**PROVINCIAL COURT OF NOVA SCOTIA**
**Citation:** R. v. Mader's Tobacco Store Ltd., 2010 NSPC 52

**Date:** 20100818
**Docket:** 2063892-95
**Registry:** Kentville

**Between:**

Her Majesty the Queen

v.

Mader's Tobacco Store Limited and
Robert George N. Gee

| | |
|---|---|
| **Judge:** | The Honourable Judge Claudine MacDonald |
| **Heard:** | January 21, 2010; July 6, 2010 |
| **Charge:** | s. 9AA(1) Tobacco Access Act<br>s. 9AA(2) Tobacco Access Act |
| **Counsel:** | Edward Gores, Q.C., for the Crown<br>Curtis Palmer, for the defence |

**By the Court**:

[1] The Defendants 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, 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.,

**Issues**

[2] Do sections 9AA of *Tobacco Access Act* S.N.S. 1993, C.14 and s.3A of the *Tobacco Access Regulations* infringe s. 2(b) of the *Charter of Rights and Freedoms*? Further, the Defendants filed a Notice Pursuant to the Constitutional Questions Act, R.S.N.S. 1989, c. 89 and are asking the Court to find s. 9AA, and companion regulations, to be of no force or effect pursuant to s. 52(1) of the *Constitution Act*, 1982.

[3] The relevant portions of the *Tobacco Access Act* are:

> 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.

[4] The relevant sections of the *Regulations* are:

> 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.

[5] Agreed Statement of Facts:

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 30 June 2009.

[6] As mentioned earlier, the issue is whether the defendants have established on the balance of probabilities that s. 9AA of the *Tobacco Access Act* S.N.S. 1993, C.14 and/or s. 3A of the *Tobacco Access Regulations* infringes their right under s. 2(b) of the *Canadian Charter of Rights and Freedoms*, specifically the right of freedom of expression.

[7] The words "display" and "store" are not defined in the legislation; the Oxford dictionary definition of "display" is : put (something) in a prominent place in order that it may readily be seen; and

"store": keep or accumulate (something) for future use; means not putting out on display for sale

**Freedom of Expression Under the *Charter***

[8] Under the *Canadian Charter of Rights and Freedoms*:

> 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;

[9] In determining whether the Defendants have established an infringement of their s. 2(b) right there must first be a decision as to whether the impugned activity falls within the sphere of conduct protected by s. 2(b). If so, the court must then determine whether the purpose or effect of the law is to restrict freedom of expression. (*Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927).

[10] Further, if the government's purpose is to restrict attempts to convey a meaning, freedom of expression has been limited and the court then considers whether the restriction is justified under s. 1 of the *Charter*. If the effect of the legislation is to limit freedom of expression, then the Defendant must show that the expression advances at least one of the underlying principles of freedom of expression.

[11] The underlying principles, according to *Irwin Toy*, *supra* at para. 53, are:

> (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.

[12] In demonstrating that the effect of the impugned legislation is to restrict freedom of expression, the Defendants must show that the expressive activity promotes at least one of these values.

[13] Does the activity at issue fall within the scope of s. 2(b)? Does displaying for public view a product that is legal to sell to persons not under the age of 19 years come within the ambit of "freedom of expression" under s. 2(b) of the *Charter*?

[14] The Supreme Court has taken a board, inclusive approach to the interpretation of the rights and freedoms guaranteed by the *Charter*. The jurisprudence is clear: in determining whether the activity in question comes within the ambit of freedom of expression, s. 2(b) is to be given a large and liberal interpretation. As set out in *Irwin Toy*, *supra*:

> 41 The necessity of this first step has been described, with reference to the narrower concept of "freedom of speech", by Frederick Schauer in his work entitled Free Speech: A Philosophical Enquiry (Cambridge , 1982) at p. 91:
>
> > We are attempting to identify those things that one is free (or at least more free) to do when a Free Speech Principle is accepted. What activities justify an appeal to the concept of freedom of speech? These activities are clearly something less than the totality of human conduct and ... something more than merely moving one's tongue, mouth and vocal chords to make linguistic noises.
>
> "Expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec Charter so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual. ...

