IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Mader's Tobacco Store Ltd., 2013 NSPC 29

Date: May 1, 2013
Docket: 2063892 - 2063895
Registry: Kentville

Between:

Her Majesty The Queen

v.

Mader's Tobacco Store Limited and Robert Gee

Judge:	The Honourable Judge Claudine MacDonald
Heard:	January 21, 2010, July 6, 2010, December 4-6, 2012, January 23, 2013, May 1, 2013, at Kentville, Nova Scotia
Written decision:	May 1, 2013
Charge:	Section 9AA(1) of the *Tobacco Access Act* Section 9AA(2) of the *Tobacco Access Act*
Counsel:	Edward Gores, for the Crown Curtis Palmer, for the Defence

By the Court:

FACTS

[1] Mader's Tobacco Store Limited and Robert Gee are charged:

> That on or about the 30th day of June, 2009, at or near Kentville, in the County of Kings, Province of Nova Scotia, did as a tobacco vendor, who is not a tobacconist, display tobacco products in a manner not prescribed by the regulations (Nova Scotia regulations 9/96, s. 3A) contrary to Section 9AA(1) of the *Tobacco Access Act*.
>
> And further on the same date and place, did as a tobacco vendor, who is not a tobacconist, store tobacco or tobacco products in a manner not prescribed by the regulations (Nova Scotia Regulations, 9/96, s. 3A) contrary to Section 9AA(2) of the *Tobacco Access Act*.

[2] The following admissions were made at trial:

1. Mader's Tobacco Store Limited is a body corporate which at all material times operated Mader's Tobacco Store at 13 Aberdeen Street.

2. Robert Gee was at all material times the president and directing mind of the corporate defendant.

3. Mader's Tobacco Store was at all material times a retail vendor of merchandise which included tobacco, tobacco products, and other items such as soft drinks, candy, chewing gum, cough drops and confectionaries and has been since 1976.

4. All the merchandise of Mader's Tobacco Store, both for sale and in storage for sale later, was displayed openly, on open shelves or racks or in cabinets or coolers with glass tops, sides or doors so that it was visible to anyone who entered the store, and during normal business hours, entry to the store was not restricted, In particular, the tobacco and tobacco products,

> which constituted most of the merchandise, were not stored or displayed in compliance with the regulation made pursuant to the *Tobacco Access Act*.
>
> 5. The store was open for business in this manner on June 30, 2009.

[3] The Defendants filed a *Charter* notice giving notice of their position that Section 9AA of the *Tobacco Access Act*, along with its companion regulations infringed their right to freedom of expression guaranteed in s. 2(b) of the *Charter*.

[4] On August 18, 2010 I found that s. 9AA and 3A of the *Tobacco Access Act* and the *Tobacco Access Regulations* infringed the Defendants' s. 2(b) right of freedom of expression.

[5] The issue now is whether this infringement is justifiable under s.1 of the *Charter*.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

[6] *Canadian Charter of Rights and Freedoms*

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 2. Everyone has the following fundamental freedoms:
>
> . . .

> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

[7] *Tobacco Access Act* S.N.S. 1993, c.14 (Tab 1)

Purpose of *Act*

The purpose of this *Act* is to protect the health of Nova Scotians, and in particular young persons, by

> (a) restricting their access to tobacco and tobacco products; and
> (b) protecting them from inducements to use tobacco,

in light of the risks associated with the use of tobacco. 1993, c.14, s.2; 1999, c.12, s 12.

> 3(e) "tobacco" means tobacco as defined by the *Tobacco Tax Act*;
> (f) "tobacco product" means a cigarette paper, cigarette tube, cigarette filter, cigarette maker, cigarette hold or pipe;

Revenue Act, S.N.S. 1995-96, c. 17 (replaced *Tobacco Tax Act*) defines 'tobacco' as follows:

> 32(h) "tobacco" means tobacco in any form, whether consumed by smoking, by chewing or as snuff;

[8] *Displaying and storing*

> 9AA(1) No vendor or employee of a vendor shall display or permit the display of tobacco or tobacco products except as prescribed by the regulations.

(2) No vendor or employee of a vendor shall store tobacco or tobacco products except as prescribed by the regulations. 2006, c.47, s.3.

[9] *Tobacco Access Regulations*, N.S. Reg. 9/96 (Tab 2)

1(1) In these regulations, unless the context otherwise requires,

"Act" means the Tobacco Access Act;

(b)"linear metre width" is the greatest horizontal distance covered by a tobacco display surface, measured between the outside edges of the outmost parts of the tobacco surface, or between the outside edges of the outmost tobacco packages or tobacco products, whichever is greater;

(ba)"opaque" means, with respect to material used to conceal tobacco and tobacco products, impenetrable enough to sight so that the tobacco and tobacco products are not visible to the public;

Clause 1(1)(ba) added: O.I.C. 2007-300, N.S. Reg. 285/2007

(e) "tobacconist" means

(i) a vendor who manufactures, blends, sells or distributes only tobacco or tobacco products at their vending premises, or

(ii) a vendor who only manufactures, blends, sells or distributes tobacco or tobacco products and sells tickets for a licensed lottery scheme within the meaning of the *Gaming Control Act* at their vending premises;

[10] Storing tobacco and tobacco products:

3A(1) A vendor, other than a tobacconist, shall store tobacco and tobacco products so that all of the following conditions are met:

(a) the tobacco and tobacco products are not visible to the public from outside the vendor's premises;

(b) the tobacco and tobacco products are stored at the point of purchase under an opaque front counter, above the front counter in an opaque cabinet or behind the front counter.

(2) If tobacco or tobacco products are stored behind the front counter in accordance with clause (1)(b), all of the following conditions must be met:

(a) the cabinet space used for storing the tobacco or tobacco products must have an area of no greater than 15 720 square centimeters (131 cm x 120 cm);

(b) the cabinet space used for storing tobacco or tobacco products must have a permanent opaque concealing device that automatically closes without the assistance of the vendor or an employee;

(c) a vendor or an employee shall not open the concealing device to show what is available to the public;

(d) tobacco must be stored in such a manner that only the Health Canada emissions panel is visible when the permanent concealing device is opened;

(e) tobacco or tobacco products must not be stored in such a manner that a tobacco manufacturer's colours, logos and any other product-identifying symbols are visible to the public.

(3) Once a consumer has indicated to a vendor or an employee an intention to purchase tobacco or tobacco products, they may view and examine only the specific number of units requested of the products before purchasing.

(4) Despite the storage requirements of these regulations, it is not an offence under the *Act* if a consumer is able to view tobacco, tobacco

products or containers used for storing or transporting tobacco or tobacco products in any of the following circumstances:

(a) a vendor, an employee or a representative of a manufacturer of tobacco or tobacco products is restocking tobacco or tobacco products;

(b) a vendor or an employee is conducting an inventory of tobacco or tobacco products;

(c) a vendor or an employee is receiving a delivery of or unpacking tobacco or tobacco products;

(d) a vendor is in the process of selling tobacco or tobacco products to a consumer.

Section 3A added: O.I.C. 2007-300, N.S. Reg. 285/2007.

[11] Tobacconists' displays of tobacco and advertising

3B(1) A tobacconist may display tobacco or tobacco products that are visible to the public from outside the tobacconist's premises, but must not display any sign or material promoting or advertising the sale of or otherwise respecting tobacco or tobacco products, other than a point of awareness sign described in subsection 3(1) or a magazine or other publication described in Section 3C.

Subsection 3B(1) amended: O.I.C. 2009-148, N.S. Reg. 73/2009.

(2) Tobacco must be stored or displayed in such a manner that only the Health Canada emissions panel is visible.

Section 3B added: O.I.C. 2007-300, N.S. Reg. 285/2007.

[12] Display of magazine or other publication

3C For the purposes of subsection 9(2) of the *Act*, a vendor may display a magazine or other publication that contains tobacco advertising only if all of the following conditions are met:

(a) the magazine or publication must be displayed in such a way that the tobacco advertisement is not visible to the public;

(b) the magazine or publication must meet any requirements set out in the *Tobacco Act (Canada)* or regulations made under that *Act*.

Section 3C added: O.I.C. 2009-148, N.S. Reg. 73/2009.

[13] Signs Listing Types of Tobacco For Sale

3D(1) A vendor may display signs listing the types of tobacco offered for sale and their prices in accordance with the following conditions:

(a) no more than 1 sign may be displayed at the till;

(b) no more than 3 signs may be posted in the vendor's premises;

(c) a sign that is posted must be fixed to the counter or wall near a till;

(d) a sign may be kept under the counter and available for reference by a cashier;

(e) a sign must not be readable from outside the vendor's premises.

[14] *Tobacco Act* (S.C. 1997, c. 13) (Tab 4)

15. (1) No manufacturer or retailer shall sell a tobacco product unless the package containing it displays, in the prescribed form and manner, the information required by the regulations about the product and its

> emissions, and about the health hazards and health effects arising from the use of the product or from its emissions.

