Translated from the original French

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| Directeur des poursuites criminelles et pénales c. Théâtre du Trident inc. | | | | | | 2021 QCCQ 11956 | |
| COURT OF QUÉBEC | | | | | | | |
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| CANADA | | | | | | | |
| PROVINCE OF QUEBEC | | | | | | | |
| DISTRICT OF | | | QUÉBEC | | | | |
| LOCALITY OF | | | | QUÉBEC | | | |
| “Criminal and Penal Division” | | | | | | | |
| No.: | | 200-61-218356-184  200-61-232730-190  200-61-230456-194 | | | | | |
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| DATE: | November 9, 2021 | | | | | | |
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| PRESIDING: | | | | | YANNICK COUTURE, PRESIDING JUSTICE OF THE PEACE | |  |
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| DIRECTOR OF CRIMINAL AND PENAL PROSECUTIONS | | | | | | | |
| Prosecutor | | | | | | | |
| v. | | | | | | | |
| LE THÉÂTRE DU TRIDENT INC.  -and-  LE THÉÂTRE DE LA BORDÉE INC.  -and-  PREMIER ACTE INC. | | | | | | | |
| Defendants-applicants | | | | | | | |
| -and- | | | | | | | |
| **ATTORNEY GENERAL OF QUEBEC** | | | | | | | |
| Impleaded party | | | | | | | |
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| **RULING ON AN APPLICATION FOR A DECLARATION OF INVALIDITY OF**  **SECTIONS 1, 2, AND 11 OF THE *TOBACCO CONTROL ACT* AND OF**  **SECTION 1 OF THE *REGULATION UNDER THE TOBACCO CONTROL ACT*** | | | | | | | |
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**BACKGROUND**

1. The defendants-applicants (hereinafter the “applicants”) were each fined for tolerating the smoking by actors of a tobacco cigarette on stage during a theatrical performance, in violation of section 11 of the *Tobacco Control Act*.[[1]](#footnote-1)
2. The applicants have acknowledged the facts. They are presenting an application for a declaration of invalidity.
3. The applicants contend that the fines represent a violation of their freedom of artistic expression protected by the Canadian and Quebec *Charters*. In their opinion, they have the right to allow the free expression, in the context of a theatrical performance, of expressive gestures or actions that include an actor smoking in order to respect the text or the creative expression of the authors and/or stage directors.
4. An actor smoking tobacco or any related substance is a protected expression because it does not constitute a threat of physical violence. A theatre stage must be considered to be a most appropriate place for the expression of artistic freedom.
5. The infringement of freedom of artistic expression is unjustified in a free and democratic society because the general prohibition against smoking under any circumstances in a place where cultural and artistic activities take place has no connection to the objectives of the *Act* and the regulations.
6. Neither the general prohibition against smoking in public places nor the toxicity of tobacco products is contested. The applicants do not claim that theatres in themselves constitute places where the general prohibition is not to be applied. Anyone who smokes inside a theatre is subject to the general prohibition. The prohibition is too restrictive in that it does not allow an actor to smoke on stage in order to respect the text or the artistic spirit or essence. Accordingly, they argue the measure is proportionate.
7. The dispute concerns the portrayal of the act of smoking in an artistic expression on stage.

**LEGISLATIVE PROVISIONS**

1. Section 2 of the *Tobacco Control Act*[[2]](#footnote-2) provides that smoking is prohibited in all enclosed spaces, including those where sports, leisure, judicial, cultural, or artistic activities take place, and where seminars, conventions, or other such activities are held, as well as in all enclosed spaces that are open to the public.
2. Section 11 of the *Act* provides that the operator of a place shall not tolerate smoking in an area where it is prohibited.