[15] Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the ambit of the guarantee. The form of expression can be by "...written or spoken word, the arts, and even physical gestures or acts." *(Irwin Toy, supra,* para.42).

**Law as it Relates to "Commercial" Expression**

[16] It is well settled that freedom of expression includes expression for a commercial purpose. The Supreme Court of Canada has considered s. 2(b) in the context of commercial expression in a number of cases, including: *Irwin Toy, supra*, *Ford v. Quebec (Attorney General)* [1988] 2 S.C.R. 712, *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code* [1990] 1 S.C.R. 1123, *Rocket v. Royal College of Dental Surgeons of Ontario* [1990] 2 S.C.R. 232 , *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 S.C.R. 199.

[17] In *Irwin Toy*, *supra*, the Supreme Court found that legislation which prohibited advertising aimed at children infringed s. 2(b) but was justified under s. 1 of the *Charter*.

[18] In *Ford*, *supra*, the court held that the respondents had a constitutionally protected right to use the English language in the signs they displayed and the fact that such signs were for a commercial purpose did not remove the expression from the scope of s. 2(b). The Supreme Court in concluding that the commercial purpose of the signs did not remove the expression from the scope of s. 2(b) stated:

> Over and above its intrinsic value as expression, commercial expression which, as has been pointed out, protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfilment and personal autonomy. The court accordingly rejects the view that commercial expression serves no individual or societal value in a free and democratic society and for this reason is undeserving of any constitutional protection. (para.59)

[19] Section 195(1)(c) of *Criminal Code* prohibiting communications in public for purpose of prostitution was found to infringe s. 2(b) (but justified under s. 1) in *Reference re ss. 193 and 195.1(1)(c), supra*. *Rocket, supra*, involved dentists who had participated in an advertising campaign in violation of regulations restricting advertising by dentists. The Supreme Court held that professional advertising aimed to convey a meaning and thus constituted expressive activity so as to fall within the ambit of freedom of expression.

[20] The *Tobacco Products Control Act*, S.C. 1988, c. 20 ( ss. 4, 5, 6, 8, 9) was the subject of a *Charter* challenge *RJR-MacDonald Inc. v. Canada (Attorney General), supra.* This legislation prohibited (with specific exceptions) advertising and promotion of tobacco products and imposed labelling requirements on the

tobacco manufacturers. The Attorney General in *RJR-MacDonald, supra,* conceded that the prohibition on advertising and promotion under the *Act* constituted an infringement of the appellants' right to freedom of expression under s. 2(b) of the *Charter*. Thus, the case focussed on the issue as to whether the legislation was saved by virtue of s. 1 of the *Charter*. The Supreme Court held that the sections of the act that limited advertising, trade mark use and compelled the inclusion of un-attributed health warnings were indeed inconsistent with the right of freedom of expression.

[21] The position taken by the Respondent in this application in that although commercial expression is protected under s. 2(b), the display of goods for sale does not constitute expression and the act of selling a tobacco product does not by itself convey a meaning.

[22] The brief on behalf of the Respondent asserts that the sale of goods has nothing to do with sending a message and does not come within the ambit of 2(b). Expanding on this, the Respondent states: “There is nothing in the display of goods for sale which conforms with the rationale for the protections afforded by s. 2(b) of the Charter” (para.35, brief). In support of this position, the Respondent relies heavily on *Rosen v. Ontario (Attorney General)* 131 D.L.R. (4th) 708 and *R.v. Greenbaum* (1991), 62 C.C.C.(3d) 147 (Ont.C.A.) – which was reversed without reference to this point at [1993] 1 S.C.R. 674.

[23] I am satisfied that *Rosen* and *Greenbaum* are clearly distinguishable from the case at bar. *Rosen* stands for the proposition that a prohibition of the sale of a particular product which is not itself a form of expression is not an infringement of s. 2(b) of the *Charter*. The act of selling tobacco by itself does not convey any meaning. This case, however, is not about the bare sale of a consumer product. The issue here is not whether the sale of a product conveys any meaning; rather, the issue in this case is whether the display of a product conveys a meaning.

