RJR-MacDonald v. Canada
On the Freedom to Advertise

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Introduction

In *RJR-MacDonald* v. *Canada*[1] a majority of the Supreme Court of Canada decides that two provisions of the federal *Tobacco Products Control Act*[2] — the general ban on cigarette advertising and the requirement that packages carry specified health warnings — are contrary to the *Canadian Charter of Rights and Freedoms*.

I have serious concerns about both parts of the Court's judgment. My concern with the decision to strike down the advertising ban is less with the Court's departure from established practice, and in particular its practice of deferring to the legislature's judgment that a certain category of expression is harmful, than with its continuation of the behavioural approach to limits on expression adopted in its previous section 2(b) decisions. As has become its practice, the Court decides the limitations issue by considering whether there is (or the legislature thinks there is) empirical evidence establishing a causal link between the restricted expression and harmful behaviour. This behavioural or cause and effect approach allows the Court to avoid addressing more difficult and important questions about the way that advertising — and cigarette advertising in particular — affects behaviour.

My disagreement with the second part of the judgment, is simply that the mandatory warnings do not amount to compelled expression. Compelled expression is objectionable because it involves an invasion of the individual's personal sphere and an affront to his/her dignity. These concerns cannot arise in the same way when a large and artificial legal entity is required to include information on its product packaging. The owners and managers of RJR-MacDonald lost some control over the presentation of their product — of their property. But these individuals will not be printing or distributing the packages themselves. Yet even if we think that corporations (in addition to individuals) have a right not to speak, which is violated here, there are some very strong reasons for compelling the cigarette companies to come clean about the risks of smoking.

The Court's Approach to The Advertising Ban

The concurring judgments of Justices McLachlin[3] and Iacobucci[4] and the dissenting judgment of Justice LaForest[5] agree that the ban on cigarette advertising is a restriction on tobacco manufacturers' freedom of expression and, therefore, a breach of section 2(b) of the *Charter*. As well, all three judgments agree that "prevent[ing] people in Canada from being persuaded by advertising and promotion" to engage in the harmful activity of smoking, is a purpose substantial and pressing enough to justify restriction of freedom of expression under section 1. Where the judgments diverge is in the application of the rational connection and minimal impairment tests.

In the view of Justice McLachlin, the federal government has not shown that there is a rational connection between a general advertising ban and a decrease in tobacco consumption. She is prepared to find "a link based on reason" or "common sense" between lifestyle advertising and tobacco consumption, even though there is no "direct evidence of a scientific nature showing a causal link."[6] It is enough that lifestyle advertising is designed to increase overall consumption, discouraging quitting or encouraging smoking. However, she sees no basis for thinking that informational advertising and brand-name advertising have the effect of increasing or sustaining overall tobacco consumption. At most

these forms of advertising support brand loyalty or encourage brand switching. They do not encourage non-smokers to take up the habit. Indeed, such a ban "deprives those who lawfully smoke of information relating to price quality and even health risks associated with different brands."[7] In the opinion of McLachlin J., because the ban on advertising covers not just lifestyle advertising but also informational and brand name advertising, which effect brand choice and not overall tobacco consumption, it is overinclusive and fails the minimal impairment test. She notes that the government presented no evidence comparing the effects of a less intrusive ban on lifestyle advertising with the effects of a total ban.[8]

McLachlin J. accepts that a judgment about the justification of limits under section 1 must take account of the social and economic context. She also recognizes that it is difficult to draw firm factual conclusions from social science evidence predictive of human behaviour and so she accepts that deference should be shown to Parliament's assessment of this evidence. However, she insists that judicial deference should not go so far as to exclude any form of scrutiny: "the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement".[9] Otherwise, the Court will have abdicated the responsibility placed upon it to ensure that laws are consistent with the basic rights and freedoms set out in the *Charter*.

