitimacy, particularly among the young."\textsuperscript{81} As one internal marketing document submitted at trial noted, young adults look for peer group acceptance in their brand selection, and they look for symbols that will help to reinforce their independence and individuality.\textsuperscript{82} Tobacco manufacturers want teens to look for peer acceptance through the type of cigarette brand they smoke. A teen’s brand preference can be reinforced by wearing a "Player’s Light" t-shirt or by using a "Benson and Hedges" lighter. Viewed in this light, a lighter containing a tobacco brand logo is just another vehicle for promoting a certain lifestyle to a target group of consumers.

\textsuperscript{79} Ibid.

\textsuperscript{80} Ibid. at 99.

\textsuperscript{81} Ibid. at 76.

(b) **Minimal Impairment**

In order to satisfy the second step in the proportionality analysis, the government had to show that the measures at issue impaired the right of free expression as little as reasonably possible in order to achieve the legislative objective. According to the majority decision, the impairment must be “minimal”, meaning that the law must be carefully tailored so that rights are impaired no more than necessary. McLachlin J. explained that “if the law falls within a range of reasonable alternatives, then courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement”. McLachlin J. noted, however, that “if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.”

According to La Forest J.’s analysis of the minimal impairment requirement, the government only had to demonstrate that the measures were the least intrusive in light of both the legislative objectives and the infringed right. In my opinion, La Forest J. was correct in placing a less onerous burden on the government to justify the infringement given that the infringed rights at issue in this case was the right of tobacco corporations to advertise the only legal products sold in Canada which, when used precisely as directed, harms and often kills those who use it.

It was also important to La Forest J.’s analysis that Parliament could validly have employed the criminal law power to prohibit the manufacture and sale of tobacco products.

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83 *RJR-MacDonald* (SCC). *supra* note 1 at 99.


products. Given this fact, La Forest J. concluded that Parliament had adopted a “relatively unintrusive legislative approach” in choosing to prohibit only the advertisement of tobacco products.86 When the *Act* was viewed in this light, La Forest J. was able to conclude that the legislation was actually narrow in scope:

“Under the *Act*, tobacco companies continue to enjoy the right to manufacture and sell their products, to engage in public or private debate concerning the health effects of their products, and to publish consumer information on their product packages pertaining to the content of the products. The prohibition under this *Act* serves only to prevent these companies from employing sophisticated marketing and social psychology techniques to induce consumers to purchase their products.”87

Another crucial factor in La Forest J’s analysis was his finding that this type of expression was entitled to a lower degree of protection under s. 1 because it was directly solely towards the pursuit of profit and fell far from the “core” of freedom of expression values.88 Taking into account the legislative context, La Forest J. found that the measures adopted under the TPCA satisfied this requirement.89

McLachlin J. first considered whether the prohibition on advertising contained in s. 4 of the TPCA met the minimal impairment requirement. In her analysis, McLachlin J. stated that a full prohibition “will only be constitutionally acceptable where the government can show that only a full prohibition will enable it to achieve its objective.”90 McLachlin J. concluded that “while one may conclude as a matter of reason and logic

86 *Ibid.* at 73.
90 *Ibid.* at 98.
that lifestyle advertising is designed to increase consumption, there is no indication that purely informational or brand preference advertising would have this effect." However, earlier in her reasons McLachlin J. found that tobacco companies would not spend great sums of money on advertising if it were not to increase tobacco consumption. After reviewing the tobacco companies' marketing documents, McLachlin J. concluded "purely informational advertising may not increase the total market, lifestyle advertising may, as a matter of common sense, be seen as having a tendency to discourage those who might otherwise cease tobacco use from doing so."

There are several problems with this analysis. First, McLachlin J. used the word "may" indicating that even purely informational advertising could, in some circumstances, encourage tobacco consumption. This is inconsistent with her later conclusion. Second, McLachlin J. used the word "purely" to describe informational advertising. As will be discussed in more detail later in this chapter, the distinction between lifestyle, information and brand preference advertising is artificial which makes it hard to determine what is "purely" informational or brand preference advertising. The lines between the different types of advertising are easily blurred and this opens the door for tobacco manufacturers to find "legal" ways to circumvent advertising restrictions. Third, I would argue that based on reason and logic brand preference and informational advertising could also have a tendency to discourage smokers from ceasing tobacco use. For example, informational or brand preference advertising could be used to inform

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91 Ibid. at 100.
92 Ibid. at 98.
93 Ibid.
consumers of the benefits of a tobacco companies’ new “light” brand of cigarettes. Based on this information, a consumer may be persuaded to switch to this new brand rather than quit smoking. As discussed in chapter 1, the smoker is likely not aware that these cigarettes may be more harmful to his or her health than regular cigarettes. It is very unlikely that the tobacco manufacturer will have printed this information on their “purely” informational advertisement.

It was central to McLachlin J.’s decision on this issue that the government had failed to present evidence in defence of its total ban on advertising.94 This omission, according to McLachlin J., was all the more glaring in view of the fact that the government had carried out at least one study of alternatives to a total advertising ban but had refused to disclose it to the court.95 McLachlin J. noted that “in the face of this behaviour, one is hard-pressed not to infer that the results of the studies must undercut the government’s claim that a less invasive ban would have produced an equally salutary result.”96 As a result, the majority concluded that the government failed to satisfy the burden of demonstrating that it had respected the requirement of minimal impairment.97

In contrast, La Forest J. did not find that the government’s failure to disclose documents undermined their argument that the Act minimally impaired the appellants’

94 Ibid. at 101.
95 Ibid. at 101-102. Note: The Attorney General refused to disclose this document and approximately 500 others demanded at the trial by invoking s. 39 of the Canada Evidence Act, R.S.C. 1985, c. C-5, thereby circumventing an application by the tobacco companies for disclosure since the courts lack authority to review documents for which privilege is claimed under s. 39.
96 Ibid. at 101.
97 Ibid. at 102.
rights in light of the legislative objective. La Forest J. found that \textquotedblthere was more than enough evidence adduced at trial to justify the government's decision to institute a full prohibition on advertisement and promotion\textquotedbl for several reasons. First, it was important to La Forest J. that the government had reached the conclusion that a full prohibition on advertising was necessary to reduce consumption only after careful study and reflection. La Forest J. made this statement in support of his position:

\textquotedbl[T]he measures adopted under the Act were the product of an intensive 20-year public policy process, which involved extensive consultation with an array of national and international health groups and numerous studies, and educational and legislative programs. Over the course of this 20-year period, the government adopted an incremental legislative approach by experimenting with a variety of less intrusive measures before determining that a full prohibition on advertising was necessary.\textquotedbl

As will be discussed in chapter 4, the public policy process described by La Forest J. has been dominated by pro-tobacco interests. Until the late 1980s, pro-health groups have not been able to effectively influence the public policy agenda and demand favourable tobacco control legislation from the government. The enactment of the TPCA in 1989, which had as its goal the protection of the public from the harmful consequences of tobacco, represented a major victory for the pro-health groups to positively influence the tobacco control debate. Given this political context, the striking down of the TPCA by the Supreme Court of Canada represented more than a legal victory for the tobacco manufacturers. The outcome of this case reflects the extent to which tobacco manufacturers have been able to influence and control the public and political debate.

\footnote{98 \textit{Ibid.} at 76.}
\footnote{99 \textit{Ibid.} at 75.}
\footnote{100 \textit{Ibid.} at 73.}
concerning the dangers of tobacco and the extent to which tobacco regulation is necessary.

Second, La Forest J. found that the “reasonableness of Parliament’s decision to prohibit tobacco advertising has been amply borne out by parallel developments in the international community before and after the passage of the Act.” It was of great significance to La Forest J. that over 20 democratic nations had, in recent years, adopted complete prohibitions on tobacco advertising similar to those adopted under the TPCA. It was also significant that the constitutionality of full prohibitions on advertising were upheld in France and that the United States had upheld full prohibitions on alcohol and gambling advertisements as a reasonable limitation on freedom of expression.

Third, La Forest J. found it reasonable to conclude that all advertising stimulates consumption because “all advertising serves to place tobacco products in the public eye and to give these products legitimacy, particularly among the young.” La Forest J. recognized the inherent problems of trying to draw a distinction between partial and full advertising prohibitions, which is what the Tobacco Act does by prohibiting lifestyle advertising while permitting both brand preference and informational advertising. First of all, it is difficult to define “lifestyle” advertising. For instance, lifestyle advertising could include the depiction of a race car, mountain scenery or a palm-tree lined beach. As

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101 Ibid. at 72.
102 Ibid.
103 Ibid. at 73.
104 Ibid. at 76.
105 Reflections from the Perspective of Health, supra note 34 at 264.
will be discussed in chapter 5, tobacco manufacturers use package design, including colour, trademark logos and product names, to evoke desirable images about their products. In addition, tobacco manufacturers have had a long history of finding creative and ingenious ways to circumvent the spirit, if not the letter, of their own voluntary restrictions on lifestyle advertising. To illustrate the problems associated with instituting a partial ban, La Forest J. cited the following example:

"[W]hen France attempted to institute a partial prohibition on tobacco advertising in the 1980s (by prohibiting “lifestyle” tobacco advertising but not informational or brand preference advertising), the tobacco companies devised techniques for associating their product with “lifestyle” images which included placing pictures on the brand name and reproducing those pictures when an advertisement showed the package, and taking out a full-page magazine advertisement and sub-contracting three-quarters of the advertisement to Club Med, whose lifestyle advertisements contributed to a lifestyle association for the brand."106

In light of these factors, La Forest J. concluded that Parliament had “compelling reasons for rejecting a partial ban on advertising and instituting a full prohibition.”107 La Forest J. stated that “it would be highly artificial for this court to decide, on a purely abstract basis, that a partial prohibition on advertising would be as effective as a full prohibition.”108 It was this kind of “line drawing”, according to La Forest J., that this court has “identified as being within the institutional competence of legislatures and not courts.”109

The second issue for the majority to consider was whether the unattributed health warnings met the minimal impairment requirement. McLachlin J. found that the

106 RJR-MacDonald (SCC), supra note 1 at 77.
107 Ibid.
108 Ibid.
109 Ibid.
government was “clearly justified in requiring the appellants to place warnings on tobacco packaging.” Once again, however, the majority concluded that the minimum impairment requirement was not met because the government could not show that an unattributed warning, as opposed to an attributed warning, was required to achieve its objective of reducing tobacco consumption among those who might read the warning.\textsuperscript{110}

Although the minority of the court found that the unattributed health warnings did not violate s. 2(b), La Forest J. commented in \textit{obiter} that this section could be justified under s. 1. Unlike the majority decision, La Forest J. reasons reflected the importance of the social context of the infringed right to the s. 1 analysis. La Forest J. concluded that a lower level of constitutional scrutiny is justified in this context for the following reasons:

“Given that the object of the unattributed health message requirement is simply to increase the likelihood that every literate consumer of tobacco products will be made aware of the risks entailed by the use of that product, and that these warnings have no political, social or religious content, it is clear that we are a long way in this context from cases where the state seeks to coerce a lone individual to make political, social or religious statements without a right to respond.”\textsuperscript{111}

\textbf{(c) Balancing the Effects of the Legislation and the Objectives}

In light of the finding that the requirement of minimum impairment was not satisfied for ss. 4 and 9 of the TPCA, McLachlin J. found it unnecessary to proceed to the final stage of the proportionality analysis under s. 1.\textsuperscript{112} In his dissent, La Forest J. briefly concluded that, given the nature of the legislation and the nature of the right infringed, “the deleterious effects of this limitation, a restriction on the rights of tobacco companies

\textsuperscript{110} \textit{Ibid.} at 103.

\textsuperscript{111} \textit{Ibid.} at 84.

\textsuperscript{112} \textit{Ibid.} at 104.
to advertise products for profit that are inherently dangerous and harmful, do not outweigh the legislative objective of reducing the number of direct inducements for Canadians to consume these products."\textsuperscript{113}

2. DISCUSSION – THE IMPACT OF RJR-MACDONALD ON SUBSEQUENT TOBACCO CONTROL LEGISLATION IN CANADA

2.1 Division of Powers

The striking down of the key sections of the TPCA was a major defeat for anti-tobacco interest groups who had lobbied hard for the passage of Bill C-51.\textsuperscript{114} In many respects, the Supreme Court of Canada’s decision was also a major set back for the government’s tobacco control and reduction strategy. One positive effect of the court’s decision, however, was that it affirmed the federal government’s authority to regulate tobacco. The majority of the court (7 out of 9 judges) found that Parliament could validly legislate under the criminal law power with respect to the manufacture and sale of tobacco products, which includes the power to regulate tobacco advertisements, sponsorships, packaging and labelling.\textsuperscript{115}

Firstly, it is important to note that the issue of whether the federal government had jurisdiction to regulate tobacco did not arise until after the TPCA was passed by Parliament in 1988.\textsuperscript{116} The government’s failure to implement tobacco control legislation sooner was not because of jurisdictional uncertainty. As La Forest J. noted, the measures

\textsuperscript{113} Ibid. at 83.

\textsuperscript{114} Note: For a discussion on this point see Chapter 4.

\textsuperscript{115} RJR-MacDonald (SCC), supra note 1 at 37.

\textsuperscript{116} Note: The Bill C-51 received Royal Assent on June 28, 1988. The TPCA came into force on January 1, 1989.
adopted under the TPCA were the product of an intensive 20-year public policy process. He further observed that as early as 1969, the Standing Committee of Health and Welfare and Social Affairs recommended in the Report on the Standing Committee of Health, Welfare and Social Affairs on Tobacco and Cigarette Advertising (the Isabelle Committee) a full prohibition on advertising.\textsuperscript{117} Parliament’s decided, however, to refrain from instituting the recommendations in this report and chose instead to implement a variety of lesser legislative measures. As discussed in Chapter 4, this delay was the result of the government acquiescing in pro-tobacco interests rather than a direct consequence of legal constraints.

It is important that the federal government have concurrent jurisdiction with the provinces to enact tobacco control legislation for two main reasons: (1) Federal legislation is necessary in order to set minimum standards for tobacco control which apply consistently throughout Canada; and (2) Federal legislation is necessary in order to regulate the inter-provincial nature of tobacco advertising, promotion and sponsorship.

\textit{Setting Minimum National Tobacco Control Standards}

Provincial governments have the constitutional power to regulate tobacco advertising and promotions, as well as tobacco product packaging and labelling pursuant to s. 92(13) “Property and Civil Rights in the Province” and s. 92(16) “all Matters of a Merely Local or Private Nature in the Province” of the \textit{Constitution Act, 1867}.\textsuperscript{118} The vires of provincial legislation banning advertising was considered by the British

\textsuperscript{117} \textit{RJR-MacDonald} (SCC), \textit{supra} note 1 at 52-53.

\textsuperscript{118} \textit{Constitution Act, supra} note 3. Note: Section 92 grants the provincial governments exclusive provincial jurisdiction over 16 enumerated sub-headings, including s. 92(13) “Property and Civil Rights in the Province” and s. 92(16) “all Matters of a Merely Local or Private Nature in the Province.”
Columbia Supreme Court in Benson & Hedges (Canada) Ltd. v. British Columbia (A.G.). The court found that the Tobacco Advertising Restraint Act, S.B.C. 1971, c. 65 was intra vires the British Columbia provincial government. The Court of Appeal in RJR-MacDonald noted that while the TPCA was intra vires Parliament, similar legislation could also have been adopted by provincial legislatures. La Forest J. noted that the federal government in enacting the TPCA was not attempting to intrude unjustifiably upon provincial powers under s. 92(13) (Property and Civil Rights in the Province) and s. 92(16) (Matters of a Merely Local or Private Nature in the Province). This case was distinguished from Margarine Reference where the prohibition was directed not to curtailing a public evil, but was in reality, in pith and substance, aimed at regulating the dairy industry.

Despite having the constitutional power, some provinces have done very little to regulate tobacco, aside from increasing taxes, since the 1970s. On the other hand,


120 Difficulties, ibid.

121 RJR-MacDonald (CA), supra note 12 at 350.

122 RJR-MacDonald (SCC), supra note 1 at 29.


124 RJR-MacDonald (SCC), supra note 1 at 29.

125 D. Studlar, “Federalism and Public Policy: The Canadian Provinces and Tobacco Control” (October 1999) [unpublished], archived at West Virginia University – Department of Political Science. at 4.
Ontario,126 British Columbia,127 Quebec128 and Nova Scotia129 have been very active in recent years in enacting tobacco control legislation. The wide variation from province to province in how tobacco is regulated is evident by comparing provincial legislative initiatives in two main categories: advertising and sponsorship; packaging and labelling.

The messages and images that tobacco manufacturers try to convey to tobacco users, as well as to potential users, through their advertisements and sponsorship promotions, is that tobacco is desirable and socially acceptable.130 The restrictions on lifestyle advertising and tobacco sponsorships contained in the federal Tobacco Act are therefore very important components of the government's overall objective of reducing tobacco consumption among Canadians and, in particular, among young persons.131

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126 See generally: Ibid. at 10. Note: Until the 1990s, the major tobacco control legislation in Ontario was the Smoking in the Workplace Act (1989). In 1994, Ontario passed the Tobacco Control Act (1994) which was, at the time, the most comprehensive provincial legislation in Canada.

127 Ibid. at 16-17. Note: British Columbia enacted some of the earliest tobacco control legislation in the 1970s. Commencing in the mid 1990s, B.C. began to pursue a more aggressive tobacco control strategy. It strengthened the Tobacco Sales Act, R.S.B.C. 1996, c. 451, by increasing fines and by requiring greater public disclosure by tobacco companies of cigarette ingredients, it enacted the Tobacco Damages and Health Care Costs Recovery Act, which gave the government the power to bring legal action against tobacco manufacturers in order to recover tobacco-related health care costs; and it introduced legislation, which, if proclaimed, would require tobacco manufacturers to pay an annual licensing fee in order to sell tobacco in the province.

128 Ibid. at 20-22. Note: Until 1998, the only major provincial legislation on tobacco control was a 1986 law providing for control of smoking in public places. In 1998, the PQ passed the Tobacco Act, R.S.Q. 1998, c. 33, which deals with advertising, sponsorship, trademarks, retail displays, packaging and labelling, sales to minors, vending machines, kiddie packs, ETS restrictions in workplaces and public places.

129 Ibid. at 23-25. Note: In 1994, the Nova Scotia government passed the Tobacco Products Access Act (1994), which established the age of sales at 19, signage at the point of sale, enforcement and fines for violations, no kiddie packs, permitting regulation to control advertising and sponsorship and prohibition of sales from vending machines and self-service displays.

130 Note: Tobacco companies use sport and event sponsorships in order to associate their products with health, glamorous, exciting and desirable activities and people. For instance, tobacco companies sponsor glamorous sporting events such as auto racing, pro golf and tennis tournaments, equestrian show jumping, and extreme sports series (including risk-taking activities such as couloir skiing, mountain biking, wild water kayaking).

131 Tobacco Act, supra note 20 at ss. 22, 24.
Provincially, only Quebec’s Tobacco Act restricts lifestyle advertising and tobacco company sponsorships.¹³² The restrictions on sponsorship contained in Quebec’s statute are to take effect on the same date as the federal legislation - October 1, 2000.¹³³ Sponsorship will be prohibited in Quebec effective October 1, 2003, which is also in line with the federal legislation.¹³⁴ British Columbia’s Tobacco Sales Act allows the government to prohibit the sale, offer for sale, distribution, advertisement or promotion of tobacco products to people under the age specified by regulation. To date, there are no regulations which set a minimum age for the advertising or promotion of tobacco products.¹³⁵

A second critical objective of the federal government’s tobacco control strategy is to adequately inform Canadians of the dangers of tobacco use and thereby reduce tobacco consumption.¹³⁶ One of the most direct ways of communicating information to users, and potential users, of tobacco products is through tobacco product packaging.¹³⁷ The federal Tobacco Act regulates packaging and labelling in a number of ways such as providing the enabling authority to enact regulations for package inserts, health warnings, and the

¹³² Tobacco Act, R.S.Q. 1998, c. 33, ss. 24, 24.3, 22. [hereinafter TAQ].