[24] The *Greenbaum* decision concerned a street vendor who sold T-shirts on a sidewalk in Toronto without a licence, contrary to s. 11 of *Metro Bylaw 211-74*. Under the bylaw the selling and exposing of merchandise for sale was prohibited except in the case of an owner or occupant of abutting property who had been granted a license. Mr. Greenbaum and Mr.Sharma were not eligible to apply for a

licence because they did not own or occupy abutting property as required. They contested the validity of the bylaw-arguing that it was discriminatory in the context of the *Municipal Act*. They also argued that the bylaw infringed freedom of expression under s. 2(b) of the *Charter*. The Ontario Court of Appeal upheld the validity of the bylaw as being authorized under the *Municipal Act*. Further, Osborne, J.A. on behalf of the majority stated:

> The issue of freedom of expression (s. 2(b) of the Charter) was raised by the appellant Greenbaum. I do not think the display of goods and wares for sale, in this case T-shirts, is a form of expression contemplated by s. 2(b) of the Charter.

[25] Upon appeal to the Supreme Court, an acquittal was entered and the Court held that the bylaw was *ultra vires* the municipality because the bylaws discriminated in a manner not authorized by the *Municipal Act*; thus the freedom of expression issue was not dealt with by the Supreme Court as the issue became moot. To suggest that *Greenbaum* stands for the proposition that the display of goods for sale is not a form of expression so as to come within s. 2(b) is perhaps an overstatement.

**Is Display of Goods Expressive Activity so as to fall within the Sphere of Conduct Protected by s. 2(b)?**

[26] Having concluded that the display of goods for sale is not *prima facie* outside the scope of freedom of expression, the question remains: is the display of products for sale expressive activity so as to come within the ambit of 2(b)?

[27] The Respondent's brief emphasizes the point that no evidence was called on behalf of the Defendants to deal specifically with the issue as to whether the display for sale of tobacco products conveys a meaning so as come within s. 2(b). Several sections of the brief dealing with this particular issue are set out below:

> the Defendants have not introduced any evidence that their display or storage of tobacco products conveys or was intended to convey any meaning other than that they have tobacco for sale. (para.40);
>
> The Defendants have led no evidence to suggest that customers at Mader's Tobacco wished to view the products for sale. (para.41);

> There is no evidence the Defendants' display of these things is the "manner by which" the Defendants intended to do anything, let alone convey information or advertising.(para.42);
>
> The Defendants have not supplied any evidence of any representation to the public or intention to convey meaning. (para. 58)

[28] Further, much of the "anticipated evidence" referred to in the Defendant's brief never did become evidence. The Respondent's brief, in expanding on this point states:

> There is no evidence that the in-store display of tobacco products is the only means of visibly advertising to the public the products offered for sale at the store(para.13);
>
> there is no evidence that the store and the products displayed for sale within the store constitute the vast majority of any advertising or promotion undertaken by the store (para.13);
>
> There is no evidence that almost all of the store's business activities centre on the sale of tobacco and tobacco products.

[29] Although no witnesses were called on behalf of the Defendants in support of this application, this is not a situation where the court is being asked to deal with a *Charter* application in a complete factual vacuum. The evidence before the court consists of the Agreed Statement of Facts as well as the photographs of the interior of Mader's Tobacco Store Ltd. I can and do find based on the Admissions and the photographs that were introduced into evidence that the Defendants wish to be able to display tobacco products that are for sale in Mader's Tobacco Store Ltd. Further, based on the photographs, I find that this display consists of many brands of tobacco and tobacco products that are located throughout the store; by inference I find that the display of tobacco products enables any person in the store to see packages of cigarettes with graphic health warnings, the types of tobacco products, and the brands of those products which the Defendants offer for sale in Mader's Tobacco Store Ltd.

[30] To return to the issue: does this display of tobacco products attempt to convey or convey a meaning so as to come within the sphere of conduct protected by s. 2(b)?

