CT-2006-10

THE COMPETITION TRIBUNAL

IN THE MATTER OF the Competition Act, R.S., 1985, c. C-34;

AND IN THE MATTER OF an inquiry pursuant to subsection 10(1)(b)(ii) of the Competition Act relating to the marketing practices of Imperial Brush Co. Ltd. and Kel Kem Ltd. (c.o.b. as Imperial Manufacturing Group);

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

-and-

IMPERIAL BRUSH CO. LTD. AND KEL KEM LTD.
(c.o.b. AS IMPERIAL MANUFACTURING GROUP)

Respondents

APPLICANT'S RESPONSE TO THE RESPONDENTS' SUBMISSIONS WITH RESPECT TO REMEDY

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I. Introduction

1) On March 10, 2008, the Respondents filed their submissions with respect to remedies.

2) The Applicant submits herewith her response regarding these submissions.

II. The Administrative Remedy [1]

3) At paragraphs 5 and 6 of their submissions, the Respondents argue as follows:

[1] Respondents' submissions, paras.2 to 7.

5. *It was not asserted that the purpose of the provision* [i.e. para.74.01(1)(b)] *was to protect individual consumers from harm arising from unsubstantiated claims – indeed, it was not asserted or shown that unsubstantiated claims, the truth or falsity of which is not known, are harmful to individual consumers. Harm would arise from representations which are false and misleading, but that was neither alleged or proved in this case.*

6. *It is therefore wrong to approach the remedy in terms of consumer protection – and much less, of product safety. There is no evidentiary basis for a product safety concern – it was neither alleged nor proved that the products which are the subject of this application are in any way dangerous. The evidence showed that these products, and products of other suppliers which are substantially similar, have been on the market for many, many years. The Respondents' evidence was that they had received no complaints, and no evidence of complaints to other suppliers was presented. Although the Tribunal has determined that the Respondents' testing was not sufficiently rigorous to meet the standard required by s.74.01, those tests all indicated that the products had a beneficial effect.*

7. *The Respondents therefore submit that the remedy should be designed to rectify the harm to the competitive process, which is the purpose and goal of the Competition Act and, in particular, Part VII.1 and s. 74.01.*

4) The Applicant submits that these submissions are in complete contradiction to the Tribunal's findings in the present matter. The following excerpts of the Tribunal's decision demonstrate clearly this point:

[75] The Respondents disagree with the Commissioner's description of the legislative objectives. They assert that if paragraph 74.01(1)b) "is to be justified, it must be with reference to the objective of preventing false and misleading representations". According to the Respondents, the legislative history shows that the object of paragraph 74.01(1)(b) relates "to false, not true but untested product claims".

[76] I must disagree with the Respondents. As explained above, it is crucial to the section 1 analysis to not over-state the objective of the paragraph. I agree that the general underlying rationale of paragraph 74.01(1)(b) is the decrease of deceptive advertising. The word "deceptive" in this case, however, does not refer to "false" advertising, but to unsubstantiated, unsupported or speculative representations

about the performance, efficacy or length of life of the product. The objective is to prevent certain unsubstantiated representations. The deception being addressed is that these representations are grounded in some objective testing. A representation that a product will perform in a specific way is designed to convince the purchaser that there is some objective basis upon which the purchaser can rely.

[77] Also, the provision sets out a substantiation requirement, the proof of which lies on the seller. The paragraph thus seeks to redress the imbalance of knowledge between the consumer and the seller. It protects the consumer by ensuring that she can rely on statements regarding the performance, efficacy or length of life of a product since those statements are to be based on proper and adequate tests.

[78] In R. v. 671135 Ontario Ltd., 55 C.P.R. (3d) 204, MacKinnon J., when examining the constitutionality of an earlier version of paragraph 74.01(l)(b), also referred to the importance of establishing a "fair balance of power between competitors and consumers".

[79] The improvement of consumer information benefits, in turn, consumers, firms selling competing products, and the proper functioning of the market. The Royal Commission on Prices Spreads noted that measures for consumer protection also benefit sellers.

