Unofficial English Translation

JTI-MacDonald Corporation c. Canada (Procureure générale) **2005 QCCA 726**

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
MONTRÉAL REGISTRY

No: 500-09-013033-030
(500-05-031299-975)

DATE: August 22, 2005

CORAM: THE HONOURABLE MARC BEAUREGARD J.A.
ANDRÉ BROSSARD J.A
PIERRETTE RAYLE J.A.

J.T.I. MACDONALD CORP.
APPELLANT – plaintiff
v.
ATTORNEY GENERAL OF CANADA
RESPONDENT – defendant
and
THE CANADIAN CANCER SOCIETY
INTERVENER – intervener

JUDGMENT

---

[1] **The Court**; Ruling on the appeal by the appellant from a judgment of the Superior Court (Montréal, December 13, 2002, Justice André Denis), which rejected the appellant's procedure impugning the legality of certain provisions of the *Tobacco Act*, 45-46 Elizabeth II, c. 38, as amended by the *Act to amend the Tobacco Act*, 46-47 Elizabeth II, c. 38, and of two regulations enacted pursuant to this Act;

[2] After studying the record, hearing the parties and deliberating;

[3] **ALLOWS** the appeal in part, without costs, **REVISES** the judgment appealed from, and **ALLOWS** the motion in part, without costs, in the following manner:

[4] For the reasons of Justice Beauregard, with which Justices Brossard and Rayle concur, **DECLARES** of no force or effect the following provisions of the *Tobacco Act*, 45-46 Elizabeth II, c. 13, as modified by the *Act to amend the Tobacco Act,* 46-47 Elizabeth II, c. 38, and of two regulations enacted pursuant to this Act:

1 – In subsection 18(2)(*a*), the words "*if no consideration is given directly or indirectly for that use or depiction in the work, production or performance*", insofar as these words refer to scientific works;

2 – In section 20, the words, "*or that are likely to create an erroneous impression*":

[5] For the reasons of Justice Brossard, with which Justice Rayle concurs, **DECLARES** of no force or effect the words "*or the name of a tobacco manufacturer*" in sections 24 and 25 of the Act, unless this name contains or refers either directly or indirectly to a product brand of this manufacturer;

[6] For his part, Justice Beauregard, dissenting on this point, would also have **DECLARED** of no force or effect the following provisions:

1 – In subsection 22(3), the words "*or advertising that could be construed on reasonable grounds to be appealing to young persons*";

2 – In the first paragraph of subsection 22(4), the words "*or evokes a positive or negative emotion about or image of*";

3 – in paragraph 27(*a*), the words "*or could be construed on reasonable grounds to be appealing to young persons*";

4 – paragraph 27(*b*).

MARC BEAUREGARD J.A.

ANDRÉ BROSSARD J.A.

PIERRETTE RAYLE J.A.

Mtre Douglas C. Mitchell
Mtre Catherine Elizabeth McKenzie
(IRVING, MITCHELL & ASSOCIATES, S.E.N.C.)
and

Mtre Georges R. Thibaudeau
(BORDEN, LADNER, GERVAIS L.L.P.)
Attorneys for Appellant

Mtre Claude Joyal
Mtre Bernard Mandeville
Mtre Marie Marmet
Mtre Marc Ribeiro
(CÔTÉ, MARCOUX & JOYAL)
and
Mtre Maurice Régnier
(GILBERT, SIMARD, TREMBLAY)
Attorneys for Respondent

Mtre Julie Desrosiers
(FASKEN, MARTINEAU, DuMOULIN L.L.P.)
and
Mtre Rob Cunningham
(CANADIAN CANCER SOCIETY-PUBLIC ISSUES)
Attorneys for Intervener

Date of hearing: November 29 to December 3, 2004

[118] It is plain to see that the Act goes too far in light of section 1 of the *Charter*, in that it removes the manufacturers' right to use brand-preference advertising that is appealing to adults (and not particularly appealing to young persons) on signs that are not in the view of young persons and in publications that are addressed primarily to adults.

PROHIBITION ON FALSE PROMOTION: SECTION 20

[119] I set out section 20 once again as follows:

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

[120] Contrary to what was written by the trial judge, the respondent and the intervener, the manufacturers do not claim the right to be false, misleading or deceptive.

[121] They do submit, however, that if they provide consumers with factual information that is not false, misleading, or deceptive, they should not be blamed if a person, upon receiving this accurate and non-deceptive information, understands something other than the information communicated.

[122] In addition to specifying that the means may not be "false, misleading or deceptive", in the French version the legislator adds that the means must not be "*susceptible de créer une fausse impression*". In classical French, the word "*susceptible*" is misused in this context. We must understand means that are "*de nature à créer une fausse impression* [TRANSLATION: "*likely to create an erroneous impression*"].

[123] We must assume that the legislator does not speak gratuitously. Since section 20 first mentions means "*that are false, misleading or deceptive*", we must therefore understand that means that are likely to create an erroneous impression differ from means that are misleading.

[124] It is, however, difficult to distinguish between promotion by means that are misleading and promotion by means that are likely to create an erroneous impression.

[125] In my view, the words "*by means likely to create an erroneous impression*" in section 20 are vague and overly broad. It is enough to ensure the legislator's objective of prohibiting promotion by means that are false, misleading or deceptive. Adding that this promotion must not be by means that are likely to create an erroneous impression does nothing more than unjustifiably infringe on the freedom of expression of the manufacturers.

[229] As noted above, the manufacturers have submitted that Parliament, while giving the impression of complying with this ruling, has in reality violated it by imposing a very broad prohibition with only very restrictive exceptions.

[230] For my part, I find that the Supreme Court ruling has been complied with but that there is reason to declare of no force or effect certain provisions which, especially because of their vagueness, unlawfully restrict the manufacturers' freedom of expression.

VARIOUS COMPLAINTS ADDRESSED BY THE MANUFACTURERS TO THE TRIAL JUDGE

[231] The manufacturers devote a significant portion of their factum to such complaints, both specific and general.

[232] Whatever the manufacturers may say regarding the trial judge's understanding of the legislative objective and his application of section 1 of the *Charter*, it remains that he was essentially in compliance with the Supreme Court's ruling. Moreover, whether the trial judge was right or wrong to accept a given expert's testimony on the relationship between tobacco advertising and the extent of smoking is irrelevant. The absence of actual scientific evidence on such a relationship does not prevent the conclusion that, on a balance of probabilities, permitting manufacturers to advertise everywhere and to do so by means of lifestyle advertising and advertising directed at children would result in a feeling that smoking is not as bad as it is said to be, and even that smoking expresses a certain zest for life.

[233] In my view, the only relevant errors made by the trial judge are not noting the vagueness of certain provisions of the Act and not remarking upon the fact that certain exceptions allowing advertising are in reality so restrictive that Parliament has in fact gone against the Supreme Court's ruling.

-o-

[234] Given the qualified success of the manufacturers' proceedings and of the appeals, I would suggest that each party assume its own costs.

-o-

[235] For these reasons, I would allow the appeal in part, without costs, reverse the judgment appealed from, allow the appellant's motion, without costs, and declare of no force or effect the following provisions of the Act:

1 – In paragraph 18(2)(*a*), the words "*if no consideration is given directly or indirectly for that use or depiction in the work, production or performance*", insofar as these words refer to scientific works;