Competition Tribunal | Tribunal de la Concurrence

Reference: *Commissioner of Competition v. Gestion Lebski inc.*, 2006 Comp. Trib. 32
File no.: CT-2005/007
Registry document no.: 0079a

OFFICIAL ENGLISH TRANSLATION

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

AND IN THE MATTER OF an inquiry under subparagraph l0(1)(*b*)(ii) of the *Competition Act* relating to the marketing practices of Gestion Finance Tamalia et al;

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

BETWEEN

The Commissioner of Competition
(Applicant)

and

Gestion Lebski inc.
La Société de Financement Vanoit inc.
Maigrissimo inc.
Gestion Finance Tamalia inc.
9083-8434 Québec inc.
Sylvain Leblanc
(Respondents)

Dates of hearing: 20060501-20060505, 20060508-20060512, 20060515-20060517, 20060523-20060524
Judicial Member: Edmond Blanchard J.
Date of Order: September 8, 2006
Order signed by: Mr. Justice Edmond Blanchard

REASONS AND ORDER

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I. INTRODUCTION

[1] The Commissioner of Competition (the "Commissioner") has filed an application under section 74.01 of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act") alleging that the respondents have engaged in reviewable conduct, in that they made false or misleading representations to the public for the purpose of promoting certain products and an apparatus that were designed to help people lose weight.

[2] The Commissioner further alleges that the respondents made false or misleading representations to the public concerning the performance or efficacy of those products and apparatus, which were not based on adequate and proper tests.

[3] From March 18, 1999, to June 27, 2005 (the date on which the application was filed), the respondents marketed an apparatus and sold various products that, according to the respondents' claims, help people lose weight. The issue is whether the Commissioner's allegations concerning the promotion of the products and apparatus are founded.

A. PARTIES

[4] The applicant is the Commissioner of Competition, appointed by Governor in Council under section 7 of the Act, and is responsible for the administration and enforcement of the Act.

[5] Gestion Finance Tamalia Inc. ("Tamalia"), Maigrissimo Inc. ("Maigrissimo") (dissolved in 2003), Gestion Lebski Inc. ("Lebski"), Société de Financement Vanoit Inc. ("Vanoit") and 9083-8434 Québec Inc. ("9083-8434") (dissolved in 2000) are the respondent corporate entities. The head offices of those entities, except for 9083-8434, share the same address: 1000 Victoria, Suite 37, Saint-Lambert, Quebec.

[6] The respondent Sylvain Leblanc was or is the sole officer, director and shareholder of Maigrissimo and Lebski, as well as the sole director of Tamalia, whose sole shareholder is Lebski. Mr. Leblanc is also a respondent in his capacity as director of the companies that were dissolved before 2001: 9083-8434, Distribution Minceur Inc., Centre de santé minceur Inc., Gestion Centre de santé minceur Inc. and 9044-0413 Québec Inc.

B. CORPORATE STRUCTURE

[7] In the early 1990s, the respondent Sylvain Leblanc developed the concept of Centres de santé minceur, a chain of clinics designed to help customers lose weight and relax. The first Centre de santé minceur opened in 1994. In 1995, Mr. Leblanc franchised the first Centre de santé minceur to a customer. That was when Tamalia, of which Mr. Leblanc is the president and director, began to manage the Centres de santé minceur chain, as a franchisor.

[8] Beginning in 1998, when several Centres de santé minceur opened in the Montreal area, Maigrissimo, a company whose sole shareholder is Mr. Leblanc, acted as financial intermediary for depositing funds and paying for corporate advertising common to all franchisees, the substance of which was decided by Tamalia. Mr. Leblanc managed the corporate advertising orchestrated by Tamalia.

[9] In about 2001, Vanoit replaced Maigrissimo as financial backer. Maigrissimo continued to collect the franchisee's corporate advertising contributions, but Vanoit paid the advertising invoices and was reimbursed by Maigrissimo, receiving a commission of15 percent.

C. CONDUCT OF THE INQUIRY

[10] On April 20, 1998, a letter was sent to Mr. Leblanc informing him that some of the advertising used for selling and marketing his products included material that might be problematic under the Act. The letter was signed by Caroline Charrette, Commerce Officer at the Competition Bureau (the "Bureau"), and explained the substance of the prohibition set out in section 52 of the Act as follows:

> [TRANSLATION] I would draw your attention to paragraph 52(1)(*a*) [of the Act] which prohibits making representations to the public that are false or misleading in a material respect, and to paragraph 52(1)(*b*) which prohibits making a representation to the public in the form of a statement, warrantee 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 representations and not on the prosecution. Subsection 52(4) provides that the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect. The penalties for everyone convicted of an offence under any of the paragraphs of section 52 are set out in subsection 52(5).