[80] On the basis of the evidence before the Tribunal, I therefore conclude that the objective of paragraph 74.01(l)(b) is the protection of consumers, competitors and the proper functioning of the market from the harm caused by unsubstantiated representations about the performance, efficacy or length of life of a product.

(...)

[83] In my opinion, Parliament's concern with the harm resulting from unsubstantiated representations regarding the performance, efficacy or length of life can be characterized as a sufficiently important concern. The need to protect consumers from representations based on inadequate or improper testing for the purpose of promoting the product to the consumer is an important requirement.

(...)

[99] In weighing out these points of analysis, the nature of any limitation must again be borne in mind. What Parliament limits are not expressions of ideas, principles, policies and the like but that of unsustained promises of performance and efficacy which not only cause harm in themselves but, where inaccurate, can potentially cause

substantial physical harm to people. Reliance on product performance claims about something as inherently dangerous as chimney fires underscores the importance of ensuring a proper basis upon which people may rely.

(...)

[123] The circumstances here are that the product is to be used to address, in some measure, the dangerous situation of chimney fires. The test must be proper and adequate given the situation in which it will be used. This speaks to a high standard of testing and analysis.

(...)

[151] I find that the evidence relied upon by the Respondents does not show that the representations at issue are based on proper and adequate tests before the representations were made to the public.

[152] Although the Supersweep Log has been in use for many years; this, in itself, does not constitute a proper and adequate test. A test is a "procedure intended to establish the quality, performance or reliability of something" (Concise Oxford English Dictionary, S.V. "test". The Canadian Oxford Dictionary defines test as "a critical examination or trial of the qualities, genuineness, or suitability of a person or thing"). The use to which Mr. Kelly refers is not a test much less adequate or proper.

[153] Paragraph 74.01(l)(b) does not set out an exception for products which have been in use for 5, 10, 15 years or any other period. The provision requires proper and adequate tests. This is not a case of false advertising where the defence is that the product is effective. Indeed, the Respondents did not attempt to prove that the product works as advertised.

[154] As a counter to the suggestion that lack of consumer complaints is an endorsement, the absence of endorsement evidence makes the lack thereof equivocal. For a product in use for so many years, if it worked as represented, one would reasonably expect not only customer endorsement but industry and academic acceptance.

(...)

[225] It is necessary for there to be some public dissemination of the Tribunal's Order to the people most directly affected and who may have relied upon the representations and felt some degree of comfort and security by using the products. The section 1 Charter justification

is based in part on the asymmetrical information base between seller and ultimate purchaser. In this case, the potential harm flowing from inadequately tested representations accrues to the consumer not to others in the supply chain.

(Emphasis added)

5) Accordingly, the Applicant submits that the Respondents' submissions regarding the general purpose of paragraph 74.01(1)(b) and of the remedies in the present matter are without any merit.

III. Compliance with the Reasons and Order of February 7, 2008 [2]

6) In her submissions filed on March 10, 2008, the Applicant submits that the prohibition order found at subparagraph 233(a) of the Tribunal's order directs the Respondents to "*cease making, causing to be made, or permitting to be made, by any means whatsoever*" the prohibited representations. Such prohibited representations include the ones found on the packaging and labels of products still available for sale in retail stores.

7) The Respondents are of a completely different view. They submit that the subparagraph 233(a) order is only effective from the date of the order and forward. Regarding the representations found on the labels and packaging of the products, the Respondents argue that the effects of the order can only be with respect to their sales to wholesalers, distributors and/or retailers, and not with respect to the products still on sale at the retail level. To support such submissions, the Respondents refer to subsection 74.03(3) of the *Competition Act* and claim that "*[t]he effect* [of this subsection] *is that the representation is made by the manufacturer at the time of supply of the material to the wholesaler or distributor*". [3]

8) The Applicant denies the Respondents' submissions and argue that the Respondents misread subsection 74.03(3) for the following reasons.