[15] *Tobacco Products Information Regulations* SOR/2000-272 (Tab 5)

In September 2011 the *Tobacco Products Information Regulations* came into effect. These regulations deal with the packaging of tobacco products, other than cigarettes as defined in section 1 of the *Tobacco Products Labelling Regulations (Cigarettes and Little Cigars)*. This includes tobacco products such as kreteks, bidis, cigarette tobacco, leaf tobacco, cigars, pipe tobacco and smokeless tobacco products. Depending on the type of product, the labelling requirements may include health warning messages, health information messages and/or toxic emissions information. Text only health warning messages are required for snuff, bidis and chewing tobacco.

[16] *Tobacco Products Labelling Regulations (Cigarettes and Little Cigars)* SOR/2011-177 (Tab 6)

In September 2011, the *Tobacco Products Labelling Regulations (Cigarettes and Little Cigars)* came into force with strengthened labelling requirements for cigarettes and little cigar packages.[1] The requirements include: health warning messages that cover 75% of the front and back of packages, health information messages on the inside of packages, and toxic emissions statements on the side of packages. The health warning messages and information messages are to be from "source document", namely, *Labelling Elements for Tobacco Products (Cigarettes and Little Cigars)*, published by the Department of Health, dated May 27, 2011.[2]

[1] At the time these charges were laid, these regulations (cigarettes and little cigars) required that the health warnings cover 50% of the front and back of packages.

[2] http://www.hc-sc.gc.ca/hc-ps/tobac-tabac/legislation/label-etiquette/cigarette-eng.php

The health warning messages can accurately be described as graphic and disturbing.

Justification under Section 1 of the *Charter*

[17] In *R. v. Oakes* [1986] 1 S.C.R. 103, the Supreme Court of Canada set out the criteria to be considered in determining whether challenged legislation was a reasonable limit on the particular freedom or right granted by the Charter. Chief Justice Dickson outlined the approach as follows:

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right of freedom": R. v. Big M Drug Mart Ltd., supra, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. (para. 69)
>
> Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": R. v. Big M Drug Mart Ltd., supra, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the

> right or freedom in question: R. v. Big M Drug Mart Ltd., supra, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance". (para.70)

[18] I must be mindful of course that the *Oakes* criteria are not to be adhered to as if they comprise an inflexible, rigid formula for determining if legislation is justified. In *Thomson Newpapers Co. (c.o.b. Globe and Mail) v. Canada (Attorney General)* [1998] 1 S.C.R. 877, Bastarache J., stressing the importance of a contextual analysis, stated:

> The analysis under s. 1 of the Charter must be undertaken with a close attention to context. This is inevitable as the test devised in R. v. Oakes, [1986] 1 S.C.R. 103, requires a court to establish the objective of the impugned provision, which can only be accomplished by canvassing the nature of the social problem which it addresses. Similarly, the proportionality of the means used to fulfil the pressing and substantial objective can only be evaluated through a close attention to detail and factual setting. In essence, context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a Charter right. (para.87)

The Nature of the Expressive Activity

[19] At this stage I will examine the nature of the expression in relation to the core values underlying s. 2(b) in order to provide context for the s. 1 analysis. In my earlier decision I found that the Defendants' display of tobacco products for sale was expressive activity that fell within the sphere of conduct that was protected by s. 2(b):

> 39 As mentioned earlier, these cases exemplify the large and liberal interpretation accorded freedom of expression. The Defendants want to display products that are for sale in Mader's Tobacco Store Ltd. They wish to be able to lawfully show any person in the store the tobacco products they sell. It is a way of providing potential customers a very simple, basic message: "these are the kinds of tobacco products I sell; these are the brands of tobacco products I sell". I find that this constitutes expressive activity; it does convey or attempt to convey a meaning.
>
> 40 The fact that the expressive activity is simple and straightforward does not take it outside the ambit of s. 2(b). Moreover, the expressive activity is not removed from Charter protection because it involves the display of tobacco products.
>
> 41 It should be noted as well that if the Defendants can lawfully display goods for sale then people in the store will be able to see those specific items and know the types and brands of tobacco products Mader's Tobacco Store Ltd. is offering for sale. Commercial expression, as noted in Ford, "protects listeners as well as speakers ... in enabling individuals to make informed economic choices ..."

[20] The Supreme Court has repeatedly emphasized that the level of protection to which expression is entitled under section 1 will vary with the nature of the expression. What are the degrees of variation and what are the differing levels of protection? My starting point will be to outline the values underlying freedom of expression as described by Dickson C.J.(as he then was) in *R. v Keegstra* [1990] 3 S.C.R. 697:

> …the reach of s. 2(b) is potentially very wide, expression being deserving of constitutional protection if "it serves individual and societal values in a free and democratic society". In subsequent cases, the Court has not lost sight of this broad view of the values underlying the freedom of expression, though the majority decision in Irwin Toy perhaps goes further towards stressing as primary the "democratic commitment" said to delineate the protected sphere of liberty (p. 971). Moreover, the Court has attempted to articulate more precisely some of

> the convictions fueling the freedom of expression, these being summarized in Irwin Toy (at p. 976) as follows: (1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed. (para.27)

[21] More recently, in *Saskatchewan (Human Rights Commission) v. Whatcott* [2013] SCC 11, Rothstein J., on behalf of the court, stated:

> 64 Freedom of expression is central to our democracy. Nonetheless, this Court has consistently found that the right to freedom of expression is not absolute and limitations of freedom of expression may be justified under s. 1: see *Irwin Toy*; *Keegstra*; *Taylor*; *R. v. Butler*, [1992] 1 S.C.R. 452; *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45; and CBC. Section 1 both "guarantees and limits Charter rights and freedoms by reference to principles fundamental in a free and democratic society" (*Taylor*, at p. 916, per Dickson C.J.).
>
> 65 The justification of a limit on freedom of expression under s. 1 requires a contextual and purposive approach. The values underlying freedom of expression will inform the context of the violation (see Taylor, Keegstra and Sharpe). McLachlin C.J., writing for the majority in Sharpe, explained succinctly the values underlying freedom of expression first recognized in Irwin Toy, being: "individual self-fulfilment, finding the truth through the open exchange of ideas, and the political discourse fundamental to democracy" (para. 23)

[22] The expressive activity here is of a commercial nature. The Defendants wish to display tobacco products they offer for sale, products that are lawful for them to sell to adults and products which contain no misleading or deceptive information. Indeed, the contrary is true. Federal legislation, namely the *Tobacco Act* and its

regulations, specify the content and images of health warnings that must be placed on tobacco products. With respect to cigarettes, for example, these warnings must occupy 75% of front and back of the cigarette packages. One approved warning is a photograph of a cancerous tongue, accompanied by the caption "ORAL CANCER These white spots are a form of oral cancer caused primarily by smoking. Even if you survive, you may lose part or all of your tongue." Indeed, given the graphic nature of the health warnings, it might strike some as ironic that the Defendants wish to display these products to their potential customers. Likewise, it might seem equally ironic that the provincial legislation bans the display of products, many of which must contain graphic health warnings. To further complicate matters, in *Canada (Attorney General) v. JTI-Macdonald Corp*. [2007] S.C.J. No. 30, McLachlin C.J. stated on behalf of the court that package warnings "inform and remind potential purchasers of the product of the health hazards it entails":

> Parliament's objective in requiring that a large part of packaging be devoted to a warning is pressing and substantial. It is to inform and remind potential purchasers of the product of the health hazards it entails. This is designed to further Parliament's larger goal of discouraging tobacco consumption and preventing new smokers from taking up the habit… The evidence as to the importance and effectiveness of such warnings establishes a rational connection… (para. 134 and 135)

[23] These 'effective' and 'important' warnings (cigarette and cigar packages) that our Supreme Court found to be important in furthering Parliament's objective of reducing tobacco consumption are banned from display under the provisions of our province's *Tobacco Access Act*. This conundrum will be explored later in this decision in terms of deciding whether the Province has shown a rational connection between the display ban and the objective of reducing tobacco consumption.

[24] It must be kept in mind that commercial expression protects listeners as well as speakers. As autonomous individuals we can choose to make purchases at our local grocery store, coffee shop or liquor store, purchases that may not be in our best interests. The choice is ours. The prospect of going to our local store or coffee shop and being prevented from viewing displays (including power walls) of products which might be, for example, fat-laden, sugar-filled and harmful in that they contribute to obesity, diabetes and cardiovascular disease is somewhat perplexing. Vendors displaying their products for sale and customers examining the items on display before deciding what, if anything, they will purchase is a routine part of our everyday lives. Whether we are buying lottery tickets, rum or vegetables, we are accustomed to visually examining displays while we decide which lottery ticket, bottle of alcohol or head of lettuce we will buy. While displaying and viewing tobacco products for sale does not involve anything so lofty as political discourse fundamental to democracy, it does enable consumers to exercise personal autonomy, make an informed choice, and, albeit at a minimal level, further individual self-fulfillment.

