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/Respondent

-and-

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

Respondents/Applicants

Memorandum of Argument of the Commissioner (Respondent on this Application)

Facts

1. The Respondent admits paragraphs 1 to 5 of the Applicant's Memorandum dated July 23, 2007 save and except that it is not the Commissioner's position as referred to in paragraph 4 thereof that the test in question must necessarily be scientific (a term that the Applicant does not define), but that the aforesaid standard is a flexible contextual one which may properly extend to the use of the scientific method to render the contextual requirement 'reasonable".

Introduction and Outline of Argument

2. Without adopting or conceding the analysis advanced by the Applicant , the Commissioner concedes that s 74.01 (1) (b) of the Act infringes section s 2 (b) of the Charter. However, the Commissioner submits that it is a demonstrably justifiable provision under s 1 of the Charter in that it is a reasonable limit prescribed by law to the freedom infringed.

3. The Applicants (Respondents) have challenged the constitutional validity of s 74.01(1) (b) of the Competition Act ("Act") on the basis that the provision constitutes an impermissible infringement on their rights to freedom of expression under s 2 (b) of the Canadian Charter of Rights and Freedoms ("Charter"). In that, as stated by the Applicant in referring to *Irwin Toy*, the representations made by the Applicant in issue in this case were made to convey meaning.[1]

4. The Applicant attributes a purpose to the Government which is inapt in paragraph 18 of its Memorandum. The issue is not ineffective product or a supposed focus upon misleading or deceptive representation, Section 74.01(1)(b) is sui generis and as will be dealt with, is designed to, simply put, ensure informed choice by consumers, promote competition between suppliers and properly allocate costs in a fairly operating market place. These are consistent with s 1.1 of the Act.

5. The subject provision (then an offence under s 36 (1) (b) of the Act) was justified under s 1 of the Charter in a number of cases in its criminal offence form. As noted by the Applicants 74.01 (1) (b)was more recently struck down under s 2(b) of the Charter by Blanchard J of this Tribunal in *Commissioner v Gestion Lebski Inc (2006) Comp Trib 32.* No argument was advanced in that case to justify the provision under s 1 of the Charter.

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1 Indeed they cannot be now read down or denigrated by the Applicants to the point that they convey nothing, by characterising them as "puffing".

6. Section 74.01(1)(b) is a carefully circumscribed civilly reviewable provision that is designed to address the harm to consumers, competitors and to the competitive process generally that results from reviewable conduct under Part VII.1 of the Act. In this instance the reviewable conduct is the making of a representation in specified forms regarding a limited class of subject matter: the i) performance, 2) efficacy or 3) length of life of a product, when such representations are not based on adequate and proper testing, the proof of the latter being on the representor. Substantiation by the latter of the enumerated representations is required when formally challenged. Reviewable conduct under the Act is not prohibited *per se* - it is "legal" until made the subject matter of a court order (including the Competition Tribunal).[2]

Standard of Charter Review

7. The conceded limitation on s 2(b) rights, including commercial speech as here, clearly satisfies the four part test in *R v Oakes [1986] 1 S.C.R. 103 at 135* and its refinements[3] to assess whether the limit is reasonably and demonstrably justified in a free and democratic society. In weighing the interests of society against those of the person(s) whose rights are affected, the following are addressed:

i) the measure responsible for the limit on the freedom must serve an objective "of sufficient importance to warrant overriding a constitutionally protected right or freedom" (pressing objective) ;

ii) the measures adopted must have been carefully designed to achieve the objective (and are not arbitrary, unfair or irrational);

iii) the measure must minimally impair the right in question;

iv) the effects of the measures limiting the right and furthering the objective must be

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2 Reviewable conduct is not illegal per se. A Respondent may, unless otherwise restrained, legally carry on the subject conduct until order of the Tribunal. No civil action lies under s 36 of the Act unless non-compliance with a prior order occurs: *Facey & Assaf, " Competition and Antitrust Law", (2006), at 325. Rowley & Campbell, "Should Reviewable Practices be treated as Competition Torts", (2001) 1 at 311 in "Private Litigation over Reviewable Practices", The Competition Law Study Group.*

3 *AG Canada v JTI Macdonald Canada et al [2007] SCC 30 at para 36*

proportional.

8. Section 74.01(1)(b) addresses a substantial and pressing objective: to redress the societal harm caused by insupportable claims respecting specified product characteristics within the knowledge of a supplier unless borne out by proof of prior substantiation.

9. The Commissioner submits that the provision has a substantial history of legislative study and amendment to clarify Parliament's intent (although the public evil that Parliament intended to deal with has remained constant). Moreover the provision is in step with international reactions to the same problem, and can be supported upon policy, economic and common sense grounds.

Affidavit of Martin Saidla

Rationale of s 74.01(1) (b)

10. Parliament's intention was narrow, specific and limited. It is not a broad a priori prohibition. The rational connection between s 74.01(1)(b) and this harm is obvious. The purchase of a product by a consumer who is in no position to exercise judgment regarding specific parameters of the product which are represented by a supplier to be able to fulfill a particular function. Price and quality elements of a product are equally meaningful. Any prior restraint by suppliers of qualitative elements of product choice restrict and distort competition in the market as much as overt restraints on price. "Less goods for same price" or "deficient goods for higher price" (i.e. deviation from the asserted characteristics) is disruptive of the proper functioning of markets. The consumer cannot react when a supplier "falsifies, adulterates or degrades his product"[4] by making claims to which it is indifferent regarding their veracity. A

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4 See infra *Report on Price Spreads*

supplier's duty to substantiate claims assists in the promulgation of accurate consumer information. This will assist consumer decision making and the quality of product rivalry between suppliers of like goods. The age of unrestricted puffery and caveat emptor has been supplanted by caveat sciens.[5]

11. Section 74.01(1) (b) is a flexible, focussed standard of substantiation. Parliament has not imposed a per se prescription of acceptable testing. In a free society, which values free markets as one of its principal tenets, the adequacy and propriety of testing in the first instance properly belongs in the hands of the supplier.[6] The limited group of supplier representations subject to substantiation are precisely those which a consumer is least able to judge, but which may have the greatest appeal to an uninformed consumer, as "promoting false precision". In addition, in this case, the subject products act in a manner which is imperceptible to the ordinary consumer. Substantiation is relevant even to the supplier, assuming bona fides. The statutory requirement of testing must involve scope and quality--"adequacy and propriety". In any given contested case, the precise standard of testing will be issues to which the judicial mind can provide content and context.

12. Section 74.01(1)(b) is, on balance, a beneficial approach to the narrow and specific limit on freedom of expression made with respect to the products in this case. The harm addressed is broad and impersonal, given the nature of consumer conduct in the market. The expression restrained is largely a declaration of information within the knowledge of the supplier. In addition, absent the provision, through the act of purchase, the supplier transfers the entire risk of substantiation to unknowing consumers. Section 74.01(1) (b) limits the advantage that suppliers who refuse to invest in product integrity gain over rival suppliers who may take the pains and expense to verify the propriety of their products regarding the three statutory specified

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5 See infra, *R v Professional Technology of Canada Ltd, para 37, and Simpson, A., Quackery and Contract Law: The Case of the Carbolic Smoke Ball [1985] Jo of Legal Studies 345*

6 The original section --s 406 (3) of the Criminal Code (1935)--specified, on a non-exclusive basis, a particular testing organization.

parameters of representation.