9) Section 74.03 of the *Competition Act* provides as follows:

74.03 (1) <u>For the purposes of sections 74.01 and 74.02, a representation that is</u>

[2] Respondents' submissions, paras.8 to 10.
[3] Respondents' submissions, subpara.10(b).

(a) expressed on an article offered or displayed for sale or its wrapper or container,
(b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,
(c) expressed on an in-store or other point-of-purchase display,
(d) made in the course of in-store, door-to-door or telephone selling to a person as ultimate user, or
(e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public,

is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2).

(...)

(3) Subject to subsection (1), a person who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in section 74.01 is deemed to make that representation to the public.

(Emphasis added)

74.03 (1) Pour l'application des articles 74.01 et 74.02, sous réserve du paragraphe (2), sont réputées n'être données au public que par la personne de qui elles proviennent les indications qui, selon le cas:

a) apparaissent sur un article mis en vente ou exposé pour la vente, ou sur son emballage;
b) apparaissent soit sur quelque chose qui est fixé à un article mis en vente ou exposé pour la vente ou à son emballage ou qui y est inséré ou joint, soit sur quelque chose qui sert de support à l'article pour l'étalage ou la vente;
c) apparaissent à un étalage d'un magasin ou d'un autre point de vente;
d) sont données, au cours d'opérations de vente en magasin, par démarchage ou par téléphone, à un usager éventuel;
e) se trouvent dans ou sur quelque chose qui est vendu, envoyé, livré ou transmis au public ou mis à sa disposition de quelque manière que ce soit.

(...)

> *(3) Sous réserve du paragraphe (1), quiconque, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, fournit à un grossiste, détaillant ou autre distributeur d'un produit de la documentation ou autre chose contenant des indications du genre mentionné à l'article 74.01 est réputé donner ces indications au public.*
>
> (Emphasis added)

10) Because the Respondents caused the representations to be displayed on the labels and packaging of the products, they are the ones that are legally deemed to make the representations to the public pursuant to subsection 74.03(1) of the *Competition Act*. Further, pursuant to subsection 74.01(3) of this Act, if the Respondents supplied to wholesalers, retailers or other distributors "*any material or thing*" that contains the prohibited representations, then they are deemed to have made such prohibited representations to the public.

11) The Applicant submits that the purpose of section 74.03 of the *Competition Act* is to impose full liability over the representations on the person "*who causes the representations to be so expressed*" or who provides material that contains the representations. Typically, that person will of course be the manufacturer of the product. Otherwise, similarly to what the Respondents are arguing in the present matter, manufactures could plead that they should no longer be held liable for representations found on products that have been sold to wholesalers, distributors and/or retailers and on which they have no propriety rights or "control". The Applicant also submits that the second purpose of section 74.03 is to protect wholesalers, distributors and/or retailers, so that they are not found liable for prohibited representations that they did not create.

12) Because they are the ones legally deemed to be making the representations to the public with respect to the products supplied to wholesalers, distributors and retailers, and because of the prohibition order of subparagraph 233(a) of the Tribunal's decision, the Applicant submits the Respondents have legal duties under the *Competition Act* to take actions to cease making the representations, including with respect to products on sale at the retail level.

13) The Applicant submits that the issue of the Respondents' "loss of control" over the products once they are sold and supplied to wholesalers, distributors and/or retailers is irrelevant with respect to the application of the prohibition order issued pursuant to the *Competition Act*. The Respondents may lose propriety rights over the products, but the Respondents' name and representations remain on the labels and packaging and they remain legally accountable for these under the Act, specifically because of the deeming provision of section 74.03 of the Act.

