SUPREME COURT SURPRISE ON TOBACCO ADVERTISING

Court ruling raises difficult questions about the role of judges in the Charter era

BY PATRICK J. MONAHAN

The Supreme Court ruling on September 21 that struck down the federal ban on tobacco advertising caught many court watchers offguard—including this one.

The *RJR Macdonald* case raised important and difficult issues, both in terms of the division of powers between the federal and provincial legislatures, as well as the interpretation of the Charter of Rights.

In terms of the federalism issues, my expectation was that the court would take a broad interpretation of the federal "residual" power to legislate for the "peace, order and good government of Canada" (POGG) and would uphold the legislation on that basis. I also expected the court to rule that, although the ban on advertising was a violation of freedom of expression under section 2(b) of the Charter, this limit could be justified as "reasonable" under section 1 of the Charter.

As it turned out, I was wrong on both counts.

The Supreme Court sidestepped the POGG issue and chose to uphold the legislation on the basis of the federal criminal law. This meant that the Quebec Court of Appeal's judgment—which had given a broad reading of the POGG power—was left intact, albeit without the endorsement of the country's highest court.

The biggest surprise, however, was the court's ruling on the Charter.

Although there was no direct, scientific evidence demonstrating a link between tobacco advertising and increased use of the product, the court had ruled in earlier cases that such scientific evidence was not necessary in order to uphold limits on free speech. The 1992 *Butler* case had upheld the obscenity provisions of the Criminal Code, even though there was no scientific link between pornography and violence against women. In the 1989 *Irwin Toy* case, the court had upheld a ban on advertising directed at children even though there was no scientific evidence tendered as to the effects of such advertising.

In *Butler* and *Irwin Toy*, the court had indicated a willingness to uphold limits on free speech when "logic" or "common sense" indicated that the bans served important social policy purposes. Many commentators had expected this same "logic and common sense" analysis would lead the court to uphold the ban on tobacco advertising.

TWO KEY FACTORS

How to explain the court's departure in *RJR Macdonald* from this earlier attitude of deference to legislative choices? Two key factors seem to have influenced the court to rule against the government here.

The first is that, while the "logic and common sense" approach might well justify significant restrictions on tobacco advertising, the justification for a total ban on all tobacco ads is more difficult to grasp. This was the opening that the tobacco companies exploited in their argument before the highest court. What is the justification for preventing tobacco companies from placing purely informational ads about their product? Federal lawyers apparently had no answer to this question. The dissenting opinion of Mr. Justice La Forest sidesteps this issue, claiming that the federal government need show only a "reasonable basis" for acting as it did.

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The second factor (perhaps more significant than the first) was the federal government's unwillingness to provide the court with background studies that had been undertaken prior to the enactment of the legislation in 1988. These studies were apparently an attempt to measure the effects of restrictions on tobacco advertising. The studies had been considered by the government when it drafted the legislation, but government lawyers refused to table the studies at trial. This led the Supreme Court majority to draw the inference that the studies contradicted the government's claims about the necessity for a total ban on all advertising.

In retrospect, the decision to withhold the studies was clearly a major tactical error. Regardless of what the studies actually said, it would have been better to have them before the court. Even if the studies had not fully supported the government's position, the government could have argued that the studies were inconclusive and they had elected to proceed because of their considered judgment as to the public interest. Attempting to conceal the studies was folly because it suggested that the government had something to hide—that it was not prepared, or not able, to justify its choices on what was admittedly a different political and social issue.

RULING ON HEALTH WARNINGS QUESTIONABLE

Although the two majority opinions by Justices McLachlin and Iacobucci are, on the whole, well reasoned and persuasive, one aspect of their ruling appears rather questionable. In addition to striking down the ban on tobacco advertising, the court held that the requirement of placing unattributed health warnings on cigarette packages was also unconstitutional. The court argued that unattributed warnings suggested that the cigarette companies themselves were the authors of these messages. The court also said that there was no evidence suggesting that a requirement to place "attributed" warnings—such as *"Health and Welfare Canada says* that smoking causes cancer"—would have been just as effective as unattributed warnings.

