

## 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:*

COMPETITION TRIBUNAL  
TRIBUNAL DE LA CONCURRENCE

**FILED / PRODUIT**

August 20, 2007

Jos LaRose for / pour  
REGISTRAR / REGISTRAIRE

OTTAWA, ONT

# 0088

**The Commissioner of Competition**

- and -

**Imperial Brush Co. Ltd. and Kel Kem Ltd.**  
(c.o.b. as Imperial Manufacturing Group)

*Applicant*

*Respondents*

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Respondents' Reply Memorandum  
Constitutional Issue

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**Reply Memorandum of the Respondents  
Imperial Brush Co. Ltd, and Kel Kem Ltd.**

**Constitutional Issue**

1. The Respondents manufacture and distribute in Canada certain products including Kel Kem Chimney Creosote Cleaner, Kel Kem Creosote Conditioner, the SuperSweep Chimney Cleaning Log and the Imperial Chimney Cleaning Log, and have made certain representations with respect to those products on the packaging in which the products are distributed.
2. The Commissioner of Competition has made an application for orders imposing sanctions and penalties on the Respondents pursuant to s. 74.01 of the *Competition Act*, with respect to those representations made by the Respondents, asserting that the representations constitute reviewable conduct under s. 74.01(1)(b) of the *Competition Act*.
3. The Commissioner asserts that the Respondents and all persons making representations with respect to the performance, efficacy or length of life of a product are required to perform such tests before they are permitted to make such representations, that the tests must be conducted and documented with sufficient scientific rigour to ensure that there is complete certainty as to the accuracy of the representations, and that such documentation must be retained and provided to the Commissioner on demand. This represents a standard of proof which is higher than the beyond-reasonable-doubt standard which applies in criminal proceedings.
4. Truth of the representations is not in issue under s. 74.01(1)(b) and the Commissioner does not assert that the representations are false or misleading in any material respect. Such assertions would be relevant and necessary in an application under s. 74.01(1)(a), but no application has been made under that section.

5. The distinction between false claims and those where the testing is alleged to be inadequate is directly applicable in this case. The Respondents' products have been in the market for approximately 25 years and are of types that have been offered by various other suppliers for many years longer than that. The representations on the label are based on 25 years of experience by the respondents and their customers, including professional chimney sweeps, and on controlled testing performed by the Respondents. Each of those controlled tests showed that the products had the effect claimed.<sup>1</sup> However, the Applicant dismisses the 25 years of experience in use and criticizes the controlled tests, in essence attempting to raise a reasonable doubt as to their accuracy. The Applicant's expert witness puts forward a standard of "absolute certainty"<sup>2</sup> that the conclusions of the Respondents are correct, and the Respondents' representations are challenged on the basis that the tests do not demonstrate the truth of the representations to this standard. However, it is neither asserted nor proved that the statements are untrue.

### Summary of Argument

6. Section 74.01(1)(b) of the *Competition Act* *prima facie* violates s. 2(b) of the *Canadian Charter of Rights and Freedoms*, Schedule B, *Constitution Act, 1982* (the "Charter") because it penalizes making certain commercial representations without first performing and documenting an adequate and proper test supporting those representations. The Commissioner concedes the s. 2(b) infringement.
7. Such infringement of the guaranteed right of freedom of expression can be permitted to stand only if it is demonstrably justified in a free and democratic society in accordance with the test established by the Supreme Court of Canada in *R. v. Oakes*<sup>3</sup> and in subsequent cases. Section 74.01(1)(b) cannot be so justified because it overreaches by prohibiting true as well as false representations that have not been previously tested. It

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<sup>1</sup> Respondents acknowledge that one of the tests of the Conditioner did not show a reduction in one type of stovepipe, and note that the representation was only that it "can" do so.

<sup>2</sup> Dr M. Pegg; Transcript Vol 2, p 178 – Dr Pegg's criterion for an adequate test is "certainty"; Dr M. Pegg Affidavit, Para 55(a) "...it cannot be said with absolute certainty that the recorded weights are accurate"; Dr M. Pegg, Transcript Vol 2, p. 209, l. 19-21 "Again, absolute certainty being your standard? DR M. PEGG: That's correct..."