Nature of the Prohibition

13. The means selected by parliament are well within the province of competition law regulation of market practice.[7] Section 74.01(1)(b) is found in Part VII.1 of the Competition Act, entitled "Deceptive Marketing Practices-Reviewable Matters", and provides for the application of civil remedies in relation to misleading advertising and other deceptive marketing practices. Section 74.01(1)(b) deals with the substantiation of certain representations. It strikes a reasonable societal balance in concluding that the locus of the primary duty to substantiate asserted characteristics of a product by testing to a supplier than to the post purchase experience of the consumer. This is a common sense application of the maxim "he who avers should prove".

14. Breach of section 74.01(1)(b) is subject to the civil remedies set out in s 74.1 of the Act. These remedies are :

i) a prohibition from engaging in the conduct or substantially similar conduct;

ii) publication of a notice describing the reviewable practice; and

iii) payment of an administrative monetary penalty ("AMP")

Section 74.1 (4) specifies that the purpose of the publication and an AMP is to promote compliance, not to punish. Section 74.1(3) provides that no publication order or AMP can be imposed where it is established that the person exercised due diligence to prevent the reviewable conduct from occurring.[8]

15. Thus s 74.01(1)(b) is a limited provision that minimally impairs the making of

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7 The control of false and deceptive claims found in s 74.01(1) (a) originate in the WWI era. These provisions have been linked to the subject substantiation provisions since the latter's enactment in 1935.

8 Due diligence is a defence available to offences requiring proof of less than full mens rea to convict. Lack of due diligence assures that a degree of advertent (including acts of omission) behaviour is present. It is obvious that Part VII.1 of the Act is civil and does not create an offence. (*R v Sault Ste Marie (City) [1978] 2 SCR 1299)*

representations which are material inducements to the product purchase decision-its performance, efficacy or length of life, without proper substantiation through reasonable testing. Without such sensible precautionary steps being taken, either the representations cannot be made or other representations may be chosen. It is consistent with the objects of the Act to favour private market actor that Parliament has chosen self policing as a regulatory tool and to avoid a priori total bans on commercial speech/action. Deference is due to Parliament in making a particular legislative solution to a complex economic social issue. Thus the measure of the rational connection to the goals of the legislation and minimal impairment of the right to achieve same should not be second guessed. *(JTI Macdonald supra at paras 41 and 43).*

Legislative History of S 74.01 (1) (b)

(The source material for the following is found appended to the affidavit of Martin Saidla filed herewith)

16. Section 74.01(1) (b) has a significant legislative history. It has been examined and furthered on numerous occasions. On February 2, 1934, the House of Commons passed a resolution to appoint a Select Special Committee of the House. The resolution provided in part as follows:

> *"That a Select Special Committee of eleven members of the House be appointed to inquire into and investigate the causes of the large spread between the prices received for commodities by the producer thereof, and the price paid by the consumers thereof; and the system of distribution in Canada of farm and other natural products, as well as manufactured products ... "*

On July 7, 1934, by Order in Council P.C. 1461, the Select Special Committee members were named as Commissioners pursuant to the *Inquiries Act*, R.S.C., 1927, Chap. 99. They were asked to continue, complete and report on the inquiry into those matters mentioned in the House resolution passed on February 2, 1934. The newly created Commission was referred to as the "Royal Commission on Price Spreads."

> House of Commons Resolution February 2, 1934
>
> Order in Council P.C. 1461 of July 7, 1935.
>
> *Report of the Royal Commission on Price Spreads*, Ottawa, 1935.

17. On April 9, 1935, the Chairman of the Royal Commission on Price Spreads submitted the Report of the Commission on Price Spreads to the Honorable R.B. Hanson, Minister of Trade and Commerce. In Chapter VIII of the Report the Commissioners made several statements indicating the need for consumer protection in the Canadian economy:

> *"...in this new world of industry and trade caveat emptor takes a new and pertinent meaning. The buyer may still beware, but he no longer knows of what he must beware. Not only must he take on faith the quality and efficacy of his purchases, but as an individual and unaided he is at the mercy of the manufacturer and merchant whenever, by organization or agreement, they may wish to curb competition, which, according to the classical economists, was his chief protection."*
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> .....
>
> *"Few of the evils... by which merchants have been able to impose upon their customers could persist in the face of an active, intelligent and organized public opinion. The difficulty of consumer action is that it is not an organized or special interest and has no representation other than the state. It is, therefore, the function of the government to pay special attention to the interests of the consumer."*
>
> ***"When a manufacturer falsifies, adulterates, or degrades his product in such a way as to cause the purchaser to think he is getting something he is not, that manufacturer is imposing not only on the consumer, but is working harm to all other manufacturers who have to meet his competition... Misleading advertising by one merchant works damage to the trade of all and provokes further falsification and misstatement."***
>
> *"There would, therefore, seem to be a strong case for taking some action designed to protect the consumer against practices of this kind."*
>
> *Report of the Royal Commission on Price Spreads*, Ottawa, 1935 , pp 234-236

18. The Report went on to illustrate the need for product advertising to be based on proper testing, as follows:

> *"We are also of the opinion that statements of performance, life, or efficacy of products are generally made with uncertain knowledge and seldom on the basis of comparative experimental tests...almost any statement concerning performance or efficacy may go unchallenged unless or until a successful action is brought under the above mentioned section of the Criminal Code. "*
>
> *"Reference has been made to tests of electric lamps made by the National Research Council at the request of the Commission. Certain manufacturers in their advertising of electric lamps have given the impression to the public that certain of their lamps are guaranteed for a life of one thousand hours. Inquiry has, however, elicited the information that this guarantee is not intended by the manufactures to apply to length of life on commercial circuits under ordinary operating conditions."*

"We, therefore, recommend that this Section [406] of the Criminal Code be amended to make any statement or guarantee, of performance, efficacy or length of life of any product, which is not based upon an adequate and proper test of such performance, efficacy, or length of life, an offence in itself, and to place upon the defendant the burden of proving that such a test has been made and that the statement or guarantee is based upon it. A test by the National Research Council or other competent department of the government shall be considered an adequate and proper test, but no reference should be allowed, in advertising, to the fact that a test has been made by the National Research Council or other government body."

"In the enforcement of this section of the Criminal Code the services of the Federal Trade and Industry Commission, recommended in Chapter IX, would be most valuable to the public and to trade organizations. Under the present conditions it is frequently impracticable for an independent merchant or even a retail merchants' association to institute either civil or criminal action against a powerful offender, although they may find their trade seriously damaged by his misleading advertising. The position of the consumer is even worse. The costs of a civil action to secure a refund on goods misrepresented in advertising or at the time of purchase is likely to be more than the value of the goods."

Criminal Code RSC 1927, Ch 36, s 406

Report of the Royal Commission on Price Spreads, Ottawa, 1935.

19. As a result of the above recommendation, section 406 of the *Criminal Code* was amended in 1935 by the addition of the following subsections:

"(3)(a) Every person who publishes, or causes to be published, any advertisement containing any statement or guarantee of the performance, efficacy or length of life of any product for the purpose of either directly or indirectly promoting the sale or disposal of such product and which statement or guarantee is not based upon an adequate and proper test, shall be guilty of an offence and liable upon summary conviction to a fine not exceeding two hundred dollars or to six months imprisonment, or to both fine and imprisonment. Provided that any person publishing any such advertisement accepted in good faith in the ordinary course of his business shall not be subject to the provisions of this subsection;

(b) Without excluding any other adequate and proper test, a test by The Honorary Advisory Council for Scientific and Industrial Research or any other public department shall be considered an adequate and proper test for the purpose of this subsection, but no reference shall be made in any such advertisement to the fact that a test has been made by such Council or other public department;

(c) On any prosecution under this subsection, the burden of proof that an adequate and proper test has been made shall lie on the defendant."