14) Finally, the Respondents specifically argue that the Tribunal does not have jurisdiction to order them to recall the products. The Applicant wishes to make the following arguments in that regard:

a) Even if one assumes that the Tribunal does not have this jurisdiction to order them to recall of the products, the Respondents must nevertheless comply with the order found at subparagraph 233(a) of the Tribunal's order and "*cease making, causing to be made, or permitting to be made, by any means whatsoever*" the prohibited representations. By having the products removed from sale, the Respondents would be satisfying that aspect of the Tribunal's order. The issue of the Tribunal's jurisdiction to order recall is therefore academic;

b) Alternatively, the Applicant wishes to inform the Tribunal that she is also of the same view that the Tribunal does not have jurisdiction to specifically order the Respondents to recall the products, for the following reasons:

i) The Tribunal's jurisdiction is found at sections 3 and 8 of the *Competition Tribunal* Act, and, regarding determinations of reviewable conduct and of judicial orders, section 74.1 of the *Competition Act* provides the jurisdiction of the Tribunal;

ii) The Applicant submits that the jurisdiction of the Tribunal is "*exceptional and statutory*", similarly to the Federal Court of Canada's jurisdiction;

iii) The Applicant submits that the provisions of the *Competition Tribunal Act* and the *Competition Act* do not provide for the issuance of product recall orders to respondents, nor can such an order of this nature be implied from the remedies specifically provided at subsection 74.1(1) of the *Competition Act* because it is not absolutely necessary.[4]

IV. The Respondents' Response to the Order [5]

15) The Respondents claim that they stopped shipments of products to wholesalers and retailers upon receipt of the Tribunal's order.[6] They claim that they advised the distributors of the products to stop shipments from their warehouses to retail outlets.[7] The Respondents further claim that they "*subsequently issued a request to wholesalers and retailers to return all shelf stock and other inventory of*

[4] See "List of Cases" in Table of Contents.
[5] Respondents' submissions, paras.11 to 14.
[6] Respondents' submissions, para.12.
[7] Ibid.

Conditioner, Cleaner and Soot Remover to the Respondents", and that "*[t]he wholesalers and retailers have been provided with a 1-800 number for information and to arrange for pickup of the remaining product*".[8]

16) The Respondents conclude by saying that "*they have complied in good faith with the Reasons and Order of the Tribunal*" and that "*they have withdrawn the products and requested their return*".[9] The Applicant submits that the Respondents are themselves making "good faith" an issue in the present matter and such argument is used to further advance their position. Accordingly, the Applicant is entitled to respond to the submissions made in that regard.

17) On February 26, 2008, the Applicant sent a letter to the Tribunal to inform it that the products in question were still being offered for sale at retail outlets across Canada more than 2 weeks after the Tribunal's decision. Photocopies of labels and photographs were attached to this letter. The Respondents refer to the letter at paragraphs 8 and 19 of their submissions on remedy. They never raised objections regarding the merits of the evidence presented by the Applicant.

18) Further, on March 14, 2008, the Applicant received reliable information from important Canadian retailers that the Respondents actually recalled the products more than a month after the Tribunal's decision was rendered. The Applicant is in the process of expanding her investigation to other retail outlets. The Applicant reserves her rights to file such evidence if requested by the Tribunal to do so.

19) Accordingly, because good faith is being made an issue, the Applicant does not agree that the Respondents meet the required standard regarding compliance with the subparagraph 233(a) order, nor did it act with all the diligence that was required of them.

V. Publication or Other Dissemination of a Notice [10]

20) The Respondents argue that no public notice is necessary because to the best of their knowledge no logs remain for sale in retail trade,[11] because sales figures for the Cleaner and Conditioner have been "modest" for the past 4 years,[12] because the dissemination of the representations was very limited[13] and because "*the products have been withdrawn and the representations are no longer being made to the public*".[14]

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[8] Respondents' submissions, para.13.
[9] Respondents' submissions, para.14.
[10] Respondents' submissions, paras.15 to 23.
[11] Respondents' submissions, para.16.
[12] Respondents' submissions, para.17.
[13] Respondents' submissions, para.19.
[14] Respondents' submissions, para.20.

