CANADA

A-277-89

Federal Court of Appeal

CORAM: THE HONOURABLE MR. JUSTICE HUGESSEN
THE HONOURABLE MR. JUSTICE MacGUIGAN
THE HONOURABLE MADAME JUSTICE DESJARDINS

BETWEEN:

ROTHMANS, BENSON & HEDGES INC.

Plaintiff
(Appellant)

- and -

THE ATTORNEY GENERAL OF CANADA

Defendant
(Respondent)

- and -

CANADIAN CANCER SOCIETY

Intervenor

A-301-89

BETWEEN:

ROTHMANS, BENSON & HEDGES INC.

Plaintiff

- and -

THE ATTORNEY GENERAL OF CANADA

Defendant

Heard at Ottawa on Thursday, August 17, 1989.

Judgment rendered from the Bench at Ottawa on Thursday, August 17, 1989.

REASONS FOR JUDGMENT OF
THE COURT DELIVERED BY: HUGESSEN J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Thursday, August 17, 1989.)

Hugessen J.A.

These two appeals, which were heard together, are from orders made by Rouleau J. granting, in the case of the Canadian Cancer Society (CCS), and denying, in the case of the Institute of Canadian Advertising (ICA), leave to intervene in an action brought by Rothmans, Benson & Hedges Inc. (Rothmans) against the Attorney General of Canada attacking the constitutionality of the *Tobacco Products Control Act* (TCPA) (S.C. 1988 c. 20).

It is common ground that the plaintiff's attack is primarily Charter based, invoking the guarantee of freedom of expression in s. 2(*b*). There can also be no doubt, given the prohibitions contained in the TCPA, that such attack is best met by a s. 1 defence and that it is on the success or failure of the latter that the outcome of the action will depend.

We are all of the view that Rouleau J. correctly enunciated the criteria which should be applicable in determining whether or not to allow the requested interventions. This is an area in which the law is rapidly developing and in a case such as this, where the principal and perhaps the only serious issue is a s. 1 defence to an attack on a public statute, there are no good reasons to unduly restrict interventions at the trial level in the way that courts have traditionally and properly done for other sorts of litigation. A s. 1 question normally requires evidence for the Court to make a proper

determination and such evidence should be adduced at trial (see *Canadian Labour Congress and Bhindi* (1985) 17 D.L.R. 4th 193.) Accordingly we think that, in any event for the purpose of this case, Rouleau J. was right when he said "the interest required to intervene in public interest litigation has been recognized by the courts in an organization which is genuinely interested in the issues raised by the action and which possesses special knowledge and expertise related to the issue raised." (*A.B.* p. 186 in file A-277-89).

As far as the intervention by the CCS is concerned we have not been persuaded that Rouleau J. committed any reviewable error in finding that it met the test thus enunciated. It is our view, however, that the intervention by the CCS should be restricted to s. 1 issues, that it be required to deliver a pleading or Statement of Intervention within 10 days and permitted to call evidence and to present argument in support thereof at trial. Any questions relating to discovery or otherwise to matters of procedure prior to trial should be determined either by agreement between the parties or on application to the Motions Judge in the Trial Division. The appeal by Rothmans will therefore be allowed for the limited purpose only of varying the Order as aforesaid.

As far as concerns the requested intervention by ICA we are of the view that justice requires that this application be granted as well. The Motions Judge recognized that ICA has an interest in the litigation but seemed to feel that its position and expertise were no different from that of the plaintiff Rothmans. With respect we disagree. The ICA's position in this litigation extends beyond the narrow question of advertising of tobacco products to more general questions relating to commercial free speech. In a s. 1 assessment of the justification and reasonableness of limits imposed

upon a Charter guaranteed freedom that position may contribute importantly to the weighing and balancing process. Its appeal will therefore be allowed and leave to intervene granted on the same terms as those indicated above for the CCS.

In our view this is not a case for costs in either Division.

(James K. Hugessen)
J.A.

A-277-89

BETWEEN:

ROTHMANS, BENSON & HEDGES INC.

Plaintiff
(Appellant)

- and -

THE ATTORNEY GENERAL OF CANADA

Defendant
(Respondent)

- and -

CANADIAN CANCER SOCIETY

Intervenor

A-301-89

BETWEEN:

ROTHMANS, BENSON & HEDGES INC.

Plaintiff

- and -

THE ATTORNEY GENERAL OF CANADA

Defendant

REASONS FOR JUDGMENT OF THE COURT

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.: A-301-89

STYLE OF CAUSE: Rothmans, Benson & Hedges Inc. v. The Attorney General of Canada

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: Thursday, August 17 1989

REASONS FOR JUDGMENT BY: Hugessen J.A.

DATED: Thursday, August 17 1989

APPEARANCES:

Mr. Claude R. Thomson, Q.C.

for the Institute of Canadian Advertising

Mr. Edward P. Belobaba
Ms. Barbara L. Rutherford

for Rothmans, Benson & Hedges Inc.

Ms. Gerry N. Sparrow

for the Attorney General of Canada

SOLICITORS OF RECORD:

Campbell, Godfrey & Lewtas
Toronto, Ontario

for the Institute of Canadian Advertising

Gowling, Strathy & Henderson
Toronto, Ontario

for Rothmans, Benson & Hedges Inc.

John C. Tait, Q.C.
Deputy Attorney of Canada
Ottawa, Ontario

for the Attorney General of Canada

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: Thursday, August 17 1989

REASONS FOR JUDGMENT BY: Hugessen J.A.

DATED: Thursday, August 17 1989

APPEARANCES:

Mr. Edward P. Belobaba
Ms. Barbara L. Rutherford

for the Appellant

Ms. Gerry N. Sparrow

for the Respondent

Mr. Karl Delwaide
Mr. Andre T. Mecs

for the Intervenor

SOLICITORS OF RECORD:

Gowling, Strathy & Henderson
Toronto, Ontario

for the Appellant

John C. Tait, Q.C.
Deputy Attorney General of Canada
Ottawa, Ontario

for the Respondent

Martineau, Walker
Montreal, Quebec

for the Intervenor