Iacobucci J., in his concurring judgment, accepts that tobacco advertising "as a whole" affects consumption, so that there is a rational connection between the ban and the goal of reducing tobacco use. However, like McLachlin J., he is unable to find any evidence showing that *all* types of advertising have this effect. Parliament had not "endeavoured to differentiate the harmful advertising from the benign advertising, before it decided to ban all advertising or sought to identify whether informational and brand-name advertising do not have the effects that the Act seeks to curb."[10] In his view, the Court should not defer to Parliament's decision to impose a general ban, when there is no evidence to show that Parliament gave any consideration to alternatives. Iacobucci J. concludes that the ban is overinclusive and cannot be justified under section 1.

In contrast, the dissenting judgment of LaForest J. stresses the need for deference to Parliamentary judgment. In his view, the Court should be reluctant to second-guess Parliament's judgment (based on internal company marketing documents and expert reports) that a general ban on cigarette advertising is necessary to prevent encouragement of tobacco use. He recognizes that, although cigarette advertising is protected under section 2(b), a lower standard of justification should apply to its limitation under section 1. Cigarette advertising is not core expression because it is motivated by profit and because it encourages people to engage in an activity that is damaging to their health.[11] As well, deference to Parliament's judgment about the proper scope of the ban is appropriate given the difficulty of establishing a causal connection between advertising and consumer behaviour. LaForest J. observes that:[12]

> [There is not] a clearly understood causal connection between advertising and tobacco consumption. This is not surprising. One cannot understand the causal connection, without probing deeply into the mysteries of human psychology.

LaForest J. believes that Parliament is in a better position than the courts "to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups."[13] As well, for LaForest J., the large advertising budgets of the cigarette companies suggests that advertising is concerned not only with maintaining brand loyalty but also with attracting new smokers and inducing existing smokers not to quit. Profits will drop off dramatically, unless the companies are able to discourage quitting and find new smokers to replace those who have died (prematurely).

THE RESTRICTION OF ADVERTISING

In all three judgments there is a recognition of the difficulty in identifying a causal connection between advertising and tobacco consumption. Each judgment relies on a combination of common sense and deference to complete the connection that social science evidence is unable to establish clearly. But the problem of proof lies at the surface of a much deeper problem with the Court's approach to limits on freedom of expression. The Court's behavioural approach suppresses entirely the role of human agency in the communication process and avoids the question of how cigarette ads effect human behaviour.[14]

All three judgments share an assumption that cigarette advertising may be restricted if it is shown to be effective in persuading its audience to smoke but that it may not be banned if it is ineffective. McLachlin J. accepts that advertisements that provide information to consumers should not be banned. The formal reason for this is the absence of social science evidence (and common sense) indicating that such ads lead to greater tobacco consumption. Informational and brand-name advertising, McLachlin J. insists, only encourage brand loyalty or switching. On the other hand, she accepts that there is a "common sense" connection between lifestyle advertising and overall tobacco consumption which supports the restriction of such ads.[15] Yet, how can it be that the justification for restricting expression is stronger when the expression succeeds in persuading its audience? Expression cannot be restricted simply because it is effective in persuading others of certain views — no matter how silly or inaccurate those views.

While the majority's decision to support the restriction of lifestyle advertising ostensibly rests on the existence of evidence showing that lifestyle advertising affects individual behaviour, and specifically that it leads to more smoking, it may be that we should see (or a commitment to freedom of expression requires that we see) this support as an implicit recognition that cigarette advertising is not the stuff of freedom of expression, because of the nature of its appeal or the way it influences behaviour. However, any questioning of the cigarette companies' claim that their advertising is informative and persuasive is buried beneath the Court's 'cause-and-effect' or behavioural discourse.[16]

The failure of the majority to question directly and openly the claim by cigarette companies that the state is interfering with their attempts to convey information to consumers about cigarettes or is suppressing discussion between themselves and their consumers about a lawful product may reflect a reluctance to assess the relative value of different forms of communication or it may simply reflect the barren state of public discourse. Because cigarette ads are (or at least have been) an ordinary part of our public discourse, which is dominated by repetitive commercial appeals to consumers, we may be slow to recognize the absurdity of the cigarette companies' invocation of a more idealized form of discourse, which involves conversation or exchange among various members of the community, and the expression of a variety of views that are meant to advance understanding of complex issues.

