

[English]

Honourable senators will note this year that the competition for new Pages was in Eastern Canada.

Honourable senators, I have one final note of business, if I may: We are having some difficulties today with the recording equipment. They are trying to solve the problem now, but we may not have *Debates of the Senate* at the usual time tomorrow. I simply advise you of the situation in case you are looking for your Hansard and cannot find it.

I also wish to remind you that at five o'clock this afternoon, there will be a reception in my quarters for the new senators, and obviously all senators are invited.

SENATOR'S STATEMENT

HEALTH

TOBACCO PRODUCTS CONTROL ACT—DECISION OF SUPREME COURT OF CANADA

Hon. Mira Spivak: Honourable senators, the Supreme Court's recent decision to strike down the Tobacco Products Control Act placed the value of private advertising to sell deadly products above that of public regulation to preserve people's health. Whether judicial solicitude for corporate arguments about commercial speech are well placed, whether full constitutional status is properly conferred upon corporations — and the place of freedom of commercial speech in the hierarchy of political values is a subject deserving of debate — I wish at this time to place on the record several of the excellent observations found in the minority judgment of the court which received too little attention in the press and elsewhere in recent weeks.

At issue in the court's decision were two essential questions: Did Parliament have the constitutional authority to enact the legislation, and, if it did, did the government demonstrate that the law did not unjustifiably violate the freedom of expression right set out by the Charter?

On the first point, a majority of the Supreme Court judges did not rule against Parliament. We have retained the constitutional authority to legislate tobacco advertising and other measures, a ruling which enables the government to quickly enact new legislation.

The reasons for the government to do this, while previously well documented, were reinforced by the Health Canada study published last month in the *Canadian Journal of Public Health*, detailing new smoking-related mortality statistics. As of 1991, there were 41,408 deaths, with women's deaths accounting for 89 per cent of the increase. Smoking is still the single largest cause of preventable death in Canada.

The key to the tobacco companies' pleadings before the court was that tobacco is a legal product and thus has the right to be advertised.

Mr. Justice La Forest in writing the minority decision put it succinctly:

It must be kept in mind that the infringed right at issue in these cases is the right of tobacco corporations to advertise the only legal product sold in Canada which, when used precisely as directed, harms and often kills those who use it.

If tobacco were a product under the Hazardous Products Act, as all the anti-tobacco groups have been advocating for some time, advertising could be prohibited. The Food and Drug Act, for example, prevents the advertising of nicotine patches, a method by which some people stop smoking.

Justice La Forest also wrote:

Nearly 7 million Canadians use tobacco products, which are highly addictive. Undoubtedly, a prohibition of this nature —

— speaking of a total ban —

— would lead to an increase in illegal activity, smuggling and, quite possibly, civil disobedience. Well aware of those difficulties, Parliament chose a less drastic, and more incremental, response to the tobacco health problem. In prohibiting the advertising and promotion of tobacco products, as opposed to their manufacture and sale, Parliament has sought to achieve a compromise among the competing interests of smokers, non-smokers and manufacturers, with an eye to protecting vulnerable groups in society. Given that advertising, by its very nature, is intended to influence consumers and create demand, this was a reasonable policy decision.

The question before the court, however, was not simply whether it was reasonable but whether it was demonstrably justified and minimally impaired freedom of expression. The majority of the court found that the Tobacco Products Control Act violates the companies' Charter right to freedom of expression, largely because the government failed to demonstrate that a total ban was necessary to counter the limited objective of curbing consumption through advertising, labelling or promotion.

Madam Justice McLachlin wrote that the "motivation to profit is irrelevant," comparing the activity of tobacco companies to book sellers, newspaper owners and toy sellers.

Again, Justice La Forest wrote —

The Hon. the Speaker: Senator Spivak, I hesitate to interrupt you, but your three minutes are up, unless there is agreement.

Hon. Senators: Agreed.

Senator Spivak: Thank you.

The *Charter* was essentially enacted to protect individuals, not corporations. It may, at times, it is true, be necessary to protect the rights of corporations so as to protect the rights of the individual. But I do not think this is such a case.