[31] As a starting point, I have highlighted some decisions that have considered the issue of what is meant by “expression”. The rationale for this approach is that these decisions exemplify the broad, inclusive approach courts have taken when determining whether human activity has expressive content so as come within the ambit of s. 2(b). In some of these decisions the infringement of the s. 2(b) right was found to be justifiable under s.1 of the *Charter*. Given that my purpose at this stage of the application is to determine the scope of s. 2(b), my summaries are, for the most part, limited to the s. 2(b) issue.

[32] *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084.

With respect to the question as to whether an absolute ban on postering on public property infringed freedom of expression, the court stated:

> 1. Does Postering Constitute Expression?
>
> Under Irwin Toy, supra at pp. 968-69, the first question to be asked in a case involving s. 2(b) is whether the activity conveys or attempts to convey a meaning. This is an easy inquiry in the present case, and indeed the appellant city of Peterborough has properly conceded that the respondent was engaging in expressive activity through the use of posters to convey a message. In the Court of Appeal, Krever J.A. held at pp. 291-92 that "[i]n informing the public, or those members of the public who read the [respondent's] posters, of a coming musical performance the posters conveyed a meaning". ...(para. 20)

[33] *R. v. Banks* [2007] O.J. No. 99 :

The Ontario Court of Appeal held that begging and squeegeeing had expressive content and came within the purview of s. 2(b):

> 112 The act of begging is communication and is evidently expression. While I think the trial judge was correct in rejecting the argument that begging, without more, is a form of political speech, I would nevertheless characterize it as fundamental communication at the core of free speech. The message "I am in

> need and I am requesting your help" is primary communication that seeks and invites participation in the community.
>
> 113 The expressive content of the activity of squeegeeing is essentially the same. While words may not be spoken and although a service is provided, I accept that the driver of the stopped vehicle understands full well that the squeegee person is requesting a donation. I am satisfied that squeegeeing, when considered in its real-life context, is an act that conveys essentially the same meaning as begging.
>
> (Appeal dismissed without reasons in [2007] S.C.C.A. No. 139 August 23, 2007)

[34] *R. v. Guignard*, [2002] 1 S.C.R. 472:

Mr. Guignard, was convicted in the Municipal Court of erecting a sign on one of his buildings expressing his dissatisfaction with the services of an insurance company. The issue in this case was whether by-laws governing the posting of signs violated s. 2(b) of the *Canadian Charter of Rights and Freedoms*. Justice LeBel, speaking for the court in finding that the bylaw infringed s. 2(b), wrote:

> 19 This Court attaches great weight to freedom of expression. Since the Charter came into force, it has on many occasions stressed the societal importance of freedom of expression and the special place it occupies in Canadian constitutional law. Very recently, in the highly sensitive context of an examination of the provisions of the Criminal Code relating to child pornography, McLachlin C.J. recalled the fundamental importance of freedom of expression to the life of every individual as well as to Canadian democracy. It protects not only accepted opinions but also those that are challenging and sometimes disturbing R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 21).
>
> 20 This freedom plays a critical role in the development of our society. It makes it possible for all individuals to express their views on any subject relating to life in society (see Sharpe, supra, at para. 23). The content of that freedom, which is very broad, includes forms of expression the importance and quality of which may vary. Some forms of expression, such as political speech, lie at the very heart of freedom of expression. (See Sharpe, at para. 23; Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, at p. 976; Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877.)

> 21 In applying s. 2(b) of the Charter, this Court has recognized the substantial value of freedom of commercial expression. The need for such expression derives from the very nature of our economic system, which is based on the existence of a free market. The orderly operation of that market depends on businesses and consumers having access to abundant and diverse information. Thus, in Ford v. Quebec (Attorney General),[1988] 2 S.C.R. 712, at pp. 766-67, this Court rejected the argument that commercial speech was not subject to the constitutional guarantee.