SC 1935 c 56, s 6

20. In 1953-54, section 406 of the *Criminal Code* was repealed and replaced by section 306 which read as follows:

"306. (1) Every one who publishes or causes to be published an advertisement containing a statement that purports to be a statement of act but that is untrue, deceptive or misleading or is intentionally so worded or arranged that it is deceptive or misleading, is guilty of an indictable offence and is liable to imprisonment for five years, if the advertisement is published

(a) to promote, directly or indirectly, the sale or disposal of property or any interest therein, or
(b) to promote a business or commercial interest.

(2) Every one who publishes or causes to be published in an advertisement a statement or guarantee of the performance, efficacy or length of lie of anything that is not based upon an adequate and proper test of that thing, the proof of which lies upon the accused, is, if the advertisement is published to promote, directly or indirectly, the sale or disposal of that thing, guilty of an offense punishable on summary conviction.

(3) Subsections (1) and (2) do not apply to a person who publishes an advertisement that he accepts in good faith for publication in the ordinary course of his business.

(4) For the purposes of subsection (2), a test that is made by the National Research Council of Canada or by any other public department is an adequate and proper test, but no reference shall be made in an advertisement to indicate that a test has been made by the National Research Council or other public department unless the advertisement has, before publication, been approved and permission to publish it has been given in writing by the president of the National Research Council or by the deputy head of the public department, as the case may be.

(5) Nothing in subsection (4) shall be deemed to exclude, for the purposes of this section, any other adequate or proper test."

S.C. 1953-54, c. 51, s.306.

21. The *Combines Investigation Act* was first used in lieu of the *Criminal Code* to protect consumers against false market information in 1960 when section 33(c) was added to prohibit misleading representations regarding sales referable to products' ordinary price . During the House of Commons Debate on the amendment, the Minister of Justice made the following remarks:

"...these amendments relating to... deceptive price advertising have a multiple purpose and effect. In all instances they directly or indirectly protect the consumer and will bring greater honesty into all branches of trade. In some instances they also protect... merchants... against unfair competition which does not relate to competitive efficiency... and they are in the long term direction of maintaining competition by cutting down practices or assisting in the prevention of practices which may serve to eliminate competitors and therefore competition through means other than straightforward and real competition itself."

House of Commons Debates, vol IV (May 30, 1960) 4349

22. Throughout this era the criminal provisions of the Code dealing with competition matters were transitioned to the Combines legislation . Section 306 of the Code remained unchanged until its repeal in 1968-69, when it was replaced by section 33(d) of the *Combines Investigation Act.*

> *"33(d)(1) Every one who publishes or causes to be published an advertisement containing a statement that purports to be a statement of fact but that is untrue, deceptive or misleading or is intentionally so worded or arranged that it is deceptive or misleading, is guilty of an indictable offence and is liable to imprisonment for five years, if the advertisement is published*
>
> *(a) to promote, directly or indirectly, the sale or disposal of property or any interest therein, or*
> *(b) to promote a business or commercial interest.*
>
> *(2) Every one who publishes or causes to be published in an advertisement a statement or guarantee of the performance, efficacy or length of life of anything that is not based upon an adequate and proper test of that thing, the proof of which lies upon the accused, is, if the advertisement is published to promote, directly or indirectly, the sale or disposal of that thing, guilty of an offence punishable on summary conviction*
>
> *(3) Subsections (1) and (2) do not apply to a person who publishes an advertisement that he accepts in good faith for publication in the ordinary course of his business.*
>
> *(4) For the purposes of subsection (2), a test that is made by the National Research Council of Canada or by any other public department is an adequate and proper test, but no reference shall be made in an advertisement to indicate that a test has been made by the National Research Council or other public department unless the advertisement has, before publication, been approved and permission to publish it has been given in writing by the President of the National Research Council or by the deputy head of the public department, as the case may be.*
>
> *(5) Nothing in subsection (4) shall be deemed to exclude, for the purposes of this section, any other adequate or proper test."*
>
> S.C. 1968-69, c. 38, s. 21 & s. 116.

23. In July 1966, due to pressure from business for more effective misleading advertising legislation, the Government requested the Economic Council of Canada to study and advise on competition policy. The Council's view was that the objective of legislation such as the *Combines Investigation Act* should be the promotion of dynamic efficiency, flexibility and good all-round performance in the Canadian economy. The Council indicated that the practice of misleading advertising amounted to a species of fraud tending to bring a market system into disrepute.

> *Economic Council of Canada Interim Report*, Consumer and Corporate Affairs and the Department of the Registrar General, Ottawa, July 1967.
>
> *Economic Council of Canada Interim Report on Competition Policy*, Ottawa, July 1969

24. Remarking on the provisions, the Director of Investigation and Research at the time said:

"It is a measure of the importance that Parliament and government have attached to the consequences of misleading advertising that these... provisions [sections 33(c) and (d)] have been inserted in the Combines Investigation Act... these provisions relate to the consumer... not only protecting the consumer against fraud and deception but as well by improving the quality of information which is available to him in making his purchases."

> Bureau of Competition Policy, *Competition Policy in Canada, The First Hundred Years*, Ottawa, 1989, at page 17.

25. The new section 33(d), in conjunction with 33(c), treated all forms of misleading advertising as a criminal offence *per se* since the practice was regarded as being rarely, if ever, productive of any substantial public benefit. Sections 33(c) and (d) proved to be very useful instruments in improving the reliability of information made available by sellers to consumers and the realization that an active enforcement program existed lead to greatly increased public interest. In the 1970 *Combines Investigation Act,* section 33(d) appeared verbatim as section 37.

> Proposals for a New Competition Policy for Canada, First Stage, Bill C-227, Ottawa, November, 1973.
>
> *Combines Investigation Act,* R.S.C. 1970, c.C-23, s. 37(2).

26. By SC 1974-75-76 section 37 was repealed and replaced with the new section 36, as follows:

> *"36(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,*
>
> *(a) make a representation to the public that is false or misleading in a material respect;*
>
> *(b) make a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate an proper test thereof, the proof of which lies upon the person making the representation;*
>
> *(c) make a representation to the public in a form that purports to be*
> *i. a warranty or guarantee of a product, or*
> *ii. a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result*
>
> *if such form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out; or*

(d) make a materially misleading representation to the public concerning the price at which a product or like products have been, are or will be ordinarily sold; and for the purposes of this paragraph a representation as to price is deemed to refer to the price at which the product has been sold by sellers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold by the person by whom or on whose behalf the representation is made

(2) For the purposes of this section and section 36.1, a representation that is

(a) expressed on an article offered or displayed for sale, 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 in any other manner whatever made available to a member of the public

shall be deemed to be made available to the public by and only by the person who caused the representation to be so expressed, made or contained and, where that person is outside Canada, by

(f) the person who imported the article into Canada, in a case described in paragraph (a), (b) or (e), and

(g) the person who imported the display into Canada, in a case described in paragraph (c).

(4) In any prosecution for a violation of this section, the general impression conveyed by a representation as well as the literal meaning thereof shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

(5) Any person who violates subsection (1) is guilty of an offence and is liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for five years or to both; or

(b) on summary conviction, to a fine of twenty-five thousand dollars to imprisonment for [a term not exceeding] one year or to both. "

S.C. 1974-75-76, c. 76, s. 18.