<sup>3</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103; Applicants' Book of Authorities, Tab 1.

has not been demonstrated by evidence that prohibiting untested representations without reference to whether they are true relates to a pressing and substantial goal. Prohibiting untested statements without reference to whether they are true is not rationally connected to the valid objective of preventing the economic harm caused by false and misleading representations. The Commissioner of Competition has not established that potential false advertisers will conduct tests, as required by s. 74.01(1)(b) any more than they adhere to the provision prohibiting false product claims. Thus, the effect of the provision will be to impair the freedom of expression of more law-abiding firms while not obviously influencing the practice of those likely to make false product claims. It also disproportionately affects those who make truthful claims in that the truth of a claim is not a defence to the substantiation requirement. Finally, there is no evidence that market forces are not sufficient to achieve the provision's objectives. Although market forces may be insufficient to ensure truthful representations with regard to credence goods, it is not clear whether such goods make up a significant percentage of goods that fall under the impugned provision of the *Competition Act*.

8. Section 74.01(1)(b) of the *Competition Act* is therefore inconsistent with the Constitution of Canada and should be declared to be of no force or effect.

### **Issue**

9. The Commissioner of Competition concedes that s. 74.01(1)(b) of the *Competition Act* infringes the guaranteed protection of freedom of expression and therefore *prima facie* violates s. 2(b) of the *Charter*. The sole issue is whether such a violation is demonstrably justified in a free and democratic society, in accordance with s. 1 of the *Charter*.

10. The test for determining whether an impugned provision is saved by s.1 of the *Charter* was set out in *Oakes*:<sup>4</sup>

69. To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a

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<sup>4</sup> *Ibid.*

limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

70. Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance".

71. With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the *Charter*; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the *Charter*, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective

must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

11. Thus, the first element of the s. 1 analysis requires an assessment of whether the objective of the impugned measure is “of sufficient importance to warrant overriding a constitutionally protected right or freedom”. If a sufficiently significant objective is recognized, the inquiry proceeds to a proportionality enquiry involves three elements: rational connection with the identified objective, minimal impairment of the *Charter*-protected right, and balancing the objectives of the provisions against its effects on *Charter*-protected rights.

### Case law

12. The constitutionality of the predecessor criminal provision (then s. 51(1)(b)) was considered by MacKinnon J. of the Ontario Court (General Division) in *R v. 671135 Ontario Ltd.* (1994) 55 CPR (3<sup>rd</sup>) 204. The learned Judge dismissed several constitutional challenges to the validity of that provision, including a challenge based on a violation of s. 2(b) of the *Charter*. It is not clear what, if any, evidence was before the Court – none is referred to and the learned Judge states:

[o]n the very face of the legislation before me in s. 51(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.<sup>5</sup>

13. With respect, no analysis is made of the connection between the impugned provision prohibiting claims which are not tested in advance and the objective of outlawing false (“fanciful and fraudulent”) claims.
14. The learned judge merely observes that “the rational link between the objectives of the legislation and the restrictive measure is obvious.”<sup>6</sup>

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<sup>5</sup> *R. v. 671135 Ontario Ltd.*, 55 C.P.R. (3d) 204, Applicants’ Book of Authorities, Tab 2 at 54-55.

<sup>6</sup> *Ibid.*, at 55.

15. With respect to the minimal impairment requirement, MacKinnon J. correctly states the issue to be whether Parliament could reasonably have chosen alternative means which would have achieved the identified objective as effectively. However, the Court does not explore the possibility of alternative means, but instead focuses on the low value it attributes to the prohibited expression. With respect, this is not relevant to a minimal impairment analysis but rather should be considered in the final stage of the s. 1 analysis. McLachlin J. (as she then was) makes this point in *RJR MacDonald* and adds:

While it may not be of great significance where this balancing takes place, care must be taken not to devalue the need for demonstration of minimum impairment by arguing the legislation is important and the infringement of no great moment.<sup>7</sup>