Although it may be true that there is no scientific evidence measuring the different effects of these two kinds of messages, "logic and common sense" indicate that an unattributed warning is more effective than one attributed to the government. Governments the world over have a credibility problem. Any sentence that begins with "the government says" is likely to arouse a healthy skepticism in the listener. This, presumably, is precisely why the cigarette companies want the warnings to be linked to the government, rather then simply being

presented as fact. An unattributed statement such as "smoking causes cancer" is powerful precisely because it is not being presented as an opinion—whether of the government, the tobacco companies, or anyone else—but as an objective fact, akin to the statement "the earth is round."

THE AFTERMATH

What will be the fallout of the judgment? The anti-smoking lobby immediately called for the government to declare tobacco a hazardous product and impose direct controls on its sale and use. There is no chance of that happening. The enforcement problems associated with those kinds of restrictions would be hugely expensive and probably futile, fueling an underground economy in cigarettes much larger than that observed in earlier 1994, prior to the cut in cigarette taxes.

The Supreme Court went out of its way to indicate that it would have upheld a somewhat less restrictive ban on advertising. Look for Justice Minister Rock to introduce new legislation imposing tough controls on advertising, while allowing for "purely informational" ads from the tobacco companies, sometime early in 1996.

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THE DEFENCE OF PAUL BERNARDO: PARADIGM OR PARADOX? *from page 13*

sibility that garners little support at the moment. However, if Murray was right to act on the instructions, just how obvious is it that he was obliged to hand them over to the prosecution? What ethical or professional duty compelled that course of action as opposed to holding them confidential?

A DUTY TO HAND OVER THE TAPES?

> The lawyer has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship, and should not divulge such information unless disclosure is expressly or impliedly authorized by the client, required by law or otherwise permitted or required by this code.
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> *Rule 4, Canadian Bar Association, Code of Professional Conduct*

The Code of Professional Conduct requires that a lawyer protect the confidentiality of "everything" except "what ought to be disclosed"—an unhelpful command if ever there was one. Guidance as to what to do with material such as the Bernardo-Homolka videotapes must, therefore, come from another source: the "common law" of the Code of Professional Conduct, in the form of the opinions and practices of senior members of the bar.

Much of that analysis has centred on categorizing the tapes—to determine just what sort of legal animal they are. The majority view seems to be that the tapes are physical evidence of the commission of crimes and, as such, constitute evidence that must be turned over to the prosecution (in a manner that harms the client's position as little as possible). A minority view casts them as a communication (or admission) of the client, a high-tech diary, as it were, and therefore subject to the rules of confidentiality: once confidential, always confidential, unless express instructions are given by the client to release them.

Not all client instructions can or should be accepted, however. For example, had Murray declined to retrieve the tapes on the ground that it would not be in Bernardo's best interest for his lawyer to be in possession of evidence that might have to be disclosed, they may well have been demolished along with the house. Such a decision would also have raised controversy if it had become known, of course, particularly among those who conceive of the defence lawyer's role as a mere adjunct to the conviction process. On the other hand, the tapes might have been held confidential forever—a personally horrible burden, but one that also could be justified, however unpopular it, too, would have been if known. There are other possibilities, including the route that was actually taken.

FOLLOWING INSTRUCTIONS?

The issue and its importance is not to second-guess what counsel did in a particular case, but to ponder the paradox. Until a trial is completed, and a verdict is rendered, the accused is innocent and entitled to (and needful of) a resolute and fearless advocate to preserve that status. He or she is entitled to "instruct" counsel and to expect that their instructions will be respected, and to expect skill and wisdom in the advice that is provided.

And therein lies the true paradox. This position assumes that, on the one hand, a lawyer's actions on behalf of a client can be morally neutral and completely shielded from scrutiny behind the mask of "instructions" and, on the other hand, presumes that a lawyer always knows just what a client's interests might (or should) be and essentially accepts no "instructions" except to provide the best possible defence. The first position is morally vacant, the second highly presumptuous.

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In the final analysis, the only position that is consistent with the exceptional power and privilege accorded to advocates for criminal defendants is that it is a lonely and difficult task, rarely simple or popular, and that each decision must be judged on its own terms. Although popular opinion must not determine the decisions that a lawyer makes for an individual client, ethical decisions cannot be divorced from their social contexts.

Ultimately, all that is truly clear is that the questions posed by the defence of Paul Bernardo have not yet been answered and may not be answered for a long time to come.

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