[35] *Montreal (City) v. 2952-1366 Quebec Inc.*,[2005] 3 S.C.R. 141:

A loudspeaker was set up by a business at the entrance to its club so that passers-by would be able to hear the show taking place inside the club. The issue was whether this noise had expressive content so as to come within the purview of s. 2(b).

> 56 Does the City's prohibition on amplified noise that can be heard from the outside infringe s. 2(b) of the Canadian Charter? Following the analytic approach of previous cases, the answer to this question depends on the answers to three other questions. First, did the noise have expressive content, thereby bringing it within s. 2(b) protection? Second, if so, does the method or location of this expression remove that protection? Third, if the expression is protected by s. 2(b), does the By-law infringe that protection, either in purpose or effect? See Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927.
>
> 58 The first question is whether the noise emitted by a loudspeaker from inside the club had expressive content. The answer must be yes. The loudspeaker sent a message into the street about the show going on inside the club. The fact that the message may not, in the view of some, have been particularly valuable, or may even have been offensive, does not deprive it of s. 2(b) protection. Expressive activity is not excluded from the scope of the guarantee because of its particular message. Subject to objections on the ground of method or location, as discussed below, all expressive activity is presumptively protected by s. 2(b): see Irwin Toy, at p. 969; R. v. Keegstra, [1990] 3 S.C.R. 697, at p. 729.

[36] *Canada(Attorney General) v.JTI-Macdonald Corp.*, [2007] 2 S.C.R.610

After the Supreme Court's decision in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 , the *Tobacco Act* and the *Tobacco*

*Products Information Regulations* were enacted. This legislation permitted some forms of advertising, but prohibited lifestyle advertising and promotion, advertising appealing to young persons, and false or misleading advertising or promotion. In addition, the size of mandatory and attributed health warnings on packaging was increased to 50 percent. The Attorney General conceded that the disputed provisions, except for the provision mandating an increase in the size of warning labels did indeed infringe the manufacturers' freedom of expression under s. 2(b) of the *Charter*. The Supreme Court concluded that the requirement with respect to the size of the warning labels was also an infringement of s. 2(b). The disputed provisions of the legislation were eventually upheld on the basis of a s. 1 analysis.

[37] The Respondent's brief, at para. 57, in its discussion of the *RJR-MacDonald*, *supra*, case, states:

> The Court held that the new Tobacco Act did not infringe the s. 2(b) rights of the tobacco manufacturers. Evident from s. 18 of the impugned federal legislation is that "promotion" is defined to mean "representation about a product or service".

[38] Two points are worthy of note here. First, at para. 57 of the decision McLachlin C.J. stated: "I conclude that 'promotion' in s.18 should be read as meaning commercial promotion directly or indirectly targeted at consumers." More significantly, the Supreme Court did indeed find that the sections of the act in question infringed s. 2(b) but were justified under s. 1 of the *Charter*. McLachlin C.J., on behalf of the court, concluded:

> 141 I conclude that the impugned provisions of the Tobacco Act and the Tobacco Products Information Regulations, properly interpreted, are constitutional in their entirety. I would therefore allow the Attorney General's appeals, dismiss the manufacturers' cross-appeals and restore the order of the trial judge. Costs are awarded to the Attorney General of Canada in this Court and in the Court of Appeal.
>
> 142 The constitutional questions are answered as follows:
>
> 1. Do ss. 18, 19, 20, 22, 24 and 25 of the Tobacco Act, S.C. 1997, c. 13, in whole or in part or through their combined effect, infringe s. 2(b) of the Canadian Charter of Rights and Freedoms?

Answer: Yes.

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the Canadian Charter of Rights and Freedoms?

Answer: Yes.

3. Do the provisions of the Tobacco Products Information Regulations, SOR/2000-272, governing the size of the mandatory messages infringe s. 2(b) of the Canadian Charter of Rights and Freedoms?

Answer: Yes.

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the Canadian Charter of Rights and Freedoms?

Answer: Yes.

[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...” (para. 59).

[42] By law, the products the Defendants wish to display must include health warnings, and information about toxic emissions and toxic constituents. There may perhaps be an irony in the fact that the Defendants wish to display products that contain mandatory health warnings and graphic images while the provincial legislation requires that these products be kept out of sight. Nevertheless, this does not detract from the fact that the Defendants wish to display products, the sale of which is not prohibited.

