

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.21  
File No.: CT-2006-010  
Registry Document No.: 0068

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 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);

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)



Conference call: 03072007  
Presiding Judicial Member: Phelan J.  
Date of order: July 5, 2007  
Order signed by: Mr. Justice M. Phelan

**ORDER RELATING TO MATTERS CONSIDERED AT THE CONFERENCE CALL OF  
JULY 3, 2007**

[1] FURTHER TO the application filed by the Commissioner of Competition (the “Commissioner”) pursuant to section 74.1 of the *Competition Act*, R.S.C. 1985, c. C-34;

[2] AND FURTHER TO the Notice of Constitutional Question filed by the Respondents challenging the validity of paragraph 74.01(1)(b) of the *Competition Act*;

[3] AND WHEREAS the Notice was filed on June 29, 2007; just over a week before the hearing of this matter is to commence but more than 10 days before the anticipated argument phase of this matter;

[4] AND WHEREAS the issue of a constitutional challenge should have been raised during the carefully supervised case management process. The responsibility for this failure rests entirely with the Respondents, a responsibility which counsel has forthrightly accepted;

[5] AND WHEREAS the Respondents have requested various forms of relief and indulgences in order to have this question put before the Tribunal;

[6] AND WERE it not for the grave prejudice to the Respondents of being held liable on the basis of a provision that is, at this stage at least, arguably challengeable, I would have dismissed the Respondents’ request;

**THE TRIBUNAL ORDERS THAT:**

[7] In the result, the Respondents will be permitted to raise the constitutional issue. The following steps and schedule shall be adhered to:

1. The hearing of the case shall proceed as scheduled to deal with the evidence of the case on its merits.
2. Argument, including the Constitutional Question, will be deferred and will be heard Thursday and Friday, September 6-7, 2007, in Ottawa at the Tribunal Hearing Room commencing at 9:30 a.m.
3. The Notice of Constitutional Question shall be served on the respective Attorneys General within 10 days of this Order.
4. The parties are to propose a schedule for the argument phase including the submission of memoranda of fact and law.

5. The parties may address any of these argument phase issues while the matter is being heard in Halifax but outside of the hearing process.

DATED at Halifax, this 5<sup>th</sup> 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  
Stéphane Lilkoff

For the respondents

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

Daniel M. Campbell