[25] Having said that, the sale of addictive and harmful products is not closely linked to the core values of s. 2(b) and clearly does not merit the stringent scrutiny accorded political speech for example, but it does merit scrutiny. This is especially so when one considers that information concerning the harmful and addictive nature of the product is not conveyed as a result of the infringement. I will return to a consideration of the nature of this expression in the final step of the s.1 analysis.

[26] With this in mind, I will now examine whether the infringement of the Defendant's freedom of expression is reasonable and demonstrably justified in a free and democratic society.

Objective and Background of the Impugned Legislation - Nature of the Social Problem which it Addresses

[27] The purpose as declared in the *Tobacco Access Act* is set out below for ease of reference:

> .2 The purpose of this Act is to protect the health of Nova Scotians, and in particular young persons, by
> (a) restricting their access to tobacco products; and
> (b) protecting them from inducements to use tobacco, in light of the risks associated with the use of tobacco.

[28] The objective of the *Tobacco Access Act*, broadly stated, is to protect the health of Nova Scotians, in particular young persons, by reducing tobacco consumption. More narrowly, the objective is to restrict access to tobacco products and to protect Nova Scotians from inducements to use tobacco.

[29] Mr. Palmer agrees that "the Crown has offered evidence showing that the objective of the retail display ban is to reduce tobacco-associated health risks by reducing advertising-related consumption of tobacco products. The Defendants concede that this is an objective of sufficient importance for the purposes of the Oakes test…" (Brief p.14) As tempting as it might be to forge ahead given this concession, the context of the impugned provisions is pivotal to the entire section 1 analysis in terms of determining the evidence required for the Crown to establish justification under s.1. That being so, I will highlight some of the evidence presented during this hearing, evidence with respect to the nature of the social problem the impugned legislation purports to address.

[30] Dr. Robert Strang, testified concerning the factors which 'set the stage' so to speak, for support of a tobacco display ban:

> …and the evidence was becoming clearer and clearer around how much the tobacco industry was investing and funding convenience stores, the evidence becoming clearer around the impact of point of sale marketing on driving both youth starting to take up smoking as well as people who were trying to quit smoking and, and creating issues for them……. and the jurisdiction for point of sale marketing and advertising being at a provincial level…There were a number of provinces who preceded Nova Scotia but I remember…at the time having a lot of conversations with colleagues around the country saying this is where we need to go in conjunction with controlling smoking in public places, controlling point of sale advertising were the two areas that we needed to pay attention to make continued declines in smoking rates across the country.

[31] The legislation banning the display of tobacco products is but one component of Nova Scotia's Comprehensive Tobacco Control Strategy,[3] a collaborative effort involving government, individuals and organizations with the goal to 'reduce disease and death related to tobacco use.' The most recent strategy has, as its objectives, prevention of tobacco use, helping tobacco users to quit, protecting Nova Scotians from the harms of smoking and second-hand smoke, and to reduce substantially tobacco-related health disparities between populations in Nova Scotia. Clearly, a complex problem such as tobacco use requires 'a whole suite of activities,' including legislation, pricing, public information campaigns, monitoring and surveillance. According to Dr. Strang:

> Despite the successes we've had in tobacco control…and we've had significant reductions in smoking rates across the country including Nova Scotia, use of tobacco products still remains the number one preventable cause of death and chronic disease and disability in Canada and that causes a significant toll …

[3] Exhibit 3 Tab 4

> at an individual family level around poor health and unnecessary early death, but it also creates a huge economic burden on our health care system, on our business community and…from the perspective of where tax dollars are being spent…

[32] Dr. Strang's evidence[4] set out the history and chronology of tobacco control initiatives in Nova Scotia from the early 1990's to the present. When the *Tobacco Access Act* was enacted in 1993, the federal *Tobacco Act* did not prohibit manufacturers from advertising their tobacco products. Thus, the initial focus of the provincial legislation was to prohibit the sale of tobacco to anyone under 19 years of age, limit where tobacco could be bought, control certain types of promotion of tobacco products, and to protect the health of Nova Scotians. Amendments to the *Tobacco Act* restricting advertising created a situation which heightened the significance of point-of-sale displays as a means to promote tobacco products. Accordingly, the province enacted amendments to ban the display of tobacco products.

[33] Dr. Strang testified that given the adverse health impact of tobacco use and the effective steps that have been taken provincially and nationally to limit tobacco advertising, the aim of preventing tobacco advertising at point of sale is to reduce tobacco consumption, and to ensure that tobacco is not viewed as a product like other consumer goods such as fresh produce and other goods targeted for sale to children and adults.

International Context of Tobacco Display Bans

[4] Exhibit 3 Tab 1

[34] Australia, Finland, Iceland, Mauritius, New Zealand, Norway, Panama, Thailand, United Kingdom, and the British Virgin Islands have enacted legislation banning the display of tobacco products.[5] To be clear, I am setting this out solely to inform the legal context of tobacco display bans. I do not draw the inference, as suggested by the Crown at page 15 in its brief, that the increasing number of jurisdictions enacting display bans is evidence of the effectiveness of such bans.

[35] In February, 2005, the World Health Organization Framework Convention on Tobacco Control (2003), 2302 U.N.T.S. 229[6] came into effect. This Convention, ratified by Canada in 2004, 'is one of the most widely embraced of multilateral treaties.' *(Canada (Attorney General) v. JTI-Macdonald Corp*. [2007] 2 S.C.R. 610, at para.10). The preamble includes the following:

> *Recognizing* that the spread of the tobacco epidemic is a global problem with serious consequences for public health that calls for the widest possible international cooperation and the participation of all countries in an effective, appropriate and comprehensive international response……..
>
> 1. Parties recognize that a comprehensive ban on advertising, promotion and sponsorship would reduce the consumption of tobacco products.
>
> 2. Each Party shall, in accordance with its constitution or constitutional principles, undertake a comprehensive ban of all tobacco advertising, promotion and sponsorship. This shall include, subject to the legal environment and technical means available to that Party, a comprehensive ban on cross-border advertising, promotion and sponsorship originating from its territory.
>
> ……

[5] Extrinsic evidence-Exhibit 8 Tab 7 and Exhibits 10A and 10B- International Legislation

[6] Extrinsic evidence-Exhibit 8 Tab 42

> 4. As a minimum, and in accordance with its constitution or constitutional principles, each Party shall:
>
> (a) prohibit all forms of tobacco advertising, promotion and sponsorship that promote a tobacco product by any means that are false, misleading or deceptive or likely to create an erroneous impression about its characteristics, health effects, hazards or emissions;

[36] The parties to the convention have adopted guidelines dealing with the implementation of Article 13[7]. Clearly, display of tobacco products constitutes advertising in the context of the W.H.O. Convention on Tobacco Control. Further, the guidelines recommend that tobacco displays be banned.

> Retail sale and display
>
> 12. Display of tobacco products at points of sale in itself constitutes advertising and promotion. Display of products is a key means of promoting tobacco products and tobacco use, including by stimulating impulse purchases of tobacco products, giving the impression that tobacco use is socially acceptable and making it harder for tobacco users to quit. Young people are particularly vulnerable to the promotional effects of product display.
>
> Recommendation
>
> Display and visibility of tobacco products at points of sale constitutes advertising and promotion and should therefore be banned. Vending machines should be banned because they constitute, by their very presence, a means of advertising and promotion.

[7] Extrinsic evidence-Exhibit 8 tab 45- W.H.O. Guidelines for Implementation of Article 13 of the W.H.O. Framework Convention on Tobacco Control

[37] Canada's international obligations include implementation of legislation banning tobacco displays 'in accordance with its constitution.' Indeed, every province in Canada has enacted legislation similar to that of Nova Scotia. I am mindful of course that this does not relieve the Province of its burden to show that the limitations on freedom of expression imposed by the *Tobacco Access Act* are justified under s.1 of the *Charter*.

[38] The Crown's brief made reference to a decision of the Oslo District Court[8] in which Philip Morris' challenge to the Norwegian tobacco display ban was dismissed, the Norwegian Court applying a proportionality analysis similar to our analysis under section 1 of the *Charter*. This is accurate. Specifically, the issue was "whether a visual display ban, whose purpose is to reduce tobacco consumption amongst the public in general and amongst young people in particular, is suitable and necessary on grounds of public health as provided for in Article 13 EEA." Merely as a point of interest, I note that the Oslo District Court's conclusion was "there is no clear evidence for the Display Ban not being a suitable measure for limiting the consumption of tobacco in Norway in the long run." (page 55) This wording indicates that, unlike our approach unders.1, the burden was on Philip Morris to establish that the display ban was not suitable for restricting tobacco consumption.