[11] The letter also requested that Mr. Leblanc provide information, studies or tests supporting the information in the advertising, while pointing out that he was not legally obliged to do so:

> [TRANSLATION] No decision has yet been made in this case. Before making a decision, we would like to obtain information from CSM [Centres de santé minceur] regarding the representations made in the advertising. Accordingly, clarification would be appreciated on the following points:
>
> > What are the tests and/or studies used by CSM that show that the products sold by CSM, and specifically the Maigrissimo, Adipo, Reduxa, Globulo, Emotion Minceur, Digesto, Laxo, Nutrima and Noctoslim products and the Tonique Dépuratif, have the effects attributed to them in the advertising?
> >
> > What are the tests and/or studies used by CSM that show that the techniques used by CSM, and specifically Thermoslim, Cellotherm, Body Liner, Aérothérapie, SonoHarmonie, Électropuncture, Vibrasum, Meditherm, Dag and Laser, have the effect or effects attributed to them in the advertising?
>
> You are of course not legally obliged to submit comments regarding this complaint or to provide any information, and all information provided may be used subsequently in legal

> proceedings. However, if you wish to do so, a reply before May 15, 1998, would be appreciated. …

[12] When the Bureau began to look at the respondents' activities, section 74.01 of the Act, which allows the Commissioner to bring a civil action in respect of misleading advertising, was not yet in force. At that time, misleading commercial practices were prohibited only under the criminal provisions of the Act, and more specifically under section 52. Section 74.01 was not incorporated into the Act until 1999, as part of Bill C-20 (S.C. 1999, c. 2).

[13] In 1999, there were discussions between the Bureau and the respondents, but the respondents did not provide any study or test to support the representations made in the advertising claims.

[14] In June 2000, the Commissioner opened a formal inquiry. On October 15, 2001, in accordance with section 11 of the Act, the Commissioner obtained an order for the production of documents in the Quebec Superior Court, to compel the respondents to produce, *inter alia*, the financial statements of several of the respondent companies and specifically [TRANSLATION] "documents relating to/or studies and/or analyses by internal or external laboratories" supporting their advertising claims and to provide specific information about the products under investigation.

[15] On December 20, 2001, Mr. Justice Orville Frenette of the Quebec Superior Court allowed the application to amend the order dated October 15, 2001, and held that the respondents did not have to produce the financial statements requested because, at that stage of the inquiry, those statements were not relevant for determining whether the respondents had made false or misleading representations.

[16] The respondents complied with the other provisions of the Quebec Superior Court order dated October 15, 2001, by providing the documents requested in late 2001 and during 2002.

[17] The inquiry continued in 2002, 2003 and 2004. The last expert report was received by the Bureau in March 2004.

[18] When the inquiry was completed, the Commissioner determined that Vanoit, Sylvain Leblanc and the companies he controlled had made representations regarding the Cellotherm apparatus and the Cure de départ, Noctoslim and Nopasim products that violated the Act.

[19] On June 27, 2005, the Commissioner filed an application alleging that the respondents had engaged in various forms of conduct reviewable under paragraphs 74.01(1)(*a*) and (*b*) of the Act. The Commissioner asked the Court, under section 74.1 of the Act, to order that the respondents (i) cease making certain representations about the weight loss method; (ii) publish a corrective notice in Quebec newspapers, magazines, and infomercials and on their Web site; and (iii) pay an administrative monetary penalty.

D. PROCEEDINGS BEFORE THE TRIBUNAL

[20] On October 14, 2005, the Chairperson of the Tribunal made an order directing that the hearing would begin in Montreal on Monday, January 9, 2006.

[21] On October 28, 2005, following a conference call with the parties, the Tribunal made an order accommodating the parties' wish to postpone the hearing from January 9, 2006, to May 1, 2006, having regard to the parties' and the Tribunal's time constraints. The anticipated length of the hearing was three weeks.

[22] On February 20, 2006, the respondents filed three preliminary motions involving the following subjects:

[i] a constitutional challenge;
[ii] removing certain respondents as parties; and
[iii] a confidentiality order.

[23] On February 27, 2006, after hearing the parties, the Tribunal ordered that the motion dealing with the constitutional challenge and the motion to remove certain respondents as parties would be heard at the beginning of the hearing on the merits.

[24] On April 3, 2006, the Tribunal made a confidentiality order to protect the personal information in the customer records.

[25] The Tribunal held a hearing in Montreal from May 1 to 24, 2006, to hear the Commissioner's application.