**ANALYSIS**

1. The applicants argue that imposing fines in the context of artistic performances during which the creators have chosen to have actors on stage smoke tobacco is a violation of freedom of expression.
2. It falls to the person alleging an infringement of freedom of expression under the *Canadian Charter* and/or the Quebec *Charter* to demonstrate:[[3]](#footnote-3)
3. That the activity at issue has expressive content, i.e., that it aims to convey a message or meaning;
4. That the activity at issue is not excluded by one of the limits on freedom of expression;
5. That, insofar as an activity is protected by the *Charter*, the Act, in its purpose or effect, impairs freedom of expression.
6. If a violation of freedom of expression is demonstrated, it falls to the State to establish, on a balance of probabilities, that the violation may be justified under section 1 of the *Canadian Charter* and/or section 9.1 of the Quebec *Charter* by meeting the following test established in *R.* *v.* *Oakes*:[[4]](#footnote-4)
7. The objective of the limitation on a *Charter* right must be sufficiently important to justify the impairment;
8. The means chosen to achieve the objective must be proportional. This second step involves three components:
   1. Proof of a rational connection between the objective and the impugned measure;
   2. Proof that the impugned measure was formulated to ensure minimal impairment; and
   3. That the benefits of the impugned measure outweigh the inconveniences arising from the limitation on the freedom of artistic expression.
9. As the debate concerns the manner of portraying the act of smoking by actors during a theatrical and/or artistic expression, as opposed to the legitimacy of playing a person who smokes, there is no inherent infringement of the freedom of artistic expression.
10. Not all human activity necessarily has expressive content, that is to say, it does not always convey a message. Thus, certain activities are purely physical.[[5]](#footnote-5)
11. The goal is to prohibit smoking, i.e., breathing in and inhaling the smoke produced by tobacco or by any substance related to tobacco in enclosed public spaces, as well as in places where artistic activities take place. This is to protect the public from smoke from tobacco or from any tobacco-like substance.
12. Furthermore, inhaling or breathing in the smoke produced by tobacco or any tobacco-like substance does not inherently have expressive content. It therefore does not benefit from the protection of freedom of expression under section 2(b) of the *Canadian Charter* or section 3 of the Quebec *Charter*, because it is not aimed at conveying expressive content (a message):

The previous analysis applies. Additionally, smoking is not an expression. It is, in most cases, an addiction, and a pathetic one at that. It is not an activity that comes within the scope of freedom of expression. Smoking does not have expressive content as defined by case law. An expression within the meaning of the Charter must convey meaning and it must have expressive content. Examples of expression within the Charter are words, writings, photographs, artwork, sculpture, music, dance, film and theatre, to mention a few. Smoking is not about the expression of ideas to or of others. It is simply not an expression within the concept of freedom of expression.[[6]](#footnote-6)

1. Other examples establish that concrete acts have not been considered to be expressive activities because they are not aimed at conveying a message, such as the conventional sale of cigarettes in a pharmacy.[[7]](#footnote-7)
2. The *Act* and its regulationsdo not prevent an actor from simulating smoking on stage in different ways by using various props, devices, or special effects. Moreover, the evidence shows that some stage directors have chosen to use fake cigarettes. Nothing in the legislation at issue prevents the exercise of artistic freedoms or hampers the ability to convey the spirit of a theatrical performance.
3. The performance of acts prohibited by other laws is commonplace in theatre, such as simulations of murder, of using a weapon, of taking drugs, or of using violence.
4. The *Act* and its regulations allow for portraying, simulating, playing, or acting the part of a person who smokes, which constitutes expressive content that is not prohibited. The prohibition consists of projecting or inhaling smoke from a tobacco product in a public place. Smoking tobacco during a theatrical performance does not constitute expressive content because no message is conveyed.
5. Because the activity at issue has no expressive content, that is to say, it is not aimed at conveying a message or meaning, it does not fall within the scope of the protection provided by either the *Canadian Charter* or the Quebec *Charter*.

**FOR THESE REASONS, THE COURT:**

1. **DISMISSES** the petition of the defendants-applicants.

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1. CQLR, c. L-6.2. [↑](#footnote-ref-1)
2. *Ibid.* [↑](#footnote-ref-2)
3. *Irwin Toy Ltd. v*. *Quebec (Attorney General)*, [1989] 1 SCR 927. [↑](#footnote-ref-3)
4. [1986] 1 SCR 103. [↑](#footnote-ref-4)
5. *Irwin Toy Ltd. v*. *Quebec (Attorney General)*, *supra* note 3. [↑](#footnote-ref-5)
6. *Yellowknife* *v*. *Denny*, [2004] N.W.T.J. No. 16 at para. 65. [↑](#footnote-ref-6)
7. *Rosen v*. *Ontario (Attorney General)*, [1996] O.J. No. 100 (QL). [↑](#footnote-ref-7)