27. A published departmental study on consumer misleading and unfair trade practices in 1976 reiterated the basis for legislated restraint on deceptive marketing practices:

"There has always been a sound theoretical basis for singling out the untruthful claim for censure. Some of the results which can be said to flow from false advertising are as follows. First, it is commercially disruptive in that it lures customers away from truthful producers and perhaps superior products and undermines the proper functioning of advertising by weakening consumer confidence in products and producers generally. Or, from the point of view of market structure, it encourages a situation where returns to producers are geared not to their efficiency, but to their ability to utilize inaccurate information. Secondly, with regard specifically to its impact on consumers, it induces transactions premised on false data and burdens consumers with products which do not fulfill their needs. Finally, the moral implications of both lying and propagating half-truths tend, in varying degrees, to separate the untruthful advertising claim from those to which objection might conceivably be made on other grounds."

A Study on Consumer Misleading and Unfair Trade Practices, Second Stage Revision, *Combines Investigation Act,* Ottawa, 1976, at page 2.

28. Further, at page 4:

Competition is, in a free enterprise system, the major force for regulating market behaviour. Competition depends, in its turn, on the operation of informed consumer choice between competing products and on the determination, through exercise of that choice, of price and quality among the various products in a market. Where competition of this order is absent, there is little incentive for producers to keep prices down and quality up. Accordingly, the provision of product information to consumers can be seen as a means to the end of preserving the orderly functioning o the market and as serving more far-reaching economic interests than individual consumer satisfaction with particular products.

Ibid.

29. Section 36 was later renumbered and reproduced almost verbatim as section 52.

Combines Investigation Act, 1985 R.S.C., c.34, s. 52.

30. In June of 1986, Bill C-91 was passed into law, creating the Competition Tribunal and amending the *Combines Investigation Act,* which was renamed the *Competition Act.*

31. In 1988 the Standing Committee on Consumer and Corporate Affairs suggested that penal sanctions under the *Competition Act* might not be the most effective method of dealing with most misleading advertising offences. Shortly thereafter, in 1991, a report was released by the Working Group on Amendments to the Misleading Advertising and Deceptive Marketing Practices Provisions of the Competition Act which recommended a dual civil/criminal enforcement regime for misleading

advertising. This report recognized that criminal sanctions were an incomplete answer to the problem of misleading advertising.

> Report of the Standing Committee on consumer and Corporate Affairs on the Subject of Misleading Advertising, Ottawa, June 1988 at page 3.
>
> *Report of the Working Group on Amendments to the Misleading Advertising and Deceptive Marketing Practices Provisions of the Competition Act, Effective and Equitable Enforcement*, Ottawa, January 31, 1991.

32. The Consultative Panel on Amendments to the *Competition Act* released its report in 1996 and recommended that a civil regime be established to address most instances of misleading advertising and deceptive marketing practices which were prosecutable at that time in the criminal courts by the Attorney General. The following reasons were given for this recommendation:

- The criminal law process can be inappropriate to some instances of misleading advertising;
- The stigma of the criminal process may encourage an adversarial response and preclude the informal resolution of many of the cases;
- The offensive conduct can continue throughout the course of the lengthy criminal process (even where there is no undue delay);
- The evidentiary requirements of the criminal process can unnecessarily increase the costs of preparing for trial;
- The criminal burden of proof can be inappropriate in some circumstances of misleading advertising;
- The stigma of a criminal conviction can also be too harsh a response in the case of an advertiser who has simply failed to exercise due diligence; and
- In general, the principle of restraint should be followed in avoiding recourse to the criminal law where other, less severe, processes can be effective.

> Report of the Consultative Panel on Amendments to the *Competition Act*, Ottawa, March 6, 1996, at page 16.

33. The Panel concluded that when misleading advertising occurs it is essential that it be deterred quickly to minimize any harm to the competitive process, including consumers, competitors and others. An Honourable Member added:

> *"Misleading advertising practices can and do have serious economic consequences especially when directed toward large groups or done over extended periods of time. Misleading advertising is detrimental to both competitors who follow the rules and engage in honest promotion and to consumers themselves."*
>
> *House of Commons Debates,* (March 16, 1998) at 4881, 4913

34. In 1999 the *Competition Act* was amended via the addition of Part VII.1, Deceptive Marketing Practices. Part VII.1 created a new civil regime of reviewable conduct. One of the new Part VII.1 provisions was 74.01(1), which rendered reviewable those practices then found in paragraph 52(1) of the Act's criminal regime. The section 52 criminal provision was contemporaneously repealed. Section 74.01 reads as follows:

> *"74.01(1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,*
>
> *(a) makes a representation to the public that is false or misleading in a material respect;*
>
> *(b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation, or*
>
> *(c) makes a representation to the public that purports to be*
>
> *i. a warranty or guarantee of a product, or*
> *ii. a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,*
>
> *in the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out."*
>
> S.C. 1999, c.2 s. 22.

35. With the enactment of section 74.01(1) a wider range of enforcement mechanisms became available for more appropriate and effective responses to deceptive practices in the marketplace. At the time of enactment, it was agreed that recourse to an adjudicator other than the criminal courts would have a number of advantages over the former criminal system, including: a lower evidentiary burden for the Bureau; avoidance of the harsh stigma attached to advertisers becoming involved in the criminal justice system even though they had broken the law inadvertently; faster and more efficient remedial action; and, in the case of the Competition Tribunal, an ability to develop expertise in adjudicating such matters.

36. Section 74.01(1) remains in the same form in the contemporary *Competition Act.*

Competition Act, R.S.C. 1985, c. C-34, as am.

Section 1 Charter Analysis

(1) Prior judicial treatment

37. Prior to the decision in *Lebski (supra),* the criminal predecessor had been dealt with judicially on three occasions. In each of these the provision was justified in the face of arguments as to vagueness for example in *R. v. 671135 Ontario Ltd.* (1994), 55 C.P.R. (3d) 204, the court stated:

> *"In my view, s. 52(1)(b) is not so vague as to fail to satisfy the requirement. It provides fair notice to an accused and limits enforcement discretion. It does not provide absolute guidance to enable the applicants to predict the legal consequences of any given course of conduct in advance but it does enunciate boundaries which create an area of risk to the applicants. In addition to delineating the area of risk, it provides fair notice and a limitation on enforcement discretion. The words are not vague just because they provide fuel for legal debate. [...] The words "adequate and proper test" will provide fuel for the trier of fact but are not so vague or lacking in precision or subject to discretionary determination that they constitute an unreasonable limit."*

See also *R. v. Teixeira* (1986), 12 C.P.R. (3d) 263, also upholding the criminal provision under s 1 of the Charter. In *R. v. Professional Technology of Canada Ltd.* (1986), 12 C.P.R. (3d) 218, (Alta Prov Ct.) in an alternative holding (the court had earlier held, in the event, erroneously that commercial speech was not captured by s 2 (b)) the court held that then s 36 (1) (b) could be justified under s 1 of the Charter:

> *"And it would--in my view, it would offend public policy immensely if this particular section (36 (1) (b)) were held to be unconstitutional because it would open up to every business man and supplier of any product, in the country, almost an unchannelled right to make representations which are totally not based on any adequate and proper tests and which could easily and quickly lead to amazing disastrous results for people who might consume those products"*
>
> *It would remind me very much of the days of the travelling salesman in the old movies selling the various snake-bite medicines and one could really never know how dangerous or what type of products one was getting.. "*