21) Assuming that the information found in the table at page 6 of the Respondents' submissions is correct, 9131 Cleaners and 88112 Conditioners[15] have been available for sale in retail stores across Canada in the last 4 years. The Applicant denies that these numbers are modest, i.e. they are not "*relatively moderate, limited, or small*".[16]

22) In any event, whether "modest" or not, the Applicant submits that what is relevant regarding sales of the products are not numbers but rather the nature of such products which is "*to address, in some measure, the dangerous situation of chimney fires*".[17]

23) The Tribunal has already directed that there is a need for public dissemination of its findings in the present matter, as provided at paragraph 225:

> *[225] It is necessary for there to be some public dissemination of the Tribunal's Order to the people most directly affected and who may have relied upon the representations and felt some degree of comfort and security by using the products. The section 1 Charter justification is based in part on the asymmetrical information base between seller and ultimate purchaser. In this case, the potential harm flowing from inadequately tested representations accrues to the consumers not to others in the supply chain.*

24) Evidence shows that the products were still being offered for sale in retail stores across Canada very recently. Even if they are eventually pulled from shelves in retail stores, consumers will be continuing to use them at home. In particular, the Respondents tell consumers on the labels of the Conditioner to sprinkle one or two tablespoons of the product onto hot coals or a low fire at least twice per week. For the Cleaner, the wood and/or the walls of the chimney or stovepipes must be sprayed regularly. One can reasonably presume that it could take months of regular use before the Conditioner and Cleaner would be fully used at home by consumers. The Applicant submits that this proves a clear and current need to inform the public about the Tribunal's findings, as directed by the Tribunal.

25) The Applicant submits that the Respondents had ample time to seek information regarding the dissemination of the products across Canada by retailers, in order to make submissions aimed at focusing the dissemination of the public notice and/or with respect to the means used to disseminate such notice. The Applicant submits that the Respondents show apparently no concern for customers who having paid $6 to $15 for these products might still believe they are actually

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[15] This number includes the 1 lb. and the 2 lb. conditioner bottles.
[16] Definition of "modest" in the *Concise Oxford English Dictionary*.
[17] Tribunal's decision, para.123.

"conditioning" or "cleaning" their chimneys, although no adequate and proper test actually confirms that they are. These consumers may continue to show trust in these products and may continue to use them without proper notification of the Tribunal's findings.

VI. Costs [18]

26) The Respondents argue that the Applicant should not be entitled to costs in the present matter. They raise various arguments. The Applicant will respond to each one of these arguments in the order they appear in the Respondents' brief.

27) First, the Respondents argue that the Applicant failed to request costs at the hearing and is precluded from any award. They refer to the case of *Balogun v. Canada,* 2005 FCA 350. In response, the Applicant submits that the Crown had not requested costs in the *Balogun* case, but that the judge nevertheless awarded them. The present matter is completely different. By letter dated October 1, 2007, the Applicant informed the Tribunal that the Crown seeks costs in contested matters and she requested the opportunity to address the issue if the Notice of Application was allowed. Before counsel to the Applicant sent this letter to the Tribunal, he contacted counsel to the Respondents by phone to inform him of the Applicant's intentions to send the letter. Counsel to the Respondents told counsel to the Applicant that he would consult with his clients after receipt of the letter and that he would decide what he would do after that. After October 1, 2007 and before the Tribunal's order of February 7, 2008, the Respondents did not object to the Applicant's request for costs, in any way or form. Because it still had jurisdiction over the case and because it had not disposed of the application when she made her request for costs, the Applicant submits that the Tribunal had authority to grant such request and give her the opportunity to address this issue of costs in the present matter.