16. The learned Judge also identifies the third element of proportionality between the effects and the objective. Once again, no analysis is provided. MacKinnon J. refers to the need to eliminate “deceit and trickery as commercial practices” and states: “[t]he right to freedom of expression does not confer a right to make untested representations to the public.”<sup>8</sup>
17. The Respondents submit that this decision is not persuasive.
18. The only case dealing with the constitutionality of the present section, s. 74.01(1)(b), is the decision of this Tribunal in *Commissioner of Competition v. Gestion Lebski Inc. et al.* (Sept 8, 2006). Blanchard J. held that s. 74.01(1)(b) infringed the freedom of expression guaranteed under s. 2 of the *Charter*, and that the Commissioner had not presented sufficient evidence to justify such infringement in a free and democratic society. He ruled that, for the purposes of that case, the section was without force, but noted that it would be open to the Commissioner to submit evidence in justification in a future case.

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<sup>7</sup> *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, Applicants’ Book of Authorities, Tab 6 at para 169.

<sup>8</sup> *R. v. 671135 Ontario Ltd.*, *supra*, note 5 at 55.



## Section 1 Analysis

### 1) The Standard of Proof

19. The party seeking to support an impugned legislative provision has the burden of presenting evidence to show that it is “demonstrably justified”. With respect to this burden, Dickson C.J.C. said in *Oakes*:

67. The standard of proof under s. 1 is the civil standard, namely, proof by a preponderance of probability. The alternative criminal standard, proof beyond a reasonable doubt, would, in my view, be unduly onerous on the party seeking to limit. Concepts such as “reasonableness”, “justifiability” and “free and democratic society” are simply not amenable to such a standard. Nevertheless, the preponderance of probability test must be applied rigorously. Indeed, the phrase “demonstrably justified” in s. 1 of the *Charter* supports this conclusion. Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case: see Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Toronto: 1974), at p. 385. As Lord Denning explained in *Bater v. Bater*, [1950] 2 All E.R. 458 (C.A.), at p. 459:

The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

This passage was cited with approval in *Hanes v. Wawanesa Mutual Insurance Co.* (S.C.C.), [1963] S.C.R. 154, at p. 161. A similar approach was put forward by Cartwright J. in *Smith v. Smith*, [1952] 2 S.C.R. 312, at pp. 331-32:

I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend on the totality

of the circumstances on which its judgment is formed including the gravity of the consequences....

68. Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the *Charter* was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit. See: *Law Society of Upper Canada v. Skapinker*, *supra*, at p. 384; *Singh v. Minister of Employment and Immigration*, *supra*, at p. 217. A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.

20. In *R. v. Bryan* 2007 SCC 12,<sup>9</sup> the required standard of proof was addressed by Abella J.<sup>10</sup> After referring to the passage from *Oakes* above, she continued:

103 These cases represent a judicial acknowledgment that policy judgments made by government often represent complex polycentric conclusions not easily amenable to "precise measurement" (*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 304). But while scientific proof may not always be necessary or available, and social science evidence supported by reason and logic can be relied upon, the evidence must nonetheless establish the consequences of imposing or failing to impose the limit. As McLachlin C.J. warned in *Sauvé*, "one must be wary of stereotypes cloaked as common sense, and of substituting deference for the reasoned demonstration required by s. 1" (para. 18).

21. This is not a case where the analysis is obvious or self evident. The facts asserted in justification of the acknowledged infringement of the right will require clear and convincing proof.

<sup>9</sup> Applicant's Book of Authorities, Tab 10.

<sup>10</sup> Abella J., with McLachlin C.J., and Binnie and LeBel JJ. concurring, dissented as to result.