(In referring to *R v 356433 Ontario Ltd.* (Ebbs J, Ont Prov Ct), *and R v Canadian Tire Corp* (Scullion J, Ont Prov Ct) the court continued:

> *" It appeared that in neither of these cases ....was argument made that 'freedom of expression ' as referred to in the Charter did not include 'commercial speech', but in any event each of those judges concluded that any limitation set out in s 36 (1) (b)of the Combines Investigation Act, When applying s 1 of the Charter was considered to be a reasonable limit prescribed by law as could be demonstrably justified in a free and democratic society. Had I not accepted the argument that 'commercial speech' was not meant to be included in 'freedom of expression'....I too would have found that any limitation provided by law as could be demonstrably justified in a free and democratic society.*

And further,

> *"Parliament obviously concluded that it would be impossible to police and canvass all of the many individuals and companies selling products and making representations in the Canadian market-place, and that it would be desirous that when these representations were made as to performance, efficacy or length of life of a product, the claim should be backed up by reputable tests completed by its maker. Moreover, the accused would be in the best and perhaps only position to know what type of tests were completed. Governments do not have the unlimited assets and resources necessary to ascertain the nature of particular tests that may be required to be used as a source for the claim of efficacy. The requirements of s. 36(1)(b) of the Combines Investigation Act do not guarantee the consumer absolute protection but it seemingly provides a reasonable approach, in that the government might then be in a position to determine whether the particular tests made, were genuine or were a complete fraud upon the public. "*

(2) Oakes test

38. The assessment of whether a limit of a Charter right is reasonable and demonstrably justified in a free and democratic society is conducted in accordance with the Oakes test. The burden of proof lies on the government to establish on a balance of probabilities "through evidence supplemented by common sense and inferential reasoning" that a limit is justified. The law must be proportionate to furthering the goal, being carefully tailored to avoid excessive impairment of the right and productive of benefits that outweigh the detriment of freedom of expression. In undertaking the justification analysis scientific empirical evidence is not always required. In Harper (infra), the court held (at para 78) *"in the absence of determinative scientific evidence, the court has relied on logic, reason and some social science evidence in the course of the justification analysis in several cases"*. And in *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199 at para 155-58, and at para 137, the Chief Justice stated :

> *"Discharge of the civil standard does not require scientific demonstration, the balance of probabilities may be established by the application common sense to what is known, even though what is known may be deficient from a scientific point of view."*

R v Guignard [2002] 1 SCR 472 at 486-7
Sauve v Canada (Chief Electoral Officer) (2003) 168 CCC (3d) 449 at 469
Ross v NB School Board No 15 [1996] 1 SCR 825 at 871-2, 876-7

39. In a s 2 (b) case, an evaluation of the value of the expression being denied is balanced against the government objective in passing the subject legislation. The further from core values of freedom of expression the lower on the value scale the infringed expression appears. Not all commercial speech is of the same value or weight. Representations to the public which are not capable of substantiation have the deleterious effects referred to infra. In balancing evidence of justification against the infringement the onus is more easily met when confronting expression of low relative value. Four factors come into play in this regard:

i) the nature of the harm, and the inability to measure it

ii) the vulnerability of the group protected

iii) the subjective fears and apprehension of harm

iv) the nature of the infringed activity

R v Bryan [2000] SC 12 para 10-30

Harper v Canada [2004] 1 SCR 827 para 75-88

40. More recently in *Canada v JTI-MacDonald Corp* [2007] SCC 30, at paras 39-47, the Chief Justice notes that a degree of deference must be paid to Parliament in tackling the statutory solution to a difficult social problem thus : *'The government must establish that the means it has chosen are linked to the objective . At the very least it must be possible to argue that the means may help to bring about the objective (para 40) ..on complex social issues the minimal impairment requirement is met if Parliament has chosen one of several reasonable alternatives and impair the right no more than is reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account."* Although Parliament is not required to implement alternatives which are less effective in achieving the objective (para 137).

41. As to representations, at para 65, the Court finds that : *"Parliament's objective of combatting the promotion of tobacco products by half-truths and by invitation to false inference constitutes a pressing and substantial objective, capable of justifying limits on the right of free expression. Prohibiting such forms of promotion is rationally connected to Parliament's public health and consumer protection purposes."* And, expression which permits consumers to draw erroneous inferences about a product is to be accorded low value, (para 68), and to the extent that it is a limited restriction, not a total ban, it is only a minimal impairment of a nominate freedom. (para 94)

42. In the context of proceedings under the *Competition Act* the Oakes test has been applied by the Competition Tribunal on two occasions. In *Canada (Commissioner of Competition) v. Sears Canada Inc.* (2005), 37 C.P.R. (4 th) 65 (Competition Tribunal), Dawson J was considering the

"ordinary price provisions" of the *Act* (s 74.03), and adopted the SCC's approach to the analysis of freedom of expression and its infringement. In particular, she noted:

> *[74] The core values of freedom of expression include the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process: RJR-MacDonald, supra, at para. 72. A lower standard of justification is required where the form of expression which is limited lies further from these core values.*
>
> *[75] In my view, the expression limited by the impugned legislation does not fall within the core protected values. The limited expression is expression that is deceptive in a material way. This is far removed from the values s. 2(b) of the Charter is intended to protect. In the result, a lower a standard of justification is required.*
>
> *[76] Second, it is a relevant contextual factor to consider the vulnerability of the group the legislation seeks to protect.*
>
> .....
>
> *[82] A third related contextual factor... is the objective of the impugned legislation and the nature of the problem it seeks to address. The Act seeks to encourage and maintain competition and the objective of the impugned legislation is to do this by improving the quality and accuracy of marketplace information and by discouraging deceptive marketing practices."*

43. With respect to the first stage of the Oakes test, the Tribunal made the following remarks:

> *"[87] In my view, the evidence of the legislative history of the provisions of the Act relating to ordinary price representations is relevant to determining the objectives of the impugned legislation.*
>
> .....
>
> *[96] The next step in the inquiry is to question the proportionality of the measure. This analysis begins with consideration of the rationality of the measure at issue. The issue is whether there is a causal relationship between the objective of the impugned legislation and the measures enacted by the law. Direct proof of such causal relationship is not always required."*

44. With regard to the minimal impairment branch of the *Oakes* test, the Tribunal at paragraph 104 adopted the following reasoning from *R v. Sharpe* [2001] 1 S.C.R. 45::

[96] The Court has held that to establish justification it is not necessary to show that Parliament has adopted the least restrictive means of achieving its end. It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account.

[97] This approach to minimal impairment is confirmed by the existence of the third branch of the proportionality test, requiring that the impairment of the right be proportionate to the benefit in terms of achieving Parliament's goal. If the only question were whether the impugned law limits the right as little as possible, there would be little need for the third stage of weighing the costs resulting from the infringement of the right against the benefits gained in terms of achieving Parliament's goal. It was argued after Oakes, supra, that anything short of absolutely minimal impairment was fatal. This Court has rejected that notion. The language of the third branch of the Oakes test is consistent with a more nuanced approach to the minimal impairment inquiry -- one that takes into account the difficulty of drafting laws that accomplish Parliament's goals, achieve certainty and only minimally intrude on rights. At its heart, s. 1 is a matter of balancing.