II. APPLICATION BY THE COMMISSIONER UNDER SECTION 74.01

[26] In her application, the Commissioner alleged that between March 18, 1999, and June 27, 2005, the respondents published advertising in various media – the press, advertising brochures, television, the Internet – concerning the Cellotherm apparatus, Cure de départ and the Noctoslim and Nopasim products.

[27] The Commissioner alleged that the representations made violated two provisions of the Act: paragraphs 74.01(1)(*a*) and 74.01(1)(*b*), which read 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,	**74.01** (1) Est susceptible d'examen le comportement de quiconque donne au public, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques :
(*a*) makes a representation to the public that is	*a*) ou bien des indications fausses ou

false or misleading in a material respect;	trompeuses sur un point important;
(*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;	*b*) ou bien, sous la forme d'une déclaration ou d'une garantie visant le rendement, l'efficacité ou la durée utile d'un produit, des indications qui ne se fondent pas sur une épreuve suffisante et appropriée, dont la preuve incombe à la personne qui donne les indications;
...	...

[28] With respect to paragraph 74.01(1)(*a*), the allegedly false or misleading representations made by the respondents during the period in question fell into four categories:

1. Representations that created a false or misleading general impression relating to the Cellotherm apparatus' ability to effect targeted weight loss, to perform liposuction without surgery, to stimulate the burning of fat, and to reshape the figure;

2. Representations that created a false or misleading general impression relating to the Cure de départ's ability to bring about a three-to-nine-pounds weight loss in seven days;

3. Representations that created a false or misleading general impression relating to the capacity of Noctoslim to burn fat at night and to act as a powerful [TRANSLATION] "fat reducer"; and

4. Representations that created a false or misleading general impression relating to the capacity of Nopasim to act as a "fat reducer" that attacks surplus fat localized in the abdomen, buttocks, hips and thighs.

[29] With respect to paragraph 74.01(1)(*b*), the Commissioner alleged that, for the purpose of promoting, directly or indirectly, the use of the Cellotherm apparatus, Cure de départ and Noctoslim and Nopasim, the respondents made a number of representations to the public concerning their performance or efficacy, which representations were not based on adequate and proper tests.

III. PRELIMINARY MOTIONS

A. CONSTITUTIONAL CHALLENGE

[30] The respondents brought a motion in which they raised a constitutional challenge. In the motion, the Tribunal is asked to declare paragraphs 74.01(1)(*a*) and 74.01(1)(*b*) and section 74.1 of the Act of no force or effect as they are inconsistent with section 7 and paragraphs 11(*d*) and 2(*b*) of the *Canadian Charter of Rights and Freedoms* (the "Charter"), pursuant to subsection 52(1) of the *Constitution Act, 1982*.

[31] The respondents submit that paragraphs 74.01(1)(*a*) and 74.01(1)(*b*) are unconstitutional for the following three reasons: (a) paragraph 74.01(1)(*b*) is inconsistent with the presumption of innocence guaranteed by paragraph 11(*d*) of the Charter, in that it reverses the onus of proof by requiring the respondent to establish that there was adequate and proper testing; (b) the provisions infringe upon the respondents' rights to liberty and security and are vague and imprecise, contrary to the rights guaranteed in section 7 of the Charter; and (c) the provisions constitute an interference with the respondents' freedom of expression, contrary to paragraph 2(*b*) of the Charter.

(1) Challenge under section 11

[32] The respondents submit that the provisions concerning reviewable conduct in paragraphs 74.01(1)(*a*) and 74.01(1)(*b*) of the Act in fact create criminal offences. Accordingly, the respondents are of the view that they should be entitled to the protection offered by section 11 of the Charter, and more specifically by paragraph 11(*d*), the right to be presumed innocent.

[33] Section 11 of the Charter reads as follows:

11. Any person charged with an offence has the right	**11.** Tout inculpé a le droit :
(*a*) to be informed without unreasonable delay of the specific offence;	*a*) d'être informé sans délai anormal de l'infraction précise qu'on lui reproche;
(b) to be tried within a reasonable time;	*b*) d'être jugé dans un délai raisonnable;
(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;	*c*) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche;
(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;	*d*) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et

	équitable;
(e) not to be denied reasonable bail without just cause;	*e*) de ne pas être privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable;
(*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;	*f*) sauf s'il s'agit d'une infraction relevant de la justice militaire, de bénéficier d'un procès avec jury lorsque la peine maximale prévue pour l'infraction dont il est accusé est un emprisonnement de cinq ans ou une peine plus grave;
(*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;	*g*) de ne pas être déclaré coupable en raison d'une action ou d'une omission qui, au moment où elle est survenue, ne constituait pas une infraction d'après le droit interne du Canada ou le droit international et n'avait pas de caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations;
(*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and	*h*) d'une part de ne pas être jugé de nouveau pour une infraction dont il a été définitivement acquitté, d'autre part de ne pas être jugé ni puni de nouveau pour une infraction dont il a été définitivement déclaré coupable et puni;
(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.	*i*) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.