[39] Regardless, it is abundantly clear that there is recognition on an international level that tobacco use is harmful and that a ban on tobacco advertising (including displays) is a legitimate means by which to achieve the goal of reduced tobacco consumption. Of course, that is not determinative of any issue which I must decide in this section 1 analysis; rather, it assists in terms of informing the contextual background.

[8] Philip Morris Norway AS v. The Norwegian Government represented by the Ministry of Health and Care Services Civil Action No: 10-041388TVI-OTIR/02 September 14/12 Oslo District Court

[40] Clearly, the objective of the *Tobacco Access Act* (set out above at paragraph 27) is 'pressing and substantial.' The main issue in this hearing is whether the Crown has shown that the impugned provisions are justified under s.1.

[41] Before highlighting the evidence heard during this hearing, I must set out concerns I have with respect to some of the extrinsic evidence put forward by the Crown. During this hearing, copious materials were submitted (with no objection) as extrinsic evidence. The lack of an objection does not transform inadmissible or irrelevant evidence into admissible, relevant evidence. I have relied only upon that extrinsic evidence which I consider admissible and I make specific reference in this decision to that extrinsic evidence. I say this because, after having reviewed the extrinsic evidence put forward by the Crown, I consider much of it to be inadmissible. My concerns are based on the following:

(1) Some of these materials were outdated and did not take into consideration amendments made to the *Tobacco Act* with respect to advertising.

(2) A considerable portion of these materials were irrelevant in the Canadian context because of our tobacco control legislation.

(3) Some of the materials were more opinion than fact.

(4) For some of the material, I would have required more contextual information in order to determine admissibility and weight. For example, many of the studies involved reliance on 'advertising' without specifying the type of advertising being used in the study. Perhaps the advertising which was critical to the authors' opinions was advertising which would be legal in Canada, perhaps not. Without more information on this, it was difficult if not impossible for me to determine admissibility, relevancy or weight.

(5) The methodology and qualifications of some of the authors merited critical analysis before I would be able to determine what, if any weight to give their reports.

(6) In a similar vein, the authors of many of the materials on point of sale advertising and tobacco consumption (which arguably are more in the nature of adjudicative facts in the context of this case) could have been called as witnesses and, if properly qualified, could have given viva voce testimony, as did Dr. Strang, Dr. Dewhirst, and Dr. Fullerton. I say this being fully aware that legislative facts establishing the purpose and background of legislation, including its social, economic and cultural context are subject to less stringent admissibility requirements. Although legislative and social facts are subject to less stringent admissibility requirements, as Binnie J. stated in *R. v. Spence*, [2005] S.C.J. No. 74, para. 58:

> No doubt there is a useful distinction between adjudicative facts (the where, when and why of what the accused is alleged to have done) and "social facts" and "legislative facts" which have relevance to the reasoning process and may involve broad considerations of policy: *Paciocco* and *Stuesser*, at p. 286. However, simply categorizing an issue as "social fact" or "legislative fact" does not license the court to put aside the need to examine the trustworthiness of the "facts" sought to be judicially noticed. Nor are counsel encouraged to bootleg "evidence in the guise of authorities": *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [1999] 3 S.C.R. 845, at para. 3.
>
> .....
>
> 65 When asked to take judicial notice of matters falling between the high end already discussed where the Morgan criteria will be insisted upon, and the low end of background facts where the court will likely proceed (consciously or unconsciously) on the basis that the matter is beyond serious controversy, I believe a court ought to ask itself whether such "fact" would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute for the particular purpose for which it is to be used, keeping in mind that the need for reliability and

> trustworthiness increases directly with the centrality of the "fact" to the disposition of the controversy.

[42] As I mentioned earlier, the impact of point of sale display bans on tobacco consumption is a critical issue in this s.1 hearing, and is the subject of reasonable dispute; to describe it as a being highly controversial issue in this hearing is not an overstatement. For the reasons set out above, I am not prepared to take judicial notice of that extrinsic evidence (including studies) which relates to the issue of display bans reducing tobacco consumption.

[43] To clarify: to the extent that extrinsic evidence was presented for the purpose of proving the truth of its contents it is not admissible. Some of the extrinsic evidence consists of materials which were presented to the government by those encouraging the government to enact legislation banning the display of tobacco products. This evidence (e.g. the Tilson Report[9], Compilation of Evidence Regarding the Impact of Tobacco Advertising and Promotion, Including at Point of Purchase-A Submission to the N.S. Minister of Health Promotion Volumes 1-4[10]) is admissible, but only for the limited purpose of showing that the Legislature was provided with these materials by those in favour of enactment of a tobacco display ban. Given that defence counsel agrees that reducing tobacco-associated health risks by reducing advertising-related consumption of tobacco products is a pressing and substantial objective, the extrinsic evidence in relation to the health consequences of tobacco use is not in dispute; I will take judicial notice of that extrinsic evidence.

[9] Exhibit 3 Tab 2

[10] Exhibit 7 Tab 1

[44] Defence counsel in his brief argues that Exhibit 14 (photographs from Your Convenience Manager) and Exhibit 15 (assorted 'tobacco' products) are not admissible. I agree. The packaging of the products depicted in the photographs (dated 2005 to 2007) appears not to comply with present-day requirements as set out in the *Tobacco Products Labelling Regulations* in force since 2011. As for Exhibit 15, I agree with Mr. Palmer that there was no proper foundation laid for the introduction of those items. No witness was called to testify that he/she purchased the items, to say when or where they were bought. Even assuming that these items were admissible, there might have been a relevancy issue given that these products might not be in compliance with the *Tobacco Act* as amended, specifically section 5.2(1) which prohibits the sale of cigarettes, little cigars and blunt wraps which contain additives that have flavouring properties or that enhance flavor. In any event, the bottom line is that Exhibit 15 is inadmissible, no foundation having been laid for its admission into evidence.

Proportionality – Is the means by which the goal is furthered proportionate?

Rational Connection

[45] I will now turn to the issue of whether the Crown has shown, on the balance of probabilities, that the infringement of the Defendants' right to freedom of expression is rationally connected to the legislative goal of reducing tobacco consumption. Dr. Strang, Dr. Dewhirst, and Dr. Fullerton testified on the issue of rational connection. Dr. Wild's curriculum vitae (Exhibit 1) and report (Exhibit 2) were entered into evidence with the consent of Defence counsel.

[46] Professor Wild is Associate Dean (Research) at the School of Public Health, University of Alberta and was qualified with consent as an 'expert in addictions generally, smoking and nicotine addiction and the environmental cues that promote and reinforce addiction and cessation issues." According to Dr. Wild's report, (admitted with consent), "Smoking is considered to be a learned cue bound

phenomenon by which smokers are reactive to cues associated with past smoking or the availability of cigarettes." (para.12) Bouts of intense craving are usually triggered by exposure to situational stimuli that are associated with smoking. (para. 16) Dr. Wild's report concludes as follows:

> 17. The retail display of tobacco products can be seen as a powerful cue to addicted smokers, smokers trying to quit, and ex-smokers. Such displays may reasonably be expected to trigger cravings and induce the purchase of tobacco products.
>
> 18. The retail display of tobacco products reinforces addiction, undermines cessation, and promotes relapse.

[47] Dr. Strang described the addictive nature of tobacco as follows:

> Well it's known that tobacco is a highly addictive substance and clear evidence that people who even may have been a non-smoker for years, that certain cues and triggers, even the sight of those power walls, even the smell of nicotine-and I've read a paper in the last couple of weeks-even some of our non-smoking signs which display a cigarette with the red circle, that simply alone can act as a trigger for somebody to resurrect a long dormant addiction. Addiction to nicotine, even if it's controlled, is a lifelong battle.

[48] With respect to whether or not there is statistical evidence relevant to determining the efficacy of display bans, Dr. Strang referred to Canadian Tobacco Use Monitoring Survey[11] and testified that between 2000 and 2007 smoking rates in Nova Scotia declined from 30% to 20%, remained at 20% in both 2008 and 2009, was 21% in 2010, and 18% in 2011. Given that the tobacco display ban legislation came into effect in 2007, these statistics, on their face, do not advance

[11] Health Canada-Controlled Substances and Tobacco Directorate. Supplementary Tables, CTUMS Annual (February-December 2010)

the Crown's argument that the display ban has had an impact on reducing tobacco consumption. Further, I accept Dr. Strang's evidence (corroborated by Dr. Fullerton on this point) that it is possible to measure the cumulative impact a comprehensive tobacco reduction program has on smoking rates, but 'very difficult in the real world' to measure the effect of an individual measure. It should be noted that Dr. Strang, describing himself as 'not the most expert person in the world' in the context of determining efficacy of tobacco reduction programs, did express the opinion that through very rigorous scientific methodology one could establish if a particular measure were effective.