28) Second, the Respondents argue that the Applicant should not get costs in the present matter because applications under s.74.01 of the *Competition Act* are "*more criminal than civil in nature*".[19] The Respondents claim that the administrative monetary penalty is "*indistinguishable from fines*" and that allowing costs above the administrative monetary penalty would be "*merely punitive*".[20] The Applicant denies these arguments for the following reasons:

a) Proceedings under s.74.01 of the *Competition Act* are clearly civil in nature. In *Gestion Lebski et al.*,[21] at paragraphs 32 to 76, Mr. Justice Blanchard provides comprehensive reasons why paragraphs 74.01(1)(a)

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[18] Respondents' submissions, paras.24 to 47.
[19] Respondents' submissions, para.27.
[20] Respondents' submissions, para.29.
[21] *Commissioner of Competition v. Gestion Lebski Inc. et al.* – Tab 5.

and 74.01(1)(b) of the *Competition Act* do not create criminal proceedings and why administrative monetary penalties (AMP) are not "*true penal consequences*". The Applicant refers the Tribunal to Mr. Justice Blanchard's reasons in response to the Respondents' arguments. In particular, at paragraphs 68 and 69 of his decision, Mr. Justice Blanchard comments as follows:

> *[68] In other words, as in the Petroleum Products Act, the administrative monetary penalty creates a debt recoverable through civil proceedings, and failure to comply with an order to pay the administrative monetary penalty cannot result in a criminal prosecution, unlike any other order made by the Tribunal under Part VII. 1 or Part VIII of the Act.*
>
> *[69] I am therefore of the opinion that the administrative monetary penalty may not be considered to be a true penal consequence.*

b) For these reasons, the Applicant submits that the same principles concerning the allocation of costs in civil matters apply to the present civil matter, as specifically provided by the legislator at section 8.1 of the *Competition Tribunal Act*:

> *8.1 (1) The Tribunal may award costs of proceedings before it in respect of reviewable matters under Parts VII.1 and VIII of the* Competition Act *on a final or interim basis, in accordance with the provisions governing costs in the* Federal Court Rules, 1998.

29) Third, the Respondents specifically note that the Tribunal has ruled that that "*the representations were based on a sincerely held belief without any intended deception*".[22] However, the Tribunal has also ruled that it was "*not satisfied that the Respondents have a due diligence defence*".[23] In other words, the Applicant submits that the Respondents' actions in the present matter are not excused. They should have taken all additional steps necessary to have adequate and proper tests before making the representations. The Tribunal has found the Respondents liable for not doing so. The Tribunal did dismiss their defence in the present matter.

30) Fourth, the Respondents argue that "*[t]he fact that the Commissioner recovered only 12.5% of what she was seeking by way of AMP is something that, according*

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[22] Respondents' submissions, para.33.
[23] Tribunal's order, at para.229.

Rule 400(3), the court should take into account when assessing costs".[24] The Applicant denies these arguments for the following reasons:

a) The Tribunal has ruled as follows:

> *[230] As serious as the breach by the Respondents is, which might otherwise justify a larger administrative penalty, the other remedies which may be ordered will have a more profound effect than an administrative penalty. Therefore, a penalty of $25,000 to be assessed jointly and severally against the Respondents is appropriate. Future breaches of the requirement for proper and adequate testing are likely to attract larger administrative penalties in the future now that the Tribunal has determined this case.*

b) Based on this ruling, the Applicant submits that the administrative monetary penalty order in the present matter cannot be isolated from the rest of the remedies, and, regarding costs, that paragraph 400(3)(b) of the *Federal Courts Rules* should therefore not be considered by the Tribunal. Such paragraph applies only where amounts of money are at issue in a specific matter, such as in contractual matters or tort actions;

c) Further, additional arguments regarding the administrative monetary penalty are raised at paragraph 34 below.

31) Fifth, the Respondents argue that they were moving the matter along quickly and efficiently throughout and that they took "*significantly less than the time required by the Commissioner, although the evidentiary burden in this proceeding is cast on the Respondent*".[25] In response to these arguments, the Applicant submits that she took more time at the hearing because it was her who filed the majority of the documents relevant in the present matter, including almost all of the Respondents' documents that had been communicated through the Respondents' Disclosure Statement. The filing of these documents was done during the presentation of the Applicant's evidence in chief and with the help of the Applicant's witnesses. For each document, counsel to the Applicant started by presenting a document to a witness, that witness was asked to identify the document and then counsel requested to the trial judge that it be marked as an exhibit. Following this, the witness was asked to explain the document to the Tribunal and provide comments. During their cross-examinations and/or examinations in chief, the Respondents could simply refer to the filed documents, without the need to provide explanations to the Tribunal as to their nature. Accordingly, the Applicant submits that the Respondents' arguments regarding its "greater" diligence in the present matter simply have no merit.

