

October 16, 1991

TESTIMONY

of

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on

S. 1088,

A BILL TO AMEND THE PUBLIC HEALTH SERVICES ACT

S. 1088 is a bill that makes important factual assumptions about the role and effectiveness of advertising in initiating and promoting the

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use of a lawful product, and the role of Government in discouraging demand for a product by affecting the type and style of advertising that may be used. For example, § 2(a)(11) asserts categorically that: "convincing evidence exists that tobacco advertising creates market expansion and retention."

I am concerned that if S. 1088 becomes a law, it will be greeted as a green light to restrict, or *de facto* prohibit, advertising of tobacco products in many of the fifty states and thousands of local jurisdictions throughout the country. Once the government ^{does} ~~is able to do~~ that, others will pressure for similar regulations involving other products or activities (e.g., alcohol, fatty foods, high diving, etc.) that some people regard as improper, immoral, or too risky.

Before enacting laws based on such factual assertions, Congress would do well to consider an important new court decision in Canada, where Justice Jean-Jude Chabot, of the Quebec Superior Court, has just ^{declared} ~~invalidated~~ the entire Canadian Tobacco Products Control Act as a violation of free speech guaranteed by the Canadian Charter of Rights and Freedoms.

The Canadian Act restricted free speech in the name of a greater good. The Canadian law prohibited advertising of tobacco products in

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Canada; restricted sponsorship activities of the tobacco industry; restricted the use of trademarks associated with a tobacco product in connection with any other product; and required the display of health warnings on tobacco products that were unattributed (that is, the warnings did not indicate that the State was the real author).

The decision, *RJR-Macdonald, Inc. v. The Attorney General of Canada*, is important because it emphasizes the important protection afforded to advertising under Canada's Charter of rights and freedoms, and suggests the spirit in which we should consider legislation that would encourage attempts to ban or restrict tobacco advertising under our own First Amendment.

The Canadian Charter strongly reflects American influence on the importance of free speech. Arguably Canada gives its Courts more latitude to find that some restrictions on speech are justified. The Canadian Charter specifically provides that its free speech is subject "to such reasonable limits" as "can be demonstrably justified in a free and democratic society." (p.58) The Canadian Government may restrict speech in order "to attain fundamental and important social objectives . . ." (p.58) Justice Chabot did not place an onerous burden on the Government. "The State need not wait for scientific 'certainty' before

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acting . . .," [p.82] he said. The State need only show a preponderance of the evidence. [p.59]

Yet -- and this point is very significant -- even though the Canadian Charter arguably offers less protection to advertising than our own First Amendment, Justice Chabot still concluded that the Canadian tobacco advertising restrictions are unconstitutional.

Justice Chabot recognized that the right to advertise is an important part of the right to free speech. Commercial speech, said the Court, ^{is} "not only has intrinsic social value as a means of expression but, in addition, it constitutes an important aspect of individual self-fulfilment and personal autonomy." [p.96] [?] [p.109] The Court concluded that advertising of tobacco protects the listener as well as the speaker, because such advertising "plays a significant role in enabling individuals to make informed ^{economic} choices" [p.108] Advertising enables listeners to make informed choices by learning of new products, changes to products in terms of tar, nicotine, and so forth. [p.108] ¹⁰⁷⁽²⁾

Justice Chabot emphasized that the Government restrictions on tobacco advertising constituted "a form of censorship and social engineering, which is incompatible with the very essence of a free and democratic society." [p.108] ¹⁰⁶ It is "unacceptable paternalism," he

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declared, [p.90] for the Government to control what we can read and

hear about a lawful product, and for the state to seek to control people's

actions and thoughts about tobacco by "eliminating" any message *other than that prescribed by the State."*

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~~contrary to the State's message~~ [p.90-91] That is anathema in any democracy.