[49] Dr. Dewhirst, an Associate Professor in the Department of Marketing and Consumer Studies at the University of Guelph, was qualified to give opinion evidence as an expert in areas including the marketing of tobacco products, history of tobacco advertising and promotion, retail display bans, tobacco packaging and the marketing of tobacco products to groups including children and smokers trying to quit.

[50] After setting out general marketing principles, Dr. Dewhirst focused on tobacco companies' advertising and promotion strategies. He placed considerable reliance on tobacco industry documents, most pre-dating 2000. According to Dr. Dewhirst, "internal corporate documents reveal that tobacco firms recognize cigarettes as a product category in which the marketing of a brand's image-and the portrayal of lifestyle-is paramount." By way of illustration, Dr. Dewhirst's report (Exhibit 5) provides many examples, only three of which are set out as below:

> "Imperial Tobacco Ltd.'s (ITL) Player's-"all Player's advertising will use lifestyle imagery…." (p.20)
>
> "The Player's Family…among its media objectives, proposed a media program that specifically spoke to those with a youthful, masculine lifestyle." (p.20)

> For ITL's Matinee Extra Mild…the creative strategy was:… "focus on depicting active forms of leisure that are in keeping with people who value a sense of physical well-being…" (p.20)

[51] After stating that changes in 'regulatory environments have facilitated retail merchandising becoming a central focus of tobacco marketing efforts" (p.21), Dr. Dewhirst sets out the increasing importance of Point-of-Sale promotion. In the next section of his report, "Tobacco Retail Merchandising", Dr. Dewhirst referred to British American Tobacco internal documents in the context of tobacco retail merchandising:

> "All activities that feature your product(s) at the point of purchase. It is the final step in ensuring that the consumer sees your product and is tempted to buy it. Good merchandising is about the impact your product has on the consumer, it is about using the product itself to stimulate the customer to buy, it is about reminding the consumer of your mass media campaigns at the actual point of purchase when he/she is faced with the buying decision…" (Exhibit p.22)

[52] A considerable portion of Dr. Dewhirst's report is of little, (if any) assistance to the court when one considers it in the context of today's 'legal landscape,' in particular the *Tobacco Act*'s restrictions on advertising. B.A.T. is no longer able to remind consumers of its mass media campaigns-such campaigns are not permitted. Likewise, emphasizing lifestyle as a means of marketing a brand's image ignores the fact that such advertising is prohibited and product packaging is regulated. Similarly, when discussing the role of packaging design at Point of Sale, Dr. Dewhirst describes it as being "considered particularly integral in an increasingly regulated advertising environment." (emphasis added p.25) After making a reference to the regulated advertising environment, Dr. Dewhirst sets out that B.A.T. has "adopted a fifth P (packaging) for strategic purposes, which speaks to its importance and the resources seemingly being dedicated towards this

marketing communication channel" (p.25). Once again he provides examples, some of which are set out below:

> "…packaging for ITL's Player's conveys masculinity, adventure, and heroism with the depiction of a sailor known as Hero; the sailor contributes to consumer perceptions that the brand is positioned primarily toward males." (p.25)
>
> "Packages are designed to be eye-catching and attractive, and meant to influence consumer product perceptions." (p.25)
>
> "Package colours can serve the function of being bright and hence noticed at POS, convey brand image, and suggest the product's relative reported tar and nicotine yield." (p. 26)

[53] Although Dr. Dewhirst makes reference to the 'regulated environment', he then proceeded to offer examples to support his position on the importance of packaging. In doing this, he provides examples which are anachronistic precisely because of the present day regulated environment. Similarly, in the context of studies relating to the pervasiveness and high intensity of tobacco promotion at retail, Dr. Dewhirst states:

> People are likely to underestimate the risks of tobacco use when cigarettes come to be seen as a standard, commonplace product that is on par with milk, bread, chewing gum, and chocolate bars……Highly visible and dense environments of cigarette merchandising and promotion give the impression that tobacco use is socially acceptable, desirable, and prevalent. Each person is likely to be exposed on a frequent and regular basis to <u>common types of cigarette messages, including lifestyle images relating to independence, sociability, and upward status, as well as implied health reassurances.</u> (p. 27) (emphasis added"

[54] This reference to and description of cigarette messages fails to take into account the *Tobacco Act's* restrictions on advertising and also pays no heed to the requirements set out in the *Tobacco Products Labelling Regulations* (Cigarettes and Little Cigars) with respect to mandatory health warnings. The 'common types of cigarette messages' required on cigarette packaging include a picture of a young stroke victim with the caption 'a single stroke can leave you helpless'; a picture of a bald, emaciated woman, (identified on the package as 'Barb Tarbox who died of lung cancer at the age of 42'), accompanied by 'This is what dying of lung cancer looks like.'; a picture of a man with a hole in his throat, identified as Leroy with text to the effect that Leroy must now breathe through a hole in his throat. To suggest that these 'common types of cigarette messages' suggest independence or contain implied health reassurance borders on incomprehensible.

[55] Dr. Dewhirst's expert opinion is that a retail tobacco display ban serves the function of reducing tobacco consumption. I have concerns with respect to the weight to give his evidence because of the following:

(1) His opinion is based in part on his belief that permitting display of tobacco products would possibly include 'promotional signage', resulting in a kind of 'imagery.' It must be kept in mind that *The Tobacco Act* prohibits 'promotion' of a tobacco product or a tobacco product-related brand element with limited exceptions, for example, in a mailed publication to an adult identified by name or signage in a place where young persons are not permitted by law. *The Tobacco Act* defines 'promotion' broadly:

> 18. (1)In this Part, "promotion" means a representation about a product or service by any means, whether directly or indirectly, including any communication of information about a product or service and its price and distribution, that is likely to influence and shape attitudes, beliefs and behaviours about the product or service.

(2) Intermingling the two separate issues of point-of-sale display and 'promotional signage' detracts from the reliability of Dr. Dewhirst's opinion evidence. In

fairness to Dr. Dewhirst, he might have been under the impression that if the display ban were not upheld, promotional signage would be permitted. I say this based on the following exchange: Dr. Dewhirst testified: "I mean, my understanding is that if this legislation was not upheld, that there would certainly be a possibility of promotional signage allowed at retail, and so it is conceivable that it would allow for resuming and sort of continuation of the kind of imagery that has, in the past, circulated. Mr. Gores replies, "That's right."

(3) Of more concern, is his evidence that "it is evident that tobacco brands are rich in symbolic and lifestyle imagery; consequently, allowing tobacco packages and promotional signage to be visibly on display establishes an environment where tobacco brands being an expression of independence, ruggedness, femininity, success, and so on is enhanced and reinforced." (p.30) There is not a scintilla of evidence to support this statement given the present law in Canada with respect to tobacco packaging. Indeed, one could argue (as does Mr. Palmer) that the opposite is true. The suggestion that images of a dying woman, stroke victim, cancerous tongue, or diseased heart, promote tobacco brands as expressing independence, ruggedness, etc. defies reason.

(4) Dr. Dewhirst's opinion relies, at least in part, on a number of studies in which findings have been made in relation to tobacco display and tobacco consumption. Some studies were in relation to impulse purchases of tobacco, others examined the effects of display bans on the likelihood of smoking or successfully quitting. Dr. Dewhirst referred to studies, including ones by Wakefield[12] Hoek[13] MacKintosh[14] Paynter[15], Edwards, Henriksen[16], Germain[17], and Burton, many of

[12] Extrinsic evidence-Exhibit 7 Item 4 Tab 65

[13] Extrinsic evidence-Exhibit 7 Item 68

[14] Extrinsic evidence-Exhibit 7 Item 73

[15] Extrinsic evidence-Exhibit 7 Item 4 Tab 50

[16] Extrinsic evidence-Exhibit 7 Tab 67

which were included in the extrinsic evidence. As I said earlier in the context of admissibility of extrinsic evidence, the issue of tobacco display bans reducing tobacco consumption is controversial in this hearing. Indeed, Dr. Fullerton's evidence, which I accept in this regard, suggests that there are concerns with the validity of studies that might equate correlation with cause and effect and/or do not test other rival theories that might explain the dependent variable in question. Clearly, Dr. Dewhirst can take these studies into consideration when forming his opinion. The difficulty for the court is in determining what weight to give his opinion where his opinion is based, at least in part, on studies which may or may be valid. The studies might have been integral to Dr. Dewhirst forming the opinion he reached; perhaps they were of only some assistance to him. I do not know. Regardless, this negatively impacts the weight I give his opinion evidence.

(5) In setting out that internal corporate documents reveal that Canadian cigarette brands are successfully marketed to youth (p.9), Dr. Dewhirst does not consider that strategy in the context of the present day legal environment, specifically the *Tobacco Act* as referred to earlier, and the *Tobacco Access Act'*s prohibition on the sale of cigarettes to anyone under 19 years of age.

