

Competition Tribunal



Tribunal de la Concurrence

Reference: *Commissioner of Competition v. Imperial Brush Co. Ltd. and Kel Kem Ltd. (c.o. b. as Imperial Manufacturing Group)*, 2007 Comp.Trib. 22
File No.: CT-2006-010
Registry Document No.: 0071

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

AND IN THE MATTER OF an inquiry pursuant to subsection IO(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);

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act*.

B E T W E E N :

The Commissioner of Competition
(applicant)

and

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



Date of Hearing: 11072007
Presiding Judicial Member: Phelan J.
Date of Order: July 11, 2007
Order signed by: Mr. Justice M. Phelan

**ORDER RELATING TO APPLICANT'S OBJECTION TO RESPONDENTS'
STATEMENT OF EVIDENCE**

[1] The Applicant has raised a number of objections to the Statement of Evidence of Abraham Kelly, which is proposed to be filed in evidence. The Tribunal, with the agreement of the parties, is following the procedure of having direct evidence filed in written form.

[2] There's no established procedure for dealing with objections to such direct evidence in the absence of the usual question and answer process. This is the first occasion of which I am aware, in this Tribunal, where the method of dealing with objections to the proposed evidence has arisen.

[3] The process used here is by no means the only method of addressing this issue but, in my view, it is appropriate for this case. Counsel for the Applicant was permitted to argue each objection. Counsel helpfully provided a marked-up version of the proposed statement, indicating the paragraphs to which objection was taken and the grounds of that objection.

[4] In approaching the issue of admissibility, in the absence of question and answer testimony, the Tribunal considered the objections from the perspective of an improper question and from that of an improper answer to a proper question.

[5] The Applicant had a number of grounds, both generally and specifically, for objection. In large measure, the Applicant was concerned that Mr. Kelly's evidence touched on areas of expert evidence, that his evidence was indirectly expert evidence and would be treated as such. The Respondents had made it clear that Mr. Kelly is a lay witness.

[6] The Applicant raised a number of procedural objections including that the rules in the Case Management Procedures have not been followed, but these objections are based on the premise that Mr. Kelly's evidence is expert evidence.

[7] It is clear that Mr. Kelly's evidence is not tendered as expert evidence and will not be received as such; therefore, the procedural objections must fall away.

[8] The Applicant has raised the issue that it is caught by surprise by Mr. Kelly's evidence. Given the pre-hearing process, the extensive disclosure statements which contained will-say statements and that the Applicant has had Mr. Kelly's statement for approximately two weeks, and finally, the fact that time for rebuttal evidence of both experts and lay witnesses, if necessary, is set aside and will likely occur next week, I am not convinced that the Applicant is prejudiced to such a degree that the evidence should be excluded on this ground alone.

[9] Turning to the specifics of the objections. The Applicant raises objection on the basis that some of Mr. Kelly's evidence is opinion evidence, which should only be given by an expert, that his statements contain hearsay and that it is repetitive of other witness' evidence.

[10] In respect of opinion evidence, Justice Dickson, as he then was, in *R. v. Graat*, [1982] 2 S.C.R. 819, all but did away with the distinction between so-called fact and opinion where the witness' testimony is founded on personal knowledge, and I quote:

Except for the sake of convenience, there is little, if any, virtue, in any distinction resting on the tenuous, and frequently false, antithesis between fact and opinion. The line between "fact" and "opinion" is not clear.

[11] Justice Dickson then went on to say that the admissibility of such evidence is on a rather simple basis - the witnesses had an opportunity for observation, they were in a position to give the Court real help. And in *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999), at page 608, Sopinka and Lederman summarize the applicable rule in reference to Justice Dickson's articulation:

Couched in these terms, the modern opinion rule for lay witnesses should pose few exclusionary difficulties when based on the witness's perceptions. The real issue will be the assessment and weight to be given to such evidence after it is admitted.

[12] The principled approach to hearsay involves an assessment of two indicia - reliability and necessity - in order to determine admissibility. The distinction between the lay and the expert opinion is that one is an expression of belief or understanding; the other is taken, if accepted, as proof of a fact.

[13] Given the modern approach to hearsay, of which expert opinion was an exception, I turn to the specific objections:

- Paragraph 1 : The use of the word "expertise" as part of Mr. Kelly's description of his statement as being a description of his practical experience and expertise does not turn him into an expert witness, so it will not be struck.
- Paragraph 5: The statements made are a description of what he did and what he received. In the absence of proof of the contents of any attestations, the matter goes to weight; therefore, it will be admitted.
- Paragraphs 16 to 18: These paragraphs are part of Mr. Kelly's story of how and why he became involved in the formulation of the product. These paragraphs contain his understanding of creosote, it's behaviour, and the sources such as the US Department of Commerce documents and other publications which may have been relied upon in creating the product and are, therefore, admissible.
- Paragraph 19: The portions of this paragraph dealing with repeating the observations of others as to the effectiveness of the product cannot be said to have the qualities of reliability or necessity. The relevancy of efficacy of the product is questionable; therefore, the portions referring to the observations of third parties will be struck.
- Paragraphs 20 to 23: These paragraphs contain Mr. Kelly's understanding and actions, all of which should be admitted.

- Paragraphs 24 and 25: For the reasons given in respect of paragraph 19, the third party observations are struck. The correspondence and statements attached are particularly problematic; these are statements not in the nature of business records, but made in the context of litigation. It is unfair to the Applicant that it not have the opportunity to question the persons making the statement, the reliability of which is in question. The attachments are to be struck.
- Paragraphs 27 and 28: These paragraphs refer to what Mr. Kelly did in part, but also contain third party comments. Those comments should be struck.
- Paragraphs 30 to 33: These paragraphs relate to Mr. Kelly's consultative role, what he did and, particularly, what he told Imperial Brush. Also, the paragraphs are relevant to any due diligence defence relied upon and they will be admitted.
- Paragraph 39: The fact that Mr. Kelly's report has come into evidence as Exhibit A-1 8 of Dr. Pegg's evidence is not determinative of the issue of admissibility of the paragraph. However, the paragraph is admissible because it relates to his understanding of events in which he was a participant.
- Paragraph 40 and following: This paragraph and the following relate to tests done in which Mr. Kelly was involved and which were said to be conducted in accordance with test protocol, which he reviewed, revised, approved or was otherwise involved in as a consultant. While there may be repetition of evidence others may give, that is not sufficient to strike out the evidence. Whether there is an issue of weight to be given remains to be seen.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[14] Subject to the above limited exceptions, the objections are dismissed.

[15] A revised statement of Mr. Kelly is to be filed by the Respondents.

[16] Because of the mixed result, no time-clock penalty shall be assessed; each side bears their time allotment.

DATED at Halifax, this 11th day of July, 2007

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Michael L. Phelan

APPEARANCES:

For the applicant

Commissioner of Competition

William Miller
Roger Nassrallah
Stkphane Lilkoff

For the respondents

Imperial Brush Co.Ltd. and Kel Kem Ltd (carrying on business as Imperial
Manufacturing Group)

Daniel M. Campbell
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