¹³³ TAQ, s. 72.

¹³⁴ Ibid.

¹³⁵ Tobacco Sales Act, R.S.B.C. 1996, c. 451, s. 2(1). [hereinafter TSABC]. See: Tobacco Sales Regulation, B.C. Reg. 216/94. Note: Section 1 states that:
Section 1: It is forbidden to sell, or to offer for sale, tobacco to purchasers who have not attained the age of 19 years.

¹³⁶ Department of Health, Proposed Tobacco Products Information Regulations (January 1999) at 150. [hereinafter Proposed Tobacco Products Information Regulations]

¹³⁷ Ibid.
reporting of toxic constituents.\textsuperscript{138} The tobacco control legislation in four provinces, British Columbia, Manitoba, Ontario and Quebec provide for package warnings\textsuperscript{139}, and three provinces, British Columbia, Ontario and Quebec, provide the authority for package inserts.\textsuperscript{140} Unlike the federal Tobacco Act, the legislation in British Columbia, Manitoba, Ontario and Quebec permit the adoption of regulations requiring plain packaging of tobacco packages.\textsuperscript{141} Despite having the statutory authority, no province, to date, has enacted regulations in these areas beyond what is required by federal regulations.\textsuperscript{142}

Overall, there is a patchwork of provincial legislation across Canada which implement various tobacco control measures. For the most part, provinces have left the regulation of advertising, sponsorship, packaging and labelling up to the federal government despite having the constitutional authority to regulate in these areas. One reason for this may be that since the Supreme Court of Canada's decision in \textit{RJR-MacDonald} affirming federal jurisdiction to regulate the manufacture and sale of tobacco there has been a reduction in the political pressure on provincial governments to enact what might be controversial tobacco control measures. Prior to the passage of the TPCA, however, tobacco advertising, sponsorship and health warning labelling were virtually

\textsuperscript{138} TA, \textit{supra} note 20 at ss. 10(1)(2), 15(1), 17(a), 15(2), 17(a).

\textsuperscript{139} Package Warnings: TSABC, s. 11(2)(a); TAQ, s. 28. An Act to Protect the Health of Non-smokers, S.M. c. S125, s. 9(e). [hereinafter MAPHNS]. \textit{Tobacco Control Act}, s. 5. [hereinafter TCAO].

\textsuperscript{140} Package Inserts: TSABC, s. 11(2)(a); TCAO, s. 5; TAQ, s. 28.

\textsuperscript{141} Plain Packaging: TSABC, s. 11(2)(a); MAPHNS, s. 9(e), TCAO, s. 5; TAQ, s. 28.

\textsuperscript{142} See generally: Canadian Clearinghouse on Tobacco Control, "Restrictions on Promotion, Packaging and Products" online: at \url{http://www.cctc.ca/ncth/docs/legislation} (last updated: 15 September 1999).
unregulated by provincial governments, with the exception of British Columbia. In light of the provincial governments’ historical reluctance to legislate in these areas, it is essential, in order to effectively reduce tobacco consumption nationally, that there be a federal regulatory framework governing tobacco advertising, sponsorships and health warnings which sets minimum standards for tobacco control in Canada.

Addressing the Inter-provincial Scope of Tobacco Advertising and Sponsorship

Over the years, tobacco manufacturers have marketed their products throughout Canada using a variety of advertising, promotional and sponsorship vehicles. Up until the early 1970s, tobacco companies promoted their products through the broadcast of television or radio commercials. Although tobacco companies voluntarily stopped placing cigarette commercials on radio and television in 1972, self-regulation by the industry proved to be an ineffective tool in eliminating broadcast advertising. Tobacco companies found creative ways to violate the spirit, if not the letter, of their own advertising code. For instance, they would place advertisements in premium locations, including the baseball outfield at Olympic Stadium and the scoreboard at the Montreal Forum, knowing that the advertisement would be in full view of the television camera and broadcast to viewers.

Just as self-regulation was insufficient in deterring broadcast advertising, similarly it did not prevent sponsorships, another important advertising vehicle. Tobacco

143 Difficulties, supra note 119 at 39. Note: In 1971, British Columbia banned tobacco advertising in the Tobacco Advertising Restraint Act, S.B.C. 1971, c. 65, but this Act was repealed a year later and replaced by the Tobacco Product Act, S.B.C. 1972, (2nd Session), c. 12. Regulations under this Act prohibited all advertising and promotion except in print form, on vending machines and in premises where tobacco was sold. The permitted advertising was required to carry a health warning. The regulations restricting advertising were repealed in 1994.

144 Ibid. at 39.
companies sponsor a wide variety of popular and high profile sports and cultural events in order to capitalize on the enormous publicity and goodwill generated by these events. They benefit from the sponsorship by being able to associate their brands or corporate image with characteristics such as excellence, fitness, health, excitement, risk, daring and independence. Many of the events sponsored by tobacco companies, such as the du Maurier Classic Women's Gold Tournament, the Player's Grand Prix of Canada and the du Maurier Open Tennis Championship, as well as the commercials promoting these events, are broadcast on national television. As a result, provincial governments cannot regulate this type of broadcast advertising because it is outside of their jurisdiction.

In addition, tobacco advertisements can be communicated through a number of other sources such as magazines, newspapers, videos, direct mail, courier, telephone videophone soliciting, fax machines, telegrams and the Internet. All these advertising mediums cross provincial borders. Brossard J.A., in finding that the TPCA met the "provincial inability test", made the following observations in respect to the inherent difficulty associated with provincial regulation of advertising:

"The fact is that communications, whether radio or television broadcasting, or even newspaper publishing, do not recognize frontiers, still less provincial borders. For example, a provincial law cannot prohibit tobacco advertising in broadcasts or publications which originate in other provinces, any more than the law at issue can prohibit advertising in foreign broadcasts or publications by foreign companies or even foreign advertising by Canadian companies if it is principally directed at foreign consumers."  

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146 Difficulties, supra note 119 at 40.

147 RJR-MacDonald (CA), supra note 12 at 350-351.
Brossard J.A. also recognized that unless all provinces adopted similar advertising restrictions consumers in a province where such legislation exists would still be subject to advertising from other provinces’ broadcast or radio or television commercials. People would also be exposed to advertisements published in newspaper or magazines printed in another province as these advertising vehicles circulate freely throughout the country. Responding to the tobacco manufacturers’ argument that provinces which enact such legislation could effectively prohibit access to their territory, Brossard J.A. made the following statement:

“Although it may be realistic to conceive of such control in the case of the electronic media, can one seriously imagine a ‘newspaper and magazine police’ which would effectively guarantee that pages containing advertisements for tobacco products would be removed from publication originating in other provinces?”

Given the national scope of these marketing tools, and given the fact that provinces cannot regulate advertising outside their borders, it was critical for the Supreme Court of Canada to recognize the federal government’s jurisdiction to regulate tobacco advertising.

2.2 Charter of Rights and Freedoms

The Supreme Court of Canada’s decision in RJR-MacDonald was a victory for tobacco manufacturers on two levels. First, the Charter challenge resulted in the striking down of the key sections of the TPCA as discussed previously in this chapter and in chapter 2. The government, in crafting legislation that attempted to meet the

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148 Ibid. at 351.

149 Ibid.
proportionality requirements set out by the majority decision, had enacted legislation that is underinclusive and potentially less effective at achieving its objectives of protecting Canadians from the health hazards of tobacco products. Second, the tobacco manufacturers learned that if they failed in the political arena to block unfavourable tobacco control legislation a Charter challenge could be used as an effective means to delay and derail legislation.

*Underinclusive Legislation - Advertising and Health Warnings*

The *Charter* constrains the government’s ability to enact tobacco control legislation to the extent that it places the burden on the government of demonstrating that the limits it has imposed on tobacco manufacturers’ freedom of expression are reasonable and justified. In drafting the TPCA, the government thought that it had crafted legislation that effectively addressed the serious and complicated problems associated with tobacco consumption while still respecting the rights guaranteed in the *Charter*. The majority of the Supreme Court of Canada found otherwise. McLachlin J.’s s.1 analysis focused too heavily on establishing the causal relationship between a complete prohibition on tobacco advertising, the implementation of unattributed health warnings and the reduction of tobacco consumption.

On the other hand, La Forest J. gave less weight to the issue of causation in light of the importance attributed to the social and economic harm caused by tobacco to society. La Forest J. was willing to take a more flexible approach to the *Oakes* analysis having regard to the factual and social context of the challenged law. As a result of this approach, in my opinion, the minority was correct in according deference to Parliament to assess the complex social science evidence examining the relationship between
advertising and tobacco consumption and between unattributed health messages and their effectiveness in deterring tobacco consumption.

After RJR-MacDonald struck down s. 4, 5, 6, 8 and 9 of the TPCA, the government drafted new tobacco control legislation. The Tobacco Act (1997) does not prohibit advertising generally, but, as advocated by the majority in RJR-MacDonald, it bans only lifestyle advertising while allowing brand preference and informational advertising to continue. As for health warnings, the Tobacco Act requires health warnings on tobacco products but allows for the attribution of the message to a prescribed person or body, i.e. Health Canada. These measures may satisfy the freedom of expression parameters established by the majority decision in RJR-MacDonald. They are less effective, however, in achieving the government’s stated objectives of protecting the health of Canadians, protecting young persons from inducements to use tobacco products and enhancing public awareness of the health hazards of using tobacco products for the reasons cited in La Forest J.’s decision.

La Forest J. found that the unattributed warnings required by s. 9 of the TPCA were rationally connected to the objective of informing consumers of the risks of tobacco use because they increased the visual impact of the warning. The example given by La Forest J. was that a bold unattributed warning such as “SMOKING CAN KILL YOU” is

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150 TA, supra note 20 at s. 22. Note: Lifestyle advertising is defined 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. Brand-preference advertising means advertising that promotes a tobacco product by means of its brand characteristics. 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.

151 RJR-MacDonald (SCC), supra note 1 at 85.
much more striking to the eye than a message cluttered by subtitles and attributions.\textsuperscript{152} As Brossard J.A. noted in the Court of Appeal decision, “an ‘attributed’ message can quickly become meaningless, or even ridiculous.”\textsuperscript{153} La Forest J. also accepted the conclusion of an expert report submitted at trial that attributed health warnings would be less effective in deterring adolescents from smoking given the fact that they are apt to disregard or disobey messages from perceived authority figures.\textsuperscript{154} In light of these reasons cited by La Forest J. and in light of Parliament’s primary goal of protecting children from tobacco, attributed measures may be less effective than unattributed measures.

\textit{Using the Charter as a means to Delay and Derail Tobacco Control Legislation}

Parliament’s ability to regulate tobacco is affected in a more indirect, yet substantial way, as a result of the constitutional limits imposed by the \textit{Charter}. Tobacco manufacturers, as well as other pro-tobacco interest groups, can use the \textit{Charter} as a means to legitimize their opposition to present and future federal tobacco regulation. These interest groups can use the \textit{Charter} to challenge legislation in order to delay and derail the implementation and enforcement of tobacco control legislation.

The effect of the Supreme Court of Canada’s decision was to create more delay in the implementation and enforcement of federal tobacco control legislation as the government had go back to the drawing board to draft new legislation and battle, once again, to get the Bill passed through Parliament. From the time that the court rendered its

\textsuperscript{152} \textit{Ibid.}
\textsuperscript{153} \textit{Ibid.}
\textsuperscript{154} \textit{Ibid.}
decision on September 21, 1995 until the Tobacco Act received Royal Assent on April 25, 1997, approximately 19 months had passed. During this time, there was no legislation in place which regulated how tobacco companies advertised and promoted their products. The only restrictions on tobacco companies were those they imposed on themselves though their voluntary advertising code.155

The striking down of s. 9 of the TPCA meant that the health warning requirements set out in the Tobacco Products Control Regulations were invalid which left tobacco manufactures free to decide whether or not to print health warnings on tobacco packages. To date, there are still no regulations in place which require tobacco manufacturers to print health warning messages on tobacco packages, even though the government has had the authority to enact regulations since 1997.156 As a result, tobacco companies have been voluntarily printing health messages on tobacco packages since 1995. However, the manufacturers attribute these health warnings to Health Canada. Only a portion of this delay, however, can be attributed to the constitutional challenge to the TPCA. In 1997, the government could have adopted regulations which would have continued the labelling requirements of the Tobacco Products Control Regulations, but Health Canada decided it needed to review and revise the regulations.157 Now, three years later, Health Canada is still in the process of developing health warning regulations.158

156 TA, supra at note 20, s. 17.
157 See: The Tobacco (Labelling and Reporting) Regulations were published in the Canada Gazette Part I on March 29, 1997.
158 See: The Tobacco Information Regulations were published in Gazette Part I in February 2000.
The delayed implementation of revised health warning regulations in 1990 is another prime example of how the tobacco manufacturers can successfully use the Charter as a tool to oppose undesirable regulation. In 1990, federal Health Minister Perrin Beatty announced that new health warning regulations were scheduled to come into effect on June 1, 1991. These revised regulations would have strengthened existing regulations by requiring tobacco manufacturers to include warnings about addiction and environmental tobacco smoke. The warnings were required to cover the top quarter of the front and back of the package and they had to be printed in black and white. In addition, tobacco manufacturers were required to include an insert in the packages with more health information. After Chabot J.’s decision in July 1991 declaring the TPCA to be unconstitutional, the government dropped its plan to strengthen warnings. In 1993, the Court of Appeal overturned Chabot J.’s decision and, within two months, the government announced new draft revisions to the health warnings. The revisions were similar to those proposed by Beatty, except that the package insert requirement had been dropped. The new health warnings first appearing on tobacco packages on September 12, 1994, which amounted to a delay in their implementation of over three years.

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159 R. Cunningham, *Smoke and Mirrors: The Canadian Tobacco War* (Ottawa: IDRC Books, 1996) at 103-104. [hereinafter Smoke and Mirrors].


163 *Reflections, supra* note 34 at 276.
3. SUMMARY

The decisions in *RJR-MacDonald* are significant for several reasons. First, the Supreme Court of Canada’s decision affirmed that the federal government has the jurisdiction to regulate tobacco. The government’s ability to regulate tobacco, however, is constrained to the extent that it must work within the constitutional powers as set out in s. 92 of the *Constitution Act*, and it must respect the rights of tobacco manufacturers to the guaranteed rights set out in the *Charter of Rights and Freedoms*. The *Charter* presents a complicated legal challenge for the federal government as it strives to enact comprehensive legislation which effectively reduces tobacco consumption in Canada and which is sufficiently tailored to meet the proportionality requirements as set out in *RJR-Macdonald*.

Second, the Supreme Court of Canada’s decision in *RJR-MacDonald* illustrates the lack of understanding on the part of some judges about the extent to which tobacco is in fact a “unique social and economic phenomenon” which justifies greater deference to Parliament to craft legislation which balances the need to protect public health with the rights guaranteed to tobacco manufacturers in the *Charter*. The fact that the court was divided on this issue is not surprising. As will be discussed in chapter 5, the tobacco industry has been able to control, for most of this century, the public policy debate over the extent to which tobacco control legislation is required or necessary. Pro-tobacco interest groups have been able to use their economic and political power to lure the public and politicians into believing that cigarettes are not harmful to health or addictive and that tobacco advertising is used merely to preserve and promote brand loyalty among smokers. The preceding analysis of the judgments in *RJR-MacDonald* illustrates how
deeply society is divided on the issues surrounding tobacco regulation. More importantly, however, it illustrates the power of the tobacco companies to control the political debate surrounding tobacco control.

The industry’s power to control public opinion on issues surrounding tobacco control has been undermined to some extent by the public disclosure of internal company documents which show that the industry has known for decades that cigarettes cause disease and are addictive. In addition, these documents portray a conspiracy on the part of manufacturers to manipulate the nicotine in their products, to market their products to children and to smuggle cigarettes across international borders. As one American author accurately predicted, this information has increased the tobacco industry’s vulnerability not only in the court of public opinion but also in the courts of law. In the context of

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Note: The largest on-line collection of tobacco industry documents can be found at the following web site: University of California San Francisco, [http://galenlibrary.ucsf.edu/tobacco/bw.html](http://galenlibrary.ucsf.edu/tobacco/bw.html) (last updated: 17 June 1997).

Note: In Canada to date there have been only a few tort actions filed against the tobacco industry and none have been decided in the plaintiff’s favour. Litigation has been far more prevalent in the United States than in Canada. Until the mid 1990s, however, tobacco manufacturers were successful at defending lawsuits which were brought mainly by individuals suing the tobacco companies for negligence or product liability. The recent wave of lawsuits launched against American tobacco manufacturers has been dominated by large class actions suits brought by both smokers and non-smokers to recover damages and by lawsuits by state attorneys general to recover state Medicaid costs attributable to smoking-related diseases. The tobacco manufacturers have lost several significant actions in recent years. For instance, in 1994, four states, Florida, Minnesota, Mississippi and Texas, filed lawsuits against U.S. cigarette manufacturers seeking to recover health care costs. In 1997, the defendants settled with Mississippi and Florida, the first two of the scheduled Medicaid actions, for $3 billion and $11 billion respectively, to be paid over 25 years. Following this, a settlement was reached with Texas for $14 billion and with Minnesota for $6 billion. Following these four state victories, many other U.S. states either filed legal actions or threatened litigation against the tobacco manufacturers. Faced with having to defend these actions, the tobacco industry was forced to negotiate with the attorney generals. A settlement was reached in November 1998. Under the terms of this settlement, the U.S. tobacco manufacturers agreed to pay $206 billion over 25 years to 46 states. Tobacco manufacturers suffered another stunning defeat in July 2000 when the Florida jury in the Engle class action
the tobacco manufacturers’ ongoing constitutional challenge to the Tobacco Act, it remains to be seen whether this “new” evidence will help persuade courts to treat the challenged law as a unique socio-economic phenomenon, of which Parliament is deemed the best judge.

The decisions in RJR-MacDonald were also significant for a third reason. These cases illustrate how special interest groups, such as the pro-tobacco lobby, can use legal action to further their own narrow interests and influence public policy outcomes. In Edward Brooks, Chief Justice Brian Dickson warned that:

"In interpreting and applying the Charter I believe that the courts must be cautious to ensure that it does not become an instrument of better situated individuals to roll back legislation which has as its objective the improvement of the condition of the less advantaged persons."^{166}

In RJR-Macdonald, Dickson C.J.'s worst fears were realized. As will be discussed in the next chapter, the pro-tobacco lobby failed in its attempt to block the passage of the TPCA, which had as its objective the protection of the public from the harmful consequences of tobacco. The tobacco lobby’s failure in the political arena did not prevent it from using the courts as another forum to exert their private interests. The tobacco manufacturers’ legal challenge in RJR-MacDonald demonstrates how the industry can effectively use the Charter as a tool to challenge, delay and derail tobacco control legislation which aims to protect and enhance the public welfare.