[56] Dr. Dewhirst's evidence, having met the criteria set out in *R. v. Mohan* [1994] 2 S.C.R. 9, is admissible. Having said that, I have concerns relating to Dr. Dewhirst's objectivity, or lack of same. These concerns are best exemplified by reference to his testimony. In direct examination, Dr. Dewhirst was answering a question which asked him to provide examples of how tobacco companies have employed market segmentation within the Canadian market. Dr. Dewhirst replies by saying as follows '…….there are many examples of some cigarette brands being more positioned and meant to appeal to a more masculine consumer, whereas others to a more feminine consumer. And so, looking in the US, Marlboro

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[17] Extrinsic evidence-Exhibit 7 Item 65

would be an example of a product today that we very much associate with being masculine, rugged, and independent, and heroic ….”

[57] In cross-examination, the following exchange occurs in the context of Dr. Dewhirst’s evidence that independence can be conveyed by the display of tobacco packages. Mr. Palmer asks: “The Marlboro Man type ad, though, that’s no longer allowed is it?” To which Dr. Dewhirst replies: “Could you specify when you say Marlboro ads? Mr. Palmer’s question was short and to the point. When testifying in direct, Dr. Dewhirst had no difficulty referring to Marlboro products in general, yet expected Defence counsel to refer to specific ads before he could or would reply to this straightforward question. Rather than answering, Dr. Dewhirst replied with a question, after which the focus of cross-examination changed.

[58] In Appendix B of his report, Dr. Dewhirst attached five photographs of cigarette packages, four of which did not contain any of the text warnings or images that are mandated by the federal legislation. I am not suggesting that this was an intentional misrepresentation; in fact, there are dates attached to each of the photographs. Nonetheless, in the context of giving evidence as an expert in the area of the marketing of tobacco products and retail display bans, one might have expected that the witness would have selected photographs depicting the packaging which the challenged legislation bans from view.

[59] Dr. Dewhirst’s report has a photo of an ad for Pall Mall Cigarettes (Appendix C page 77), showing packages of the cigarettes and the caption “Tastes Smoother Burns Slower Lasts Longer with the Surgeon General’s warning in the lower left corner. Defence counsel suggested: “that’s not a Canadian advertisement, is it?” Dr. Dewhirst’s reply was “Pall Mall is offered in the Canadian market, but this advertisement was from a US magazine…” After agreeing with defence counsel that this ad could not be displayed at retail in

Canada, Dr. Dewhirst added: "There is the issue of cross-border advertising, however…there is the potential that…such an ad could be…viewed in Canada."

[60] In direct examination, Mr. Gores asked Dr. Dewhirst if cigarette packages "actually contain any substantive information about the product itself?" Dr. Dewhirst's response was as follows: In terms of packaging in Canada, 75% of the package on both the front and back side would be a graphic pictorial health warning, but 25% of the package remains for branding elements where there would be the use of the brand name, as well as the logo, colours and designs that would convey certain associations with the brand, including image. There would be the number of cigarettes that are contained in the package, whether it's 20 cigarettes or 25 cigarettes. There would likely be a tax stamp acknowledging which province the package was purchased in, and there would also likely be the producer of the cigarettes, whether it's Imperial Tobacco Canada Limited, Rothmans Benson & Hedges and so on, and perhaps a mailing address, or a way that they could be contacted.

[61] Dr. Dewhirst then goes on to explain the significance of colours, the shape of the package, 'whether it's flip top for example, and there are concerns with flip top –that's where if you're actually opening the package and you sort of, sort of undo the lid then the graphic pictorial health warning is no longer visible as it was when closed.' In terms of being asked about substantive information consumers receive from cigarette packages, one might have expected Dr. Dewhirst to make more than the bare passing reference he did to the 75% mandatory warning.

[62] During cross-examination, Dr. Dewhirst was being questioned with respect to studies from other countries perhaps not being 'interchangeable' from one jurisdiction to another because of differing legislation on tobacco advertising. Within this context, Dr. Dewhirst volunteered that Canada, as a party to the

W.H.O.'s Convention on Tobacco Control has obligations to meet. In fact, the final paragraph of Dr. Dewhirst's report is a brief outline of the W.H.O. Framework Convention on Tobacco control, including Article 13. Dr. Dewhirst points out that this convention is legally binding on those countries that have ratified the treaty, including Canada. This 'advocacy' set out in the final paragraph of his report might have been dismissed if not for the cumulative effect of his evidence, only some of which is set out herein.

[63] Other aspects of Dr. Dewhirst's testimony which caused me similar concern, included his reluctance to concede, even slightly, that an 'impulse' purchase of tobacco might be less likely at Mader's Tobacco Store given its signage indicating it is a tobacco store, his apparent unease over the possible situation of a pre-purchase discussion between customer and retailer, and not referring to the possibility of 'pantry stocking' when examining the issue of impulse purchases of tobacco leading to increased tobacco consumption.

[64] Having read his report and having heard his evidence in both direct and cross-examination, I am left with concerns as to Dr. Dewhirst's impartiality and his level of objectivity.

[65] In conclusion, Dr. Dewhirst is extremely knowledgeable in the area of tobacco marketing. Some of his evidence outlined the strategies tobacco companies' have resorted to in an effort to market their products. This evidence is admissible solely as historical background; as such, it is of little if any relevance to the issues in this hearing. His evidence with respect to tobacco display bans and tobacco consumption is also admissible given that the *Mohan* criteria have been met.

[66] The issue now becomes what, if any, weight do I give his evidence insofar as it relates to tobacco display bans and tobacco consumption. Dr. Dewhirst's failure to take into consideration the law, specifically federal legislation restricting advertising, leaves me with significant concerns as to the reliability of his evidence. I might have attached little weight to his evidence, but for my concerns outlined above with respect to what was at times, an apparent lack of objectivity. After having given this matter considerable thought, I have decided to attach no weight to his evidence in relation to display bans and tobacco consumption.

[67] Dr. Fullerton, an Associate Professor of Marketing in the Sobey School of Business at Saint Mary's University, was qualified to give expert evidence in the area of marketing. His evidence is that the tobacco display ban had no effect in reducing the incidence of tobacco product use in Nova Scotia. Dr. Fullerton relied, at least in part, on the same statistics as used by Dr. Strang, namely Health Canada's Canadian Tobacco Use Monitoring Survey (C.T.U.M.S.). Dr. Fullerton's evidence, not inconsistent with that of Dr. Strang, was that in 2006, 22% of Nova Scotians smoked. In 2007 the percentage of smokers was 20% where it remained in 2010.

[68] With respect to teenagers and smoking, Dr. Fullerton testified that for teenagers (15 to 19 years of age), the statistics showed that 15% smoked in 2006, 13% in 2007, and in 2010, 16% of 15-19 year olds smoked. Cross-examination elicited that Dr. Fullerton did not have the 2011 data, which put teenage smoking at 12%, and 18% for Nova Scotians over 15 years of age. Being confronted with the most recent data did not lead Dr. Fullerton to alter his opinion that the display ban is ineffective in terms of reducing tobacco consumption.

[69] Dr. Fullerton's report examines the tobacco display ban in the context of existing legislation with respect to package warnings. His evidence is that the

intensity of exposure to the warning message over time has likely been a significant reason why Canadians accept that smoking has a number of negative consequences. Changes in attitude towards smoking, efforts oriented around the denormalization of smoking have resulted in the social norm being not to smoke.

[70] Perceived behavioural control makes it more difficult for smokers to engage in smoking behaviour, thus reducing smoking rates. Dr. Fullerton's evidence is that communications campaigns on the wide scope of policy interventions put in place with the goal of changing attitudes about tobacco consumption have been unambiguously successful. The number of existing customers is declining and the number of new customers is also declining, both in absolute and relative terms although new smokers do enter the market every year. In such a market environment the thrust of marketing activity is not so much around customer attraction. It is around the creation of brand switching given that smokers exhibit high levels of brand loyalty and engage in infrequent brand switching.

[71] Dr. Fullerton also testified with respect to studies purporting to show a causal connection between tobacco display bans and reduced tobacco consumption. According to Dr. Fullerton, the evidence that retail tobacco displays impede smoking cessation efforts is sketchy at best. Specifically, there are issues with these studies in terms of external validity, equating correlation with causality, and the lack of analysis in a Canadian context.

[72] In Dr. Fullerton's opinion, the actual scientific evidence that retail tobacco displays have had any meaningful effect on the initiation of smoking behaviour is quite weak. According to Dr. Fullerton, it is equally arguable that tobacco display bans might lower exposure to the significant package warning label information that would be highlighted in any display although he notes this has not been empirically tested in Canada.