Pressing and Substantial Objective

45. The Supreme Court of Canada has declared that the objects of the Competition Act are "a central and established feature of Canadian economic policy." That said, as stated in *RJR-Macdonald*, the objective relevant to a Charter section 1 analysis is that of the particular measure, in this case that of protecting consumers from misleading advertising. As Dr. Corts explains in his expert opinion, this narrower goal is important to achieve the broader goal of the Competition Act - to "maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy".

RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, para. 144

Competition Act, R.S.C. 1985, c. C-34, s. 1.1

R v Nova Scotia Pharmaceutical Society [1992] 2 S.C.R. 606 at 649

46. More specifically, the Supreme Court has also confirmed the importance of the "pressing and substantial objective" of preventing misleading representations:

"While the Crown submitted little evidence at trial to directly support the contention that these objectives are "pressing and substantial", I am prepared to accept that preventing false/misleading advertisers from benefiting from false/misleading advertising and protecting consumers from the detrimental effects of false/misleading advertising is sufficiently important to warrant overriding constitutionally protected rights and freedoms."

R. v. Wholesale Travel Group Inc. [1991] 3 S.C.R. 154 at 191

47. The court in *R. v. 671135 Ontario Ltd.* also held that there was a pressing and substantial objective to then s 52 (1) (b) :

"... On the very face of the legislation before me in s. 52(1)(b) of the Competition Act, I find that the real pressing and substantial nature of the objectives is demonstrated. The government objectives of outlawing fanciful and fraudulent claims that could entice the public is important enough to justify restricting a constitutional right and is a concern which is pressing and substantial."

48. Furthermore, economic reasoning demonstrates the importance of this requirement that vendors substantiate performance claims, as Dr. Corts explains (by way of summary) in his expert opinion:

Pressing Need

- *The provisions on misleading advertising in the Competition Act counter what is known as the problem of "asymmetric information" - the fact that sellers presumably have much better information about their product's attributes than do consumers. In a well-functioning market economy, consumers base their purchasing decisions on their knowledge of the qualities and prices of products offered by competing firms. Armed with this knowledge, they make trade-offs to maximize their utility. One consumer might be willing to pay less for a lower-quality product, another might be willing to pay more for a higher-quality product. Both of these consumers will obtain what they see as the ideal outcome. The result of this is to provide an incentive for firms to create quality and variety in the market, by making higher-quality products that can demand a higher price, and lower-quality products that can be sold at a discount. The long-run effect of this is to encourage innovation in the economy through an incentive to improve product quality.*

Expert opinion of Kenneth S. Corts, pp.9-10

- *Well-informed consumers, however, are critical to the proper functioning of this mechanism. False claims, in situations where the consumer can not easily check their veracity, throw a wrench into the works. For consumers, they directly reduce the utility obtained for a given amount of money, by leading to a higher demand (and hence higher price) for products that are no better than the competition. On the other side of the equation, they hurt honest producers who do not promulgate such false claims, by reducing demand for their equally valuable products. Furthermore, these claims lead to an increase in consumer scepticism, which in turn negates the value of true performance claims for high-quality products. In the long run, they indirectly harm consumers by leading to the exit of honest firms from the market, and by inhibiting such firms from entering. False claims have the potential to do serious harm to the confidence of consumers in Canadian markets; as such, their prevention is a pressing and substantial objective.*

  Expert opinion of Kenneth S. Corts, pp. 12-15

Proportionality

- *In order to satisfy the Oakes test, the measure must be rationally connected to the objective. In this case, the connection is clear. By ensuring that tests are performed before claims are made, the provision ensures some basis for such claims. More specifically, the lack of a substantiation requirement would create a strong incentive for firms to make such false claims. In the absence of such a requirement, firms can almost effortlessly increase the price and/or sales of their product by making a false performance claim, safe in the knowledge that market mechanisms are insufficient to encourage consumers to verify or debunk these claims. Individual consumers, in a classic tragedy-of-the-commons scenario, have insufficient incentive to spend the effort to verify such claims, as they would only obtain a small portion of the payoff from their effort.*

  Expert opinion of Kenneth S. Corts, pp. 15-17

- *While some market mechanisms exist that can help, they are insufficient to fully solve the problem. Branding, for instance, only works for products that consumers purchase frequently enough to create a word-of-mouth reputation. Guarantees are viewed with scepticism when a company is not well-established; They also can be costly to provide, as they remove the incentive from consumers to use the product carefully. Reputations have a useful role in aggregating consumer information, but can*

only be built with respect to products that consumers purchase repeatedly. Third-party certification schemes, for their part, depend on the reputation of the certification firm, and are often blunt instruments that only give a general approval/disapproval, or focus on a specific aspect such as safety. In short, none of these market mechanisms can provide the same effect as a substantiation requirement.

Expert opinion of Kenneth S. Corts, pp. 19-22

- *The overarching objective of the Competition Act is to encourage the proper functioning of competitive markets in Canada. Competitive markets depend in large part of proper flows of information. As a sub-goal of facilitating the functioning of markets in Canada, the assurance of reliable information flows is a pressing and substantial objective. The creation of a requirement that advertisers substantiate performance claims before making them is a rational means of attaining this objective, given the insufficiency of market-based mechanisms.*

Expert opinion of Kenneth S. Corts, pp. 24-25

Minimal Impairment

49. The second leg of the proportionality test is that a measure taken be such as to impair the right as little as possible. That said, when the goal is the protection of vulnerable groups, it is not a question of requiring the *least* restrictive alternative, but whether Parliament had a *reasonable* basis to conclude that the measure was minimally impairing. This is particularly true where, as here, the legislation is aimed at protecting vulnerable groups, and where the choice of measures is based on complex social-science evidence. A look at the potential alternatives shows that a substantiation requirement was in fact the least impairing measure that Parliament could have taken to achieve the desired goal.

R. v. Oakes, supra.
R. v. Irwin Toy, [1989] 1 S.C.R. 927 at para. 81

50. One option would be simply to do nothing, leaving to the consumer the onus of assessing the truth of claims. As discussed above, consumer information is a public good and hence is under-provided, as consumers do not have enough of an incentive to verify claims themselves when they might only purchase a product once. It is almost axiomatic that doing nothing will contribute nothing to the solving of the problem.

Expert opinion of Kenneth S. Corts, p. 26

51. A second option would be to leave to "the market" the task of weeding out false claims. As discussed above, market mechanisms such as firm reputation, guarantees, and third-party certifications each have their deficiencies, and are not sufficient to remedy the problem. The *Competition Act*'s very raison-d'être is to ensure proper market functioning where the market itself is incapable of doing so.

Expert opinion of Kenneth S. Corts, pp. 26-27

52. Another alternative would be to have a requirement that sellers "reasonably believe" their claims to be true. First off, such a requirement would require determining the subjective point-of-view of the seller. Second, this would not go to the heart of the issue, as the factor that has an impact on consumers' well-being is not the seller's intent or belief, but whether the claims *in fact* have a basis. This option would clearly not be sufficient to counter, nor even rationally connected to, the existence of false claims.

Expert opinion of Kenneth S. Corts, p. 27

53. Finally, one could rely on a simple ban on false claims. Such a measure, however, would not have nearly the same effect as a substantiation requirement. Without a substantiation requirement, firms would only be forced to engage in performance testing once charged under the Act. Unless and until such enforcement action were taken, sellers would continue to be able to sell a product

using unsubstantiated claims, harming consumers. Given the infrequent nature of such charges, the seller would not have much of an incentive to actually perform tests. This measure, like the others, would not be nearly sufficient to achieve the desired goal of ensuring accurate consumer information.