[34] As the introductory portion of section 11 clearly states, a person must be "charged with an offence" in order to rely on the rights protected by that section. The leading decision on the definition of the expression "charged with an offence" is *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, in which Madam Justice Wilson stated the test to apply to determine whether a person is charged with an offence within the meaning of section 11.

[35] In *Wigglesworth*, a member of the Royal Canadian Mounted Police (the "RCMP") was charged with an offence under the RCMP Code of Discipline and was also charged in respect of the same incident under the *Criminal Code*, R.S.C. 1970, c. R-9. The constable challenged the *Criminal Code* charge under paragraph 11(*h*) of the Charter, which provides that a person cannot be tried twice for the same offence. The Court first had to determine whether the constable was entitled to the protection of section 11, that is, whether the charge

under the RCMP Code of Discipline made him a “person charged with an offence” within the meaning of section 11.

[36] Although the circumstances of this case are entirely different, there are certain factors in *Wigglesworth* that apply. After reviewing a number of decisions dealing with the concept of “person charged with an offence”, Justice Wilson in her analysis first stated that the application of section 11 should be limited to truly criminal proceedings, to preserve the actual meaning of the protection provided by section 11. She wrote, at pages 554-558:

> It is my view that the narrower interpretation of s. 11 favoured by the majority of the authorities referred to above is in fact the proper interpretation of the section. The rights guaranteed by s. 11 of the *Charter* are available to persons prosecuted by the State for public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted. A number of factors impel me to this conclusion.
>
> I turn first to the text of s. 11. The Ontario Court of Appeal in *Trumbley and Pugh v. Metropolitan Toronto Police* (*sub nom. Re Trumbley and Fleming*) (1986), 55 O.R. (2d) 570, in concluding that s. 11 is concerned with only criminal or penal matters, properly observed that "the clear impression created by s. 11, read as a whole, is that it is intended to provide procedural safeguards relating to the criminal law process". Section 11 contains terms which are classically associated with criminal proceedings: "tried", "presumed innocent until proven guilty", "reasonable bail", "punishment for the offence", "acquitted of the offence" and "found guilty of the offence". Indeed, some of the rights guaranteed in s. 11 would seem to have no meaning outside the criminal or quasi-criminal context. As Hugessen A.C.J.S.C. stated in *Belhumeur v. Discipline Committee of Quebec Bar Association*, *supra*, at p. 281, s. 11 [TRANSLATION] "is directed exclusively at procedure in criminal and penal matters". This same observation was made by Stevenson J.A. in *Re Barry and Alberta Securities Commission* (1986), 25 D.L.R. (4th) 730 (Alta. C.A.), at p. 734, and by Monnin C.J. in *Re Law Society of Manitoba and Savino*, *supra*, at p. 292.
>
> ...
>
> Another factor which leads me to adopt a somewhat narrow definition of the opening words of s. 11 is a concern for the future coherent development of the section if it is made applicable to a wide variety of proceedings. Unless the section is restricted to criminal or penal matters there may be serious difficulty in giving the section a reasonably consistent application. The particular content of the various rights set out in s. 11 may well vary according to the type of proceeding if a broader definition is given to the opening words of the section. It is beyond question that those rights are accorded to those charged with criminal offences, to those who face the prosecutorial power of the State and who may well suffer a deprivation of liberty as a result of the exercise of that power. The content of those rights ought not to suffer from a lack of predictability or a lack of clarity because of a universal application of the section. As is obvious from a study of the various rights enumerated in the section, they are crucial fundamental rights whose meaning ought to be made crystal clear to the authorities who prosecute the offences falling within the section. For this reason it is, in my view, preferable to restrict s. 11 to the most serious offences known to our law, i.e., criminal and penal matters and to leave other "offences" subject to the more flexible criteria of "fundamental justice" in s. 7.