[73] I accept much of the evidence of Dr. Fullerton; specifically his opinion evidence with respect to the weakness of scientific evidence on display bans and smoking behaviour, his evidence concerning the change in attitudes towards smoking, and perceived behavioural control making it more difficult for smokers to smoke. Moreover, I have no reason to doubt that his concerns with respect to the validity of studies are well-founded. Given that I am not considering these studies for reasons set out earlier, this evidence, although interesting, is not as relevant as it might otherwise have been. Likewise, I accept his evidence that impulse purchases in the context of tobacco products might be 'pantry stocking,' not an impulse purchase in the sense of one purchasing a product that they do not regularly use and otherwise would not have bought.

[74] Certainly I find it difficult to imagine that a person who has never smoked would decide to buy a package of cigarettes on impulse, being motivated to do so by seeing a cigarette display. That just does not make sense. For a smoker (unless he or she might be trying to quit), the purchase of cigarettes is impulsive only with respect to time and place of the purchase, not with respect to the cigarettes per se. Again, because of my evidentiary rulings on the extrinsic evidence (some of which deals with impulse purchases of tobacco), and my decision to give no weight to most of Dr. Dewhirst's evidence (some of which included evidence on impulse purchases) Dr. Fullerton's evidence is not as relevant as it might otherwise have been.

[75] There was evidence heard on the issue of whether or not smoking is a low or high involvement decision, as low involvement products are more likely to be bought on impulse. I accept Dr. Fullerton's evidence that it is a high involvement purchase decision for a person to decide to take up smoking for the first time. They would be aware of the risks, the costs, and be subject to the 'normative influences' when making such a decision. As Dr. Fullerton said, and I accept, 'given the

quantity of forces that make an impact on the individual consumer's decision to take up smoking for the first time I'm not sure that a retail display…will make much of an impact on that.' It is also Dr. Fullerton's opinion that it is a high involvement decision for a former smoker to resume smoking, given that they too would know the costs and the risks associated with smoking. In Dr. Fullerton's opinion, as a high involvement decision, it is unlikely that the former smoker would make an impulsive purchase of tobacco as a result of seeing the display. Dr. Fullerton's analysis with respect to former smokers does not take into account the highly addictive nature of tobacco and the importance of smoking cues in terms of contributing to relapse. A former smoker, not influenced by smoking cues, rationally considering whether to resume smoking or not, is engaging in a high involvement decision and unlikely to buy cigarettes on impulse. If that same former smoker is, however, in a store where cigarettes are displayed, the display can serve as a powerful cue to trigger a craving, thereby inducing the purchase of cigarettes. In such a situation, cigarettes are low involvement products and are more likely to be bought on impulse.

Evidence and Standard of Proof

[76] In the course of the s. 1 analysis, the burden is on the Crown to establish on the balance of probabilities that the infringement of the Charter right is justified under section 1. (*Oakes, supra*, p.137) Having said that, the more perplexing question is what (if any) evidence must the Government put forward in order to satisfy its onus. The question of whether a limitation is reasonable and demonstrably justified in a free and democratic society must take into account all of the interests and values which are at play in the given factual context. The significance of contextual factors in assessing whether the Government has shown an infringement to be justified becomes clear when one considers jurisprudence with respect to proof of justification. By way of example:

> …evidence may not be required to meet the standard, but where evidence is required, it should be 'cogent and persuasive'. *Oakes,*

supra, at para.68 in the context of whether Narcotic Control Act reverse onus provision was justifiable under s.1.

"The question is whether the government had a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government's pressing and substantial objective." *Irwin Toy Ltd. v. Quebec (Attorney General),* [1989] 1 S.C.R. 927, para. 81

"Discharge of the civil standard does not require scientific demonstration; the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view. . . . " *RJR-MacDonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199, at para. 137 (in the context of whether advertising bans and package warnings lead to a reduction in tobacco use)

"In *Butler*, supra, considering the obscenity prohibition of the Criminal Code, this Court rejected the need for concrete evidence and held that a "reasoned apprehension of harm" sufficed (p. 504). A similar standard must be employed in this case." *R. v. Sharpe*, [2001] 1 S.C.R. 45 at para. 85;

"The legislature is not required to provide scientific proof based on concrete evidence of the problem it seeks to address in every case. Where the court is faced with inconclusive or competing social science evidence relating the harm to the legislature's measures, the court may rely on a reasoned apprehension of that harm." *Harper v. Canada (Attorney General)* [2004] 1 S.C.R. 827 at para.77 (limits on third party election spending)

"The Attorney General has offered no evidence to support a connection between the limits on citizen spending and electoral fairness. However, reason or logic may establish the requisite causal link; see *Sharpe*, supra; *R. v. Butler*, [1992] 1 S.C.R. 452. In Thomson Newspapers, supra, the Court accepted as reasonable the conclusion that polls exert significant influence on the electoral process and individual electoral choice. More to the point, in *Libman*, supra, the Court concluded that electoral spending limits are rationally connected to the objective of fair elections. While some of the evidence on which this conclusion

> was based has since been discredited, the conclusion that limits may in theory further electoral fairness is difficult to gainsay. (*Harper*, supra, para. 29)
>
> "The government must establish that the means it has chosen are linked to the objective. At the very least, it must be possible to argue that the means may help to bring about the objective." *Canada (Attorney General) v. JTI-Macdonald Corp.* [2007] 2 S.C.R. 610, at para. 40;

[77] Has the Crown established on the balance of probabilities that a rational connection exists between the challenged provisions and the legislative objectives? To begin, it is clear that there is no evidence showing that the tobacco display ban, which has been in effect since 2007, has reduced tobacco consumption. According to both Dr. Fullerton and Dr. Strang, smoking rates in Nova Scotia have hovered around 20% since 2006. Mr. Palmer, on behalf of the Defendants, argues that the tobacco display ban has been completely ineffective in reducing rates of tobacco consumption in Nova Scotia. The only conclusions I am prepared to draw from the evidence relating to the statistical data are as follows: the statistics provide an overview of smoking rates in Nova Scotia; the statistics do not show that the tobacco display ban has been effective in terms of reducing tobacco consumption.

[78] One could argue, based on the C.T.U.M.S. statistics and margin of error, that not only has the tobacco display ban been ineffective, but indeed the comprehensive strategy to reduce tobacco consumption has been of limited effectiveness since 2006. The difficulty of course is that such an approach does not take into account other possibilities. Most obviously, one could argue (rightly or wrongly) that without a comprehensive strategy an even high percentage of Nova Scotians would be smoking. Another issue of course is that one component of the strategy might be particularly efficacious whereas another component is weaker. I am not prepared to find as a fact that the ban has been ineffective in terms of reducing tobacco consumption.

[79] Further, indeed both Dr. Strang and Dr. Fullerton agree on this, it would be difficult to 'tease out' the effectiveness or a particular item in a comprehensive strategy. I am satisfied that the causal relationship between the display ban and reduced tobacco consumption is not scientifically measurable. In a situation such as this, the jurisprudence referred to earlier makes it clear that the Crown does not have to establish causal connection between the measures enacted and the desired goal. What the government must show is that "the means it has chosen are linked to the objective. At the very least, it must be possible to argue that the means may help to bring about the objective." (*J.T.I.-MacDonald,supra,* para. 40)

[80] I accept the evidence of Dr. Fullerton that the tobacco display ban results in non-smokers and infrequent smokers getting less exposure to the warning messages set out on cigarette packages. Common sense dictates the same opinion. The issue now becomes whether the Crown has established a rational connection when these 'important' and 'effective' messages intended to reduce tobacco consumption are hidden from view by virtue of the display ban. Although much of the evidence during this hearing related to smoking it is important to keep in mind that the display ban covers 'tobacco and tobacco products.' The required warnings for tobacco products are set out in the *Tobacco Products Labelling Regulations (Cigarettes and Little Cigars)* and the *Tobacco Products Information Regulations.* Not all tobacco products are required to have the graphic warnings that cigarette packages must have. By way of example, chewing tobacco, bidis, oral snuff and nasal snuff must have only a text warning.

[81] Dr. Wild's report, which I accept, defines addiction as a "primary chronic neurobiologic disease…with a relapsing and remitting course, meaning that symptoms can return even after many years of sustained recovery." He also states that "Research has demonstrated that relapse is reliably associated with situational triggers and is more likely when smokers are exposed to smoking cues." I accept

the opinions set out in his report, the most relevant sections of which were referred to earlier but are repeated below for ease of reference:

> 17. The retail display of tobacco products can be seen as a powerful cue to addicted smokers, smokers trying to quit, and ex-smokers. Such displays may reasonably be expected to trigger cravings and induce the purchase of tobacco products.
>
> 18. The retail display of tobacco products reinforces addiction, undermines cessation, and promotes relapse.