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[24] Respondents' submissions, para.33.
[25] Respondents' submissions, para.34.

32) Sixth, the Respondents submit that

> *... the constitutional issue argued by the parties was one on which the Commissioner herself required clarification in light of the decision in* Gestion Lebski, *which determined that s.74.01(1)(b) violated constitution rights of free speech and held it inoperative in the absence of evidence of justification under s.1 of the* Charter. *Indeed, it could be argued that the Commissioner sought judicial consideration of s.74.01(1)(b) itself and, in many respects, viewed within proceeding as a "test case".*[26]

In response, the Applicant submits that the Notice of Application was filed in the present matter only for the reasons that were stated in such notice, i.e. because of the reviewable conduct regarding the representations at issue. It is the Respondents themselves that raised the *Gestion Lebski* case a few weeks before the start of the hearing with the filing of their Constitutional challenge. The Applicant then requested time to prepare the Constitutional defence. Accordingly, the Applicant submits that the Respondents' arguments simply have no merit.

33) Seventh, the Respondents claim that there is little jurisdiction to aid costs assessment for contested proceedings under s.74.01. They refer to *Sears Canada* and they say that the case "*did not involve the Tribunal's exercise of its discretion*".[27] Regarding *Gestion Lebski*, the Tribunal ordered that each party bear its own costs and the Respondents submit "*that this decision should be considered highly persuasive*".[28] In response, the Applicant submits as follows:

a) In *Sears Canada,*[29] Madam Justice Dawson rejected Sears' Constitutional Challenge, she allowed the Notice of Application and she awarded costs in favor of the Applicant. She did not explain in her reasons why she decided to exercise her discretion on costs accordingly. However, that case is a clear example of the general rule that costs should follow the event.[30] It is also interesting to note that Sears was ordered to pay $100,000 in AMP, which is the maximum under the *Competition Act*, and more than $387,000 in costs. In other words, costs do get incurred to litigate important matters under the *Competition Act* and such costs are at the public expense. The AMP may be an important amount for a respondent to pay, but costs are also an important amount that the public must pay to bring cases to litigation;

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[26] Respondents' submissions, para.34.
[27] Respondents' submissions, para.35.
[28] Respondents' submissions, para.36.
[29] *Commissioner of Competition v. Sears Canada* – Tab 4.
[30] *Balfour v. Norway Cree Nation* (2006) FC 616 – Tab 12.

b) In *Gestion Lebski*,[31] at paragraph 314 of his decision, Mr. Justice Blanchard says as follows:

> *[314] The Commissioner did not ask for costs, although the respondents did claim costs in their closing argument. Having regard to the fact that the constitutional challenge has been allowed in part, and having regard to my findings in this case, the parties will bear their own costs.*

In other words, that decision was a split decision and the judge exercised his discretion on costs accordingly. The Applicant submits that the present matter was not a split decision, and, accordingly, that *Gestion Lebski* is not "highly persuasive" regarding costs in the present matter.