Expert opinion of Kenneth S. Corts, p. 28
Report of the Royal Commission on Price Spreads, 1935

Proportionality of Effects

54. The final step of the *Oakes* test is to determine whether there is "proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been determined to be of sufficient importance" (*Oakes, supra, at 139).* To put it another way, this should take into account the "proportionality between the deleterious and the salutary effects of the measures" (*Dagenais v. CBC*). In this case, such proportionality is very clearly made out.

Oakes, supra at 139
Dagenais v. CBC [1994] 3 S.C.R. 835 at 889

55. In this case, the deleterious effects of the measure are minimal. The narrow type of expression being restricted is that related to unsubstantiated claims. Unlike in the *Zundel* case, this provision does not create a blanket ban on false claims, but only one on those made "for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest". As Dr. Corts puts it, such claims serve "no useful purpose in a free market". If the only effect of the measure is to eliminate unsubstantiated claims, then absolutely nothing of value is lost.

Expert opinion of Kenneth S. Corts, pp. 30
Competition Act, R.S.C. 1985, c. C-34, s. 74.01
R. v. Zundel, [1992] 2 S.C.R. 731

56. One concern might be that the measure increases the cost of disseminating *true* claims about a product, by requiring "adequate and proper tests". First, in an environment where there was no substantiation requirement, and where consumers would be sceptical of performance claims anyhow, a high-quality producer would obtain little value from making a performance claim, even a true one. The value to be obtained from a performance claim depends on the faith that consumers put in such claims; this faith in turn depends on the existence of a substantiation requirement. In other words, the existence of a substantiation requirement, while it might increase the cost for a high-quality producer to enter the market, also increases the potential benefit. Second, this increase in cost would only be a problem in situations where the cost of testing would outweigh the benefit to be gained from being able to make a performance claim. This would clearly only be the case where testing costs accounted for a large portion of the entry costs as a whole. This potential downside of the restriction is therefore minimal.

Expert opinion of Kenneth S. Corts, pp. 13, 30-31

57. It is true that commercial expression is protected by the *Charter,* as expressed in *Ford* at para. 59:

> *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*"

However, this very same reasoning that justifies the protection of honest commercial expression can be used to justify the restrictions on dishonest commercial expression. A substantiation requirement improves the functioning of a market. It helps consumers maximize their well-being by making informed economic choices in cases where quality is not easily verifiable. It also levels the playing field by not punishing honest firms who do *not* make unsubstantiated claims. Finally, by providing an incentive to improve quality, it encourages innovation. The right impaired is of little value; the benefit to be gained is an important one. The effects of the measure are therefore clearly proportional to the objective.

Expert Opinion of Kenneth S. Corts, p, 29

Ford v Quebec, [1988] 2 S.C.R. 712

And by way of Reply to the Memorandum of Argument of the Applicants dated 20 August, 2007

59. The Applicants misstate the position of the Commissioner in paragraph 3 of their Memorandumrandum, ("Applicants Memorandum"):

a) The statute requires prior substantiation as to "performance" claims to provide necessary information to consumers and others.

b) Contrary to the Applicants allegations, the statute does not prescribe:
   i) rigid standards of scientific rigour,
   ii) nor a requirement of complete certainty as to the claimed performance,
   iii) nor a hidden or implied requirement to keep or provide documentation .[9]

c) There is no basis to the suggested imposition of a criminal standard of proof.

60. The matters referred to in paragraph 5 of the Applicants Memorandum are not germane to the issue on this challenge, in that the specific standard of testing and the efficacy thereof are to be determined on the evidence in each individual case.

61. Section 74.01 deals with different categories of conduct to establish reviewable conduct based upon characterizations of "misleading" or "false or misleading": Subsection 74.01(1)(a), (c), (2) and (3). In principle each of these matters could be dealt with under s 74.01 (1)(a). Each of those provisions may call in aid the "general impression" presumption contained in ss (6).

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[9] Prudence, of course, may dictate that these last conservancy steps would, in many cases and for many purposes, be a useful course of conduct.

62. Section 74.01(1)(b) is based upon a different premise--a restricted requirement to provide "performance" information. Truth or falsity, except in the broadest effect, is irrelevant. It may also be that there is a degree of overlap between the treatment of performance claims under various provisions of s 74.01 as described in paragraph 61, above. However, s 74.01(1) (b) also deals with speculative claims. It does not focus upon the level of intent of the maker of the representations, nor the ultimate weighing of the worth of the representations. It seeks to re-balance the harm to the competitive process that information asymmetry may cause.

63. The Applicant posits in paragraph 7 a "straw man" argument that the pressing social problem arises only in the instance of persons making performance claims, if they are "rationally connected to the valid objective of preventing economic harm caused by false and misleading representations". However as Dr Corts has explained, true but speculative claims, ie situations where the maker is indifferent or unknowing as to performance of a product may also cause harm. Section 74.01(1) (a) deals with the former[10]. However, the separate concern of careless, reckless or negligent speech ***with respect to factual matters,*** is dealt with under ss (b), which is a sui generis provision.

64. The Applicants essentially argue regulatory overburden, in that substantiation applies to all citizens, law abiding or not. The aim is not to undyuly burden anyone, but to preserve the conduct of private markets. They posit *a priori* categories of "false advertisers" and truthful "law abiding firms". It is a whole cloth invention and does not reflect the statute. The Applicants interpretation of s. 74.01(1)(b)does not advise how we are to depict who is truthful and who is not. Within this paradigm, the Applicants suggest that there is overreach and disproportionality, since substantiation does not discriminate between false representors and true ones, imposing a burden on both. While some alleged false or misleading claims may be proven to be otherwise if substantiation can be demonstrated, it is the specific reach of the instant provision, which does not pivot on truth, that governs. Firms determined after the fact to have made truthful claims but who have not taken care may commit reviewable conduct under s 74.01 (1)(b). The provision requires not an *a priori* sorting

7 And it is not limited to "false advertisers".

between truthful and untruthful claims before a specified form of representation is made, but whether there is substantiation. Firms may be unknowing as to the true performance. They ought not to be able to pass that risk on to purchasers when, as vendors they solicit reliance on claimed performance. Substantiation is no more than a requirement of due diligence writ large. Proportionality in this instance is not the measure of firms affected, but the extent of the burden to be borne between consumers and vendors.

65. The Applicants deride the lack of quantification of harm, however short of highly regulating commercial transactions, specific harm is to private market processes cannot be discovered in the short run, other than by enforcement The Bureau has indicated that formal enforcement is in principle, a last resort, and has indicated that "no test" situations are the enforcement focus. The applicants also expect a sorting of goods to focus on "credence goods". The latter is simply a label which applies to those goods which a consumer is less advantaged than the supplier regarding specific attributes of the product. A quantitative inventory of the prevalence of the such goods is a false goal. As the courts have indicated, "common sense" and logic plus the real world experience of the court are acceptable standards in judging various elements of the Oakes Test. In this case, the Commissioner has provided ample legislative and social history of the provision to identify a decades old issue that the impugned provision was designed to meet.

66. With respect to the Applicants position generally, the Commissioner submits that the following should be kept in mind:

a) The general issue of consumer protection in the context of competition in the Canadian economy, as represented by the Competition Act is a central feature of government regulation, and thus is an institutional reaction to a worthy and important goal;

b) Representations affecting consumer behaviour and the possible failure to substantiate is removed from the central focus of values protected under s 2(b)–this is conceded at paragraph 40.

c) Especially in the instance of a long-standing legislative reaction (and one which has been upheld judicially on prior occasions), deference to Parliament's choice of instruments should be observed.

d) There is no total ban on representations of all kinds. Suppliers enter the reach of the statute voluntarily. It relates to specific sub-set of performance claims, and given that the provision is civil, is subject to a limited form of due diligence, and no deprivation of liberty nor criminal stigma.