[82] Likewise, I accept the opinion evidence of Dr. Strang set out above at paragraph 47. Given the highly addictive nature of nicotine I find that displaying tobacco products, including those with graphic warnings, can act as an inducement so as to cause a former smoker to relapse, and make it more difficult for a smoker who wants to quit. A non-smoker, unaddicted to nicotine is not likely to make an impulse purchase of cigarettes merely because of seeing the products. The same cannot be said about one who is addicted to nicotine. As I stated earlier, for a former smoker attempting to stay off cigarettes, seeing a cigarette display (even with package warnings) could be the cue to trigger the craving, thereby resulting in an impulse purchase of tobacco and a return to smoking. It is perhaps, as simple as saying 'out of sight, out of mind.' The Crown has established, on the balance of probabilities that the challenged legislation is linked to the objective of reducing tobacco consumption and further, that it might result in reduced tobacco consumption.

Minimal Impairment

[83] At this stage of the s.1 analysis the issue is whether the Crown has shown on the balance of probabilities that the means are carefully tailored to the objective.

> The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The

> tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement. *RJR-MacDonald*, at para. 160:

[84] The Crown argues that the display ban provisions are minimally impairing and that 'less restrictive measures would be less effective at advancing the objectives of the legislation. Relying on *J.T.I. MacDonald*, *supra*, the Crown argues that the context here justifies a high level of deference to the Legislature.

[85] Mr. Palmer, in arguing that the Crown has not established minimal impairment, states that point of sale retail displays are akin to purely informational advertising in that they allow consumers to be aware of "different brands, different qualities of tobacco within brands and the different sized packages available to consumers". In support of this, he refers to *RJR-MacDonald, supra,*:

> 162 I turn first to the prohibition on advertising contained in s. 4 of the Act. It is, as has been observed, complete. It bans all forms of advertising of Canadian tobacco products while explicitly exempting all foreign advertising of non-Canadian products which are sold in Canada. 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. (emphasis added)
>
> 164 As noted in my analysis of rational connection, while one may conclude as a matter of reason and logic that lifestyle advertising is

> designed to increase consumption, there is no indication that purely informational or brand preference advertising would have this effect.

[86] First, as recognized by Mr. Palmer, the underlined portions of the above paragraphs are no longer applicable given amendments to the *Tobacco Act*. Consumers can no longer learn of relative tar content of different brands with an aim to reducing the risk to their health. More to the point, on the facts as presented in *RJR-MacDonald,supra,* Justice McLachlin found 'while one may conclude as a matter of reason and logic that lifestyle advertising is designed to increase consumption, there is no indication that purely informational or brand preference advertising would have this effect.'

[87] Based on the issues and the evidence in this s.1 hearing, I found that a rational connection had been established. This is in contrast to the situation in *RJR-MacDonald, supra*, where Justice McLachlin found there was 'no indication' of a rational connection between informational or brand preference advertising and increased tobacco consumption. At trial level, the only direct or scientific evidence of a correlation between advertising bans and tobacco consumption was that of Dr. Jeffrey Harris testifying as to the accuracy of a New Zealand report on the issue. When this evidence was rejected, the court was left without direct evidence supporting a rational connection. Not only was evidence presented and accepted in this hearing, but, as was recognized in *J.T.I, supra*, "RJR was grounded in a different historical context and based on different findings supported by a different record at the time." (para.11). Such is the situation here.

[88] Defence counsel also argues that, based on the distinction drawn in *J.T.I.-MacDonald, supra*, between 'lifestyle' and 'information or brand-preference' advertising, the display ban fails the minimal impairment test by not permitting the latter. To fully inform the context of the *J.T.I, supra*, decision, I have set out below

the legislative provisions which were the focus of scrutiny. The issue referred to by Defence counsel was one of statutory interpretation, specifically the interplay between section 22 (2) and 22 (3). I do not see *J.T.I.*, *supra*, as standing for the general proposition that 'information and brand-preference' advertising must or should be permitted in order for the Crown to satisfy the minimal impairment test.

[89] Advertising

> **22.** (1) Subject to this section, no person shall promote a tobacco product by means of an advertisement that depicts, in whole or in part, a tobacco product, its package or a brand element of one or that evokes a tobacco product or a brand element.
>
> Exception
>
> (2) Subject to the regulations, a person may advertise a tobacco product by means of information advertising or brand-preference advertising that is in
>
> (*a*) a publication that is provided by mail and addressed to an adult who is identified by name;
>
> (*b*) a publication that has an adult readership of not less than eighty-five per cent; or
>
> (*c*) signs in a place where young persons are not permitted by law.
>
> Lifestyle advertising
>
> (3) Subsection (2) does not apply to lifestyle advertising or advertising that could be construed on reasonable grounds to be appealing to young persons.

[90] The provisions of the *Tobacco Access Regulations* restrict display or storage of tobacco and tobacco products with few exceptions. The exceptions are as follows:

(1) Once a consumer has indicated to a vendor or an employee an intention to purchase tobacco or tobacco products, they may view and examine only the specific number of units requested of the products before purchasing. (S.3A(3))

(2) Further, s. 3A(4) states that it is not an offence if a consumer is able to view tobacco if the vendor or employee is restocking it, conducting an inventory, receiving a delivery, unpacking or selling tobacco products to a consumer.

(3) The regulations permit a vendor to display information about his/her products by magazine or publication under certain conditions (s. 3C)

(4) Signs listing the types of tobacco offered for sale and their prices are permitted under certain conditions (s.3D(1))

[91] These exceptions were carefully crafted. A vendor is able to display cigarettes as is necessary in order to operate his/her business. Communication between vendor and customer is not prohibited. The vendor is not prohibited from showing the product to the potential purchaser at the time of purchase. Likewise, the vendor can still provide information as to the types and prices of tobacco he/she has in stock. Consequently, that information can be made available to the consumer so that he/she is not prevented from knowing what tobacco is for sale and the prices of that tobacco. Finally, the magazine enables the customer to view what is available without having to engage in a 'guessing game' with the salesperson as to what brand of cigarettes, for example, is in stock.

[92] When tackling a complex social problem, which this unquestionably is, the law is clear. The minimal impairment requirement is met if the Legislature has chosen one of several reasonable alternatives. After hearing the evidence on the highly addictive nature of nicotine and the risk of relapse if exposed to tobacco products on display, it is difficult to envisage a legislative scheme that would be reasonably effective in reducing tobacco consumption, yet constitute less of an impairment on freedom of expression than does the challenged legislation in his case. I am satisfied on the balance of probabilities that the Crown has established minimal impairment.

PROPORTIONALITY – Whether the Benefits Outweigh the Deleterious Effects

[93] The final issue is whether the Crown has established on the balance of probabilities that there is proportionality between the effects of the measure that limits the right and the law's objective.

[94] What benefits might the display ban yield? The tobacco display ban is but one component of a comprehensive strategy to reduce tobacco consumption. In all likelihood, the benefits of the display ban will not, in the near future at least, be capable of scientific measurement. Having said that, when one considers the highly addictive nature of tobacco, and the effect of cues-such as seeing cigarettes on display (even with warnings)-in terms of inducing a former smoker to resume the habit, or making it more challenging for a smoker to quit, the potential benefits are high. Similarly, not displaying tobacco with other consumer goods might serve to further denormalize tobacco use, and potentially result in reduced consumption.

[95] How important is the limitation on the right? The Defendants wish to be able to display for sale tobacco products that are lawful to sell to persons over 19 years

of age. As I indicated earlier, vendors being able to display their products for sale enables vendors and consumers to exercise personal autonomy. Having said that, tobacco products are unlike other consumer products. Other consumer products that are displayed for sale are potentially harmful, an obvious example being alcohol. But unlike alcohol, there is, as Dr. Strang said and I accept, no safe level of tobacco use from a carcinogenic perspective. Unlike most, if not all other consumer products that are lawful to sell or buy, nicotine is a highly addictive poison that is unsafe when consumed as intended. The expressive activity of displaying tobacco for sale might induce smoking by a former smoker or make it harder for a smoker to quit. When expression is used for the purpose of selling harmful and addictive products, its value becomes tenuous, despite the fact that the packaging warns any potential user of the product's dangerousness.

[96] When one is weighed against the other, is the limitation justified? Clearly it is. The nature of the expressive activity, although deserving of scrutiny is not close to the core values underlying s. 2(b) whereas the legislation might reduce tobacco consumption and thereby reduce tobacco-related disease, disability and death. The challenged legislation is rationally connected to the goal of reducing tobacco consumption, and is a minimal impairment of the Defendants' right of freedom of expression. Simply put, the potential benefits of the tobacco display ban are significant and the detriment to the Defendants' s. 2(b) right is minimal.

[97] The Crown has established on the balance of probabilities that the benefits outweigh the deleterious effects. The limitation imposed on freedom of expression by the impugned sections of the *Tobacco Access Act* and *Tobacco Access Regulations* is a reasonable limit demonstrably justified in a free and democratic society. I dismiss the *Charter* challenge.

[98] Having found justification under s. 1, the facts giving rise to these charges are as set out in paragraph 2. I am satisfied that the Crown has proven each of the offences beyond a reasonable doubt and I find the Defendants guilty on all counts.