Tobacco Advertising Rules Go Back to Court … Again

Imperial Tobacco Ltd and JTI-Macdonald Corp are challenging the constitutionality of new federal tobacco advertising regulations. The regulations will take effect in June 2012. The companies have each launched cases in Ontario Superior Court.[1]

Under federal regulations, tobacco products already must display health warnings on at least 50% of the product's package.[2] In the fall of 2011 the federal government announced that the requirement would increase to 75%.[3] The tobacco companies say that these new regulations infringe their freedom of expression, guaranteed by section 2(b) of the *Canadian Charter of Rights and Freedoms.*

A long line of challenges

The coming battle will be the latest in a long line of cases on the constitutionality of tobacco advertising laws. In an early *Charter* case, the Supreme Court of Canada ruled that corporate advertising is protected by the freedom of expression guarantee in section 2(b) of the *Charter*.[4] In the *Charter*, freedom of expression is a "fundamental freedom" enjoyed by "everyone." The Court said that "everyone" includes corporations.[5]Commercial expression (including advertising) has *Charter* protection because it "plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy."[6]

It was not long before tobacco companies argued that limitations on tobacco advertising infringed their freedom of expression. In the early 1990s, Canadian federal legislation required tobacco product packages to display an unattributed health warning and a list of toxic ingredients. The legislation prohibited any writing on the package other than the name, brand name, trademark, or other information required by legislation.[7] In other words, a warning was mandatory and promotional messages were forbidden on tobacco packaging.

Tobacco companies challenged this law. In 1995, the Supreme Court struck down the provisions, ruling that they were unconstitutional.[8] In a 5-4 decision, the majority of the Court found that the requirements infringed tobacco companies' freedom of expression. The Court ruled that the infringement could not be justified, because less intrusive means were available to the government and had not been proven less effective.

In response, Parliament enacted the *Tobacco Act*.[9] The new Act and the government's regulations under it were challenged by tobacco companies in 2007.[10] This time, the Supreme Court's response was different. The Court unanimously ruled that Parliament and the federal government had responded to the Court's earlier concerns appropriately, so it found the new laws to be constitutional.

Part of the 2007 decision considered a new regulation that required the display of health warnings on at least 50% (up from 33%) of the packaging. The issue was whether the size requirement was an infringement of freedom of expression. The Court found it was an infringement, but the restriction was "demonstrably justified in a free and democratic society" under section 1 of the *Charter*.

In coming to this conclusion, the Court emphasized that the regulations were connected to an important objective: informing Canadians about the hazards of tobacco use. The Court ruled that the regulations were reasonable and justified for three key reasons.

- First, health warnings were an effective way to communicate this message. The Court referred to a "mass of evidence" demonstrating that health warnings increase public awareness of the danger of smoking.[11] The Court viewed the companies' resistance to the new regulations as evidence that larger warnings could reduce sales, presumably as a result of increased public awareness.[12]
- Second, the increase was justified because bigger warnings made the communication more effective.[13] The Court said the size requirement was within a "range of reasonable alternatives," emphasizing that Parliament is "not required to implement less effective alternatives."[14]
- Third, the Court ruled that the regulation was a proportionate response to the problem of tobacco use. It said the benefits flowing from larger warnings were clear, and the detriments to the tobacco companies' "expressive interest" were small.[15]

In addition, the Court looked to the fact that a number of other countries at the time required warnings at least as large, including Australia, Belgium, Switzerland, Finland, Singapore, and Brazil.[16]

Is the situation different today?

With another change to labelling requirements comes another constitutional challenge. Imperial Tobacco says the new regulations simply go too far:

Does anyone seriously believe that Canadians don't already know the risk of smoking? … Increasing the size of the warning from 50 to 75 percent will not lead to any measurable change to public awareness. We have been forced to take this position for us and for other industries that may be the target of over regulation.

Is the situation really different? Does this increase go too far? If the Ontario Superior Court looks to the international community, it will find that at least one other country is moving in the same direction as Canada. Australia has gone so far as to pass "plain packaging" legislation. There, cigarette packaging may display only the text of the brand and health

warnings, without logos or promotional images.[17]

In 2007, the evidence was clear that larger warnings led to increased public awareness about the dangers of tobacco use. Today, the decision may turn on whether this is still the case. If Imperial Tobacco is correct in saying that the larger warning will not increase awareness, the outcome today may be different. What is clear, though, is that tobacco companies in Canada won't hesitate to challenge advertising restrictions.

---

[1] Les Perreaux, "Tobacco companies launch legal battle over health warning regulations", *The Globe and Mail* (26 April 2012).

[2] *Tobacco Products Information Regulations,* SOR/2000-272.

[3] *Tobacco Products Labelling Regulations (Cigarettes and Little Cigars)*, SOR/2011-177. Under the federal *Tobacco Act*, SC 1997, c 13, s 17, Parliament delegated the power to make regulations regarding labelling requirements to the federal Cabinet.

[4] *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927.

[5] Some of the rights and freedoms in the *Charter* (such as freedom of expression) are enjoyed by "everyone", including corporations. However, other rights are limited to human beings. An example is the s. 7 right to "life, liberty and security of the person", which applies only to human beings and not corporations: see *ibid*.

[6] *Ford v Quebec (Attorney General)*, [1998] 2 SCR 712 at para 59.

[7] *Tobacco Products Control Act*, SC 1988, c 20, ss 4, 5, 6, 8, 9. See *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199.

[8] *Ibid.*

[9] *Tobacco Act*, SC 1997, c 13.

[10] *Tobacco Products Information Regulations*, *supra* note 3; *Canada (Attorney General) v JTI-Macdonald Corp*, 2007 SCC 30 .

[11] *JTI-Macdonald, ibid* at para 135.

[12] *Ibid* at para 136.

[13] *Ibid* at para 137.

[14] *Ibid* at para 137.

[15] *Ibid* at para 139.

[16] *Ibid* at para 138.

[17] *Tobacco Plain Packaging Bill 2011* (Cth). Australian legislators are facing their own challenge to this new legislation - tobacco companies have launched a challenge in a case which is currently before the Australian High Court: see Jonathan Pearlman, "Tobacco Companies to challenge Australia plain packaging legislation", *The Telegraph* (17 April 2012).