These decisions also illustrate the difficulty that judges have in identifying and protecting legislation which reflect public values and enhance public welfare. For reasons

\[\begin{align*}
\text{lawsuit awarded plaintiffs $144 billion in punitive damages against the five largest U.S. tobacco manufacturers. The tobacco manufacturers are currently appealing this decision.}
\end{align*}\]

^{166} Edward Brooks and Art Ltd. v. The Queen, [1986] 2 S.C.R. 713 at 779.
which will be discussed in the next chapter, legislation all too often benefits the narrow interests of special interest groups. In some cases, policy-makers enact public interest legislation, such as the TPCA. Despite the important objective of the legislation, the TPCA was struck down. This chapter illustrates that judges cannot protect legislation which serves to enhance public welfare unless they are sensitive to the factors which skew legislative outcomes in favour of special interests groups. The factors that influence public policy in the area of tobacco control are the subject of the next chapter.
CHAPTER 4

POLITICAL FACTORS INFLUENCING LEGISLATIVE OUTCOMES

Interest groups lie at the core of the anti-smoking debate. This chapter employs a public choice theory of group behaviour in order to understand how the anti-smoking and pro-tobacco lobbies have influenced the evolution of public policy development in the area of tobacco control over the last century. The analysis throughout this chapter focuses on answering the question of whether legislative outcomes in the area of federal tobacco control are predictable under public choice theory. The first part of this chapter begins by examining the principles and concepts upon which public choice theory is founded. The second part of this chapter applies this theory to the tobacco control context.

1. PUBLIC CHOICE THEORY

1.1 Overview

Public choice theory\(^1\) developed in the latter half of the twentieth century in response to the traditional pluralistic political theory\(^2\) which was popular in the 1950s and early 1960s. According to the pluralist theory, private parties form organized groups in

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order to press their interests before government. Interest groups struggle with other competing groups for policy outcomes that benefit them most. Public officials broker compromises among competing groups and, as a result, the legislative and administrative decisions reflect the balance of competition between interest groups. Pluralist theorists believed that policy outcomes reflected an equilibrium among all interests and advantaged no specific interests in particular. Public choice theory rejects this vision of the political process arguing that decision-making by majority rule yields arbitrary and discriminatory results and that interest groups skew public decision-making toward private rent-seeking and away from public interest statutes.

Dennis Mueller, in his book *Public Choice II*, characterized public choice theory in the following manner:

“Public choice theory can be defined as the economic study of nonmarket decision making, or simply the application of economics to political science. The subject matter of public choice theory is the same as that of political science: the theory of the state, voting rules, voter behaviour, party politics, the bureaucracy, and so on. The methodology of public choice is that of economics, however. The basic behavioural postulate of public choice, as for economics, is that man is an egotistic, rational, utility maximizer.”

A public choice approach to politics assumes that political representatives, like voters, are rational, economic people bent on maximizing their utilities, which may be shaped by

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3 For a summary of the pluralist theory see generally: S.P. Croley, “Theories of Regulation: Incorporating the Administrative Process” (1998) 98 *Colum L. Rev.* 1 at 32.


more than just the desire to stay in power.\textsuperscript{6} A politician may seek, for example, wealth leisure, fame and respect, as well as power.\textsuperscript{7} The public choice theory of regulation treats legislative, regulatory and electoral institutions as an economy in which the relevant actors (ordinary citizens, legislators, agencies and organized interest groups) exchange regulatory "goods" which are in demand and "supplied" according to the same basic principles governing the demand and supply of ordinary economic goods.\textsuperscript{8} The outcome of these forces of supply and demand is a function of the constraints under which the participants in the regulatory marketplace operate. These constraints are determined by the general rules\textsuperscript{9} through which democratic decisions are made and, as a result, democratic decision making results in regulatory policies that benefit narrow interests at the expense of broad interests.\textsuperscript{10}

Public choice theory has been criticized on many fronts. M.J. Trebilcock, in a recent paper, cites four main criticisms of public choice theory.\textsuperscript{11} First, public choice

\textsuperscript{6} Ibid. at 179.

\textsuperscript{7} Ibid. at 247.

\textsuperscript{8} For a complete discussion on the model of political competition see: Ibid. Public Choice Theory II at 196-216.

\textsuperscript{9} For example: One branch of public choice theory examines legislation and voting as a game in which rational behaviour by the game players yields unhappy results for the group as a whole. See: J. Buchanan and G. Tullock, \textit{The Calculus of Consent} (Ann Arbor: University of Michigan Press, 1962). Subsequent public choice scholarship has broadened the lessons of game theory in analyzing the dynamics of interest group and government.

\textsuperscript{10} For examples of government regulation which benefit special interests see: Public Choice II, \textit{supra} note 10 at 453-454.

theory does not adequately take into account the range of non-economic and non-self-interested values that commonly motivate various participants in the collective-decision making processes. Second, public choice theory discounts the long-run independent impact of incremental changes to institutional design and *modus operandi* on subsequent policy outcomes. Third, public choice theory does not have a well-developed dynamic account of what sort of forces disrupt existing political equilibria and lead over time to non-incremental policy changes. Fourth, public choice theory leaves insufficient room for the impact of non-self-interested ideas on the policy-making process and on inducing changes in policy outcomes. On this point, Trebilcock\(^\text{12}\) cites another author, Steven Kelman, who argues that public choice theorists generally underestimate the "power of ideas" in the political system.\(^\text{13}\) Kelman's work demonstrates that the public choice view of the political process dramatically underestimates the role of "public spirit" or "civic virtue" or non-self-interested ideas in the political process.\(^\text{14}\)

Despite the fact that public choice theory may make unrealistic assumptions about the rationality of individuals and may overlook important aspects of the political process, many economists continue to defend the importance of this theory. Trebilcock writes that the reservations about the theory are not intended to "denigrate the important contributions that public choice theory has made and can make to understanding existing

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\(^\text{12}\) *Ibid*, Lurking around Chicago, at 32.


policy outcomes and the public policy decision-making process that generated them, or to understanding the likely impact of changes to various features of that process.15 The chapter will examine the extent to which the principles of public choice theory are reflected in the battle between pro-tobacco and pro-health interest groups for favourable tobacco control policy from the federal government. In the final analysis, I will argue that public choice theory does shed light on the political evolution of federal tobacco control and, as a result, this theory is useful in predicting the future direction of tobacco control regulation in Canada.

1.2 Public Choice Analysis of the Legislative Process

Public choice theorists treat legislation as an economic transaction in which the demand side of the market is represented by interest groups acting as consumers of public policy. Policy makers, such as legislators and bureaucrats, represent the supply side.16 According to this theory, the market for legislation is a badly functioning one. It yields too few laws that provide public goods (i.e. laws that contribute to the overall efficiency of society by providing a collective benefit that would probably not arise from individuals acting separately) and too many laws that reflect rent-seeking (i.e. laws that distribute resources to a designated group without any contribution to society’s overall welfare).17

In this public choice theory of government, legislation is supplied to groups or coalitions that outbid other rival interest groups for favourable legislation.18 Interest

15 Ibid. at 236.


17 Eskridge, supra note 4 at 286.
groups pursue regulatory goods up to the point where the marginal costs equal the marginal benefits of doing so.\textsuperscript{19} The price that the winning group pays in exchange for the legislation includes the cost of communicating with politicians; the cost of hiring consultants, lawyers and lobbyists; the cost of providing legislators with political benefits, such as votes and campaign contributions; and the cost of outbidding competing groups.\textsuperscript{20}

\textit{Demand Side of Political Markets}

Public choice theorists argue that the incidence and activity of interest groups determine the demand for legislation.\textsuperscript{21} The formation of interests groups is plagued by the problems associated with collective action and, as a result, the demand for legislation is highly biased.\textsuperscript{22} Professor Mancur Olson, in his seminal work entitled, \textit{The Logic of Collective Action}, explains why interest groups form so selectively and why collective action occurs in some instances (e.g. states work together to fight forest fires) but fails to materialize in others (e.g. individuals fail to conserve water or energy unless coerced to do so).\textsuperscript{23}

Olson begins his work by defining the purpose of organization. Olson explains that organizations exist, regardless of their type, shape and size, in order to further the

\begin{flushleft}
\textsuperscript{18} Faber, \textit{supra} note 16 at 889-890.

\textsuperscript{19} Croley, \textit{supra} note 3 at 38.

\textsuperscript{20} \textit{Ibid.} at 39.

\textsuperscript{21} Eskridge, \textit{supra} note 4 at 285.

\textsuperscript{22} \textit{Ibid.} at 286.

\end{flushleft}
interests of their group members. The idea that groups act in support of their group interests follows logically from the widely accepted premise of rational, self-interested behaviour.

What does not follow from the premise of rational and self-interested behaviour, however, is that groups will act in their self-interest. Olson explains that “even if all individuals in a large group are rational and self-interested, and would gain if, as a group, they acted to achieve their common interest or objective, they will still not voluntarily act to achieve that common or group interest.”

The reason is that legislation is a nonexclusive public good that benefits all members of the affected group even if some members do not contribute to its enactment. This observation has become known as the “free rider problem.” The free rider problem is more acute for large groups because individual stakes in the outcome will usually be very small.

According to Olson’s theory, members of a large group will not act to advance their common or group objectives unless there is coercion to force them to do so, or some other separate incentive, distinct from the common or group interest. The free rider problem means that social and economic difficulties will not always stimulate group formation, especially for large, diffuse groups like consumers, taxpayers and non-

24 Ibid. at 5-6. Note: Olson cites several examples, for example: labour unions are expected to strive for higher wages and better working conditions for their members; farm organizations are expected to strive for favorable legislation for their members; and the state is expected to further common interests of its citizens.

25 Ibid. at 1.

26 Ibid. at 2.

27 Note: Although Olson never used the term free riding in The Logic of Collective Action, nevertheless this concept is associated with his seminal work. The term free rider can be defined as “anyone who contributes less than his or her true marginal value derived from a nonexcludable public good.” When a good is nonexcludable many people will fail to contribute because they will get the good’s benefits free once provided by others. See: Sandler, supra note 23 at 17.
smokers.\textsuperscript{29} Olson argues that the problem of free riding may be less acute for small groups because the potential gain for individuals is larger and because there is a greater opportunity to monitor free riders. As a result, sufficiently small groups may be able to provide themselves with some amount of a collective good through voluntary and rational action of one or more of their members.\textsuperscript{30}

Olson points out that it is not enough to determine whether a small group will provide itself with the collective good. It is also necessary to determine whether the amount of collective good gained is maximized.\textsuperscript{31} Olson concludes that “just as there is a tendency for large groups to fail to provide themselves with any collective good at all, so there is a tendency in small groups towards a suboptimal provision of the collective good.”\textsuperscript{32} This is due to the fact that a collective good is such that other individuals in the group cannot be kept from consuming it once any individual in the group has provided it for himself.\textsuperscript{33} As a result, “the larger the group, the farther it will fall short of providing an optimal amount of a collective good.”\textsuperscript{34} According to Olson, the necessary conditions for the optimal provision of a collective good occurs when, “the marginal cost of

\begin{itemize}
\item\textsuperscript{28} Olson, \textit{supra} note 23 at 2.
\item\textsuperscript{29} \textit{Ibid.} at 9-16.
\item\textsuperscript{30} \textit{Ibid.} at 33.
\item\textsuperscript{31} \textit{Ibid.} at 27. Note: An allocation or assignment of resources is Paereto optimal when it is not possible to improve the well-being of one individual without harming at least one other.
\item\textsuperscript{32} \textit{Ibid.} at 28.
\item\textsuperscript{33} \textit{Ibid.} at 35.
\item\textsuperscript{34} \textit{Ibid.} at 35.
\end{itemize}
additional units of the collective good must be shared in exactly the same proportion as the additional benefits."\(^\text{35}\)

Olson's theory also recognizes that collective action occurs in some circumstances despite the problems associated with free riding because economic incentives are not the only incentives motivating people to contribute to an achievement of a group activity.\(^\text{36}\) He writes that "people are sometimes also motivated by a desire to win prestige, respect, friendship, and other social and psychological objectives" and that these social sanctions and social rewards are "the kind of incentives that may be used to mobilize a latent group."\(^\text{37}\) According to Olson, social incentives usually only operate in groups of smaller size.\(^\text{38}\) Nevertheless, Olson recognizes that these incentives may be able to bring about group-oriented action in a latent group in the case of a "federal" group. In this situation, a large group is composed of a number of small groups, each of which has a reason to join with the others to form a federation representing the larger group as a whole. The larger federated organization induces the individual members, through the use of social incentives, to contribute towards the collective goals of the whole group.

Olson also acknowledges that large pressure groups can form in some situations. He states that lobbies of the large economic groups (e.g. union laborers, farmers and doctors) form for the following reason:

\(^{35}\) Ibid. at 30.
\(^{36}\) Ibid. at 60.
\(^{37}\) Ibid. at 60-61.
\(^{38}\) Ibid. at 63.
“The lobbies of the large economic groups are the by-products of organizations that have the capacity to “mobilize” a latent group with ‘selective incentives’. The only organizations that have the ‘selective incentives’ available are those that (1) have the authority and capacity to be coercive, or (2) have a source of positive inducement that they can offer the individuals in the latent group.”39

Subsequent public choice literature has demonstrated that large groups may form based on shared ideologies, well-recognized threats and historical factors.40 The formation of large charities is an example where collective action occurs despite the free rider problem. According to Sandler, author of Collective Action, charities which provide a pure public good in their philanthropic activities, and which rely on a large number of donors for contributions, should in theory never form.41 Sandler writes that the answer to why charities do in fact form, despite this contradiction, lies “both in a failure of charities to provide a pure public good and in the charity’s ability to design an institutional structure that manages to circumvent standard free-riding concerns.”42 For instance, many large charities organize their fund-raising drives at a local level because individuals may be more willing to contribute due to a system of rewards (status or prestige) and punishments (stigma).43 In addition, these groups use the revenue raised by fund-raising to support local charities so that the benefits have the greatest impact on contributors. Charities may also try to assure donors that the funds raised will go to stated purposes by limiting the degree of trustee discretion.44

39 Ibid. at 133.
40 Eskridge, supra note 4 at 287.
41 Sandler, supra note 23 at 108.
42 Ibid.
43 Ibid. at 111.
44 Ibid.
In summary, formal organization of an interest group is essential for a group to influence legislative outcomes. Organized interest groups who are willing to pay the price to obtain or block legislation because they have the most to gain will be rewarded by favourable legislation at the expense of groups that are not well organized. In some cases, small organizations may lack the resources needed to be effective within political markets. Smaller interest groups may be able to overcome these problems by forming a coalition of interest groups which may increase their bargaining position and influence in relation to other competing groups. Coalitions are most likely to form where the "resources and autonomy for all prospective members can be significantly threatened (a crisis) or enhanced (an opportunity)." This increased effectiveness, however, may come at the expense of sustained efficiency, as the group grows larger. Organizations that are able to maintain a balance between efficiency and effectiveness will often receive a disproportionate share of public policy benefits.

Unorganized interests, on the other hand, will fail to press their point of view with policy makers. These groups may also fail to recognize the harms they will suffer from proposed legislation, or they may be falsely reassured by symbolic action on the part of policy makers. It is important to note that unorganized interests may still have an impact

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45 Olson, supra note 23 at 47. Note: Olson argues that the smallest type of group, where one or more members get such a large fraction of the total benefit that they find it worthwhile to see that the collective good is provided, may not require a formal organization. In any group larger that this, no collective good can be obtained without some group agreement, coordination or organization. The larger a group is, the more agreement or organization it will need.

46 Samford, supra note 4 at 850-851.

47 J. Wilson, Political Organizations (1973) at 275. As cited in Samford, supra note 4 at 852.

48 Ibid.
on policy makers if their preferences are strong and commonly held. Politicians ignore strong public opinion on important issues, such as tobacco control, at their peril, as to do so may cost them votes and, ultimately, their job, at election time.

Supply Side of Political Markets

Policy makers represent the supply side of the political market. According to this economic model of legislative behaviour, legislators are motivated solely by self-interest.\(^4^9\) The main goal of elected policy makers is to get re-elected and preserve the benefits flowing from office. Public choice theory argues that legislators supply interest groups with demanded legislation and other regulatory goods in exchange for the resources they need to secure their position in office. In light of this fact, policy makers are unwilling to take a course of action that might jeopardize their support among key interest groups without first weighing the electoral repercussions of such an action.

Predicting Legislative Outcomes

Public choice theory offers a positive model for predicting legislative outcomes.\(^5^0\) This theory suggests that interest groups and policy makers begin by examining the costs and benefits of specific legislative proposals. The legislative outcomes of any particular issue can be predicted based on the incidence of costs and benefits. This model predicts that where both costs and benefits are distributed across the population, it is hard to build consensus among interest groups that are likely to be widely dispersed and unorganized. As a result, legislative action is unlikely. If a law is enacted, the legislature will generally

\(^{49}\) See generally: Public Choice II, supra note 5 at 247-273. For an overview of the supply side of political markets see: Faber, supra note 16 at 891; Samford, supra note 4 at 853-4; Croley, supra note 5 at 42.

\(^{50}\) See generally: Samford, ibid. at 860.
fail to monitor the legislation's efficacy or to update it.\textsuperscript{51} Similarly, policy-makers are unlikely to enact legislation where costs are concentrated and benefits are widely distributed. In this situation, opposition groups are usually stronger than groups who support legislative action. This results in no legislation or delegation to an agency which may become “captured” over time by the interests of the regulated group.\textsuperscript{52}

In situations where benefits are concentrated and costs are dispersed, interest group activity is much more likely. Groups that support the proposed policy will mobilize to ensure that the benefits are received. The result is rent-seeking legislation or self-regulation.\textsuperscript{53} When both benefits and costs are concentrated, the legislative process is likely to be contentious and hard-fought between competing interest groups. In this scenario, the winner gains a benefit at the expense of the loser’s increased burden. For policy makers, this situation presents a no win situation and, as a result, delegation to a governmental agency or department is even more likely.\textsuperscript{54}

2. DISCUSSION – PUBLIC CHOICE THEORY AND FEDERAL TOBACCO CONTROL LEGISLATION

In the context of tobacco regulation, the interest groups which form the demand side of the political market can be classified as either pro-health or pro-tobacco. For these interest groups, the most sought after regulatory “goods” are favourable tobacco control policies. Government, made up of legislators, cabinet, caucus and bureaucrats, is the

\textsuperscript{51} Eskridge, supra note 4 at 289. See also: Samford, \textit{ibid.} at 859.

\textsuperscript{52} Eskridge, \textit{ibid.}

\textsuperscript{53} \textit{Ibid.}
supplier of these regulatory "goods." As described by one anti-smoking lobbyist, "[G]overnments in democracies are like footballs. They move up and down the field depending upon (a) how much force is applied to them and (b) how hard one kicks them. They seldom move, especially on tobacco, without real pressure." This section will analyze how the pro-health and pro-tobacco groups have applied pressure to the government as a whole and, in particular, to the Minister of Health, in order to either overcome resistance or build consensus among government to the policies which the health community or the tobacco industry want the government to supply.

2.1 Symbolic Legislation - (1908-1994)

In the early 1900s, Parliament debated several resolutions and bills prohibiting cigarettes, but none became law. Instead, the government enacted the Tobacco Restraint Act, which prohibited cigarette sales to people under the age of 16. This Act was essentially symbolic legislation as it was rarely enforced and never updated in its 86 year history. As this section will demonstrate, this legislative outcome was predictable under public choice theory.

Pro-health Interest Groups

In the early 1900s, at the time when cigarettes were just starting to become popular in Canada, there was already a strong, persistent, well-coordinated anti-smoking

54 Ibid.


56 R. Cunningham, Smoke and Mirrors: The Canadian Tobacco War (Ottawa: IDRC Books, 1996) at 33-37. [hereinafter Smoke and Mirrors].

lobby. The opposition to tobacco smoking was led by the Dominion Women’s Christian Temperance Union (WCTU), one of the largest non-denominational organizations in Canada. At the beginning of the century, the WCTU had an active membership of 10,000 women and by 1914 membership had swelled to 16,838. The WCTU was actively lobbying the government to enact legislation to prohibit both tobacco and alcohol.