## 2) Pressing and Substantial Objective

22. The first element of the *Oakes* test is to determine whether it has been demonstrated that the objective of the impugned provision is “of sufficient importance to warrant overriding of a constitutionally protected right or freedom.” There is no doubt that both the *Competition Act* in general and Part VII.1 in particular seek to achieve pressing and substantial goals. The Commissioner of Competition’s submission is that the goal of the Act is to “maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy.”<sup>11</sup> The performance of Canada’s economy is clearly an important goal.
23. However, in *RJR MacDonal*d,<sup>12</sup> McLachlin J. warned that “[c]are must be taken not to overstate the objective. The objective relevant to the s. 1 analysis is the objective of the infringing measure” (emphasis in original). According to the Commissioner of Competition, the objective of the impugned measure, s. 74.01(1)(b), is: “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.”<sup>13</sup> However, it has not been demonstrated that preventing representations which are merely untested, without reference to whether they are true, is a pressing and substantial objective. Rather, the Commissioner of Competition’s submissions relate only to the harms of false and misleading product claims, not to true but unsubstantiated claims. Nor does the application of reason lead to the conclusion that the impugned provision seeks to prevent harm caused by true but untested product claims. If the impugned provision is to be justified it must be with reference to the objective of preventing false and misleading representations.

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<sup>11</sup> Memorandum of Argument of Commissioner of Competition, para 45.

<sup>12</sup> *Supra*, note 7 at para 144.

<sup>13</sup> Memorandum of Argument of Commissioner of Competition, para 8.

24. The legislative history clearly shows that the object of s. 74.01(1)(b) relates to false, not true but untested product claims.<sup>14</sup> Although false advertising affects only economic interests, it is nevertheless conceded that the government has a pressing and substantial objective in seeking to prevent it.<sup>15</sup> As indicated below, however, there is no evidence to show the impugned provision can achieve this goal.

## 2) Proportionality

25. The contentious issue between the parties is therefore whether s. 74.01(1)(b), as a means of achieving the government's legitimate objective of preventing false product claims, is proportionate to its *Charter*-infringing effects. The Commissioner of Competition has the onus of proving, on a balance of probabilities, that it is. The Supreme Court in *Oakes* noted that the s. 1 criteria:

...impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society.<sup>16</sup>

## 3) Rational Connection

26. The rational connection branch of the s. 1 analysis seeks to determine whether a law is tailored to its objective in a way that is not arbitrary, unfair or based on irrational considerations. The government "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic."<sup>17</sup> The justified objective of Part VII.1 – prevention of false and misleading representations – is addressed directly in s. 74.01(1)(a): such representations are prohibited.<sup>18</sup> This

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<sup>14</sup> See, for example, the section on False and Misleading Advertising in the *Report of the Royal Commission on Price Spreads*, Ottawa, 1935, Affidavit of Martin Saidla, Tab A1 at 245-247.

<sup>15</sup> *R. v Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at 191.

<sup>16</sup> *Supra*, note 1 at para 65.

<sup>17</sup> *RJR*, *supra*, note 7 at para 153.

<sup>18</sup> Although the structure of the Act is that the specific activities are "prohibited" only after they are ordered by the Tribunal following a hearing, they are "prohibited" in the sense that sanctions and penalties can be imposed for past conduct.

prohibition was held to be a demonstrably justifiable infringement of free speech in *Commissioner of Competition v. Sears*.<sup>19</sup> However, the Respondents submit that s. 74.01(1)(b) of the *Competition Act* is not rationally connected to the objective of preventing false advertising for three reasons.

27. First, a substantiation requirement such as that found in s. 74.01(1)(b) only achieves its stated pressing and substantial objective if it is adhered to. There is no evidence to show, nor can it be inferred, that firms that are willing to violate s. 74.01(1)(a), prohibiting false product claims, will comply with s. 74.01(1)(b). Firms willing to make false claims are unlikely to test their products. The substantiation requirement will therefore have little effect on firms prepared to make false claims, while placing a considerable burden on well-intentioned firms. Given its likely ineffectiveness, the provision is not rationally connected to its goal of significantly reducing false product claims.
  
