

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE  <b>FILED / PRODUIT</b> December 7, 2006 CT-2006-010  Chantal Fortin for / pour REGISTRAR / REGISTRARIAIRE	
OTTAWA, ONT.	# 0010

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) the *Competition Act* relating to the marketing practices of Imperial Brush Co. 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*.

**BETWEEN:**

**THE COMMISSIONER OF COMPETITION**

**Applicant**

**-and-**

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

**Respondents**

**APPLICANT’S MEMORANDUM**

*(Motion for Particulars and an Amended Response)*

- 1) The Applicant has filed a Notice of Application pursuant to Section 3 of the *Competition Tribunal Rules*.
- 2) In its Notice of Application, the Applicant submits that Respondents have engaged in reviewable conduct contrary to paragraph 74.01(1)(b) of the *Competition Act* because they have made representations about the performance and efficacy of certain products without first ensuring that these representations are based on “adequate and proper tests”.
- 3) The issues raised in the present matter are:
  - a) Whether certain representations were made about the performance and efficacy of the products at issue;

- b) Whether these representations were based on “adequate and proper” tests; and,
  - c) Whether the tests were done before the representations were made.
- 4) The Respondents have filed a Response pursuant to section 5 of the *Competition Tribunal Rules* to oppose the Notice of Application.
  - 5) In this Response, the Respondents generally admit having made representations about the performance and efficacy of the products at issue.
  - 6) However, they say that the representations were based on “adequate and proper test”, in conformity with paragraph 74.01(1)(b) of the *Competition Act*.
  - 7) Accordingly, the Applicant submits that the Respondents’ alleged tests are relevant and material to the present proceedings.
  - 8) The Competition Tribunal will have to determine if these tests were “adequate and proper” in the circumstances.

### **Issues**

- 9) Although the Respondents’ Response contains a concise statement as to the grounds on which it opposes the Notice of Application, and contains some factual assertions, the Applicant submits that the Respondents have completely failed to provide the material facts relevant with respect to the alleged tests noted above.
- 10) The Applicant submits that these facts are required to be alleged in the Respondents’ Response, in order to comply with paragraph 5(3)(a) of the *Competition Tribunal Rules*.
- 11) Further, with respect to other matters, some material facts are also missing in the Response with respect to other alleged matters, as noted in the Applicant’s Notice of Motion, and should have been included in the Respondents’ Response.
- 12) Hence, the Applicant seeks by way of a request for particulars these missing and essential material facts.

### **Applicable Sections of Law**

- 13) The Applicant intends to rely on the following provisions of the *Competition Act*, the *Competition Tribunal Act*, the *Competition Tribunal Rules* and the *Federal Court Rules*, all of which are reproduced in the Book of Authorities:
- a) Paragraph 74.01(1)(b) of the *Competition Act*;
  - b) Subsection 8(2) of the *Competition Tribunal Act*;
  - c) Paragraph 5(3)(a) of the *Competition Tribunal Rules*;
  - d) Subsection 72(1) of the *Competition Tribunal Rules*;
  - e) Subrule 181(1) of the *Federal Courts Rules*; and,
  - f) Rule 183 of the *Federal Courts Rules*.

### **Submissions**

- 14) Paragraph 5(3)(a) of the *Competition Tribunal Rules* states as follows:

*(3) A person shall set out, in numbered paragraphs,*

*(a) a concise statement of the grounds on which the application is opposed and of the material facts on which the person opposing the application relies ...*

- 15) The clear purpose of paragraph 5(3)(a) is to ensure that the Applicant knows the case a Respondent intends to make to oppose an application, to avoid surprises at trial and for the proper functioning of the proceedings.
- 16) However, in the present matter and contrary to paragraph 5(3)(a), the Applicant submits that the Respondents make various allegations without providing the relevant material facts, i.e. the things and actions that have been done by people and have taken place.
- 17) In particular:
- a) At paragraphs 5, 7, 10, 12, 16 and 18 of their Response:
    - i) The Respondents allege that the representations made about the products at issue “are based on adequate and proper test”;
    - ii) However, the Respondents do not say what were these tests, who did the tests, how these tests were performed, when these tests were done, where

these tests were done and what were the results; and,

iii) Without these material facts, the Applicant cannot reply to the Respondents' allegations that the tests were "adequate and proper".

b) Same, at paragraphs 9, 14 and 20 of their Response:

i) The Respondents say that the alleged tests noted previously in their Response were "controlled tests performed by Imperial Brush under the supervision of independent engineers and consultants";

ii) The same questions noted above can be raised about the tests, i.e. what were these tests, who did the tests, how these tests were done, when these tests were done, where these tests were done and what were the results;

iii) Further, the Respondents allege that these tests were supervised by "independent" engineers and consultants, but they do not say who they were;

iv) Without these material facts about the alleged tests, the Applicant cannot reply to the Respondents' allegations that they were "adequate and proper"; and,

v) Also, the Applicant cannot reply to the Respondents' allegations that the engineers were "independent" if she is not informed about their identity.

18) The Applicant submits that the Respondents cannot simply deny any legal wrongdoing in the present matter without referring to relevant material facts in support of its defence.