The fact that the WCTU existed as a special interest lobby meant that this regulation-demanding group had to first overcome the problems of collective action as described by Olsen. In this case, members of the WCTU were motivated to come together to lobby for prohibition based on a strong moral and ideological belief that cigarettes, like alcohol, were harmful to human health and to the human spirit. Cigarette smokers, according to members of this group, were seen as both victims and sinners who needed to be protected and saved from the evils of tobacco. As a result of this strong belief, the WCTU was able to form a special interest lobby group and to exert some pressure on the government to enact tobacco control legislation by "besieging Parliament with petitions, memorials and deputations."

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58 Smoke and Mirrors, supra note 56 at 32.
60 Ibid.
61 Smoke and Mirrors, supra note 56 at 32.
62 Cook, supra note 59 at 115.
**Pro-tobacco Interest Groups**

Tobacco farmers were strong opponents of tobacco control measures given that regulation or prohibition would have a direct impact on their income. At the turn of the century, tobacco farming in Canada was starting to prosper and the federal government worked hard to encourage the domestic growth of this industry. From 1870 to 1910, the domestic production of tobacco grew more than tenfold from 726,000 kg to 7,938,000 kg. Despite this tremendous growth, two-thirds of tobacco used in Canada during this time still had to be imported. It was not until the 1930s that tobacco farmers started to produce tobacco in large quantities in what is now known as the tobacco belt in southwestern Ontario.

The prohibition movement was very strong in the early 1900s and the threat of alcohol prohibition was a concern to tobacco companies. Fearing that an alcohol ban would make it easier to argue that cigarettes should also be banned, tobacco companies financially supported liquor interests to fight the prohibition movement. At this point in time, the Canadian tobacco manufacturing industry was dominated by one company - the

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63 Smoke and Mirrors, supra note 56 at 181.

64 Ibid. at 185. Note: In the early 1880s, the federal government's National Policy stimulated domestic growth by setting taxes on domestic tobacco at lower levels than the tariffs on imported tobacco. Note: In 1906, the Department of Agriculture created the Tobacco Branch which, three years later, established a research station in Harrow, Ontario.

65 Ibid.

66 Ibid.

67 Ibid.

68 Ibid. at 33.
Montreal based American Tobacco Company of Canada Ltd. (ATC). Imperial Tobacco was formed in 1908 as a result of a merger between ATC and Empire Tobacco Company (ETC). The rest of the tobacco industry was comprised of many small, mainly Canadian owned manufacturers, including the family owned Montreal firm, MacDonald Tobacco. MacDonald Tobacco became RJR-MacDonald (RJR) in 1974.

Legislative Outcome

The debate in Parliament in the early 1990s over cigarette prohibition reflected the positions of these two competing interest groups. One MP opposing prohibition argued that it would hurt the "flourishing establishments that manufacture [cigarettes], and which thereby carry on legitimate trade." On the other side, MPs supporting prohibition argued that cigarette smoking was harmful to body, mind and soul. MP Robert Bickerdike’s introduction in 1903 of a resolution to ban cigarettes was a prime example of the strong prohibition sentiment in Parliament in the early 1900s. In support of his resolution, Bickerdike made the following statement:

"[T]he smoking of cigarettes has been proved by overwhelming testimony to be productive of serious physical and moral injury to young people; impairing health, arresting development, weakening intellectual power, and thus constituting a social and national evil."  

69 Ibid. at 20, 33. Note: ATC dominated the domestic manufacturing industry accounting for 80% of all cigarette sales in Canada. ATC was created by the merger of the American Cigarette Company and D. Ritchie & Company, a Montreal firm founded in 1885. Over the next few years, ATC acquired controlling interest in the following cigarette manufacturers operating in Canada: Empire Tobacco Company (ETC), B. Houde Company, Joliette Tobacco Company and National Tobacco Company.

70 Ibid. Note: The British company, British-American Tobacco Co., now controlled Imasco.

71 Ibid. at 21. Note: MacDonald Tobacco was founded in 1858. It was a family owned business until it was sold to R.J. Reynolds in 1974.

72 Ibid. at 37. See: Demers, L.P. House of Commons debates. (June 20, 1904) at 5137.

73 Ibid. at 34. See: Bickerdike, R. House of Commons debates. (April 1, 1903) at 820.
From 1903 to 1907, the federal government debated several resolutions and one bill which supported the prohibition of cigarettes. Each time the government debated the merits of prohibition it had to weigh the costs and benefits of taking action. It is important to note that at this point in time the health consequences of tobacco use were not well understood by scientists let alone politicians. For instance, the medical opinion of Dr. Christie, which was cited in support of MP Bickerdike’s resolution for prohibition, stated that:

“[I]t is the most universal opinion of medical men that the cigarette habit is most deleterious to the young, producing physical degredation, and the habit should be denounced in trumpet tones by all who have the welfare of humanity at heart.”

Prime Minister Sir Wilfrid Laurier, while he supported legislation prohibiting the sale of tobacco to minors, voted against Bickerdike’s resolution for prohibition on the grounds that smoking was not injurious to adults. This lack of knowledge about the harmful effects of tobacco were echoed in statement made by other MPs in Parliament during the early to mid 1900s.

The government, weighing the costs and benefit of enacting the prohibition, had to consider the interests of both groups. In light of the medical opinions of the day, the benefits of cigarette prohibition would be to protect minors from the health and moral

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74 Ibid. at 34. In 1904, the House of Commons agreed to a resolution supporting prohibition of cigarettes. MP William Maclaren introduced Bill 128 to enact the resolution. The Bill was approved at second reading and Committee stage; however, it failed to pass final reading before the end of Parliament. In 1907 and 1908, the House of Commons debated resolutions introduced by MP Richard Blain supporting prohibition.

75 R. Holmes. House of Commons Debates. (April 1, 1904) at 826. As cited in Ibid. at 36 (S&M)

76 Smoke and Mirrors, ibid. at 34.

77 Ibid. at 36. Note: One MP stated in Parliament that “it has not been proved that tobacco is a poison. It is no worse to smoke tobacco than it is to use hundreds or thousands of other articles that are in common use in the country.”
consequences of tobacco use. These benefits would be widely dispersed to a group of people who did not hold political power because they could not vote. On the other hand, the costs of cigarette prohibition (loss of sales, jobs, farm income) were concentrated in a relatively few number of manufacturers and farmers. In the end, the government's failure to supply the WCTU with the prohibition they sought is a predictable outcome under public choice theory. In what appears to be a contradiction of the public choice model, the unorganized and dispersed interests of the tobacco farmers and the manufacturers won over the organized interests of the anti-smoking lobby. One possible explanation for this is the fact that the WCTU could not offer the government electoral "goods" in exchange for favourable tobacco control legislation given that women at this point in time could not vote. In addition, the tobacco manufacturers had more financial resources to oppose prohibition than the WCTU had to lobby for the legislation. The fact that the WCTU did not have the economic resources to "purchase" favourable tobacco control legislation, whereas the tobacco manufacturers did, was reflected in the words of one WCTU activist:

"On this occasion, the women were defeated by the counter-campaign staged by the Tobacco Trust of Montreal with $20,000 at its disposal. We had no money to spend, nor did we ever dream that money was needed to secure passage of a Bill which was for the benefit of children and the saving of the race from this evil. One learns a lot when lobbying."\(^{78}\)

The WCTU kept the issue of prohibition alive by having its members write letters, send telegrams, prepare publications, gather medical opinions, meet with MPs and organize petitions.\(^{79}\) In 1908, the government responded to this pressure by passing the

\(^{78}\) See generally Cook, supra note 59 at 61.
Tobacco Restraint Act, which restricted sales of tobacco products to youth under age 16 and set penalties for offences.\(^9\) By enacting legislation, which aimed to protect minors from the evils of tobacco, the government tried to appease the WCTU with symbolic legislation. By the end of WWI, cigarettes and alcohol had become socially acceptable and, as a result, the prohibition movement against both substances died.\(^8\) Given the absence of organized interest, the Tobacco Act became nothing more than symbolic legislation as it was rarely enforced and never updated in its 86 year history.\(^8\)

2.2 Self-regulation by the Tobacco Industry - (1960s to late 1980s)

During the 1960s, health concerns about cigarette smoking started to grow. The 1964 U.S. Surgeon General’s report on smoking and health legitimized the concerns of the health community and forced the government to start considering a policy response to the tobacco issue.\(^8\) In light of the mounting scientific evidence linking tobacco to cancer and other serious diseases, the tobacco industry adopted a strategy of denial, which they have continued to maintain until the late 1990s.\(^8\) Over the next three decades, Parliament

\(^79\) Smoke and Mirrors, supra note 56 at 37.

\(^80\) Tobacco Restraint Act, supra note 57.

\(^81\) Smoke and Mirrors, supra note 56.

\(^82\) Ibid. at 35. Note: The Tobacco Restraint Act was finally repealed in 1994 and replaced by the Tobacco Sales to Young Persons Act.


\(^84\) M.O. Wilson, The Politics of Tobacco in Canada, Non-Smoking: Sign of the Times (LL.M. Thesis, Queen’s University, 1991) [unpublished] at 8-9. [hereinafter Politics of Tobacco in Canada]. Note: Philip Morris, the largest cigarette manufacturer in the United States, launched a new Internet site in October 1999. The company states that there is “overwhelming medical and scientific consensus that cigarette smoking causes lung cancer, heart disease, emphysema and other serious diseases in smokers.” The
considered several tobacco control initiatives, including Bill C-75 (1963) and Bill C-248
(1971). Neither the Liberal nor the Conservative governments, however, passed
legislation, preferring instead to let the tobacco manufacturers regulate their own
activities through a voluntary advertising code.85 This period of self-regulation by the
industry was a predictable outcome under a public choice analysis of the political process
given the rising economic and political power of the tobacco industry and the slow
development of the anti-smoking movement during this time.

Pro-tobacco Interest Groups

Tobacco farming in Canada took off after the 1930s.86 By the 1950s, Canadian
tobacco farmers were growing 99% of the tobacco used in Canadian cigarettes, and 90%
of all tobacco cultivation was concentrated in southwestern Ontario near the towns of
Delhi and Tillsonburg.87 A small amount of tobacco was also grown in Quebec, New
Brunswick, Nova Scotia and PEI.88 Tobacco made a huge contribution to the local
economies of four Ontario counties, Haldimand-Norfolk, Brant, Elgin and Oxford, as
well as to the Ontario economy as a whole.89 The economic importance of the tobacco

85 See generally Chapter 2.
86 Smoke and Mirrors, supra note 56 at 183. Note: The Flue-Cured Tobacco Marketing Association of
Ontario was formed in 1936. In 1957, the Ontario Flue-Cured Tobacco Growers' Marketing Board was
created.
87 Ibid. at 180-181.
88 Ibid. See also: P. Pross & I. Stewart, “Breaking the Habit: Attentive Publics and Tobacco Regulation” in
Breaking the Habit]. Note: In 1961, 139,638 acres of land were under tobacco cultivation on 7,639 farms.
89 Ibid. See also: D. Studlar, “Diffusion of Innovations Across International Boundaries: Tobacco Control
in North America” (April 2000) [unpublished]. [hereinafter Tobacco Control in North America]. Note:
industry to these ridings in Ontario, as well as in Montreal, P.E.I. and the Annapolis Valley, gave it political significance.\textsuperscript{90}

As domestic production increased, tobacco manufactures were guaranteed a secure domestic supply of tobacco leaf at low prices.\textsuperscript{91} This fact, coupled with rising cigarette consumption, meant prosperity for tobacco manufacturers and farmers. In 1968, tobacco was the second largest Canadian agricultural export behind wheat.\textsuperscript{92} In the same year, tobacco taxes generated approximately $5.8 million in federal tax revenue, which accounted for 6\% of the federal government's total revenue for the year.\textsuperscript{93} At this time, the tobacco industry employed 9,500 full-time and 40,000 seasonal workers in production and 10,500 people in processing.\textsuperscript{94}

As tobacco industry grew in economic importance during the 50s and 60s, control of Canada's tobacco manufacturing industry was becoming more and more concentrated in a small number of multinational corporations. During this time, Imperial's market share had grown through its acquisition of a number of other Canadian manufacturers.\textsuperscript{95}

\footnotesize{Ontario became the fourth largest tobacco producer in North America, ranking behind North Carolina, Kentucky and Tennessee.}

\textsuperscript{90} Breaking the Habit, supra note 88 at 131.

\textsuperscript{91} Smoke and Mirrors, supra note 56 at 181.

\textsuperscript{92} Politics of Tobacco in Canada, supra note 84 at 22.

\textsuperscript{93} Federal Tax Revenue, supra note 135. Also see: Politics of Tobacco in Canada, supra note 84 at 23.

\textsuperscript{94} Politics of Tobacco in Canada, ibid. at 22.

\textsuperscript{95} Smoke and Mirrors, supra note 56 at 20. Note: From the 1920 to the 1950s, Imperial acquired controlling interest in the following tobacco companies: General Cigar Co. (1921), a firm that included another company, S. Davis & Sons; Tuckett Tobacco Co. (1930), which controlled Tobacco Products Company of Canada and Philip Morris Co. Ltd.; Landau & Cormack Ltd. (1936); L.O. Grothe (1942); Imperial Tobacco Company (Newfoundland) Ltd. (1949). Imperial also purchased Canadian rights to certain brands and trademarks held by British-American Tobacco in 1921 and from Brown & Williamson in 1950.

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In 1970, Imperial changed its name to Imasco (Imperial Associated Companies). Benson & Hedges became a more important player in the Canadian manufacturing industry after its merger with U.S. based Philip Morris in 1954. In 1961, Benson & Hedges opened a new cigarette factory near Brampton, and in 1962, it purchased Tabacofina of Canada, who were the makers of Belvedere. In 1957, the British-controlled Rothmans of Pall Mall started operations in Canada. Rothmans acquired the brands Craven “A”, Black Cat and Sportsman through its acquisition, in 1958, of Rock City Tobacco Company, which had been operating in Quebec City since 1899. In 1986, Rothmans merged with B&H, creating Rothmans, Benson & Hedges (RBH).

As the industry’s economic power grew, so too did its political power. All three companies had political connections. For example, Claude Castonguay, a former Quebec Minister of Social Affairs and Senator, sat on Imasco’s Board of Directors during the 1970s. In more recent years, directors have included Paul Martin (current Minister of Finance), Bill Bennett (former Premier of British Columbia), Torrance Wylie (senior official with the Liberal Party) and Bernard Roy (former Principal Secretary to Prime

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96 Ibid. at 20.
97 Ibid. at 22.
98 Ibid.
99 Ibid.
101 Smoke and Mirrors, supra note 56 at 21.
Minister Brian Mulroney). During most of the 1960s, former Prime Minister Louis St. Laurent (1948-1957) was the chairman of Rothmans’ Board of Directors. Maurice Sauve, a former Liberal cabinet minister and husband of Jeanne Sauve (who later became the Governor-General) sat on the Benson & Hedges (Canada) Board of Directors prior to the company’s merger with Rothmans in the 1980s.

In the mid-1960s, the tobacco manufacturers started to work together to address the government’s growing concerns about the health implications of tobacco. Prior to this, the manufacturers did not respond as a group to proposed government interventions for two main reasons. First, there was intense competition among the companies prior to the consolidation of the industry during the 40s and 50s. Second, manufacturers were reluctant to work together on anything for fear that the Competition Bureau which is charged with monitoring collective activities might consider their actions collusive or otherwise anti-competitive.

This all changed after the federal government requested that the manufacturers present their views at the 1963 National Conference on Smoking and Health as a group rather than as individual companies. Ironically, this became the catalyst for the

102 Ibid.
103 Ibid. at 23.
104 Ibid.
106 Ibid.
107 Ibid.
108 Ibid.
formation of the tobacco coalition. In response to the government’s request, the four major Canadian tobacco manufacturers, Imperial, MacDonald Tobacco, Benson & Hedges and Rothmans voluntarily formed the Ad Hoc Committee on Smoking and Health. In June 1964, the Ad Hoc Committee issued its first ten point advertising code. In 1969, this Ad Hoc Committee presented another brief to a Standing Committee of Health, Welfare and Social Affairs (Isabelle Committee).

Health Minister John Munro introduced Bill C-248, the Cigarette Products Act in 1971, which would have prohibited tobacco advertising, required health warnings on tobacco packages, required disclosure of tar and nicotine yields on cigarette packages, and allowed the government to set maximum limits for nicotine and other constituents. The tobacco manufacturers, who were already used to working together, hammered out a revised advertising code which addressed some of the government’s concerns. For instance, the manufacturers agreed to stop advertising cigarettes on the radio and television; to restrict advertising expenditures to 1971 levels; to print health warnings on tobacco packages, and to limit the maximum tar and nicotine yield per cigarette to 22 mg

109 Ibid.


111 Ibid.

and 1.6 mg per cigarette respectively. As a result of these voluntary measures, Bill C-248 died on the order paper.

In 1971, the Ad Hoc Committee changed its name to the Canadian Tobacco Manufacturers Council (CTMC). The CTMC became a formal vehicle for promoting the interests of the industry as opposed to individual company interests. It was now the acknowledged leader of the whole industry including tobacco farmers, wholesalers, unions and cigarette manufacturers. The CTMC’s budget in the early 1970s was approximately $500,000 per annum. For the manufacturers, the solution was to address the government’s concerns by voluntarily implementing restrictions on advertising and promotion. The industry recognized that it would be obliged to yield to one or two of the government’s demands each year as failure to do so could provoke legislation that was more damaging to their economic interest.

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114 See generally Chapter 2 at 1.2.

115 Government Relations to 1973, supra note 105.

116 Ibid.

117 Ibid.

118 Ibid. Note: According to industry documents, the CTMC political policy during this time was to work effectively with various levels of federal government (and provincial government as required) to preserve maximum freedom of activity for the industry while fully recognizing government responsibility for a perceived health problem. The CTMC also admitted it was not “desirous of ‘pioneering’ voluntary restraints which could result in pressure being brought to bear on the tobacco industries in other countries.”

119 Ibid.
Prior to the mid-1980s, health groups did very little lobbying for anti-tobacco legislation.\textsuperscript{120} One reason for this was the public perception that smoking was a right and that government should not interfere with an individual’s decision on whether or not to smoke.\textsuperscript{121} Throughout the 1960s, the government’s objective was to focus on educating the individual about the health hazards of smoking.\textsuperscript{122} During this time, the major health organizations took a similar stance in relation to the tobacco issue. At the 1963 National Conference on Smoking and Health, the Canadian Medical Association (CMA) recommended that the government openly recognize the risks of smoking and called for government to increase public awareness of the risks of tobacco consumption through the dissemination of educational materials and health programs.\textsuperscript{123} The Canadian Cancer Society (CCS), as well as the Association des Medecine de langue francaise du Canada and the Canadian Heart Foundation made similar recommendations.\textsuperscript{124}

As the 1970s progressed, the nonsmokers’ rights movement grew. Two important health organizations were formed in 1974. The first was the Non-Smoker’s Rights Association (NSRA) which began as a small volunteer group dedicated to achieving clean air for non-smokers.\textsuperscript{125} The NSRA, under executive director Garfield Mahood, was

\begin{footnotes}
\footnote{120}{Smoke and Mirrors, supra note 56 at 62.}
\footnote{121}{Breaking the Habit, supra note 88 at 131.}
\footnote{122}{Politics of Tobacco in Canada, supra note 84 at 12.}
\footnote{123}{Ibid.}
\footnote{124}{Ibid.}
\footnote{125}{Smoke and Mirrors, supra note 56 at 63.}
\end{footnotes}
the driving force behind the lobby for Bill C-51 (the *Tobacco Products Control Act*)\textsuperscript{126} and Bill C-204 (the *Non-Smokers’ Health Act*)\textsuperscript{127}. The second organization to form in 1974 was the Canadian Council on Smoking and Health (CCSH).\textsuperscript{128} The CCSH was an umbrella group for independent health organizations to co-ordinate their strategies against the tobacco industry. The Canadian Medical Association (CMA), the Canadian Cancer Society (CCS) and the Canadian Lung Association (CLA) joined the CCSH in its first year. While the CCSH provided a vehicle for the health lobby to keep in touch with one another, it lacked, until the early 1980s, the resources to play an effective role in advocating for tobacco control legislation.\textsuperscript{129} The CCSH became a more effective organization after the appointment of Victor Lachance as the organization’s full-time executive director in 1987.\textsuperscript{130}

At this point, anti-smoking activists recognized the importance of government policy as a tool in tackling the tobacco epidemic.\textsuperscript{131} They also recognized that health organizations could play an important role in the anti-smoking movement by providing legitimacy to the movement derived from their experience in health issues. In addition, these groups had a large membership and financial resources which could be mobilized to

\textsuperscript{126} See: Chapter 2. Note: Bill C-51, the *Tobacco Products Control Act* (TPCA), came into force on January 1, 1989, it marked the first time that federal legislation regulated the advertising, promoting, labelling, packaging and manufacturing of tobacco products. The purpose of the Act was to protect the health of Canadians from the detrimental health effects caused by tobacco consumption.