28. Second, the Commissioner of Competition suggests, without saying as much, that s. 74.01(1)(b) is necessary to enforce the false advertising prohibition. For example, Dr Corts notes in his affidavit, at paragraph 48, that substantiation is “in a sense redundant to the false claims prohibition” but that it is “an integral part of enforcing the false claims prohibition”. In addition, the Commissioner cites *R. v. Professional Technology of Canada Ltd.* to the effect that:
 

Parliament obviously concluded that it would be impossible to police and canvass all of the many individuals and companies selling products and making representations... Governments do not have the unlimited assets and resources necessary to ascertain the nature of particular tests...<sup>20</sup>
  
29. The difficulty of enforcing s. 74.01(1)(a) therefore appears to be a major reason why s. 74.01(1)(b) is deemed necessary. However, facilitating enforcement is not related to the pressing and substantial goal of reducing false product claims unless such additional

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<sup>19</sup> *Canada (Commissioner of Competition) v. Sears Canada Inc.*, (2005) 37 C.P.R. (4<sup>th</sup>) 65; Applicant’s Authorities, Tab 13.

<sup>20</sup> Memorandum of Argument of the Commissioner, para 37.

enforcement also has the effect of reducing false claims. The Commissioner of Competition implicitly assumes either that firms will voluntarily comply with the substantiation requirement or that enforcement of s. 74.01(1)(b) will provide greater deterrent than enforcement of s. 74.01(1)(a). The Commissioner of Competition provides no evidence of the extent to which s. 74.01(1)(b) is currently enforced or its deterrent effect (or lack thereof). Similarly, no evidence is provided to indicate that enforcement of the prohibition on false advertising under s. 74.01(1)(a) is ineffective; indeed, the various reports appended to the Affidavit of Martin Saidla are to the contrary.<sup>21</sup> Although empirical evidence is not needed to support a rational connection, it cannot be inferred from logical reasoning that a substantiation provision has a significant deterrent effect on false and misleading representations beyond that of a direct prohibition of such representations.

30. Third, truth is not a defence under this section. Since making false product claims is already prohibited by s. 74.01(1)(a), the “value added” of s. 74.01(1)(b) is to create a category of reviewable conduct, subject to sanctions and penalties, of making true representations that were not tested before the claims were made. However, as Dr Cortis acknowledges, untested but true representations are not harmful to consumers and producers.<sup>22</sup> Absent a defence of truth, the substantiation provision is not rationally connected to the legitimate goal of preventing false product claims.

#### **4) Minimal Impairment**

31. A minimal impairment analysis addresses whether Parliament could reasonably have chosen an alternative, less rights-infringing means to achieve its goal. The analysis does not require that a provision be perfectly tailored to its objective – some leeway will be

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<sup>21</sup> For instance, the 1996 *Report of the Consultative Panel on Amendments to the Competition Act*, Exhibit A9 to the affidavit, notes at page 16 (page 425 of the affidavit) that: “[t]he prohibitions against misleading or deceptive advertising in the *Act*, generally, have been effective in dealing with many aspects of this problem.” This comment relates to the former criminal offence – not the new civil regime, which the Report recommended. See also *Competition Policy in Canada – The First Hundred Years*, Exhibit A4 to the affidavit, which refers at page 17 (page 176 of the affidavit) to the explosion of prosecutions that occurred following the transfer of the legislation to the federal jurisdiction.

<sup>22</sup> *Ibid.*, at para 48.

given to the legislator.<sup>23</sup> However, the government must establish that no reasonable alternative was available in order for a *Charter* violation to be demonstrably justified in a free and democratic society. Section 74.01(1)(b) of the *Competition Act* is not minimally impairing for two reasons: first, the impugned section proscribes a wider range of communication than what it seeks to prevent. It prohibits all untested commercial representations, including true ones, when only false representations are harmful to the economy.

32. In addition, it prohibits untested representations with regard to all types of consumer goods when market forces are sufficient to prevent false advertising with regard to many goods. At paragraph 16 of his affidavit, Dr Corts indicates that market forces such as signalling, reputation and certification help prevent false product claims with regard to search goods (those which consumers can verify attributes such as quality before purchase) and, to a lesser extent, experience goods (those whose attributes are determinable upon purchase or consumption). Market forces are largely ineffective at preventing false product claims about credence goods (those whose quality the consumer can never discover), but the impugned measure is not limited to claims about credence goods. Rather, it applies to all consumer goods and is therefore overbroad.
33. The subject of overbreadth was addressed in *RJR MacDonald*,<sup>24</sup> in which the Supreme Court held that a complete ban on tobacco advertising was not a justifiable limit on freedom of expression. The ban was not rationally connected to the goal it purported to achieve - namely, reducing tobacco consumption. In addition to prohibiting advertising that could lead to increased tobacco consumption, it also prohibited advertising unrelated to increasing consumption. For example, there was no evidence adduced, nor was it logical to infer, that informational and brand-oriented advertising led to increased consumption. Rather, such advertising provides important product information to consumers. As a result, the Court held that the prohibition was not minimally impairing because reasonable alternatives to the ban were available, such as a ban on lifestyle