[37] Madam Justice McLachlin, as she then was, confirmed the need for the section to be applied narrowly in *R. v. Shubley*, [1990] 1 S.C.R. 3, a case dealing with a disciplinary offence in a penitentiary. At page 23, Justice McLachlin wrote:

> I share the concern expressed by Wilson J. in *R. v. Wigglesworth* about an overbroad application of s. 11. I agree with her conclusion (at p. 558) that "it is preferable to restrict s. 11 to the most serious offences known to our law, i.e., criminal and penal matters and to leave other 'offences' subject to the more flexible criteria of 'fundamental justice' in s. 7."

[38] In *Wigglesworth*, Justice Wilson set out a two-pronged test for determining whether a person is a "person charged with an offence" within the meaning of section 11. First, is the offence criminal in nature? Second, does the offence have true penal consequences? If either question is answered in the affirmative, then section 11 applies. That approach has been adopted by the Supreme Court of Canada in cases following that decision, and in particular in *Shubley*, *supra*; *Martineau v. Canada (M.N.R.)*, [2004] 3 S.C.R. 737; and *R. v. Rodgers*, 2006 SCC 15.

(a) Offence is criminal in nature

[39] In *Wigglesworth*, at page 559, Justice Wilson defined which criminal offences would engage the protection guaranteed by section 11, by contrasting them with offences that would not:

> In my view, if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity: see, for example, *Re Law Society of Manitoba and Savino*, *supra*, at p. 292, *Re Malartic Hygrade Gold Mines (Canada) Ltd. and Ontario Securities Commission* (1986), 54 O.R. (2d) 544 (H.C.), at p. 549, and *Re Barry and Alberta Securities Commission*, *supra*, at p. 736, *per* Stevenson J.A. There is also a fundamental distinction between proceedings undertaken to promote public order and welfare within a public sphere of activity and proceedings undertaken to determine fitness to obtain or maintain a licence. Where disqualifications are imposed as part of a scheme for regulating an activity in order to protect the public, disqualification proceedings are not the sort of "offence" proceedings to which s. 11 is applicable. Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s. 11 is applicable. <u>But all prosecutions for criminal offences under the *Criminal Code* and for quasi-criminal offences under provincial legislation are automatically subject to s. 11. They are the very kind of offences to which s. 11 was intended to apply.</u> [Emphasis added]

[40] Justice Wilson cited examples of cases intended "to regulate conduct within a limited private sphere of activity", and specifically two decisions relating to securities commissions: *Re Barry* and *Re Malartic Hygrade Gold Mines*. In those two cases, a company was charged with violating a provision of the *Securities Act*. The penalty in both cases was a loss of Stock Exchange privileges. The companies argued that they were entitled to the protection of section 11. In both cases, the judges refused to recognize such a right, on the ground that the law that imposed the penalty was not penal, but rather was intended to regulate conduct in order to protect the public. The penalties contemplated were in fact intended to prevent companies from engaging in conduct that could be harmful to the public; they were not punitive.

[41] In *Martineau*, *supra*, Mr. Justice Fish further explained how to determine whether a case is criminal in nature. At paragraph 24, he said that the case must be reviewed in light of the following criteria: (a) the objectives of the Act and the provisions in question; (b) the purpose of the sanction; and (c) the process leading to imposition of the sanction.

[42] *Martineau* dealt with a notice of ascertained forfeiture under section 124 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.). Speaking for the Court, Justice Fish concluded that the proceeding was a civil collection mechanism and not a criminal proceeding. He then stated the opinion that the purpose of the notice of ascertained forfeiture was to provide a timely and effective means of enforcing the *Customs Act* and to produce a deterrent effect, but not to punish the offender. Justice Fish further said that the notice of ascertained forfeiture procedure involved a four-step administrative process that has nothing to do with a criminal proceeding. On that point, he said, at paragraph 45 of his decision:

> This process thus has little in common with penal proceedings. No one is charged in the context of an ascertained forfeiture. No information is laid against anyone. No one is arrested. No one is summoned to appear before a court of criminal jurisdiction. No criminal record will result from the proceedings. At worst, once the administrative proceeding is complete and all appeals are exhausted, if the notice of ascertained forfeiture is upheld and the person liable to pay still refuses to do so, he or she risks being forced to pay by way of a civil action.

Justice Fish accordingly concluded that the proceeding was not criminal in nature.

[43] The respondents argued a number of factors that, in their submission, create a distinction between the proceeding that was challenged in *Martineau* and the proceeding in this case, and concluded that paragraphs 74.01(1)(*a*) and (*b*) and subsection 74.1(1) of the Act constitute an offence that is criminal in nature. I will briefly summarize my understanding of the respondents' arguments.

[44] First, the respondents submit that unlike the facts in *Martineau*, in which the purpose of the impugned provision was to facilitate the collection of duty and taxes on imported goods, the objective of paragraphs 74.01(1)(*a*) and (*b*) and subsection 74.1(1) of the Act is to regulate a matter that is public in nature: advertising.