67. The Applicants concede that "the performance of Canada's economy is clearly an important goal". But they query once again whether the impugning of true but unsubstantiated claims is a pressing and substantial objective. Substantiation serves a greater value, not mere punishment or prohibition. The world in which the Applicants live suggests a prescience of truth regardless of the conditions then applicable. The Applicants, when referring to true representations must be referring to some body of prior knowledge which must be disclosable. On this view the provision presents no burden. other than the worth of that information. If otherwise "true" means ultimately true, then it is irrelevant to consumer choice based on timely belief. Reputation, aspiration, faith or mere hazard is no substitute for prior knowledge respecting performance claims. The pressing and substantial objective of this section was outlined in *R v Envirosoft Water Inc. (1995) 61 CPR (3d) 307 at 314*, as well as the previously cited precedents.

68. If, which is denied, that to require a prior inquiry as to truth or other wise of the representations provides a better focus of regulation, It would largely conflate s 74.01(1)(a) with (b); there is no practical way to tackle the problem, if a vendor makes these species of claims: *Envirosoft (supra) at 315* . Lack of substantiation for all intents and purposes makes the claim at least misleading or speculative, but in many instances it is to the benefit of the vendor (and its competitors) that proper testing occurs. In the case of creosote reduction, the efficacy of the IMG product is not readily detectable. In the case of a medical remedy, which suggests an alternate course to accepted treatment, the lack of prior substantiation could cause grievous injury because of the inability to prior sort suggested true representation from quackery.

Rational Connection

69. This test has been described as "not particularly onerous": *Health Facilities Subsector Bargaining Association v BC [2007] SCC 27 para 148,* so long as the subject statute is linked to the objective or may be of help bring about the objective. Providing a level of confidence and a re-balancing of information on issues generally not within the grasp of the generic consumer: *JTI MacDonald Health para 40* is also sufficient. The fact that there are firms who may be unwilling to comply with the substantiation requirement, that ss (b) may be easier to enforce that ss (a) or that ss (b) may catch truthful representations does not detract from the objective of providing accurate information to consumers.

70. The Applicants suggest that since substantiation is structured to reduce false claims (as indicated, in the final analysis, not *a priori*),then a provision which requires, in the same paradigm, true claims, as finally determined, which after all, in the Applicant's view can cause no harm, overreaches. This is the same argument advanced in PANS to suggest that an overly broad or vague definition of"lessen competition unduly" catches innocent commercial actors. There are of course many adjusting factors, including, past legal precedent and the case-by-case standard selection.

71. However, unsubstantiated but true claims do cause harm. In a situation where there are X number of products with performance claims, all known to be substantiated (true) and in a another where there is X number of products with performance claims half substantiated and half not substantiated but simply speculative (it remains to be seen if they are substantiated--ie true, but in the event this turns out to be the case) it is submitted that these two situations are not the same. In the latter consumers will discount all claims, including the true ones, and will not sufficiently reward high-quality firms. This is exactly the point of the adverse selection analysis about the averaging out of willingness-to-pay, which Dr Corts posits, in that uncertainty as to factual matters injures the competitive process.

72. Subsection (b) is not redundant to ss (a). Under (a) only, a firm may weigh the costs (legal and loss of reputation) and benefits (increased demand) of a speculative claim and decide to go ahead with it, without knowingly breaking a law. This may lead to claims that are, in the ultimate fact assessment, false being made. With (a) and (b) in effect, the only way a false claim comes into the market is through (1) a knowing breech of ss (b)–no testing, or (2) testing that leads to a knowing breach of part (a). This is a very different calculation for the firm, and there is no reason to think that ss (b) doesn't incrementally prevent some false claims. Given the wider net of ss (a), it is a misstatement of Dr Corts position to suggest that ss (b) does little to prevent "false" claims but burdens the true claimant. Subsection (b) has primary and secondary goals, its first goal is to provide accurate information to the consumer, the lack thereof leaves the question of reliability moot, it may also be an avenue to restraining the spurious and careless representor, given the subsequent use of that information.

73. At paragraph 26 of the Applicants Memorandumrandum they misstate the function of AMPs and the likelihood of the Tribunal to sanction past conduct. Since the both remedies are prospective in nature, intended to avoid future repetition of reviewable conduct, it is only on a demonstration of likely repetition that "prohibition" for past (and concluded conduct) that they will be ordered. The Applicants, in building upon the false premise of false and misleading advertising as the relevant legislative purpose, fail or refuse to follow their own dictate that it is the impugned provision, not another, regardless of its proximity in the statute that must be considered.

a) At paragraph 27, the Applicants continue to overlook those species of representors who are less than dishonest, but are merely misguided, slothful or careless; while adequate testing will indeed sort the depths of the categories of representors, it is not directed to distinguishing falsehood or truth;

b) At paragraph 28, the above distinction is once again overlooked, since the detection of falsehood, even in a civil setting and with the assistance of the presumptions within the statute is a distinct challenge of proof. Section 74.01(1) (b) has its own set of proof, assisted by the unchallenged reverse onus provision. As indicated above, while some overlap might exist, absent ss (b) consumers and competitors will be left disadvantaged with respect to strong inducements to the purchase decision. As to levels of enforcement, and results, it is trite that a regulatory statute succeeds by warning and requirement, with enforcement on an as required basis. This approach has been publicly proclaimed by the Commissioner in his Conformity continuum Bulletin

c) At Paragraph 30, the Applicant is correct that truth is not a defence, but the relevant point is that it is irrelevant, since it is the goal of substantiation which informs the world about the reliability and utility of the product. It is known proof of the representation, and its parameters, not the truth of what is said that matters.

Minimal Impairment

74. The central theme of the Applicants is alleged over breadth of the provision, which is properly dealt with as an issue of minimal impairment: *R v NS Pharmaceutical Society [1992] 2 SCR 606.* A provision does not have to be a perfect solution, only one which falls within a reasonable range of options, given the practical difficulties of preserving competition without increasing interference in that very process.

75. A substantiation provision requires the compiling of "proof" before a form of specified communication can be engaged in. It is not true as stated in paragraph 32 of the Applicants Memorandum that it applies to "all consumer goods", rather it applies only to goods to which

certain representations are made. As described by Dr Corts, substantiation assists the competitive process generally. It is not limited to credence goods, since elements of experience and search goods can virtually be found in every good. This complicates the statutory task in making substantiation rules. It is submitted that the performance representations are most comfortably applicable to credence goods, or is aimed at the credence aspect of such goods. It is the avoidance of credence elements that the substantiation provision is aimed at and is accepted by the court in *Envirosoft,* and the perception of the reporters in proposing such legislation as the "imbalance" between buyers and sellers. Unlike *RJR* there is no complete ban. Thus a provision, as suggested by the Applicants which must sort true from false claims *a priori*, would be a more complex, and less effective provision, which Parliament is not obliged to enact: *JTI* at para 137.

Conclusion

76. It is accordingly submitted that section 74.01(1) (b) can be justified under s 1 of the Charter, and should accordingly be available to the Commissioner to proceed upon the merits in this Application.

Dated at Ottawa this 31 day of August, 2007

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