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<sup>23</sup> *RJR*, *supra*, note 7 at para 160.

<sup>24</sup> *Ibid.*

advertising, which likely *does* lead to increased tobacco consumption. This would have achieved the stated objective in a less rights-infringing way.<sup>25</sup>

34. In contrast, in *Canada (Attorney General) v. JTI MacDonald*<sup>26</sup> a targeted ban that prohibited advertising which would tend to increase smoking or be attractive to young persons was found to be minimally impairing and demonstrably justifiable.
35. The difference between those two cases is instructive. The present case is analogous to *RJR MacDonald* in that s. 74.01(1)(b) prohibits making true but untested claims - conduct that is unrelated to the provision's objective and that is not harmful. S. 74.01(1)(b) is, in fact, more egregious than the tobacco ban, because a prohibition on false advertising already exists in s. 74.01(1)(a). Whereas the tobacco advertising ban would have achieved, but exceeded the scope of its objective, the Commissioner of Competition has not established that s. 74.01(1)(b) would even achieve the stated goal, while clearly exceeding its scope.
36. The second reason that the impugned provision is not minimally impairing is that the Commissioner of Competition has not established that the goal of reducing false advertising cannot reasonably be achieved through less rights-infringing means, such as relying on the false claims prohibition in s. 74.01(1)(a).
37. The Commissioner submits in paragraph 53 of her Memorandum of Argument that charges under s. 74.01(1)(a) of the *Act* are so infrequent as to fail to ensure "accurate consumer information". Only a substantiation requirement, it is argued, would achieve this goal. (Note that paragraph 53 refers to preventing the use of "unsubstantiated claims, harming consumers". However, since there is no evidence that true but unsubstantiated claims are harmful, and since the Commissioner frequently refers to false or inaccurate information, the Respondents infer that false information is the harm the Commissioner

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<sup>25</sup> *Ibid.*, at paras 162-165.

<sup>26</sup> *Canada (Attorney General) v. JTI MacDonald* 2007 SCC 30; Applicant's Book of Authorities Tab 12.



seeks to avoid.) No evidence is provided to indicate that enforcement of s. 74.01(a) is not, or cannot be, effective.

38. This argument is unpersuasive. It assumes one of two things – neither of which follows logically or has been proven by the Commissioner. For a substantiation requirement to achieve the goal of ensuring accurate consumer information, potential false advertisers would have to comply with the substantiation requirement despite being unwilling to comply with the prohibition on false advertising. Alternately, the substantiation requirement would have to be enforced to a much greater degree than the prohibition to deter firms from making false claims. Thus, there is no evidence to suggest, nor does it follow logically, that s. 74.01(1)(b), which infringes s. 2(b) rights to a greater extent than s. 74.01(1)(a), is better at achieving the stated goal of reducing false product claims than relying on, and enforcing, a direct prohibition of false claims.
39. Further, s. 74.01(1)(b) is not minimally impairing is that its pressing and substantial objective could be achieved through greater enforcement of the less rights-infringing s. 74.01(1)(a). If this Tribunal finds it logical to assume that deterrence would result from enforcement of s. 74.01(1)(b), it would also follow that greater enforcement of s. 74.01(1)(a) would deter false product claims. In other words, the ban on false product claims would be a sufficient mechanism to achieve the government’s objectives if it were properly enforced. The Commissioner has not established by evidence that enforcement of s. 74.01(1)(a) is impossible or impractical. S. 74.01(1)(b) is less targeted at protecting consumers than at minimizing the Competition Bureau’s expenditure of resources in enforcement, at the expense of s. 2(b) rights.