[45] Second, the respondents argue that while it was held in *Martineau* that the notice of ascertained forfeiture did not seem to be a sanction intended to redress a wrong done to society, the opposite is true for 74.1 of the Act. Corrective notices ordered under paragraph 74.1(*b*) and administrative monetary penalties under paragraph 74.1(*b*) are clearly, in the respondents' submission, imposed in order to redress a wrong done to society in general, rather than to maintain discipline in a limited sphere of activity.

[46] Third, the respondents argue that unlike the process in *Martineau*, the process in this case is essentially judicial and not administrative. They pointed, in particular, to the fact that a "court" (defined in section 74.09 of the Act as the Competition Tribunal, the Federal Court or the superior court of a province) is responsible for determining whether a person has engaged in reviewable conduct under section 74.01 and for imposing a penalty under section 74.1.

[47] Having regard to all these factors, the respondents are of the view that the proceeding in this case is criminal in nature and therefore meets the first component of the test in *Wigglesworth*.

[48] While I agree with the respondents that it is possible to distinguish the proceeding in *Martineau* from the proceeding in this case, that is not sufficient, in my view, to find that paragraphs 74.01(1)(*a*) and (*b*) are criminal in nature. I agree that the conduct for which the impugned provisions impose penalties is public in nature and that the proceeding is public.

[49] However, in my view, the public nature of the proceeding still does not make the respondents persons charged with an offence within the meaning of section 11 of the Charter. If we consider the rights protected by section 11, we see that a number of the concepts that make up that section do not apply in this case: bail, trial by jury, acquittal, self-incrimination.

[50] If we apply the factors listed by Justice Fish in *Martineau*, the objective of the Act and the provisions in question, the purpose of the sanction, and the process that leads to the imposition of the sanction, we find that they indicate, in this case, that the proceeding is civil rather than criminal in nature.

[51] The provisions set out in Part VII.1 of the Act, Deceptive Marketing Practices, are not intended for punishing people for harm caused to society in general; rather, as Justice Wilson put it in *Wigglesworth*, they are for "the protection of the public in accordance with the policy of a statute". In this case, they are for the protection of the public against the adverse consequences of deceptive advertising and fraudulent commercial practices.

[52] In fact, Parliament's stated intention in enacting Part VII.1 was to establish a civil regime. Part VII.1 was introduced by Bill C-20. When the then Minister of Industry, the Hon. John Manley, introduced the bill in the House of Commons at second reading, he made it plain that Parliament's intention was to establish a civil regime to address violations relating to deceptive marketing practices:

> The changes before us will create a combination criminal-civil regime to address misleading advertising and deceptive marketing practices. They will foster quick and efficient compliance through a series of measures that allow a great deal of flexibility. This flexibility will enable the competitive [sic] bureau to tailor its approach and use the tools that are most effective for each different situation. Criminal sanctions will remain in place but only for the most serious cases of misleading advertising.
>
> Most existing misleading advertising and deceptive marketing offences will fall under the less cumbersome provisions of the civil law as reviewable matters. Remedial orders could be granted by a judicial member of the competition tribunal, by the Federal Court of Canada or by a provincial superior court.
>
> Remedies available to the court would include cease and desist orders, interim cease and desist orders, administrative monetary penalties, information notices and consent orders. (House of Commons Debates, Edited Hansard, No. 74, March 16, 1998)

[53] Here the proceeding does not give rise to a charge being laid and cannot not lead to a criminal conviction or a criminal record. The proceeding is civil in nature, and the Tribunal must decide the issues before it on a balance of probabilities.

[54] The objective of the sanctions provided for in Part VII.1 is the protection of the public, not punishment. The first sanction consists of a cease and desist order, and the second is publication of a corrective notice. The third does involve a monetary penalty, but subsection 74.1(4) of the Act specifically provides that it "shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment". As well, the administrative monetary penalty creates a debt that may be collected, as may any debt, in a civil court.

[55] After examining the impugned provisions, I find that the procedure that results from the provisions of paragraphs 74.01(1)(*a*) and (*b*) is civil in nature and cannot trigger the application of section 11 of the Charter. The precision with which the Act applies, and the narrow framing of the sanctions provided for, show that the Act operates within a limited sphere of activity. The provisions concerning deceptive commercial practices where there is no *mens rea* are meant solely to protect consumers and to regulate vendors' conduct accordingly.