The dissenting judgment of LaForest J. does question the companies' reliance on this more idealized form of expression. Specifically, LaForest J. makes reference to the "sophisticated marketing and social psychology techniques" used by the cigarette companies. In his view, the character of cigarette advertising "undermines the claim to freedom of expression protection because it creates an enormous power differential between these companies and tobacco consumers in the 'marketplace of ideas'."[17]

McLachlin J. is prepared to uphold a ban on lifestyle advertising because this form of advertising has the effect of increasing tobacco consumption, and perhaps also because it is not intended to inform or persuade consumers. However, she considers that the general ban in the Act, which prohibits informational advertising (disseminating information concerning product content) and brand-name advertising (promoting one brand over another on the basis of colour design and appearance of packaging) is overinclusive. She accepts that informational and brand name ads do not encourage individuals to smoke; they simply encourage brand loyalty or brand switching. But can an ad reinforce brand loyalty without reinforcing the smoking habit or can it encourage brand switching without encouraging smokers not to quit or non-smokers to start? As LaForest J. quite reasonably suggests:[18]

> even commercials targeted solely at brand loyalty may also serve as inducements for smokers not to quit. The government's concern with the health effects of tobacco can quite reasonably extend not only to potential smokers who are considering starting, but also to current smokers who would prefer to quit but cannot.

McLachlin J. says very little in her decision about informational cigarette ads. This is hardly surprising. Informational cigarette advertising seems little more than a theoretical possibility. After all what can the cigarette manufacturers say about their product? The only example ever given of an informational ad is one that informs smokers about the tar levels of particular cigarette brands. But as many have pointed out, this sort of advertisement could be seen as deceptive inasmuch as it suggests that smoking lower tar cigarettes is not unhealthy.[19]

Similarly, it is not clear what the category of brand name advertising encompasses. My suspicion is that brand name advertising has an impact on consumer behaviour either because it is in truth a subtle form of lifestyle advertising, associating a brand name with certain lifestyles, values or feelings, or because it draws on the background of other lifestyle ads that construct an image for the product. Without such a background the simple repetition of a brand name would be unlikely to have much effect on consumer behaviour.

The Court's decision to strike down the general ban on the ground that it is overinclusive, assumes that there is a reasonably clear distinction between lifestyle advertising, which can be restricted by the state, and informational and brand advertising, which cannot be restricted. However, if we think that these categories are difficult to distinguish and that most advertising is not concerned with rational persuasion, then we should question the assumption that cigarette advertising deserves any form of protection under the *Charter*.

THE COURT'S APPROACH TO THE MANDATORY WARNINGS

The judgment of McLachlin J., representing the majority view on this point, holds that the requirement that manufacturers include specified health warnings on cigarette packaging violates section 2(b) because it compels the manufacturers "to say what they do not wish to say" and "in a way that associates them with the opinions in question." [20] McLachlin J. accepts that the reasons for requiring manufacturers to include these warnings are substantial enough to justify limitation under section 1 of their 'right not to speak'. However, she believes that because the warnings are not attributed to the government (and the manufacturer is prohibited from displaying any message on the package other than brand name, trade mark, and state-required information), some consumers might mistakenly think that they are voluntary statements made by the cigarette companies: "some may draw [the inference] that it is the corporations themselves who are warning of the danger."[21] Since, in her view, a warning attributed to the government would be no less effective than an unattributed warning, the requirement is more intrusive than is necessary and so cannot be justified under section 1 as a minimal impairment on the freedom.

COMPELLED EXPRESSION

Why is attribution of the health warnings so important? As LaForest J. points out in his dissenting judgment, everyone who reads these packages knows that the warnings are compelled by legislation and are not voluntary statements by the manufacturers.[22] But this is so in most cases of compelled expression. Generally, when an individual is compelled to express him/herself, the audience is aware that the message has been compelled and is not the speaker's own. The central objection to compelled expression is not that the individual will be identified with the views of others but is rather that she/he will suffer the indignity of having to speak or write words or express views that are not her/his own.