[43] I agree with the Respondent’s assertion that there is no evidence that any of the “brand names, logos and colors identified are expressions belong to or were created by either of the Defendants.”(Respondent’s brief, para.53); “there is no evidence that Mr. Gee nor the corporate Defendant alters the tobacco products in any way or adds any of his own expressive content to the products.”(brief, para.13)

[44] One must be mindful, however, that the right of freedom of expression is not so narrow as to be limited to content that belongs to or is created by the Defendants (*R. v. Butler* [1992] 1 S.C.R. 452). By way of example, a bookseller could be prohibited from selling specific books and would have no recourse under s. 2(b) because he/she was not the author or publisher of the books. To interpret freedom of expression so as to restrict it to owners/creators of brand names, for example, would be to do so contrary to the large and liberal interpretation accorded this *Charter* right.

[45] The Respondent states that there is no evidence to suggest that customers at Mader’s Tobacco Store wished to view the products for sale. Clearly, there was no necessity on the part of the Defendants in this application to call evidence to establish that customers wished to view the tobacco products. It was not critical to this case whether all, some or none of the customers wished to view the products for sale. The Defendants need not establish that their message was received by others. “It is the conveying or the attempted conveying of the meaning, not its receipt, that triggers the guarantee under s. 2(b).” *(Weisfeld v. Canada*, [1995] 1 F.C. 68)

**Is the Storage of Tobacco Products Expressive Activity so as to fall within the Sphere of Conduct Protected by s. 2(b)?**

[46] Having found that the display of goods for sale by the Defendants is expressive activity, the question remains as to whether the storage of goods is expressive activity so as to come within the ambit of s. 2(b). The relevant portions of the *Regulations* are set out above; for ease of reference section 3A(1) is set out:

> 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

[47] Thus the manner in which the legislation deals with the issue of storing tobacco is similar to its prohibition on display of tobacco. The tobacco must be stored so that it is not visible to people inside or outside the store except in very limited circumstances. When one thinks of storage of products, it is difficult to imagine that the act of storing anything could ever be capable of coming within the confines of "expressive activity". This is especially so when one considers "storing" in its ordinary meaning– putting away for future use or not putting on display. In this case, however, the legislation is drafted in such a way that vendors are prohibited from displaying any and all of their tobacco products, including those that are stored. They are prohibited from displaying tobacco products that are available for immediate sale; they are prohibited from displaying tobacco products that will be ready for sale at a later time.

[48] Whether one describes it as displaying for sale or displaying while stored, the activity the Defendants wish to engage in is activity with an expressive content, that is displaying products which they wish to sell. The restrictions on storage of tobacco and tobacco products serve to ensure any in-store display of tobacco

products is prohibited except in specific circumstances set out in the *Regulations*. The legislation is clear–tobacco and tobacco products are not to be displayed. Thus, when one considers the act of "storage" in the context of this legislation, the "storing" of tobacco products is an "expressive activity" so as to come within the ambit of freedom of expression.

**Is the Purpose or Effect of Section 9AA(1) of the *Tobacco Access Act* to Prohibit or Restrict Expression?**

[49] In *Irwin Toy*, *supra* , the Court held that once it is determined that a claimant's activity falls within the scope of freedom of expression, the court must then determine whether the purpose or effect of the impugned legislation was to control attempts to convey meaning through that activity. In offering guidance as to how to accomplish this, the majority stated:

> ... The importance of focussing at this stage on the purpose and effect of the legislation is nowhere more clearly stated than in R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at pp. 331-32 where Dickson J. (as he then was), speaking for the majority, observed:
>
> > In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity.
> >
> > Moreover, consideration of the object of legislation is vital if rights are to be fully protected. The assessment by the courts of legislative purpose focuses scrutiny upon the aims and objectives of the legislature and ensures they are consonant with the guarantees enshrined in the Charter. ...(para.47)

[50] For ease of reference, portions of the legislation are set out below:
Tobacco Access Act

> Purpose of Act
>
> 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 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. 2.
>
> 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.