(b) True penal consequences

[56] Under the second component of the test set out in *Wigglesworth*, the Tribunal must determine whether the sanctions imposed under section 74.1, in cases of reviewable conduct within the meaning of paragraph 74.01(1)(*a*) or (*b*), constitute "true penal consequences". If so, section 11 applies.

[57] Justice Wilson considered the question of what distinguishes a penal consequence from a sanction of an administrative nature, and concluded as follows:

> … a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity..

[58] As I said earlier, under subsection 74.1(1) of the Act the Tribunal may order the respondents to cease engaging in the conduct in question, publish a corrective notice or pay an administrative monetary penalty. The maximum amount of that penalty is $50,000 for an individual and $100,000 for a corporation in the case of a first order; the amounts rise to $100,000 and $200,000, respectively, for a subsequent order.

[59] The respondents submit that these sanctions are penal in nature, rather than administrative. In support of that position, they cite the duration of the prohibition order made under subsection 74.1(2) – ten years, unless the Tribunal specifies a shorter period. In the respondents' submissions, the corrective notices result in public stigmatization and may ruin the company or the reputation of an individual or a company, particularly if the

individual or company is well known. As well, it is expensive to publish a corrective notice. The respondents further submit that the administrative monetary penalties are penal in nature because they are substantial amounts of money, and are determined by the Tribunal based on aggravating or mitigating factors, and not by a simple mathematical calculation. For all those reasons, the sanctions provided constitute true penal consequences.

[60] In my opinion, that argument cannot stand. First, unlike the facts in *Wigglesworth*, imprisonment is not one of the sanctions contemplated. Second, Parliament clearly states in subsection 74.1(4) that the corrective notices and administrative monetary penalties are imposed not to punish but to promote compliance with the Act:

74.1 (4) The terms of an order made against a person under paragraph (1)(*b*) or (*c*) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.	**74.1** (4) Les conditions de l'ordonnance rendue en vertu des alinéas (1)*b*) ou *c*) sont fixées de façon à encourager le contrevenant à adopter un comportement compatible avec les objectifs de la présente partie et non à le punir.

[61] With respect to the order to cease engaging in conduct that violates paragraph 74.01(1)(*a*) or (*b*), I am of the opinion that such an order is not penal in nature. An order intended to prohibit that conduct is not, in my view, punitive. Rather, its purpose is to prevent the conduct and deter businesses and businesspeople from using practices that are contrary to the objectives of the Act.

[62] I am of the opinion that an order to publish a corrective notice is not a true penal consequence. I note that in fact the consequences alleged to result from publication of such a notice, in terms of public stigmatization, reputation or profits, were not proved. I cannot conclude, based on these factors, that there is a penal consequence, since there is no evidence to show this.

[63] The final point, in relation to administrative monetary penalties, is that the amounts are not so large that they may be regarded as true penal consequences. The Act prescribes a maximum amount that the Tribunal may not exceed, but it may reduce that amount based on the factors that it considers under subsection 74.1(5). Once again, the objective stated by Parliament should not be forgotten: to promote a conduct, and not to punish the offender.

[64] In the tax law context, numerous courts have ruled with respect to the monetary penalties imposed in an administrative proceeding, and have stated the opinion that notwithstanding the sometimes substantial amounts of the penalties imposed, such sanctions are not criminal fines. They are essentially administrative sanctions, the amounts of which are limited by law, and which are intended to secure compliance with the provisions of tax laws and not to redress a general harm caused to society. In *Lavers v. British Columbia (Minister of Finance)* (1989), 90 DTC 6017, the British Columbia Court of Appeal explained the distinction between a "civil" sanction and a "criminal" sentence for acts that

differ in their degree of seriousness. Mr. Justice Wallace, writing for the majority, stated, at page 6020:

> In my view, the distinction in the severity of the respective penalties indicates that Parliament intended that the imposition of the statutory penalty following assessments by the Minister would reflect a sufficiently significant monetary punishment to deter taxpayers from failing to comply with the Income Tax Acts and would thereby achieve the objective of this administrative procedure. It is also an incentive to diligence for those who might be grossly negligent but not truly criminal. On the other hand, the severity of the public sentence which could be imposed following a conviction under s. 239 clearly points to Parliament's intention to provide a punishment designed to redress a public wrong. I do not consider this distinction in the nature and purpose of the two punishments to be diminished by the fact that all fines end up in the consolidated revenue fund, via the Receiver General of Canada. In the circumstances this is the only appropriate office to which such payments could be made. In summary, therefore, the penalty assessment, while not trivial, is not so severe as to amount to a "true penal consequence".

[65] In this case, I agree that the monetary penalties are not insignificant, but I am of the opinion that the maximum amounts are not so large that we can describe them as a true penal consequence.