*Société des produits Marnier-Lapostolle v. René Rey Swiss Chocolates Ltd. (1989), 32 F.T.R. 75, 29 C.P.R. (3d) 329 (T.D.).*

19) The Black's Law Dictionary, 7<sup>th</sup> Edition, defines a "material fact" as follows:

*A fact that is significant or essential to the issue or matter at hand.*

20) In the matter of *James Russell Baird v. Her Majesty the Queen* (2006) F.C.J. No. 287, Justice Lemieux, f.c.j., said as follows:

*[11] In other words, in my view, the Plaintiff's statement of claim is fatally flawed because he does not tell the Defendant who, when, where, how and what gives rise to the Crown's liability to him. Counsel for HMQ is correct in stating that what the Plaintiff pleads are allegations and conclusions, not the essential facts grounding his claims or causes of*

*action (see Bashi v. Canada, 2004 FC 80, a decision of the late Prothonotary Hargrave).*

21) In *Bashi v. Canada* (2004) F.C.J. No. 95, Prothonotary Hargrave said as follows:

*[6] ...Crucial to section 174 is defining a material fact. Mr. Peter Fraser, Q.C. and Master John Horn provide a consideration of the definition of a material fact, equating it to an essential fact, at pages 224 and 225 of volume 1 of The Conduct of Civil Litigation in British Columbia, Butterworth, Toronto, 1978, going on to observe that a material fact is not always easy to delineate, because it amounts to a prediction of what will be necessary to prove at trial. Certainly, on the one hand, a material fact is one that a party is obliged to plead and when in doubt should plead, but on the other hand, one can certainly recognize when a statement of claim contains no material facts, in the sense of particularized material facts, as is the situation in this instance. Here it is profitable to refer to a passage from Homalco Indian Band v. The Queen, a 13 November 1998 decision of Mr. Justice Smith, then of the B.C. Supreme Court, docket C944747:*

*[5] The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material fact, that is, those facts necessary for the purpose of formulating a complete cause of action: Troup v. McPherson (1965), 53 W.W.R. 37 (B.C.S.C.) at 39. The defendant, upon seeing the case to be met, must then respond to the plaintiff's allegations in such a way that the court will understand from the pleadings what issues of fact and law it will be called upon to decide.*

*The important points made by Mr. Justice Smith, as he then was, is that the Defendant, upon reading the statement of claim, must be able to respond in such a way that the Court will understand what the action is all about. I would go on to add that the Court could find it virtually impossible to regulate the trial of a matter that is pleaded without sufficient particulars. In the present instance the Court would find it impossible to regulate the trial or to transmute the allegations, such as they are, into remedies. As I pointed out Inmates of Mountain Prison v. The Queen (1998) 146 F.T.R. 265 at 267, such a situation constitutes an abuse of the system sufficient to strike out a statement of claim.*

*[7] Still dealing with the factual basis required to support a reasonable cause of action, Mr. Justice MacKay gave the following guidance in Kelly Lake Creen Nation v. Canada (1997) F.T.R. 9 at 18:*

[19] Nevertheless, where bare conclusions are set out without a supporting factual basis, a claim has been found not to disclose a reasonable cause of action [see footnote 14]. In this regard, I note Mr. Justice Rouleau's decision in *Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare) and Apotex Inc. et al.* (No. 2) [(1987) 11 F.T.R. 121 at 128] where he sets out the basic rules of pleading as follows:

"The rules governing pleadings establish the fundamental rule that the plaintiff is under an obligation to plead material facts that disclose a reasonable cause of action. This very basic rule of pleadings involves four separate elements: (1) every pleading must state facts and not merely conclusions of law; (2) it must include material facts; (3) it must state facts and not the evidence by which they are to be proved; and (4) it must state facts concisely in a summary form (See Odgers, *Principles of Pleading and Practice* (21<sup>st</sup> Ed.), p. 94)."

*Mr. Justice MacKay went on to observe that the pleadings in Kelly Lake did not effectively set out the material facts necessary to support the action, although a further amended statement of claim might salvage the action, which I take it would otherwise have been struck out.*

- 22) Considering the Respondents' defaults to provide all of the material facts in support of its Response, the Applicant seeks an order from this Tribunal to obtain the requested particulars.
- 23) The requested particulars will notably:
  - a) Enable the Applicant to know the full nature of the Respondents' defence in the present matter;
  - b) Prevent surprises at the hearing before the Competition Tribunal;
  - c) Facilitate the gathering of the evidence needed for the Applicant to oppose the Respondents' evidence;
  - d) Limit the issues to be tried; and,
  - e) Prevent the Respondents, without leave for the Competition Tribunal, from going into matters not pleaded in their Response.

*Gulf Canada Ltd. v. "Mary Mackin" (The)*, [1984] 1 F.C. 884 (F.C.A.)  
*Schuster v. Canada*, [2001] T.C.J. No. 453 (Tax Court of Canada)

- 24) The Applicant submits that the *Competition Tribunal* can make the requested order pursuant to section 8 of the *Competition Act*, rules 5 and 72 of the *Competition Tribunal Rules*, and pursuant to rules 181 and 183 of the *Federal Court Rules*;
- 25) The Applicant submits that the requested particulars should be filed in an Amended Response that will include, were applicable, the requested particulars found in the Applicant's Notice of Motion;
- 26) The Applicant further submits that the requested particulars should be underlined;
- 27) Finally, given the nature of this motion, the Applicant requests that the Tribunal grant an extension of the time by which she may file a Reply to the Response filed by the Respondents, to a date following the determination of this Motion, as the content of the information to which the Applicant may reply could be materially effected by the outcome of this motion.

All of which is respectfully submitted.

DATED at Ottawa, Ontario, this \_\_\_ day of December, 2006.

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