[51] When applying the purpose test to the guarantee of free expression, I must be mindful that "the government's purpose must be assessed from the standpoint of the guarantee in question" (*Irwin Toy*, para. 48). Expanding on this issue, the Court in *Irwin Toy* stated:

> 49 If the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression. Archibald Cox has described the distinction as follows (Freedom of Expression (1981), at pp. 59-60):
>
> The bold line ... between restrictions upon publication and regulation of the time, place or manner of expression tied to content, on the one hand, and regulation of time, place, or manner of expression regardless of content, on the other hand, reflects the difference between the state's usually impermissible effort to suppress "harmful" information, ideas, or emotions and the state's often justifiable desire to secure other interests against interference from the noise and the physical

> intrusions that accompany speech, regardless of the information, ideas, or emotions expressed.
>
> Thus, for example, a rule against handing out pamphlets is a restriction on a manner of expression and is "tied to content", even if that restriction purports to control litter. The rule aims to control access by others to a meaning being conveyed as well as to control the ability of the pamphleteer to convey a meaning. To restrict this form of expression, handing out pamphlets, entails [page 975] restricting its content. By contrast, a rule against littering is not a restriction "tied to content". It aims to control the physical consequences of certain conduct regardless of whether that conduct attempts to convey meaning. To restrict littering as a "manner of expression" need not lead inexorably to restricting a content. Of course, rules can be framed to appear neutral as to content even if their true purpose is to control attempts to convey a meaning. For example, in Saumur v. City of Quebec , [1953] 2 S.C.R. 299 , a municipal by-law forbidding distribution of pamphlets without prior authorization from the Chief of Police was a colourable attempt to restrict expression.

[52] The approach to be taken when determining whether the purpose or effect of the legislation infringes s. 2(b) has been considered in a number of Supreme Court decisions including *R. v. Zundel*, [1992] 2 S.C.R. 731 and *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 . The court is not to focus on a "particular consequence of a proscribed act in assessing the legislation's purpose"; rather the court "examines what might be called the 'facial' purpose of the legislative technique adopted by Parliament to achieve its ends (*Zundel*, para 40) Thus although the objective of the *Tobacco Access Act* as set out in the legislation is to "protect the health of Nova Scotians, and in particular young persons", s. 9AA(1) is on its face a restriction on freedom of expression. Clearly, the purpose of this section is to prohibit the display of tobacco or tobacco products. This prohibition goes to both form of expression (displaying for sale) and to content (tobacco and tobacco products). I find that the purpose of s. 9AA(1) of the *Tobacco Access Act* is to restrict freedom of expression.

**Is the Purpose or Effect of Section 9AA(2) of the *Tobacco Access Act* to Prohibit or Restrict Expression?**

[53] Section 9AA(2) when read in conjunction with the accompanying regulations has as its purpose a restriction on freedom of expression. In the words of *Irwin Toy* (para. 49) this section "aims to control access by others to a meaning

being conveyed as well as to control the ability of the pamphleteer to convey a meaning."

[54] Further, both s. 9AA(1) and s. 9AA(2) fall squarely within component (b) of Thomas Scanlon's Freedom of Expression referred to by the Supreme Court in *Irwin Toy*:

> 50 If the government is to assert successfully that its purpose was to control a harmful consequence of the particular conduct in question, it must not have aimed to avoid, in Thomas Scanlon's words ("A Theory of Freedom of Expression", in Dworkin, ed., The Philosophy of Law (1977), at p. 161):
>
> > a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing.
>
> In each of Scanlon's two categories, the government's purpose is to regulate thoughts, opinions, beliefs or particular meanings. That is the mischief in view. On the other hand, where the harm caused by the expression in issue is direct, without the intervening element of thought, opinion, belief, or a particular meaning, the regulation does aim at a harmful physical consequence, not the content or form of expression.