In the United States, the paradigm compelled expression case is *West Virginia* v. *Barnette*, which involved the suspension from school of children who, for religious reasons, refused to salute the flag as required by a School Board resolution.[23] The U.S. Supreme Court holds that the resolution is contrary to the First Amendment. The flag salute is an expression of loyalty that individuals should not be compelled to make. Mr. Justice Jackson states that:[24]

> If there is a fixed star in our constitutional constellation, it is that no official, high or petty can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.... We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The 'invasion' seems significant in this case because of the very personal character of an expression of national pride and loyalty. The invasion is greater perhaps because the children had chosen not to salute the flag for religious reasons.

In the *Barnette* case, the School Board may have hoped that the attitudes of the children would be altered by the repeated expression of national pride. More likely, though, the Board simply thought that American children should show respect for the flag and should be forced to show respect if they refused to do so voluntarily.[25] If the children had given way

and agreed to participate in the flag salute, the teachers and students witnessing the salute would have known that it was not done voluntarily. The School Board resolution is objectionable not because people might think that the flag salute by these students reflects their sincere opinions. It is objectionable because it requires an individual to present him/herself publicly in a way that is not true to his/her own beliefs. The wrong is the indignity of having to affirm publicly views that are not your own.

Compelled expression is wrong because an individual's communication (what she/he says or writes) is closely linked to his/her sense of self and to his/her place in the community. Our ideas, feelings and, more broadly, our identity, take shape in public expression — by being expressed in a public language and presented to others who respond or react to them. Because the public articulation of ideas and feelings is so critical to the individual's identity, to the emergence of his/her personality, any interference with his/her expression, either in the form of censorship or compulsion, is experienced as an invasion of the self. Compelled expression is invasive even though, in many or most cases, the audience knows that the views expressed are not the actual views of the speaker or, at least, are not views the speaker has him/herself chosen to express.

If compelled expression is objectionable because it is experienced by the individual as an invasion of his/her personal sphere — or an interference with his/her 'freedom of mind' — then a large and artificial legal entity, such as a corporation, cannot have the same claim as an individual to be free from compulsion to communicate.[26] Certainly the owners of large cigarette companies do not have to suffer the indignity of having to speak or write views that are not their own. They will not be printing or distributing the packages themselves. At most, the requirement that health warnings be included on cigarette packages is an expropriation of their property or a reduction of their control over the product.

In the earlier decisions of *Ford* v. *Quebec*[27] and *Slaight Communications* v. *Davidson,*[28] the Supreme Court of Canada finds that the state has compelled expression contrary to section 2(b) but that this interference with the freedom is justified under section 1. It may be significant that in one case the required expression is commercial in character and in the other case it relates to business operations. Concerns about individual dignity that underlie the right not to speak cannot be as strong when commercial expression is involved or when a corporation is subject to compulsion. As well, the significant control that economically powerful actors sometimes have over information or over important channels of communication, may provide strong reasons to compel expression.

AN OBLIGATION TO DISCLOSE

Even if we saw this law as requiring the companies to express views that are not their own, why should cigarette manufacturers not be required to publicly acknowledge or disclose the risks of smoking? The majority judgment assumes that the state's purpose in requiring the manufacturer to place warnings on packages is simply to ensure that other voices are heard in the smoking debate — voices that inform consumers about the risks of smoking. Or at least their assumption is that this is the only purpose that could legitimately support the warnings requirement. However, the requirement might better be understood and defended as an attempt to get the cigarette manufacturers to come clean about the risks of smoking. One of the Act's purposes is "to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products."

Imposing such an obligation on cigarette manufacturers seems more than justified, in light of all their efforts to suppress information about the fatal consequences of smoking. Canadian law requires disclosures of many different kinds. The law requires house sellers to reveal latent defects, drug manufacturers to disclose risks and side-effects, and doctors to inform their patients of the risks of different procedures. It would seem strange if a manufacturer, vendor or doctor objected to these disclosure requirements on the ground that the information about product or procedure risks was not attributed to the government.

The idea that health warnings on cigarette packages are objectionable because they are not attributed to the government assumes that they are contestable statements of opinion — an assumption that cigarette manufacturers have worked long and hard to reinforce. Attribution matters only if we think that these health warnings are just the views or opinions of the government and that it is unfair when they are passed off as the views of the manufacturer. Indeed, if the majority is correct that manufacturers must

have the freedom to dissociate themselves from the warnings, then surely the manufacturers should also be free to include on the packaging a contradiction of the warning.