34) Seventh, the Respondents argue that regards should be made to their pre-hearing offer to settle the administrative monetary penalty at $50,000.[32] The Respondents refer to subrule 400(3)(e) of the *Rules of the Federal Courts* that provides that the court may consider "*any written offer to settle*" in exercising its discretion on costs. The Applicant categorically denies the Respondents arguments in that regard for the following reasons:

a) During pre-hearing settlement discussions, the following elements were being discussed on a without prejudice basis: the impugned representations, the products recall, the compliance program, the "new packaging", the public notice, the Bureau's news release, the AMP and the costs. The critical point here is that the AMP was not the central issue being discussed. Settlement discussions failed towards the end of May 2007 considering the Applicant's and the Respondents' firm and irreconcilable positions regarding the impugned representations, the "new" packaging and the products recall. Discussions did not fail because of the administrative monetary penalty issue. Accordingly, in this context, the Applicant submits that paragraph 400(3)(e) should not be considered by the Tribunal in the present matter.

b) Additionally, the Applicant submits that she offered the Respondents to settle for an administrative monetary penalty of $70,000 ($35,000 per respondent) and for $15,000 in costs, but these were initial offers made 2 months before the start of the hearing. Hence, the difference between the Applicant's and the Respondents' initial offers was only $35,000 ($85,000 - $50,000) which is a small difference for initial offers made 2 months before the start of an hearing. The Applicant was requesting costs

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[31] *Commissioner of Competion v. Gestion Lebski et al.* – Tab 5.
[32] Applicant's submissions, para.37 to 45.

because expert fees had already been incurred in preparation of the hearing. At the hearing, it is important to note that the Applicant requested the maximum AMP against each respondent because of their decision to litigate the matter, because of the evidence provided by Mr. Abraham Kelly and because she felt that only a maximum AMP could promote conduct on the part of the Respondents that was in conformity with the purposes of the *Competition Act* (see paragraph 74.1(4) of the *Competition Act*).

c) Finally, the Applicant submits that she cannot provide further details about the negotiations that took place between the parties because they remain privileged between them. However, the Applicant reserves her rights to provide such details if the Respondents persist in advancing their arguments regarding this issue.

35) Considering the Respondents' position on costs, i.e. that no costs whatsoever should be allowed, the Applicant submits that it may be important for the Tribunal to be informed about the fees and expenses for her expert witnesses. These were the major expenses incurred. The Applicant submits that these fees were reasonable considering the nature and complexity of the issues discussed. The totals are as follows:

a) $25,350.04 for Dr. Pegg;

b) $28,428.33 for Mr. Paul Stegmeir;

c) $18,900 for Dr. Kenneth Corts.[33]

36) Finally, as indicated in the Applicant's submissions filed on March 10, 2008, the Applicant is requesting costs for 2 of her counsels in the present matter as per Tariff B of the *Federal Courts Rules*. Further, travel expenses were incurred for the discovery, for one preparation meeting in Halifax and for the hearing.

VII. Other Matters [34]

37) The Respondents conclude their submissions with comments about the prohibition order found at subparagraph 233(a) of the Tribunal's order. They ask the Tribunal to confirm that "*[t]he prohibition order would be applicable to the actions of other persons mentioned in the Order of February 7 only to the extent that they may be acting on behalf of the named Respondents at the time the*

[33] Back-up documents will be made available upon request.
[34] Respondents' submissions, para.48 to 50.

alleged conduct is committed, and in such case it will be deemed to be the conduct of the Respondents".[35]

38) The Applicant is not sure why the Respondents are making such a request because the prohibition order of subparagraph 233(a) presently reads in part as follows:

> *... the Respondents and any person acting on their behalf or for their benefit, including all directors, officers, employees, agents or assigns of the Respondents, or any other person or corporation acting on behalf of the Respondents or any successors thereof ... shall for a period of ten (10) years from the date of such order, cease making, causing to be made, or permitting to be made, by any means whatsoever, representations to the public for the purpose of promoting the use of the products ...*
>
> (Emphasis added)

39) The Applicant submits that the prohibition order clearly only applies to the Respondents and to persons that may be acting on their behalf regarding the prohibited representations.

40) Accordingly, the Applicant submits that there is no need for the Tribunal to clarify the order provided at subparagraph 233(a) of its decision.

Gatineau, March 24, 2008.

Stéphane Lilkoff
Justice Canada
Counsel to the Applicant.

[35] Respondents' submissions, para.50.