[55] What the impugned legislation attempts to avoid in this particular case are "harmful consequences of acts performed as a result of those acts of expression". In other words, the expressive act of displaying goods for sale may influence or induce individuals to use tobacco products (harmful consequence). Clearly the purpose of s.9AA of the *Tobacco Access Act* is to prohibit display of tobacco products because of concern over the harmful consequences should the display act as inducement to use tobacco products.

[56] In the context of freedom of expression an attempt on the part of the government to restrict freedom of expression by stating that the purpose of the legislation is to avoid harmful consequences arising from the expressive activity will be an infringement of s. 2(b) unless the harm caused by the expression in issue

is direct, that is “without the intervening element of thought, opinion, belief, or a particular meaning...”(*Irwin Toy*, para. 50)

[57] Here, “the intervening element” is the decision of the individual who would be able to look at the variety of tobacco products/brands for sale in Maders Tobacco Store Ltd. He/she would be able to make his or her own decision as to whether to:

1. purchase the tobacco products, and
2. what type and brand of tobacco product he/she wanted.

Ultimately the decision as to the purchase of tobacco products and type/brand selection is that of the customer. It is not the display that causes the “harmful consequence”, it is the decision made by the individual (even if based on the display) that may result in harmful consequences. Therein lies the “intervening element of thought.”

[58] Section 9AA of the *Tobacco Access Act* is a legislative effort to avoid harmful consequences as a result of the expressive activity of displaying tobacco products that are for sale. Further, the connection between the displaying of tobacco products and the “subsequent harmful acts” consists only in the fact that the display of tobacco products may serve as an inducement to use tobacco products. The comments of Wilson,J. (dissenting, but not on the s. 2(b) issue) in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man. )*, [1990] 1 S.C.R. 1123 are instructive on the s. 2(b) issue:

> 114 I believe we see in this case a good example of government's attempt to deal with the harmful consequences of expressive activity, not by dealing directly with those consequences, but by placing constraints on the meaning sought to be conveyed by the expressive activity. Rather than deal directly with the variety of harmful consequences which the Attorney General of Canada and others submit ultimately flow from the communicative act, s. 195.1(1)(c) prohibits the communicative act itself in the hope that this will put an end to such consequences
>
> 115 This approach has obvious weaknesses. Section 195.1(1)(c) does not make clear the harmful consequences that it is designed to control. Nor does it limit the range of instances in which the expressive activity will be prohibited by requiring a link between the expressive activity and the harmful consequences. More precisely, s. 195.1(1)(c) does not require that the Crown show that the expressive act in a given case is in fact likely to lead to undesired consequences such as noise or traffic congestion. Instead, the provision prohibits all communicative acts for

> the purpose of engaging in prostitution or obtaining the sexual services of a prostitute that take place in public regardless of whether a given communicative act gives rise to harmful consequences or not.
>
> 116 The provision prohibits persons from engaging in expression that has an economic purpose. But economic choices are, in my view, for the citizen to make (provided that they are legally open to him or her) and, whether the citizen is negotiating for the purchase of a Van Gogh or a sexual encounter, s. 2(b) of the Charter protects that person's freedom to communicate with his or her vendor. **Where the state is concerned about the harmful consequences that flow from communicative activity with an economic purpose and where, rather than address those consequences directly, the content of communicative activity is proscribed, then the provision must, in my view, be justified as a reasonable limit under s. 1 of the Charter if it is to be upheld.** (emphasis added)

[59] These statements of Wilson, J. are analogous to this case. The province, rather than prohibiting the sale of tobacco enacted legislation that is designed to restrict communicative activity with respect to its sale.

[60] To summarize: I find that the display and storage of cigarettes is expressive activity that comes within the sphere of conduct that is protected by s. 2(b); further, the purpose of s. 9AA of the *Tobacco Access Act* is to restrict freedom of expression. In conclusion, I find that the Defendants have met the burden of establishing that s. 9AA of the *Act* and s. 3A of the companion *Regulations* infringe their s. 2(b) *Charter* right to freedom of expression.

Claudine MacDonald, J.P.C.