Canada tried to justify its restrictions on speech by arguing that the end (less use of tobacco) justified the means (a restriction on free speech). But during the extensive trial -- it lasted over a year and produced "tens of thousands of pages" of ^{exhibits} transcript [pp.6-7]; the Court heard the testimony of many experts, the judicial opinion alone was over 140 pages -- the Attorney General of Canada could not establish that prohibiting advertising of tobacco would likely affect the use of the product. The Court did not demand "scientific 'certainty,'" [p.82] ³¹⁷² but only a reasonable probability. Yet Canada could not meet that burden of proof.

This refers to Michigan's argument. Not to the findings.

Advertising does allow manufacturers to establish brand loyalty, to encourage people to shift from one brand to another, and to introduce people to new products. [p.90] But the Court examined the evidence very carefully, and found that it simply did not show a link between increased advertising and increased smoking (nor was decreased

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advertising linked with decreased smoking). Some foreign countries prohibit tobacco advertising, while others allow it; but the studies and experts offered by the Government did not demonstrate a causal relationship between the amount of advertising and the rate of smoking. Even Canada's expert witness (during cross examination) was forced to admit that. [p. 130]

(Although it did not expressly find)
The Court assumed that tobacco products are harmful, but nonetheless was forced to conclude that speech about tobacco products is not. As the Justice pointed out, quoting Aristotle, "the word 'dog' never bit anyone." [p.92]

This result should not be surprising. If we were all helpless slaves to the supposed power of advertising, we would be driving Edsels today. Communism would not have fallen in the U.S.S.R.; after all, it had three-quarters of a century to propagandize its people. The notion that we, the people, have no minds of our own is inconsistent with the basic assumption that underlies democracy. As the Court pointed out --

Even if it were accepted that nicotine in tobacco does give rise to a certain state of dependence, what connection has that with advertising? With or without advertising, nicotine will or will not continue to create a state of dependence. Notwithstanding this state of dependence, tobacco use has been in constant decline for over 20 years in all age groups despite the large amounts spent by the

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industry during this period." [p.122]

The Court also carefully examined the *Toxic Substances Board Report of New Zealand (the T.S.B. Report)*, published in May, 1989. This report -- which is frequently cited by tobacco advertising opponents -- attempts to link advertising with consumption. Justice Chabot examined this report in the neutral, objective atmosphere of a courtroom. The Justice's conclusion is worth quoting:

With respect to the T.S.B. Report, the Court can only note that it contains serious methodological errors and a lack of scientific rigour which renders it *for all intents and purposes devoid of any probative value*. It is a report with an obvious point of view and its conclusions reflect that point of view. (p. 128) *(emphasis added)*

agreed with the court's analysis of the report

The Court found that the T.S.B. manipulated the data to reach predetermined results. "If Portugal were shown in the few media group with Italy and Sweden, the result, using the T.S.B.'s own methodology, would be that countries with a 'total ban for health reasons' had a lower rate of decline in consumption than those countries which permit advertising in few media or most media." (appendix 1, p. 28, 4) *or* ~~55~~ *(emphasis added)* In other words, more advertising was correlated with a decline in tobacco consumption!

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[ANNEX to Memorandum
of Argument of Applicant
RJR Mac Don Ltd,
Tab C, p. 28, #55]
TAB C,

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This is the applicant's argument

its "persuasive or subtle form," [p.68] or because it is necessary to protect "young people from inducements to use tobacco." [p.79] Even Canada's own Department of National Health and Welfare repeatedly advised that "banning tobacco advertising would have no effect on consumption . . ." [p. 78]

Justice Chabot said that the basic question is: "whether the State has the right, through elimination of all competing messages, to impose on its citizens its view and only its view of what is right in an attempt to mould their thoughts and behaviour?" [p. 112] He answered that question in the negative, and quoted John Stuart Mill:

"Each is the proper guardian of his own health, whether bodily or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest." [p. 112]

p. 112 III

Our First Amendment -- which Justice Chabot referred to as the "firstness" of the First Amendment" [p.110] is a beacon of light that the whole world sees. The wave of the future is not Communism; it is Democracy and freedom. As we celebrate the 200th Anniversary of the Bill of Rights, we should not forget that one of the most important things that we have done is to export what the Bill of Rights represents.

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