\textsuperscript{127} See: Chapter 2. Note: Bill C-204, the *Non-Smokers’ Health Act*, which was introduced as a private member’s bill in 1986 by New Democrat MP Lynn McDonald, proposed to restrict smoking in federally regulated workplaces, as well as on common carriers under federal jurisdiction.

\textsuperscript{128} Breaking the Habit, *supra* note 88 at 136.

\textsuperscript{129} *Ibid.*

\textsuperscript{130} *Ibid.*
pressure the government on tobacco control issues. The main obstacle for anti-smoking groups was motivating the large health and professional groups to mobilize and take action on the tobacco issue. The Canadian Cancer Society (CCS), for instance, did not see itself as an anti-smoking group. Rather, it saw its primary purpose as being health-care delivery and research and not public policy advocacy. Traditionalists within the CCS, as well as other major health and medical groups, were reluctant to engage in public policy advocacy for fear that it would jeopardize their charitable status.

**Legislative Outcome**

If the government had passed legislation such as Bill C-248 to protect public health, the benefits would have been distributed to the public at large. The costs of regulation, on the other hand, would have been concentrated on the economic and politically important tobacco industry. The tobacco farmers and manufacturers argued that restrictive tobacco legislation would cost jobs and hurt the economy. The government was very sensitive to this argument given that it collected approximately $500.8 million dollars from tobacco sales in 1968-69. The manufacturers also used the rhetoric of personal freedom and individual choice to shape the debate on smoking and to counter anti-smoking activists’ calls for government regulation of cigarettes.

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131 *Ibid.* at 133.


The manufacturers were able to promote their collective interests through the CTMC which, by the end of the 1960s, was an active and effective lobby group. As predicted by Olson's theory on group behaviour, the high degree of organization of the tobacco industry and the power of this group was due in large part to the oligopolistic nature of the tobacco industry.\textsuperscript{136} According to Olson, business interests, such as those represented by the CTMC, can organize and act efficiently for the following reason:

"[T]hese industries will normally be small enough to organize voluntarily to provide themselves with an active lobby – with the political power that ‘naturally and necessarily’ flows to those that control the business and property of the country."\textsuperscript{137}

In contrast, there was no equivalent organization to represent anti-smoking interests to the government. This too fits with Olson's theory as he writes that:

"[T]he laboring, professional, and agricultural interests of the country make up large, latent groups that can organize and act effectively only when their latent power is crystallized by some organization which can provide political power as a by-product."\textsuperscript{138}

At this point in time, the power of medical, health and other professional groups to effectively represent the public interest in the anti-smoking debate remained latent. The power of these groups would not be crystallized until the mid 1980s. As a result, the interests of the organized tobacco industry won over the unorganized public interest, which was represented by only a few peripheral anti-smoking groups. The government supplied the tobacco industry with the favourable tobacco policies it sought – self-regulation.

\textsuperscript{136} Olson, \textit{supra} note 23 at 143.

\textsuperscript{137} \textit{Ibid.}

\textsuperscript{138} \textit{Ibid.}
From the mid 1960s until the late 1980s, the tobacco industry’s advertising activities were regulated only by its voluntary code of conduct. Industry self-regulation, however, had some very serious limitations. First, in order for a tobacco manufacturer to be bound by the code it had to be a member of the CTMC, and membership in this organization was voluntary. Second, enforcement of the code was dependent on a complaint being filed by one tobacco manufacturer against an alleged violation by another manufacturer. There was no legal avenue for individual citizens to force manufacturers to comply with their own code. The largest drawback of the code was the fact that the tobacco manufacturers, as documented in the Non-Smokers’ Health Association’s (NSRA) *Catalogue of Deception*, frequently violated their advertising code of conduct.

From the industry’s standpoint, self-regulation was desirable because it allowed the CTMC to negotiate directly with the government about the extent and degree of advertising restrictions. In addition, the negotiation process also served to legitimize the role of the CTMC in representing the interests of the tobacco industry. Self-regulation also required regular communication between the CTMC and government which, in time, resulted in familiarity and the formation of ties between industry leaders and government officials. In internal confidential documents, the CTMC described its relationship with

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139 Politics of Tobacco in Canada, *supra* note 84 at 21. Note: The weakness in this system was illustrated when Rothmans, Benson & Hedges temporarily withdrew from the CTMC in 1985


142 Politics of Tobacco in Canada, *supra* note 84 at 76-77.
Liberal Health Minister, Marc Lalonde (1972 to 1977) as “co-operative but firm”\textsuperscript{143} and its relationship with the senior Deputy Minister as “understanding and co-operative.”\textsuperscript{144} Imasco’s president, Paul Pare, described his company’s relationship with the federal government in a letter written in 1978 to the president of B&H.

“Our relationship with the federal government – our prime public – is of a reasonable order. The marketing of our products has been orderly and successful. We have tried both militant and diplomatic approaches. The former was a failure, the latter, in my opinion, a success.”\textsuperscript{145}

The building of these ties with government was central to the industry’s ability to maintain such a long period of self-regulation. These ties would also be critically important during the industry’s pending battle to oppose Bill C-51 and Bill C-204.

2.3 Government Regulation - (1988 to present)

The era of industry self-regulation came to an end with the passage of the Non-Smokers’ Health Act (NSHA) and the Tobacco Products Control Act (TPCA) in 1988. At first blush, it would seem contrary to the public choice model that the government would pass public interest legislation such as the NSHA, the TPCA and, later, the Tobacco Act (TA). The objectives of the TPCA, for example, stated that the purpose of the Act was to protect the health of Canadians; to protect young persons and others from inducements to use tobacco products and consequent dependence on them; and to enhance public awareness of the hazards of tobacco use.\textsuperscript{146} In order for government to

\textsuperscript{143} Government Relations to 1973, \textit{surpra} note 105.

\textsuperscript{144} \textit{Ibid.} Note: The industry maintained their amiable relationship with government by having company chief executives met with the Minister every six months and with the Deputy Minister or Assistant Deputy Minister every quarter.

\textsuperscript{145} Pare Letter, \textit{supra} note 105.

\textsuperscript{146} \textit{Tobacco Products Control Act}, R.S.C. 1985, c. 14 (4\textsuperscript{th} Supp.), s. 3. [hereinafter TPCA].
achieve these ends (reduction in tobacco consumption) legislators had to support the means, which included prohibiting advertising, restricting promotions and sponsorship, implementing warning requirements and enforcing penalty sections for infringements. Despite this apparent contradiction, I will argue below that the passage of Bill C-51 is consistent with the public choice model.

**Pro-Tobacco Interest Groups**

Throughout the 1980s, the CTMC remained the tobacco industry’s principal lobby association. Its membership at this time consisted of three foreign owned and controlled multinational corporations: Imperial, RBH and RJR. These three companies controlled 98% of the Canadian tobacco industry.\(^{147}\) Imperial was still Canada’s largest tobacco manufacturer. At the end of the 1980s, its share of the Canadian market was 54%,\(^ {148}\) from 37% in 1975.\(^ {149}\) Its parent company, British American Tobacco (B.A.T.), is currently the world’s second largest cigarette manufacturer.\(^ {150}\) With the merger of Rothmans and B&H in 1986, RBH became the second largest Canadian manufacturer.\(^ {151}\)

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\(^{148}\) Ibid. at 478. See also: “Multinational Tobacco Companies in Canada” in *Tobacco in Canada*, online: Physicians for a Smoke Free Canada http://www.smoke-free.ca/pdf/1/TobaccoInCanada.pdf, (date accessed: 16 April 2000). [hereinafter Tobacco in Canada]. Note: Imperial’s leading tobacco brands are Player’s and DuMaurier which together account for 60% of Canadian sales. Over the last decade, its market share has risen to approximately 69%.

\(^{149}\) J.B. Claxton, “Smoking and Health in Canada – 1976” (June 18, 1976), CD ROM: Tobacco Documents (Physicians for a Smoke Free Canada, April 13, 2000).

\(^{150}\) Statement of Claim, supra note 100. Note: B.A.T. manufactures cigarettes in over 50 countries and sell cigarettes in approximately 150 countries.

\(^{151}\) Claxton, supra note 149. Note: In 1975, Rothmans had a market share of 28%, B&H had a market share of 15% and MacDonald had a market share of 20%.
By the end of the 1980s, its share of the Canadian market was 27%.\textsuperscript{152} RBH is currently owned and controlled by Philip Morris International (the largest U.S. tobacco manufacturer) and Rothmans Inc. (a company based in the Netherlands).\textsuperscript{153} RJR was the third largest Canadian manufacturer with a market share of 17% at the end of the 1980s.\textsuperscript{154} Until recently, RJR has been owned and controlled by RJR Nabisco Inc. (RN), a large U.S. based conglomerate.\textsuperscript{155} In March 1999, Japan Tobacco Inc. (JT) acquired RJR in its purchase of RN’s non-US tobacco operations. This acquisition made JT the third largest global tobacco company.\textsuperscript{156}

During the 1980s, tobacco sales in Canada had begun to decline as the smoking prevalence rate dropped from 35% in 1981 to 31% at the end of the decade.\textsuperscript{157} In 1980, domestic cigarette sales totalled 64,343,300,000 and, by 1988, sales had dropped to 51,025,412,800.\textsuperscript{158} Despite declining sales, the tobacco manufacturers’ profits continued

\textsuperscript{152} RJR-MacDonald (SCC), \textit{supra} note 147 at 478. See also: Tobacco in Canada, \textit{supra} note * . Note: RBH’s market share has decreased over the years, and it now stands at approximately 18.5%. RBH manufacturers Benson & Hedges, Craven “A”, Rothmans, Number 7, Belvedere, Mark Ten, Viscount, Dunhill, Peter Stuyvesant, Belmont and Canadian Classics.

\textsuperscript{153} “The Tobacco Industry”, online: British Columbia Ministry of Health http://www.tobaccofacts.org (date accessed: October 2, 1999). [hereinafter Tobacco Industry]. See also: Statement of Claim, \textit{supra} note 100 at 45. Note: At present, Rothmans Inc. owns 60% of the shares in RBH and Philip Morris International Inc. owns the remainder.

\textsuperscript{154} RJR-MacDonald (SCC), \textit{supra} note 147 at pg. 478. See also: Tobacco in Canada, \textit{supra} note *. RJR’s market share is currently approximately 12.5%. RJR’s manufacturers Export “A”, Vantage, Macdonald and Contessa Slims.


\textsuperscript{156} \textit{Ibid.} JT control seven of the world’s top twenty cigarette brands. In the years ending on March 31, 1999, JT had sales of US $32 billion. As a result of this acquisition, the holding company R.J. Reynolds International B.V. was renamed JT International B.V.

to climb.\textsuperscript{159} In 1980, Imperial recorded profits of $99 million and by 1988 their profits had risen to $308 million.\textsuperscript{160} Similarly, RBH’s profits climbed from $21.52 million in 1986 to $54.55 million in 1988.\textsuperscript{161} This trend continued throughout the 1990s. Although sales had dropped to 45,484,820,710\textsuperscript{162} in 1997, both Imperial and RBH recorded record profits of $775 and $112 million respectively.\textsuperscript{163} Manufacturers have been able to maintain profit levels in spite of declining sales by increasing mechanization of the manufacturing process and by decreasing direct employment.\textsuperscript{164} The tobacco manufacturers, however, have been careful not to increase profits through large price increases. From the 1950 until early 1980s, tobacco became more affordable as the real price of tobacco products in Canada decreased while personal disposable income increased significantly.\textsuperscript{165} Research has shown that as the real price of cigarettes increase, tobacco consumption decreases.\textsuperscript{166} The decrease in consumption is most significant

\begin{footnotesize}
\begin{enumerate}
\item [\textsuperscript{159}] “Cigarettes in Canada: Earnings (pre-tax profits), 1986-1997,” online: Physicians for a Smoke-Free Canada http://www.smoke-free.ca/factsheets/pdf/earnings.PDF (last modified July 1998). [hereinafter Earnings]. Note: Profit levels are not known for RJR because, as a wholly owned subsidiary of RN, its earnings were not reported separately.
\item [\textsuperscript{160}] Ibid.
\item [\textsuperscript{161}] Ibid.
\item [\textsuperscript{162}] Domestic Sales, supra note 158.
\item [\textsuperscript{163}] Earnings, supra at note 159.
\item [\textsuperscript{164}] Tobacco in Canada, supra note 84. Note: Industry Canada estimates that direct employment in this sector has dropped by 12\% between 1990 and 1996 (from 4,483 jobs to 3,943 jobs). The tax reduction in 1994 has also contributed to increased profit levels.
\item [\textsuperscript{166}] Ibid.
\end{enumerate}
\end{footnotesize}
among youth who are more price sensitive than among older and more addicted smokers. Tobacco manufacturers realize that in order to maintain a long-term market for their products they must continue to attract new smokers to replace those who die from tobacco-related diseases even if this means keeping prices down.

In 1995, the world-wide revenues of tobacco transnationals operating in Canada totalled CA $168 billion. The profitability of the Canadian manufacturers, coupled with the corporate wealth of their parent companies, translates into enormous economic and political power. As demonstrated during their campaign to defeat Bill C-51, the tobacco industry has the financial ability to hire politically well-connected lobbyists, lawyers, public relations specialists and advertising agencies in an attempt to outbid the pro-health interest groups who were lobbying for the passage of Bill C-51.

Pro-health Interest Groups

After the defeat of Bill C-248 in 1971, anti-smoking groups started actively pressing the government for an advertising ban. It took almost two decades, however, for the government to introduce legislation to regulate the manufacture and sale of cigarettes. Given the tobacco industry’s historic ability to demand favourable legislative outcomes, Bill C-51 would not have been put on the governmental agenda, let alone passed by Parliament, unless the pro-health organizations were able to efficiently and effectively mobilize their resources.

167 Smoke and Mirrors, supra note 56 at 24. Note: In 1995, Philip Morris had global annual revenues of US $65 billion; BAT, GB £21 billion; R.J. Reynolds, US $15 billion; and Rothmans, GB £7 billion.

168 Ibid. at 68.
In the early 1980s, both the large institutional health organizations and the small anti-smoking groups started to work together to advocate change. There were a number of factors which contributed to crystallizing the latent power of the health and medical community at this point in time. A key factor was the change in public opinion towards cigarettes and tobacco control legislation. As discussed previously in this chapter, cigarettes had been socially acceptable since World War I. This was gradually beginning to change as more scientific evidence was brought to the public’s attention throughout the 70s and 80s which convincingly demonstrated that smoking was harmful to both smokers and non-smokers alike. The new medical evidence linking environmental tobacco smoke (ETS) to disease and illness was of particular importance because it helped to redefine the smoking issue from one of smokers’ health to one of nonsmokers’ rights. In the words of one author, this resulted in a radical shift in the assignment of risks and responsibilities.

"The hazards of smoking were relocated from the individual’s risky behaviour to the behaviour of his smoking neighbor; exposure was no longer a matter of choice but of involuntary victimization; and, finally, the responsibility for risk education was shifted away from the individual at risk to the “polluting” smoker and the regulatory agencies of government."

During the late 1970s and early 1980s, the federal government was becoming increasing concerned with the high cost of health care. Health care expenditures during this time were outpacing economic growth and population increases. Both the federal and provincial governments were under pressure to reduce their deficits which meant cutting back on government expenditures in areas such as health care. At the same

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time, a new definition of health and health care was beginning to emerge in Canada. The new health policy approach being adopted by government was to focus more on health promotion as a means of obtaining greater control over health status.\textsuperscript{172} The concept of health promotion required the government to take a more active role in providing a healthy environment.\textsuperscript{173} As a result of this shift in policy, the Department of Health began to recognize that tobacco consumption was not conducive to a healthy environment since smoking was the leading cause of preventable death in Canada and that tobacco control legislation could play an important role in creating a healthy environment.\textsuperscript{174}

It was also important, for the purpose of health policy formation, that tobacco was becoming somewhat less important to the Canadian economy and to government revenue. By the mid 1980s, the federal government was less dependent on the revenue generated from tobacco sales than it had been in the 1960s. In 1985, the government collected approximately $3.8 billion in tobacco taxes which was significantly higher than the $723 million it collected in 1968. This revenue, however, accounted for only 2\% of the government’s total revenue in 1985 whereas, in 1968, tobacco taxes accounted for 6\% of total revenue.\textsuperscript{175} In addition, the publication of economic assessments during the late 1970s which showed the enormous economic and social costs of tobacco to society also

\textsuperscript{171} Ibid. at 8.
\textsuperscript{172} Politics of Tobacco in Canada, supra note 84 at 33, 38.
\textsuperscript{173} Ibid.
\textsuperscript{174} Ibid. at 40-42.
\textsuperscript{175} Ibid. at 22,25.
contributed to undermining the privileged position of tobacco. Anti-smoking groups were able to use these findings to argue that tobacco was a drain on the economy and a burden to the health care system.

Another important factor that allowed health organizations to band together was the institutional changes taking place within some of the major health organizations. For example, internal restructuring of Canadian Cancer Society (CCS) in the mid 1980s resulted in the CCS taking a more active advocacy role in the area of tobacco control. A key change in the organization came in 1985 with the appointment of Doug Barr as the Chief Executive Officer of the CCS. Barr supported advocacy and sought to instil this value within the organization. In 1986, the CCS opened a Public Issues Office in Ottawa and hired Ken Kyle as its first full-time advocate. Barr credited the shift in policy towards advocacy to the Non-Smokers’ Rights Association (NSRA), stating that: “The NSRA have helped organizations like the CCS realize that sometimes you have to take the gloves off.” Changes were also taking place within the Canadian Council for Smoking and Health (CCSH) such as increased funding and the hiring of Victor Lachance as the organization’s first full-time executive director in 1987.

176 Ibid. at 56. Note: One report found that tobacco cost Canadian society $5.2 billion in 1979 and $7.1 billion in 1982.

177 Ibid.

178 Ibid. at 66.

179 Smoke and Mirrors, supra note 56 at 195.

180 Politics of Tobacco in Canada, supra note 84 at 67.

181 Ibid. at 68.
The Campaign to Oppose Tobacco Sponsorship of Amateur Skiing

A prime example of the changing role of health organizations within the anti-smoking movement was illustrated by the 1983 campaign to oppose tobacco sponsorship of amateur skiing. The Canadian Council for Smoking and Health (CCSH), the Canadian Cancer Society (CCS) and the Heart Foundation of Canada (CHFC), joined the Non-Smokers' Rights Association (NSRA) to form the Coalition of Health Interests to oppose RJR's Export "A" sponsorship of amateur skiing. Although the campaign was initially unsuccessful, it put pressure on the government to act. In 1985, Sports Minister Otto Jelinek announced that amateur sports organizations would not receive federal funding if they accepted new tobacco sponsorships.