LaForest J., in his dissent, rejects the companies claim that they must have the right to "engage in counterspeech". He recognizes that warnings "do nothing more than bring the dangerous nature of these products to the attention of consumers". He sees the purpose as "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". In his view, these warnings have "no political, social or religious content" and so are very different from the statements of opinion that are the focus in most compelled expression cases.[29]

CONCLUSION

The judgment is no great victory for the cigarette companies. Parliament can re-enact an advertising ban that is slightly narrower in scope and a requirement that packages include health warnings that are attributed to the government. Indeed it may be that the Act will remain in force for a year, while Parliament considers its alternatives. Although a majority of five judges thought that the law was unconstitutional, one of the five, Iacoboucci J., thought that the declaration of invalidity should be suspended for a year to enable Parliament to draft a constitutionally valid advertising ban.[30]

Drafting a narrower ban — specifically a ban on lifestyle cigarette advertising — may present some difficulties. LaForest J. recognizes that evasion of a ban directed only at lifestyle advertising may be relatively easy. He observes that "in countries where governments have instituted partial prohibitions upon tobacco advertising such as those suggested by the appellants, the tobacco companies have developed ingenious tactics to circumvent the restrictions". Evasion is possible because the category of lifestyle advertising is so difficult to define. For this reason, a ban on such advertising is likely to be vague. Yet, having struck down the general ban as overinclusive and criticized Parliament for not having distinguished between different forms of advertising, the Court would be acting in bad faith if it were to strike down a prohibition directed exclusively at lifestyle advertising on the ground that it is too vague.

If there is a victory in this case, it is for a rigid and formal approach to freedom of expression adjudication — an approach that does not even begin to come to grips with the commercial domination of public discourse.❑

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Endnotes

1. (1995), 127 D.L.R. (4th) 1 (S.C.C.) (all further SCC references are to paragraph numbers).
2. *Tobacco Products Control Act* S.C. 1988 (35-36-37 Elizabeth II) c. 20.
3. Sopinka and Major JJ. concur with McLachlin J. on the freedom of expression issues.
4. Lamer C.J.C. concurs with Iacobucci J. on the freedom of expression issues. Iacobucci J. says that he agrees with many of Justice McLachlin's general conclusions.
5. Cory, L'Heureux-Dubé and Gonthier JJ. concur with LaForest J. on the freedom of expression issues.
6. Para. 155.
7. Para. 170. McLachlin J. says: "It extends to advertising which arguably produces benefits to the consumer, while having little or no conceivable impact on consumption. Purely informational advertising, simple reminders of package appearance, advertising for new brands and advertising showing relative tar content of different brands — all these are included in the ban. Smoking is a legal activity yet consumers are deprived of an important means of learning about product availability to suit their preferences and to compare brand content with an aim to reducing the risk to their health (para. 162)."
8. The government had declined to disclose studies it had carried that considered alternatives to a total ban on advertising. For McLachlin J. this weighed against the government's argument that the ban was not overinclusive.
9. Para. 129. According to McLachlin J.: "Context is essential in determining legislative objective and proportionality, but it cannot be carried to the extreme of treating the challenged law as a unique socio-economic phenomenon, of which Parliament is deemed the best judge. This would be to undercut the obligation on Parliament to justify limitations which it places on Charter rights and would be to substitute *ad hoc* judicial discretion for the reasoned demonstration contemplated by the Charter (para. 134)."
10. Para. 188.
11. In the view of LaForest J., "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 very low degree of protection under section 1 (para. 75)."
12. Para. 66.

13. Para. 68.

14. McLachlin J. states: "The causal relationship between the infringement of rights and the benefit sought may sometimes be proved by scientific evidence showing that as a matter of repeated observation, one affects the other. Where, however, legislation is directed at changing human behaviour, as in the case of the *Tobacco Products Control Act*, the causal relationship may not be scientifically measurable (para. 154)."