##### **5) Balancing the effects of the impugned provision and its objectives**

40. Product claims are not closely tied to the core values of freedom of expression (“political, artistic and scientific truth; the protection of individual autonomy and self-development; and the promotion of public participation in the democratic process”). However, the

Supreme Court has stated that “commercial speech... should not lightly be dismissed.”<sup>27</sup> “Freedom of expression, even commercial expression, is an important and fundamental tenet of a free and democratic society.”<sup>28</sup> It may only be restricted to the extent that the need for such a restriction justifies the infringement of a *Charter* right.

41. Further, the effect of the provision on all businesses must be considered. The Applicant asserts that the standard of “adequate and proper” testing requires that the tests be performed with the same level of scientific rigour as required in academic research and publication in a peer-reviewed scientific journal. Further, results must be documented to a level that would be expected in that environment to facilitate peer review. The Applicant’s expert witness, Dr Pegg, has extensive experience in that environment.<sup>29</sup>
  
42. However, the Respondent’s expert witness, Mr Jenkins, has spent his career in practical product research for large and small companies, including a time in which he was an entrepreneur. His evidence is that this standard is not followed by actual businesses in testing which they do for their own decision making.<sup>30</sup> The incremental cost of meeting the standard propounded by the Applicant represents the burden imposed by the impugned legislation – the barrier to, or price of, commercial free speech. The actual cost will be case-specific, but there is no evidence for dismissing it as immaterial.
  
43. The Commissioner of Competition has established the harmful effects of false advertising but has failed to prove, either through evidence or logic, that the further restriction of s. 2(b) rights that flow from s. 74.01(1)(b) would reduce the incidence of false product claims. The Commissioner’s expert economist can only state, without citing any evidence, that “[t]he end result of a lack of a requirement for substantiation of

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<sup>27</sup> *RJR, supra*, note 7 at para 170.

<sup>28</sup> *Ibid.*, para 175.

<sup>29</sup> Dr M. Pegg, Transcript Vol 2, p. 175. MR D. CAMPBELL: “...You’re only presenting your concept of “adequate and proper” testing?” DR M. PEGG: “Yes. And it’s based on the kind of rigour that – that I used to working with both with graduate students and also based on a lot of the contract-type research that I’ve done in the past.” (Dr Pegg’s contract work has been done almost entirely for governments and large corporations in an institutional environment, although he did some projects for smaller companies early in his career. Transcript, Vol 1, pp. 44-48)

<sup>30</sup> Jenkins Affidavit, Para 3.4: “In my opinion, the degree of rigour put forth by Dr Pegg is inappropriate for routine industrial testing.”

performance claims is *likely* to be false claims.”<sup>31</sup> Even this conclusion appears to be based on the questionable assumption that firms prepared to make false product claims would adhere to a substantiation requirement.

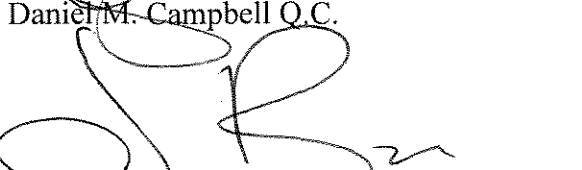
44. Given the lack of evidence that the impugned provision would better achieve the goal of limiting false product claims than the less rights-infringing s. 74.01(1)(a), the Commissioner has not satisfied her burden of proving that the restriction on freedom of expression resulting from s. 74.01(1)(b) is demonstrably justified in a free and democratic society.

### Order Sought

45. The Respondents seek an order pursuant to s. 52 of the *Constitution Act, 1982* that s. 74.01 (1) (b) is of no force or effect, and that accordingly the application of the Commissioner of Competition should be dismissed.

Dated at Halifax, Nova Scotia, this 20<sup>th</sup> day of August, 2007-08-19

  
 Daniel M. Campbell Q.C.

  
 Joseph E. Burke

Counsel to the Respondents, Imperial Brush Co. Ltd.  
 and Kel Kem Ltd.

<sup>31</sup> Affidavit of Dr Corts, para 36, emphasis added.