This campaign was significant for several other reasons. First, it brought together health and anti-smoking organizations who were natural allies and taught them a number of important lessons about the art of coalition management. It also taught them that a large number of groups of different sizes and resources could effectively work together. The health organizations, such as the CCS and the CHFC possessed considerable resources, including favourable public standing. What these groups lacked, however, was the tactical flexibility that smaller groups such as the NSRA could bring to an advocacy campaign.

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182 Smoke and Mirrors, supra note 56 at 68.
183 Ibid.
184 Breaking the Habit, supra note 88 at 133, 135.
185 Ibid. at 136.
186 Ibid.
Second, the CCS’s role in a campaign to oppose tobacco sponsorships of amateur sports opened the doors to the organization adopting a more activist approach to the smoking debate. Throughout the 1970s, the CCS had been a “sleeping giant” in the tobacco control arena as it was the largest voluntary charity in Canada, with offices across Canada and a budget of millions of dollars.\textsuperscript{187} The CCS would become a very important player in the campaign for Bill C-51.

Third, this campaign led to the formation of a new anti-smoking lobby group in 1985 - Physicians for a Smoke-Free Canada (PFSC).\textsuperscript{188} During the campaign, the Canadian Ski Association’s Medical Committee had opposed tobacco sponsorship. The Canadian Medical Association (CMA), however, refused to become actively involved in advocacy efforts. Dr. Pipe, a member of the Committee, was very critical of the CMA’s position. As a result of his involvement with the campaign and his frustration with the CMA’s lack of response to this important issue, he decided to form an organization to represent physician’s interests in the anti-smoking debate. PFSC would subsequently play an important role in the campaign for Bill C-51.

\textit{Parliament Considers Tobacco Regulation - Bill C-51 and Bill C-204}

Over the next few years, health groups worked together and individually on a number of other smaller tobacco-related campaigns.\textsuperscript{189} Through these campaigns the health lobby by the mid 1980s was beginning to succeed in redefining the smoking

\footnotesize{187} Smoke and Mirrors, supra note 56 at 68.

\footnotesize{188} Ibid.

\footnotesize{189} Ibid. at 69. See also: Breaking the Habit, supra note 88 at 137.
debate as an issue of health and not individual rights.\textsuperscript{190} The health lobby was also learning how to use public opinion to exert pressure on the government to take action.\textsuperscript{191} The tobacco lobby responded to these changes by strengthening its own support network within the community. The CTMC enlisted the support of retailers, represented by the Retail Council of Canada, farmers, unions representing cigarette workers and even smokers, through the creation of the Smokers' Freedom Society in 1986.\textsuperscript{192}

As a result of the persistent violation by the industry of its own advertising code, Health Minister Jake Epp was determined to take a stronger position against tobacco advertising than his predecessors.\textsuperscript{193} Inspired in part by the success of the private members Bill C-204,\textsuperscript{194} Mulroney's Conservative government introduced Bill C-51 (the TPCA) on April 22, 1987.\textsuperscript{195} As explained below the turbulent journey of Bill C-51 and Bill C-204 through Parliament illustrates the atmosphere of intense conflict that had

\begin{footnotes}
\textsuperscript{190} Breaking the Habit, \textit{supra} note 88 at 137.
\textsuperscript{191} \textit{Ibid.}
\textsuperscript{192} \textit{Ibid.} at 138.
\textsuperscript{193} Note: The following people have held the position of Minister of Health: Judy LaMarsh (1963-1965 – Liberal); Allan MacEachen (1965-1968 – Liberal); John Munro (1968-1972 – Liberal); Marc Lalonde (1972-1977 – Liberal); Monique Begin (1977-1979 – Liberal); David Crombie (1979-1980 – P.C.); Monique Begin (1980-1984 – Liberal); Jake Epp (1984-1989 – P.C.).
\textsuperscript{194} Note: Bill C-204, the \textit{Non-Smokers' Health Act}, which was introduced as a private member's bill in 1986 by New Democrat MP Lynn McDonald, proposed to restrict smoking in federally regulated workplaces, as well as on common carriers under federal jurisdiction. Epp used McDonald's private member Bill C-204 (the NSHA) to gain support in Cabinet and caucus for the government to introduce its own bill to prohibit tobacco advertising. Also see Chapter 2.
\textsuperscript{195} Note: Bill C-51, the \textit{Tobacco Products Control Act} (TPCA), came into force on January 1, 1989, it marked the first time that federal legislation regulated the advertising, promoting, labelling, packaging and manufacturing of tobacco products. The purpose of the Act was to protect the health of Canadians from the detrimental health effects caused by tobacco consumption. Also see Chapter 2.
\end{footnotes}
developed between the pro-health and the pro-tobacco interest groups over the last decade.\textsuperscript{196}

After Bill C-51 was introduced in April 1987, the tobacco industry mounted a massive $2.5 million campaign to oppose the legislation.\textsuperscript{197} At first the CTMC was not united in its agenda to fight the legislation.\textsuperscript{198} This lack of cohesion was a result of the fact that Imperial controlled 52% of the market and was not as threatened by the legislation as it had mass and momentum. On the other hand, RBH and RJR were concerned with protecting the marketing and promotional tools which would enable them to remain competitive in the marketplace.\textsuperscript{199} However, eventually the tobacco industry decided that they had to work together in order to successfully oppose this legislation. The industry’s main objectives were to maintain the ability to communicate with consumers, to have the freedom to promote within the retail arena and to be able to use brand sponsorship vehicles.\textsuperscript{200} As for Bill C-51, the tobacco industry’s public position was that the advertising ban violated their freedom of expression and that it would not reduce smoking. As for the sponsorship restrictions, the industry claimed that arts and sports groups would lose their funding and that thousands of jobs in the advertising industry would be lost.\textsuperscript{201}


\textsuperscript{197} Smoke and Mirrors, supra note 56 at 71.


\textsuperscript{199} Ibid.

\textsuperscript{200} Ibid.
The CTMC retained the Houston Group, a public relations firm, which put together an information kit to help generate a letter writing campaign against Bill C-51.\textsuperscript{202} Retailers and others were sent letters and pre-stamped envelopes that they could sign and mail to their MP.\textsuperscript{203} In one case, 15,000 letters were sent to homes in the riding of Toronto-area MP John Bosley.\textsuperscript{204} RBH also hired a public relations firm - Burson-Marsteller. Imperial held news conferences in various parts of Canada threatening to withdraw sponsorship of local sporting events.\textsuperscript{205} The industry also launched a major advertising campaign, endorsed by other pro-tobacco interest groups, to foster public opposition to the Bill.\textsuperscript{206}

By the end of the summer of 1987, support for the Bill in the House of Commons was slipping. Both the Agriculture Minister and the Sports Minister had publicly criticized the Bill. Despite the large majority government and despite support from the opposition parties, the Bill was in jeopardy of not making it past first reading.\textsuperscript{207}

\textsuperscript{201} Smoke and Mirrors, supra note 56 at 71.

\textsuperscript{202} Ibid.

\textsuperscript{203} Ibid. at 73.

\textsuperscript{204} Ibid. at 71.

\textsuperscript{205} Ibid. at 71-72.

\textsuperscript{206} Ibid. at 72. Note: These ads were endorsed by the following groups: The Committee of Concerned Tobacco Area Municipalities, Ontario Flue-Cured Tobacco Growers' Marketing Board, National Association of Tobacco and Confectionery Distributors, Bakery, Confectionery and Tobacco Workers International Union, I.T.W.A.I., Nova Scotia Flue-Cured Tobacco Growers' Marketing Board, New Brunswick Flue-Cured Tobacco Growers' Marketing Board, Association of Canadian Advertisers, Smokers' Freedom Society, P.E.I. Tobacco Commodity Marketing Board, Office des producteurs de tabac jaune du Quebec.

\textsuperscript{207} Ibid. at 73.
Health Minister at the time, Jake Epp, informed health groups that unless their campaign was stepped up the Bill would not pass.208

The pro-health groups responded with their own aggressive campaign, which aimed to expose and upstage the industry's campaign.209 They emphasized that a ban on advertising would reduce smoking, especially among youth and protect the public health. They also refuted the tobacco industry's forecast that the Bill would hurt jobs.210 The Non-Smokers' Rights Association (NSRA) was the driving force behind the pro-health lobby efforts.211 It published ads in newspapers outlining support for the Bill within the cultural community.212 It also brought cultural and arts celebrities together to counter the arguments of Coalition 51, which was a group of academics, artists and sports figures brought together by the tobacco industry to oppose the prohibition of tobacco sponsorships.213 The NSRA was also instrumental in revealing how the flood of letters opposing the campaign was in fact orchestrated by the tobacco industry.214

Other health organizations mobilized support for the Bill from their members and from the public. The Canadian Medical Association (CMA) joined the coalition of health groups lobbying for the passage of Bill C-51 and Bill C-204. It asked its 48,000 member

208 Ibid.
209 Breaking the Habit, supra note 88 at 140.
210 Smoke and Mirrors, supra note 56 at 73.
211 R. Ferrence & L. D'Souza, “Tobacco Regulation in Canada: Evaluating the Roles of Advocacy and Community Involvement in Affecting Public Policy” In Experience with Community Action Projects (Addiction Research Foundation: Toronto) 71 at 72. [hereinafter Roles of Advocacy]
212 Smoke and Mirrors, supra note 56 at 73.
213 Ibid. at 73. See also: Breaking the Habit, supra note 88 at 140.
physicians to vote against any MP opposing the Bill and doctors were asked to call their MPs to voice their support for the legislation. The CMA’s involvement was important to the success of the campaign as its involvement gave legitimacy to the anti-smoking lobby in the eyes of legislators and bureaucrats. Given the large amount of public support and publicity generated from this campaign, it was in the CMA’s best interest to join forces with more vocal anti-smoking groups such as the NSRA.

The CCS and the Canadian Public Health Association met with more than 25 MPs. The CCS also had its volunteers send MPs 35,000 black-bordered cards, one card for each person who died from tobacco-related causes each year, asking for the speedy passage of the Bill. The PFSC contributed to the anti-smoking lobbying campaign by conducting a small-scale radio campaign in Toronto in support of the two Bills.

At this point, the health lobby was winning the public debate which was being conducted through the media and was intended to bring public opinion to bear on individual MPs and senators. The tobacco lobby, on the other hand, was more effective behind the scenes at opposing the legislation by fueling the concerns of MPs representing tobacco growers and cigarette manufacturing areas that the Bill would adversely affect the economic interests of these specific groups. The tobacco lobby also represented to

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214 Ibid.
215 Ibid.
216 Politics of Tobacco in Canada, supra note 84 at 69.
217 Smoke and Mirrors, supra note 56 at 73.
218 Ibid.
219 Breaking the Habit, supra note 88 at 140-149.
220 Ibid. at 141.
government the economic interests of the more dispersed interest groups such as cigarette retailers, advertisers and shippers.\(^{221}\)

Bill C-51 received second reading and was sent to Committee stage, where the lobbying by both sides continued. At this stage, the majority of the debate focused on whether an advertising ban would reduce tobacco consumption and both groups brought in experts to make their case.\(^{222}\) The health group was well-coordinated and cohesive, and they were successful at presenting a simple and powerful argument before the Committee.\(^{223}\) The tobacco lobby, on the other hand, was comparatively ineffective as a coalition as the different groups made presentations in line with their own specific interests.\(^{224}\) For example, artists and amateur sports groups argued for the continuation of tobacco company sponsorships of their cultural and sporting events. The Smokers' Freedom Society promoted the freedom to smoke, qualified by the need to respect the rights of others.

Both pro-tobacco and pro-health groups were frustrated with the partiality within the Committee for one lobby or the other.\(^{225}\) One Committee member, Ron Stewart, who was a Conservative MP for a tobacco growing constituency, as well as a tobacco wholesaler and the former chairman of the National Association of Tobacco and Confectionery Distributors, ignored party discipline and opposed the Bill at second

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\(^{221}\) Ibid.

\(^{222}\) Smoke and Mirrors, supra note 56 at 74.

\(^{223}\) Breaking the Habit, supra note 88 at 142.

\(^{224}\) Ibid.

\(^{225}\) Ibid.
reading. The NSRA and the CCS held a news conference in Stewart’s riding claiming that this conflict of interest meant that Steward could not properly represent the interests of his constituents. Steward resigned from the Committee, apparently as the result of this negative publicity.

The tobacco industry, in order to strengthen their position, hired Bill Neville as the new President of CMTC. Neville was a well-connected political insider. He had been the Chief of Staff to former Conservative Prime Minister Joe Clark and he was responsible for setting up the Prime Minister’s Office for the Mulroney government. Neville was also a personal friend of Mulroney’s.

Bill C-51 made it through Committee stage without major amendments, but the government was slow to bring it forward for third reading. Although the Minister of Health, Jake Epp supported the Bill, he faced opposition from Don Mazankowski, Minister of Agriculture and Harvie Andre, Minister of Consumer and Corporate Affairs, as well as caucus members who represented tobacco farmers and workers. Health groups feared that if the Bill was not brought forward for third reading before the summer recess, there was a chance that it might not be reintroduced in light of the upcoming federal election.

In order to exert pressure on the government to bring the Bill forward for final reading, the health coalition conducted an advertising campaign designed to expose the

\[^{226}\text{Ibid.}\]
\[^{227}\text{Smoke and Mirrors, supra note 56 at 74.}\]
\[^{228}\text{Ibid. at 74-75.}\]
\[^{229}\text{Breaking the Habit, supra note 88 at 139. Also see: Smoke and Mirrors, ibid. at 76.}\]
political connection between Mulroney and Neville. The health lobby placed full page advertisements in the Globe and Mail which appealed to the Prime Minister and the Committee on Bills C-51 and C-204 to back integrity and not give in to the lobbying efforts of Neville and the tobacco industry to derail the Bills.\textsuperscript{231} This campaign was effective because the government did not want to be accused of giving special treatment to its friends in light of the charges of patronage and scandals that had plagued the Mulroney government in the past.\textsuperscript{232} In the end, both Bills were brought before the House of Commons for final reading. Although the government supported Bill C-51 (the Tobacco Products Control Act), Cabinet did not support the passage of Bill C-204 (the Non-Smokers’ Health Act). Bill C-204 was originally scheduled to reach final vote on May 30, 1988 but it was delayed until the next day in order to allow the government to pass Bill C-51 before defeating Bill C-204 in its final vote. Much to the government’s surprise, Bill C-204 was not defeated as a result of Tory backbenchers voting for the Bill’s passage.\textsuperscript{233}

\textit{Legislative Outcome}

In this particular case, the pro-health and pro-tobacco interest groups had different but approximately equal resources at their disposal which were used to persuade

\textsuperscript{230} Smoke and Mirrors, \textit{ibid.} at 74-75.

\textsuperscript{231} \textit{Ibid.} at 75. Note: This ad campaign was endorsed by the Association des conseils des medecins, Dentistes et pharmaciens du Quebec, CCS, CCSH, Canadian Teachers’ Federation, National Action Committee on the Status of Women, NSRA and PFSC.

\textsuperscript{232} Politics of Tobacco in Canada, \textit{supra} note 84 at 110.

\textsuperscript{233} Smoke and Mirrors, \textit{supra} note 56 at 76. Note: Bill C-204 was brought up for third reading on May 30, 1988. The government rescheduled the vote so that Bill C-51 could be brought forward and passed and the private members Bill could be defeated. Health Minister Jake Epp was absent for the vote. Bill C-204 was passed by a vote of 77 to 58 as a result of many Conservative backbenchers voting for the Bill.
politicians, bureaucrats, regulators, media and the public of the virtues of their position. As this chapter has demonstrated, both groups used these resources to buy advertising space in newspapers and to hire lobbyists, public relations firms, experts and lawyers, in order to make their respective case to government and to the public. Clearly, both groups were willing and able to pay a high "price" to achieve their objective. The tobacco industry was willing to pay the necessary "price" to oppose the legislation in order to maintain the status quo – self-regulation. Legislation had the potential to devastate the tobacco industry, whereas self-regulation gave the industry the power to negotiate with the government in order to achieve concessions on advertising and sponsorship, which were critical to the industry's survival and profitability. Health groups were also willing to pay the necessary "price" in order to ensure that Bill C-51 and Bill C-204, two important pieces of tobacco control legislation, were passed by Parliament.

In light of the power of both interest groups, the important question that remains unanswered is whether public choice theory can account for this legislative outcome. In this particular case, public choice theory offers only a partial explanation for why Parliament passed Bill C-51 and Bill C-204. For the reasons set out below, the policy outcome in this case reflects both the strengths and the limitations of public choice theory.

First, this campaign illustrates that self-interest, as the public choice theory postulates, is an important factor in the political process. Self-interest played an important role in bringing the many diverse health, professional and anti-smoking groups together to lobby as a coalition for the passage of the TPCA. The success of the pro-health lobby in this particular campaign hinged on the participation by groups such as the CCS and the
CMA because they could supply the coalition with economic resources, as well as political legitimacy, which it needed to combat the powerful persuasive currency of the tobacco lobby. As discussed earlier in this chapter, the large health and professional organizations were initially reluctant to get involved in lobbying for tobacco control legislation. In the early 1980s, Garfield Mahood, executive director of the NSRA, tried to galvanize groups such as the CCS into action by publicly criticizing these groups for their inaction on this important health issue. These “social incentives” worked to mobilize these groups, but only after they realized that it was in their best interest to take action. These organizations joined in the campaign for Bill C-51 only after the NSRA started to gain public acceptance and recognition for its lobbying efforts and as public opinion began to shift towards a more anti-smoking attitude. The groups which were previously reluctant to get involved in lobbying realized that being on the winning side of the tobacco control debate could help to maintain their social prestige and position of influence among both the public and government upon which they relied on for funding and volunteer staffing.

While self-interest played an important role in motivating some interest groups to lobby for Bill C-51 and Bill C-204, it alone does not explain the passage of these two bills. The large health, medical and professional organizations joined the campaign to

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234 Breaking the Habit, supra note 88 at 133-134. Note: Mahood tried to convince these groups that prevention was the best route to reducing smoking and diseases and that prevention was best achieved through regulation.

235 Gallup Canada Inc. National omnibus – Canadian Cancer Society (19 December 1991). As cited in Smoke and Mirrors, ibid. at 73. Note: The results of a poll conducted by the Canadian Cancer Society in 1987 found that 62% of Canadians supported an advertising ban while only 30% were opposed to the ban.

236 See generally: Politics of Tobacco in Canada, supra note 84 at 123-125.
lobby for the passage of these bills for a second important reason. They recognized and supported the important objectives of the Bill C-51 and Bill C-204. The following excerpt, taken from their “Neville Factor” campaign advertisement, illustrates this point:

“In a few hours, a small group of Members of Parliament will begin the clause-by-clause review of two proposed bills. They could become the most important federal laws in disease prevention and health promotion in over a decade. In fact, the health community believes that the Committee’s decision will greatly influence illness and death rates from cancer and other diseases for decades to come... Bills C-51 and Bill C-204 are supported by hundreds of organizations representing millions of Canadians. These bills constitute world precedent-setting legislation. Passage of this legislation would represent the first time a government, in a tobacco growing country, had sufficient integrity to withstand the muscle of the tobacco lobby.”