15. Para. 158.

16. I have argued in "The Supreme Court of Canada on the Structure of Freedom of Expression Adjudication" 45 University of Toronto Law Journal 419 (1995) that the Court oscillates between a discourse of freedom and rationality (in its application of section 2(b)) and a behavioural or causal discourse (in its application of section 1.) Difficult questions about the role of social and economic power are ignored in the rationalism of section 2(b) or buried in the behaviourism of section 1.

17. Para. 76.

18. Para. 84. LaForest rejects the companies' argument that their advertising was directed solely at preserving or expanding brand loyalty among smokers and not at expanding the tobacco market by inducing non-smokers to start: "brand loyalty alone will not, and logically cannot, maintain the profit levels of these companies if the overall numbers of smokers declines (*ibid.*)."

19. LaForest J. makes the point: "Although the appellants argue that informational advertising allows smokers to make informed health choices by giving them information about tobacco product content and thereby permitting them to choose tobacco products with lower tar levels, they submit no evidence that such products are actually healthier, nor logically could they, since the evidence seems to point in the opposite direction; such products are no safer than high tar products and serve mainly to induce smokers who might otherwise quit to keep smoking 'lighter' brands (para. 108)."

20. Para. 172. Section 17(f) of the Act authorizes the Governor-General in Council to adopt regulations prescribing content etc. of health messages.

    The *Tobacco Products Control Regulations* SOR /93 - 389 section 11 provides that every tobacco product must include one warning from a list that includes the following:

    (i) Cigarettes are addictive;
    (ii) Tobacco smoke can harm your children;
    (iii) Cigarettes cause fatal lung disease;
    (iv) Cigarettes cause cancer.
    etc.

21. Para. 172.

22. Para. 115. LaForest J. states that: "Simply because tobacco manufacturers are required to place unattributed warnings on their products did not mean that they must endorse these messages, or that they are perceived by consumers to endorse them. In a modern state, labelling of products, and especially products for human consumption, are subject to state regulation as a matter of course. It is common knowledge amongst the public at large that such statements emanate from the government, not the tobacco manufacturers. In this respect, there is an important distinction between messages directly attributed to tobacco manufacturers, which would create the impression that the message emanates from the appellants and would violate their right to silence, and the unattributed messages at issue in these cases, which emanate from the government and create no such impression (*ibid.*)."

23. *West Virginia State Board of Education* v. *Barnette* 319 U.S. 624; 63 S.Ct. 1178 (1943).

    The resolution required a "'stiff-arm' salute, the saluter to keep the right hand raised with palm turned up while the following was repeated: 'I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one nation, indivisible, with liberty and justice for all" (*Barnette* at 628).

    "Failure to conform is 'insubordination' dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile the expelled child is 'unlawfully absent' and may be proceeded against as a delinquent. His parents or guardians are liable to prosecution ..." (*Barnette* at 629).

24. *Barnette* at 642.

25. Mr. Justice Jackson in *Barnette*: "It is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture of barren meaning" (at 633).

26. As LaForest J. states: "The Charter was enacted to protect individuals, not corporations. It may, at times it is true, be necessary to protect the rights of corporations so as to protect the rights of the individual. But I do not think this is such a case ...." (para. 116).

27. [1988] 2 S.C.R. 712

28. [1989] 1 S.C.R. 1038.

29. Para. 116. LaForest J. does "not accept the distinction sought to be drawn by the Attorney-General that here the statement is one of fact, not of opinion" (para. 114).

    But this is something he says at the section 2(b) stage of his analysis, when he is considering whether there was compelled expression. At the section 1 stage he does seem to take account of this distinction. For example he says that these warnings:

    > do nothing more than bring the dangerous nature of these products to the attention of consumers. Given that the objective of the unattributed health message requirement is simply to increase the likelihood that every literate consumer of tobacco products will be made aware of the risks entailed by the use of that product, and that these warnings have no political, social or religious content, it is clear that we are a long way in this context from cases where the state seeks to coerce a lone individual to make a political, social or religious statement without a right to respond (para. 116).

30. This is complicated a little by the judgment of Cory J. Although he finds that the advertising ban and the warnings requirement do not violate the *Charter*, Cory J. says that if these provisions are found to be invalid, he agrees with Iacobucci J. that the declaration of invalidity should be suspended for a year (para. 121).