Following the successful passage of Bill C-51, Doug Barr, the chief executive officer of the CCS, made the following comment about the importance of this lobbying campaign:

“If we are willing to learn the political ropes and mobilize our volunteers to exercise their political clout, our organization can bring about significant legislative change that can reduce disease, that can prevent deaths and, in the long run, do more for the health of Canadians than all the hospitals in this country put together. And in the final analysis, isn’t that what we are all about?”

These passages reflect the fact that many diverse organizations felt strongly that this tobacco control legislation must be enacted in order to help prevent disease and to promote public health. This sentiment was also strongly held by some members of Parliament, in particular, the Minister of Health, Jake Epp. Jake Epp’s personal commitment to tobacco control issues is reflected in the Foreword he wrote for Rob Cunningham’s book Smoke and Mirrors in 1996:

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237 Associations des Conseils des Medecins, et al., “How many thousands of Canadians will have to die from tobacco industry products may largely be in the hands of these two men” (25 January 1988) The Globe and Mail A3. For a copy of this advertisement see: Smoke and Mirrors, supra note 56 at 75.

238 Lobbying for Lives, supra note 196. As cited in Smoke and Mirrors, supra note 56 at 196.
“It was not long after I was appointed Minister of Health and Welfare in 1984 that I realized that the tobacco epidemic was a crucial issue requiring a significant solution. Tobacco use was then – and, lamentably, remains today – public health enemy number one... While Health Minister, I introduced Bill C-51, the *Tobacco Products Control Act*, in the House of Commons. This bill banned tobacco advertising, regulated other forms of tobacco marketing, and created authority to require health messages on packages. Even though the bill enjoyed all-party support in Parliament and strong public approval, it was 14 months before the bill received Royal Assent, surely convincing evidence of the industries’ tactical abilities.”

Epp goes on in his Foreword to state that Canadians can be proud of what has been achieved after several decades of effort to reduce smoking. Despite these achievements, Epp writes that:

“[I]t is with extreme personal frustration that I witness continuing tobacco industry efforts to undermine health policies. Tobacco companies weakened the advertising ban by shifting money into sponsorship promotion, promotions that conveyed the same lifestyle images that Parliament intended to eliminate through the *Tobacco Products Control Act*. The industry initiated legal proceedings that resulted in the invalidation of the advertising ban. The industry exported to the United States large quantities of cigarettes, products that returned to Canada as contraband. Widespread smuggling led to a rollback in tobacco taxes. Despite these setbacks, we must press on to not only recapture lost ground but to advance our strategy in new areas. And we must be vigilant to protect each new health gain.”

As discussed earlier in this chapter, public choice theorists generally underestimate the “power of ideas” in the political system. As these examples illustrate, the “idea” that legislation could be used as a means to protect the health of Canadians from the harmful consequences of tobacco by implementing restrictions on the advertising, promotion, manufacture and sale of tobacco products was a powerful and good idea. This “idea” found support in many different and diverse interest groups. The

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239 *Smoke and Mirrors*, *supra* note 56 at vii.

“idea” also enjoyed support from some influential politicians. The people and groups who supported these bills used their economic and political power to persuade other politicians, bureaucrats, interest groups, as well as the media and the public, that Parliament had to pass Bill C-51 and Bill C-204. The fact that these bills became law, despite the strong tobacco lobby, illustrates that ideas do matter and can, in certain circumstances, affect policy outcomes. The ability of public choice theory to explain and predict public policy outcomes in the area of tobacco control is therefore tempered by this observation.

As noted above, it took Parliament 14 months to pass the Bill C-51, despite the fact that the bill had all-party support in the House of Commons. The fact that the legislation was delayed for so long in Parliament is consistent with a situation in which the benefits and costs of the regulation are concentrated. In this case, the government was faced with a no-win situation. If the government passed this legislation, it would alienate a politically and economically important ally to the tobacco industry. In addition, if the government passed legislation, which reduced tobacco consumption, it would undermine its own economic interest given that it collected approximately $1.7 billion dollars from tobacco sales in 1988-89.241

On the other hand, if the government did not pass the legislation it would alienate the pro-health lobby, which had now become politically important. Another key factor for the government to consider was the strong public support for tobacco control legislation. In this instance, public opinion was important to the government because of the upcoming federal election. It would have been a political embarrassment for the private

241 Federal Tax Revenue, supra note 135.
members bill - Bill C-204 - to pass and not the government's own Bill C-51. By passing this legislation, the government could take credit during their electoral campaign for enacting legislation to protect the public, and especially minors, from the harmful health consequences of tobacco.

The public choice model postulates that where legislation is passed, despite concentrated costs and benefits, the government is likely to delegate regulatory authority to an agency where the organized interests can continue their clash. In this case, the TPCA delegated regulatory power to Health Canada to develop regulations in a number of areas, including health warnings.242 The health lobby was less effective in influencing the bureaucratic environment surrounding the implementation of the new legislation.243 The tobacco industry, on the other hand, was successful in using their constitutional challenge to the TPCA as a means to delay the implementation of the health warning regulations. After the Quebec Superior Court's decision in 1991 finding the TPCA to be ultra vires Parliament, Health and Welfare Minister Benoit Buchard, who had been ready to proceed with the regulations, hesitated in taking them to Cabinet until the legal question was answered.244 The Minister's hesitation reflected, at least in part, the strength of the opposition in Cabinet by the Minister of Agriculture and the Minister of Consumer and Corporate Affairs to the tobacco control legislation.245

242 Tobacco Products Control Act, R.S.C. 1985, c. 14 (4th Supp.), s. 17(f). Note: The TPCA delegated regulatory power to Health Canada to develop and implement regulations prescribing the content, position, configuration, size and prominence of the health messages on tobacco products.

243 Breaking the Habit, supra note 88 at 144.

244 Ibid.

245 Ibid.
3. SUMMARY

The public choice theory of interest groups predicts that government expenditures, regulation and tax policy will benefit a particular well-organized, influential group. As demonstrated in this chapter, this central tenet of the public choice model is reflected in the context of tobacco regulation. This chapter has argued that the public choice model can explain the evolution of federal tobacco control over the past century from symbolic legislation (early 1900s) to industry-self regulation (1960s to the 1980s) to government regulation (late 1980s to the present). This chapter has also demonstrated the limitations of public choice theory to fully explain the political process and, in particular, the passage of Bill C-51 and Bill C-204 in 1988. As Trebilcock points out, and as this chapter demonstrates:

"[P]olitics is partly about what are thought to be good ideas as well as what are thought to be politically salient interests. Exactly what weight each carries is a matter of serious indeterminacy in the theoretical literature. It is clear, however, that persuasion is an important currency in the political process. Voters and interest groups may persuade politicians, bureaucrats, and regulators of the virtues of a position or idea. Similarly, political leaders, bureaucrats, or regulators may persuade interest groups and voters of the wisdom of an idea."

These conclusions are important in that they may help predict the direction of future policy development in the area of tobacco control, as well as offer insight into how anti-smoking groups can better influence policy outcomes in this area. The final and concluding chapter explores these issues by anticipating future battles between anti-smoking and pro-tobacco interests in the area of federal tobacco regulation.

246 Public Choice Theory II, supra note 5 at 453.

247 Prospect for Reinventing Government, supra note 4 at 32-33.
CHAPTER 5
FEDERAL TOBACCO CONTROL – THE WAY FORWARD

During the late 1980s, the importance of tobacco control to the health community resulted in national health organizations coming together with grass roots anti-smoking groups to work as a coalition to lobby successfully for the passage of Bill C-51 and Bill C-204. Although the health lobby could claim a victory in its battle for these important pieces of tobacco control legislation, in reality the war between the tobacco industry and the anti-smoking lobby had really just begun. In the years following the passage of the Tobacco Products Control Act (TPCA) in 1988, the tobacco industry won a number of important victories, including the roll-back of cigarette taxes in 1994\(^1\), the successful constitutional challenge to the TPCA in 1995\(^2\) and the delay of government restrictions on tobacco sponsorship of arts and sporting events in 1998\(^3\). This concluding chapter begins by exploring the following four areas in which health and anti-smoking groups are currently lobbying for federal regulation: (1) The disclosure of more ingredients and additives in tobacco products by brand; (2) The elimination of deceptive labelling on

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\(^1\) Note: During the 1980s and early 1990s, the federal and provincial governments significantly increased their taxes on cigarettes. As taxes increased, the price of Canadian cigarettes became more expensive than the price of American cigarettes. This price differential created an incentive to smuggle cheaper cigarettes in from the United States. The tobacco industry lobbied governments to combat smuggling by lowering taxes. On February 8, 1994, Prime Minister Chretien announced in the House of Commons a roll-back of between $5 and $10 on excise taxes on each new carton of cigarettes. The size of the tax roll back depended on the extent of provincial participation in the plan. This tax roll-back was implemented as a way to combat the negative social and economic effects of smuggling contraband cigarettes. In December 1999, the federal government filed suit under U.S. legislation (RICO – Racketeer Influenced Corrupt Organizations) against RJR-MacDonald, the Canadian Tobacco Manufacturers’ Council, R.J. Reynolds Tobacco Co. and various related companies. The suit stemmed from allegations of direct tobacco industry involvement in the smuggling of Canadian cigarettes. In July 2000, the U.S. district judge in Syracuse N.Y., Thomas McAvoy, threw out the government’s $1-billion dollar lawsuit.

\(^2\) For a review of this issue see Chapter 3.

\(^3\) For a review of this issue see Chapter 2.
cigarette packages such as "mild" or "light"; (3) The elimination of tobacco advertising and sponsorships; and (4) The implementation of plain or generic packaging for tobacco products. Although the list of future and ongoing policy battles in the area of tobacco control is extensive, this chapter focuses on these four tobacco control initiatives because they relate to the case study areas - tobacco advertising, promotion, labelling and packaging, which have been the focus of this thesis. The thesis concludes by analyzing the keys to achieving successful policy outcomes from the perspective of the pro-health lobby, taking into account the legal and political constraints discussed in this thesis which influence policy formation and legislative outcomes.

1. **ONGOING POLICY BATTLES IN THE TOBACCO CONTROL ARENA**

In recent years there have been numerous government, expert committee and other reports which have attempted to outline a comprehensive, long-term strategy to successfully reduce tobacco consumption at both national and provincial levels.¹ Some reports advocate specific actions on the part of the federal government with respect to regulating the advertising, sponsorship, labelling and packaging of tobacco products. This section of the chapter will examine four areas where tobacco control advocates have lobbied, and continue to lobby, the federal government to take regulatory action.

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1.1 Disclosure of More Ingredients and Additives in Tobacco Products by Brand

In 1997, Garfield Mahood, executive director of Non-Smokers’ Rights Association (NSRA) and Smoking and Health Action Foundation, gave a plenary address to the 10th World Conference on Smoking or Health in which he argued that legislation is the key to the implementation of a comprehensive tobacco control plan. In his address he suggested five elements of a model comprehensive tobacco control plan. One important element was reducing the demand for tobacco products through informed consent. Mahood explained that informed consent, in the context of tobacco products, means that the consumer must be fully informed about both the nature of the risks and the magnitude of those risks. For instance, it is not enough that manufacturers tell consumers that cigarettes cause lung cancer. In order for consumers to be fully informed, manufacturers must also disclose the fact that if the smoker gets lung cancer, he or she has a 90% chance of dying from the disease within one or two years. If consumers have this type of information then at least those people who choose to smoke will be doing it “with their eyes as wide open as possible.” As discussed in the first chapter, consumers, especially young smokers, tend to underestimate the risks associated with tobacco products. For this reason, encouraging informed consent is important in order to create an environment in which children will not wish to risk tobacco addiction. In addition, if consumers are given more and better information about the health risks of smoking and tobacco addiction then some smokers may be motivated to leave the tobacco market (or at least attempt to quit an addictive habit).

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In order for consumers to be fully informed about the products they are consuming, manufacturers must supply consumers and governments with more comprehensive information about the health risks of tobacco products and about the toxins, additives and ingredients in cigarettes and other types of tobacco products. As discussed in chapter 2, the federal government has spent the last three years drafting regulations, pursuant to the Tobacco Act, which implement strong warning, labelling and reporting measures. In June 2000, the House of Commons Standing Committee on Health unanimously supported the government's proposed regulations. The House of Commons approved the Tobacco Products Information Regulations⁶ and the Tobacco Reporting Regulations⁷ on June 8, 2000.⁸

The Tobacco Products Information Regulations require that manufacturers and importers of tobacco products ensure that every package or carton of cigarettes, tobacco sticks, cigarette tobacco, leaf tobacco, kreteks (clove and tobacco cigarettes), bidis (small tendu leaves hand-wrapped over tobacco), pipe tobacco, cigars, chewing tobacco and snuff display a prescribed health warning message.⁹ These new health warnings will cover 50% of the principal display surface of the package. In addition, every

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manufacturer or importer of cigarettes, tobacco sticks, cigarette tobacco, leaf tobacco and kretek must also display 16 additional health information messages. Depending on the package, this information will be displayed either on the package or on a leaflet inside the package.

The regulations also require manufacturers to display information about the toxic chemicals found in tobacco smoke. Information about the level of tar, nicotine, carbon monoxide, benzene, hydrogen cyanide and formaldehyde must be displayed on a side of all packages of cigarettes, kreteks, bidis, tobacco sticks, cigarette tobacco and leaf tobacco. For chewing tobacco and snuff, information about the levels of nicotine, lead and nitrosamines must be displayed on the bottom of these packages. Manufacturers must comply with these regulations within six months of the registering of the regulations.

These regulations are precedent setting in a number of respects. First, the regulations make Canada the first country to require colour graphics as part of the health warning. In addition, Canada is the first country to require messages inside the tobacco packages; the first country to include tips on quitting; the first country to include a web site where consumers can obtain more information about tobacco products and about quitting; and the first country to require tobacco packages to list the yields of formaldehyde, benzene and hydrogen cyanide. In a predictable move, the tobacco manufacturers have filed a motion seeking to stay the implementation of these regulations. A hearing on this matter is scheduled for August 7, 2000.


11 Telephone interview with Francois Choquette at the Bureau of Tobacco Control (Ottawa) (13 July, 2000), Tel: (613) 941-8524. Note: The motion has been filed in Quebec Superior Court in Montreal.
The second regulation, the *Tobacco Reporting Regulations*, expands the current reporting requirements to include more classes of tobacco products sold in Canada.\textsuperscript{12} The purpose of these regulations is to enable Health Canada to identify and monitor how tobacco companies package and promote their products and how these practices influence consumer behaviour.\textsuperscript{13} In turn, this information will help the government develop more effective tobacco control policies, regulations and programs. Specifically, the regulations require manufacturers to report on an expanded list of toxic chemicals found in tobacco smoke for the following classes of tobacco products: cigarettes, cigarette tobacco, leaf tobacco, tobacco sticks, kreteks and bidis.\textsuperscript{14} These regulations increase the list of reportable chemicals found in mainstream smoke (inhaled by smoker) and side stream smoke (inhaled by non-smoker) from the current three (tar, nicotine and carbon monoxide) to approximately 40 different chemical compounds.\textsuperscript{15} In addition, manufacturers and importers of all tobacco products sold in Canada must report on a list of 33 constituents found in whole or unburned tobacco. The regulations also require manufacturers and importers of tobacco products to report information on all aspects of their products, including: the tobaccos and other components or ingredients used in the

\begin{enumerate}
\item Note: Cigars and pipe tobacco are exempt from this requirement because standardize test methods have not yet been developed to test for the smoke from these products. Smokeless tobacco is exempt from the requirements because this product does not produce smoke.
\item\textsuperscript{14} *Tobacco Reporting Regulations*, supra note 7.
\end{enumerate}
manufacturing process, the papers, tubes and filters; sales data, research activities; and promotional activities.

Although these regulations are a positive step forward, they could still be strengthened in a number of ways. First, in order for consumers to make a truly well informed decision about whether they should use tobacco products they need to have all the information about these products. This means that there must be full disclosure to the consumer, and not just the government, of all chemicals, additives and ingredients found in tobacco products. Les Hagen, the executive director of Action on Smoking and Health (ASH), criticized the proposed Tobacco Products Information Regulations in his submissions to the House of Commons Standing Committee for precisely this reason.16 These regulations require manufacturers to disclose over 40 different chemical components found in tobacco smoke to the government. The manufacturers, however, only have to disclose a very short list of toxic ingredients (six chemicals for cigarettes, kreteks, bidis, tobacco sticks, cigarette tobacco and leaf tobacco and three chemicals for chewing tobacco and snuff) to consumers.

These regulations are limited in a second way. Although the regulations require more comprehensive disclosure to government about the chemicals, additives and ingredients found in tobacco and tobacco smoke, they do not mandate full disclosure. In British Columbia, for instance, tobacco manufacturers whose products are sold or promoted in the province must submit quarterly reports to the Ministry of Health identifying all additives and ingredients in each brand of cigarette and cigarette

tobacco.\textsuperscript{17} In addition, manufacturers must submit annual reports on the tobacco smoke constituent for every brand of cigarette or cigarette tobacco which is sold or promoted in British Columbia. In October 1998, shortly after the regulations came into force, RJR-MacDonald (now JTI-MacDonald) brought a legal action against the government challenging the constitutional validity of the regulations.\textsuperscript{18} In the summer of 2000, the British Columbia government negotiated an agreement in which JTI agreed not to continue its litigation for two years in exchange for the government making minor amendments to the reporting requirements.\textsuperscript{19}

Despite the legal challenge, however, all three tobacco manufacturers have complied with the regulations by filing the required reports. The British Columbia government makes these reports available to the general public via the Ministry of Health’s website.\textsuperscript{20} While public disclosure is a first step, it does not go far enough. For the average consumer, this information is useless. In order for consumers to make use of the information, they would first have to know about the website. Then, consumers would have to take the initiative to read the reports, and finally, they would have to correctly interpret the information. What is needed is for brand specific information to be


\textsuperscript{19} Telephone interview with Shelley Canitz at the Tobacco Strategy Branch (British Columbia) (18 August 2000), Tel: (250) 952-1673. Note: JTI-MacDonald will withdraw their constitutional challenge in December 2002 providing the British Columbia government does not amend the regulations to make the testing and reporting requirements more onerous.

printed on all tobacco packages in a manner which consumers can easily understand. By requiring the information be printed on the package the government is ensuring that the message reaches the target audience. Neither the British Columbia nor the federal regulations require manufacturers to take this crucial step.

1.2 **Elimination of Deceptive Labelling on Cigarette Packages such as “Mild” or “Light”**

Another important aspect of creating an environment where consumers can be informed about the products they use is to eliminate tobacco industry “disinformation”. Tobacco manufacturers use various marketing techniques to spread misinformation about their products. One prime example is the marketing of “light” and “mild” cigarette brands to consumers. Anti-smoking activists argue that the use of these labelling terms must be prohibited because they mislead the public into believing that these particular brands of cigarettes are safer, or that they contain less tar and nicotine than regular cigarettes. As discussed in the first chapter of this thesis, the amount of tar and nicotine delivered by a cigarette to the smoker depends to a large extent on how the cigarette is smoked, such as the depth and duration of inhalation. This means that “light” and “mild” cigarettes could be more harmful to the health of smokers than regular cigarettes depending on how the cigarette is smoked. In addition, some consumers may smoke more of these cigarettes because of their false belief that these cigarettes are not as harmful as regular brands.

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21 See generally: Mahood, *supra* note 5.

22 See: *Actions Speak Louder than Words*, *supra* note 4 at 18.
Research has shown that many smokers are unaware that these “light” cigarettes can yield the same amount of tar and nicotine as regular cigarettes.\(^{23}\)

In 1999, the federal government released a consumer warning on light and mild cigarettes advising Canadians that these cigarettes have the same potential to be as debilitating and lethal as regular cigarettes.\(^{24}\) Health Canada also launched a consumer awareness campaign to inform smokers about terms such as “light” and “mild.”\(^{25}\) To date, however, the government has not proposed regulations which would ban the use of these misleading and confusing terms.

1.3 **Elimination of Tobacco Advertising and Sponsorships**

Tobacco manufacturers also spread disinformation through the use of advertising and tobacco sponsorships by creating an impression in the minds of consumers that their products are safe, acceptable and glamorous when in fact they are just the opposite. As discussed in chapter 2, the *Tobacco Act* attempts to eliminate this type of disinformation by prohibiting advertising. Because of the Supreme Court of Canada’s decision in *RJR-MacDonald*, the government cannot prohibit all advertising.\(^{26}\) As a result, the *Tobacco Act* prohibits only lifestyle advertisements but allows brand preference and informational


\(^{26}\) For a review of this issue see Chapter 3.
advertising to continue. The problem with this approach, as discussed previously in chapter 3, is that “lifestyle” advertising is hard to define. The distinction between what is lifestyle advertising and what is brand preference or information advertising is artificial in nature. By not prohibiting all tobacco advertising, the Tobacco Act gives the tobacco manufacturers an opportunity to find creative ways to market their products to consumers within the “grey” area of permissible advertising.

Tobacco sponsorships are another key way that manufacturers market their products. Tobacco manufacturers realized some time ago the tremendous marketing potential of associating their products with sports and cultural events. Although lifestyle advertising is prohibited, tobacco manufacturers can still associate their products with images of health, vitality, glamour, excitement and prestige through the use of these sponsorships. Anti-smoking advocates successfully lobbied the government to prohibit tobacco sponsorships. The prohibition on tobacco sponsorships is to take effect in 2003. The tobacco manufacturers, having failed to block the passage of this legislation in Parliament, are currently challenging the constitutional validity of the sponsorship prohibition contained in the Tobacco Act.

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27 For a review of this issue see Chapter 2.

28 For a review of this issue see Chapter 3.

29 For a review of this issue see Chapter 2.

30 Note: In 1997, immediately following the passage of the Tobacco Act, the tobacco manufacturers launched a constitutional challenge in Quebec Superior Court. The discovery process commenced in March 2000, and a trial date is expected to be set this summer.
1.4 Implementation of Plain or Generic Packaging for Tobacco Products

Another key marketing tool for tobacco manufacturers is the tobacco product package. Some anti-smoking activists argue that the package is the core of all tobacco marketing. The tobacco package is an important marketing vehicle because tobacco manufacturers can use the package to create a desired image using colour, words and trademarks. In turn, these images create marketing impressions on the consumer. Advertising executives estimate that the total number of advertising impressions created by the package exceeds the aggregate of all other forms of advertising including newspapers, magazines and billboards. In order to combat this type of marketing, anti-smoking activists have been lobbying for the government to implement regulations requiring plain packaging. Plain packaging would mean that cigarette packages would be one generic colour (such as brown or grey), and the only distinguishing feature would be the brand name, printed in small, standard type in black ink.

The battle for plain packaging is not a new one. Health groups have been pressing for legislation implementing plain packaging since the 1980s. The federal government has considered plain packaging on a number of occasions. For example, in April 1994, the House of Commons Standing Committee on Health held hearings to explore this

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31 See generally: Mahood, supra note 5.

32 For example: Light and mild cigarettes are typically marketed in packages with lighter colours than regular cigarettes in the same brand family. Light colours suggest images such as purity and cleanliness.

33 Mahood, supra note 5.

34 R. Cunningham, Smoke and Mirrors: The Canadian Tobacco War (Ottawa: IDRC Books, 1996) at 137. [hereinafter Smoke and Mirrors].

35 Ibid. at 139. Note: The Canadian Medical Association first recommended plain packaging in 1986. In 1986, the Non-Smokers’ Rights Association lobbied unsuccessfully for regulations to Bill C-51 which would authorize plain-packaging regulations.
The hearings were part of Prime Minister Jean Chretien's commitment to take tough anti-smoking measures in the wake of the federal government's tax rollback in February 1994. The Committee's report supported plain packaging stating that "plain or generic packaging could be a reasonable step in the overall strategy to reduce tobacco consumption." The Committee recommended that the federal government establish a legislative framework to implement plain packaging if Health Canada's ongoing study found that such packaging would reduce consumption. The Committee's less than decisive findings and recommendations clearly illustrate the lack of government commitment to take firm action on this controversial issue.

In March 1995, Health Canada released the results of its study. The report reached the following conclusion with respect to plain packaging:

"Plain and generic packaging of tobacco products (all other things being equal), through its impact on image formation and retention, recall and recognition, knowledge, and consumer attitudes and perceived utilities, would likely depress the incidence of smoking uptake by non-smoking teens, and increase the

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36 Ibid. at 140.


39 Ibid.

incidence of smoking cessation by teen and adult smokers. This imposition would vary across the population. The extent of change in incidence is impossible to assess except through field experimentation conducted over time.\textsuperscript{41}

The government did not want to make a final decision on whether to proceed with plain packaging regulations until after the Supreme Court of Canada released its decision in \textit{RJR-MacDonald}.\textsuperscript{42} In this circumstance, the tobacco manufacturers’ legal proceedings gave the government a “legitimate” way to delay having to make a decision on this hotly contested issue.

After the release of the Supreme Court of Canada’s decision in September 1995, the government decided to put the issue of plain packaging on hold while it concentrated on drafting new tobacco legislation.\textsuperscript{43} To date the government has not proceeded with plain packaging regulations, despite the fact that new studies indicate that plain packaging would reduce smoking uptake by non-smoking youth and contribute to smoking cessation among youth and adults.\textsuperscript{44} A recent expert report to the Ontario government concluded that generic packaging was necessary because the “current packaging of tobacco products promotes the positive imagery associated with these products.”\textsuperscript{45}

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\textsuperscript{41} \textit{Ibid.} at 15.
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\textsuperscript{43} See generally: M. Kennedy, “Cigarette firms launched secret tactics to fight plain packs, documents show” \textit{The National Post} (17 January 2000).
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\textsuperscript{45} Actions Speak Louder than Words, \textit{supra} note 4 at 18.
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In June 2000, the House of Commons Standing Committee on Health recommended, as part of their report on the new federal labelling and reporting regulations, that Parliament, within the next 18 months, examine and report on the need for further regulatory action with respect to the movement toward plain packaging. The likelihood of the government proceeding on this issue will be discussed in the next section of this chapter.

2. DISCUSSION – ACHIEVING TOBACCO CONTROL GOALS FROM THE PERSPECTIVE OF THE PRO-HEALTH LOBBY

Despite the many victories by the pro-health lobby during the past decade, the battle for federal tobacco control legislation is clearly ongoing. The battles still to be fought, which are described in the first section of this chapter, are not an exhaustive list. Other important battles include regulating the nicotine content in tobacco products; regulating product design to require fire safe cigarettes; prohibiting all point-of-sale advertising; launching health care costs litigation against tobacco manufactures; increasing tobacco taxes; and ultimately, prohibiting the sale of all cigarettes and other tobacco products in Canada. In order to achieve these goals, the first step for pro-health groups is to have the specific tobacco control issue make it onto the government’s policy agenda. From this point, the issue must take the second crucial step from a policy option to legislative enactment or regulation. Whether or not an issue makes it this far in the political arena, assuming there is no question of federal jurisdiction, is a matter of politics.

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This section of the chapter will analyze the key factors that must be present in order for the pro-health lobby to achieve desirable policy outcomes in the political arena in light of the analysis in chapter 4. This chapter concluded that public choice theory is an important analytic tool for understanding the evolution of policy outcomes and policy decision-making in the context of federal tobacco regulation. The chapter also concluded, however, that public choice theory does not fully explain policy outcomes and that factors other than self-interest play an important part in determining the outcome of a particular policy debate. This chapter will conclude by predicting the future direction of policy outcomes as they relate to tobacco control issues.

2.1 Predicting Policy Outcomes in Light of Public Choice Theory

As discussed in chapter 4, public choice theorists argue that the incidence and activity of interest groups determine the demand for legislation and that formal organization of an interest group is essential for a group to influence legislative outcomes. If a group is not organized, it will fail to press its point of view effectively with policy makers. The history of federal tobacco regulation clearly illustrates this point. From the 1920s until the mid 1970s, there were no formal organizations to represent the interests of non-smokers and to press for tobacco control legislation. Groups such as the Canadian Cancer Society (CCS) and the Canadian Medical Association (CMA) were involved in the smoking debate only in so far as they advocated greater public education about the risks and hazards of tobacco products. As a result, there was no significant demand for the federal government to enact tobacco control legislation. The demand for legislation came only after the anti-smoking movement began to organize and form
special interest groups, such as the Non-Smokers’ Rights Association (NSRA), in the late 1970s and early 1980s.

The important point to take from this is that there must be formal organizations to represent the interests of those people who believe that government regulation of tobacco is necessary in order to protect the public from the harmful consequences of tobacco. Due to the strength of the anti-smoking sentiment in this country, there are numerous interest groups which are dedicated to achieving tobacco control goals. Some organizations, such as the NSRA, devote all of their resources to tobacco control issues, while for other organizations, such as the CCS, tobacco control is just one aspect of the work they do.

The mere fact that these interests groups exist does not ensure that they will be successful in influencing policy decisions and achieving desirable tobacco control measures. As public choice theory predicts, legislation is supplied to groups or coalitions that outbid other rival interest groups for favourable legislation. Organized interest groups that are willing and able to pay the price to obtain or block legislation will be rewarded by favourable legislation. This means that on order for pro-health interest groups to successfully influence a particular policy outcome, they need substantial economic and political resources to outbid their opposition - the Canadian Tobacco Manufacturers’ Council (CTMC) and other pro-tobacco groups. The amount of resources needed to be successful will depend on the importance of the campaign to the tobacco industry. As the campaign for Bill C-51 and Bill C-204 illustrated, the more the proposed regulatory measures threaten the viability of the tobacco industry the more resources the industry will devote to trying to prevent the passage of the legislation. The pro-health lobby, to successfully press their point with government, had to persuade politicians,
bureaucrats, regulators, media and the public of the virtues of their position, and they accomplished this by hiring lobbyists, public relations firms, experts and lawyers.

The problem for pro-health interest groups is that they do not have anywhere close to the same resources as the CTMC. As long as tobacco manufacturers continue to rake in enormous profits\(^\text{47}\), these groups, working on their own, will never have similar resources to the pro-tobacco lobby. For instance, pro-health groups have a limited amount of human resources to devote to the long list of tobacco control issues. Currently, only the following three groups have full time staff dedicated to tobacco advocacy work: the CCS has approximately one full time position; the NSRA has approximately two full time positions; and the PSFC has approximately 1.5 full time position.\(^\text{48}\) One way that pro-health groups can try to overcome this limitation is by coordinating their advocacy efforts and by pooling their resources as they did during the campaign for Bill C-51 and Bill C-204.

In order for pro-health interest groups to have sufficient resources to influence government policy on issues which are hotly contested, such as implementing plain packaging or prohibiting tobacco sponsorships, they must build coalitions. Coalitions, however, cannot be built unless other players want to be part of the team. One would think that individual groups would recognize that they could achieve more together than apart and would therefore voluntarily join together in order to further the interests of their group members. The problem, as described by Olson, is that self-interest will not always

\(^{47}\) Note: In 1997, Imperial and RBH recorded record profits of $775 and $112 million respectively.

\(^{48}\) Telephone interview with Francis Thompson at the Non-Smokers’ Rights Association (Ottawa Office) (26 June 2000), Tel: (613) 230-4211. Note: There are people with the Heart and Stoke Foundation and the Quebec Coalition which also do some advocacy work on the federal level. In addition, the Canadian Medical Association has five staff members who work on tobacco related issues.
motivate individuals to form interest groups because of the free rider problem. As a result of free rider problems, Olson concluded that even if all individuals in a large group are rational and self-interested, and would gain if, as a group, they acted to achieve their common interest or objective, they will still not voluntarily act to achieve that common or group interest. Olson recognized that collective action can still occur in some circumstances, despite the problems associated with free riding, because people are sometimes motivated by non-economic incentives, such as a desire to win prestige, respect and friendship. These social sanctions and social rewards can work as incentives to mobilize a latent group. Olson also concluded that the collective action problems associated with large groups could be overcome if there is coercion to force members of the groups to join together.

The pro-health coalition that formed during the campaign for Bill C-51 and Bill C-204 proves that the collective action problem can be overcome. As discussed in the previous chapter, self-interest played an important role in the successful coalition building during this campaign. Self-interest alone, however, was not the only factor which motivated collective action. In this case, the NSRA used social incentives and sanctions to motivate latent groups, such as the CCS, to join the campaign.

As this analysis has demonstrated, pro-health interest groups can overcome their collective action problems. Once a coalition is formed, the next problem for the group is to maintain its efficacy despite an increase in size. Olson’s theory predicts that the larger a group becomes the farther it will fall short of providing an optimal amount of a
collective good. As discussed above, small groups, such as the NSRA, may not be effective because they lack resources to undertake large expensive advocacy campaigns. Despite this limitation, small groups have the advantage of being efficient because they do not have large bureaucratic decision-making structures. This allows the group to make decisions more quickly than large groups. In addition, small groups can be more aggressive and flexible in their campaign tactics than larger groups. In order for coalitions to remain effective, they must find ways to promote fast decision-making which will allow them to respond more quickly and aggressively as situations warrant.

2.2 Limitations of Public Choice Theory and the Implication for Predicting Policy Outcomes

Public choice theory is attractive because it offers a positive model for predicting legislative outcomes. According to public choice theorists, legislative, regulatory and electoral institutions are an economy in which the relevant actors (ordinary citizens, legislators, agencies and organized interest groups) exchange regulatory "goods" which are demanded and supplied according to the same basic principles governing the demand and supply of ordinary economic goods. Public choice theory also presumes that the relevant actors are rational and self-interested. Based on these principles, legislative outcomes can be predicted based on the incidence of costs and benefits.

Public choice theory, however, suffers from some serious limitations. The analysis in chapter 4 exposed the fact that public choice theory fails to recognize the significant impact that non-self-interested ideas have on influencing and determining

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49 M. Olson, *The Logic of Collective Action*, (Cambridge: Harvard University Press, 1971) at 27-28. Note: The nature of collective goods is that other individuals in the group cannot be kept from consuming it once any individual in the group has provided it for himself. The necessary conditions for the optimal provision of a collective good occurs when, "the marginal cost of additional units of the collective good."
policy outcomes. The campaign for Bill C-51 and Bill C-204 demonstrated that ideas have power. During this campaign many diverse interests groups from all across Canada were motivated to work as a coalition because of their strongly held belief that this legislation was important and had to be passed in order to promote and protect the health of Canadians. This case study illustrated that persuasion is an important currency in the political process.

In addition, public choice theory does not adequately take into account the range of non-economic and non-self-interested values that commonly motivate various participants in the collective-decision making processes. As history has shown, individuals have played an important role in determining the success or failure of public policy outcomes. It is unlikely that Parliament would have passed Bill C-51 and Bill C-204 without the dedication of individuals, such as Garfield Mahood of the NSRA, David Sweanor of the CCS, Victor Lachance of the CCSH and Dr. Pipe of the PSFC, to lobby for this legislation. In order to successfully influence future policy outcomes there must be dedicated individuals within the various anti-smoking, medical, health and professional communities who are willing to commit their time and energy to further the tobacco control cause on either a local, provincial or national level.

History has also shown that there must be dedicated and committed individuals within government who support tobacco control measures and who are willing to persuade other Cabinet ministers to support the legislation. As discussed in chapter 4, Health Minister Jake Epp’s support of Bill C-51 was a key factor in the successful passage of this Bill. A more recent example is Health Minister Allan Rock’s support for implementing stronger health and reporting regulations. Rock’s commitment to this issue
has resulted in the successful passage of the ground-breaking Tobacco Reporting Regulations and Tobacco Products Information Regulations, which were discussed earlier in this chapter.

What this means is that a particular policy outcome cannot be predicted with the certainty that public choice theory suggests. What is more certain, however, is that specific ingredients, such as self-interest, collective action, economic and political resources, individual commitment and a powerful idea, must be present in order to increase the likelihood of achieving a policy objective. There is no precise mathematical formula for determining how much of each ingredient will be required on any particular issue. That being said, it is reasonable to presume that the more a policy threatens the tobacco industry's financial viability, the more resources the pro-health lobby will require to press their point successfully with government. The fact that the tobacco industry is threatened by a particular regulatory measure, such as plain packaging, sponsorship prohibition and increased taxes, is all the more reason that pro-health groups must use their resources to help enlist the support of politicians, bureaucrats, media and the public in order to ensure that these “good ideas” become law.

3. CONCLUSION

Pro-health interest groups will continue to have an uphill battle to secure meaningful tobacco control regulation from the federal government. The narrow interests of the pro-tobacco lobby have historically won out over the larger public interest represented by the pro-health groups. The past success of the pro-tobacco lobby can be attributed to the fact that they have had the resources, both politically and economically, to pay the price to demand favourable tobacco control policies. All is not bleak, however,
for the pro-health lobby. The history of Bill C-204 and Bill C-51 has shown that the pro-health lobby can overcome collective action problems and work as a coalition to achieve policy objectives and to demand favourable tobacco control legislation from the federal government.

History has also shown that to be effective pro-health groups must persuade policy makers, as well as the public, that a particular tobacco control measure is vital to the health of Canadians. As the campaign for Bill C-51 and Bill C-204 illustrated, the pro-health lobby must be willing to employ a wide variety of advocacy tools, including letter writing, advertising campaigns, meetings with government officials, opinion polls, appearances before Parliamentary committees and media coverage. As Garfield Mahood noted in his address to the 10th World Conference on Smoking and Health, organizations must campaign as if they are at war and they must campaign with intensity. In his words organizations must, "be as aggressive, as tough and as tenacious as tobacco death rates suggest are necessary. Take risks, for our children."50

In order to use the "currency of persuasion," there must be individuals within the health and anti-smoking community who are passionate about the tobacco control cause and dedicated to bringing about change. It is equally important that the Health Minister is dedicated to implementing a comprehensive tobacco control strategy, which includes legislation, taxation, research, educational programs and litigation, and that the minister is committed to using his or her influence to overcome resistance within government for tobacco control initiatives.

50 Mahood, supra note 5.
A new challenge that has emerged in the last decade is for pro-health groups to maintain their lobbying efforts even after they have achieved successful policy outcomes in the political arena. The pro-health lobby cannot claim victory just because a desired statute or regulation becomes law. To be effective, the legislation must be implemented and enforced. In some instances, the legislation must also survive a legal challenge by the tobacco industry. As past history attests, if a particular tobacco control measure threatens the tobacco industry’s viability, as the Tobacco Products Control Act did in 1989, the industry will use the courts as a means to derail or, at least, delay the unfavourable legislation. Litigation is a particularly powerful tool for the tobacco lobby because, regardless of the outcome, it has the net effect of increasing the cost of the challenged regulation. For government, it must be prepared to defend a legal challenge and, if it looses, to start over again and draft new legislation. For the pro-health lobby, it must be prepared to continue its lobbying efforts in the political arena and, if necessary, act as intervenors inside the legal arena.

The ability of the pro-health lobby to overcome its collective action problems and work as a coalition for a sustained period of time is a serious challenge. Once again, this challenge can be overcome if individuals are committed to promoting the message to politicians that tobacco control legislation is a critical and powerful tool for social change. As Jake Epp, the former Minister of Health, acknowledged, “a smoke-free world is a monumental challenge, but one that we must relentlessly pursue.”

\[51\] Smoke and Mirrors, supra note 33 at viii. As cited in the Foreword written by Jake Epp, Minister of National Health and Welfare, 1984-1989.