[66] In *Petroleum Products Act (P.E.I.) (Re)*, [1986] P.E.I.J. No. 118, 33 D.L.R. (4th) 680, the Prince Edward Island Court of Appeal held that the provisions of the *Petroleum Products Act* did not create a criminal offence, notwithstanding the fact that a monetary penalty could be imposed. One of the facts relied on by the Court was that the penalty was to be collected in the usual way for collection of a civil debt.

[67] In that regard, sections 74.15 and 66 of the Act should be noted; they provide as follows:

74.15 The amount of an administrative monetary penalty imposed on a person under paragraph 74.1(1)(*c*) is a debt due to Her Majesty in right of Canada and may be recovered as such from that person in a court of competent jurisdiction.	**74.15** Les sanctions administratives pécuniaires imposées au titre de l'alinéa 74.1(1)*c*) constituent des créances de Sa Majesté du chef du Canada, dont le recouvrement peut être poursuivi à ce titre devant tout tribunal compétent.
66. Every person who contravenes an order made under Part VII.1, except paragraph 74.1(1)(*c*), or under Part VIII is guilty of an offence and liable	**66.** Quiconque contrevient à une ordonnance rendue en vertu de la partie VII.1, sauf l'alinea 74.1(1)*c*), ou de la partie VIII commet une infraction et encourt, sur déclaration de culpabilité :
(*a*) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years, or	*a*) par mise en accusation, l'amende que le tribunal estime indiquée et un emprisonnement maximal de cinq ans, ou l'une de

to both; or	ces peines;
(*b*) on summary conviction, to a fine not exceeding $25,000 or to imprisonment for a term not exceeding one year, or to both.	*b*) par procédure sommaire, une amende maximale de 25 000 $ et un emprisonnement maximal d'un an, ou l'une de ces peines. [Emphasis mine]

[68] In other words, as in the *Petroleum Products Act*, the administrative monetary penalty creates a debt recoverable through civil proceedings, and failure to comply with an order to pay the administrative monetary penalty cannot result in a criminal prosecution, unlike any other order made by the Tribunal under Part VII.1 or Part VIII of the Act.

[69] I am therefore of the opinion that the administrative monetary penalty may not be considered to be a true penal consequence.

[70] Having determined that paragraphs 74.01(1)(*a*) and (*b*) are not criminal proceedings and that the sanctions provided for in subsection 74.1(1) are not true penal consequences, I find that a person against whom the Commissioner initiates a proceeding under paragraphs 74.01(1)(*a*) and (*b*) is not a person "charged with an offence" within the meaning of section 11, and accordingly that the respondents may not rely on section 11 of the Charter to challenge the constitutionality of paragraphs 74.01(1)(*a*) and (*b*).

(2) Challenge under section 7

[71] The respondents also rely on section 7 of the Charter, which reads as follows:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[72] The cases decided by the Supreme Court of Canada under section 7 of the Charter provide for a two-stage analysis: first, has there been an infringement of the right to life, liberty or security of the person; and second, is that infringement consistent with the principles of fundamental justice?

[73] In this case there is no threat to life or liberty. The respondents submit that there is a threat to security, since the negative publicity arising out of the allegations made against them create a real risk that Mr. Leblanc will be assaulted or have his home vandalized. The respondents also argue that Mr. Leblanc could suffer stigmatization because it is alleged that he deceived his customers. The respondents claim, lastly, that paragraphs 74.01(1)(*a*) and (*b*) are void and of no effect because they are vague and imprecise and thus contrary to the principles of fundamental justice.

[74] The respondents' submissions are limited. The allegations regarding the threat to Mr. Leblanc's security are entirely speculative. No evidence was adduced to support those assertions, nor was any evidence adduced regarding the stigmatization effect, which, according to the Supreme Court of Canada, generally attaches to criminal convictions (see *Reference re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] 2 S.C.R. 486). I find that the risk to Mr. Leblanc's security is too speculative for section 7 to be triggered.

[75] It is therefore pointless to consider the second stage of the section 7 analysis, which is whether the infringement is in accordance with the principles of fundamental justice. The Tribunal therefore need not consider whether the provisions in question are vague. While the Supreme Court of Canada has recognized that vagueness in legislation may be contrary to the principles of fundamental justice, there must nevertheless be a threat to the rights guaranteed by section 7 – life, liberty and security of the person (see *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606). Since the respondents have not established an infringement of any of those rights, there is no need to consider whether the provisions are vague.

[76] I therefore find that the respondents have not established an infringement of section 7 of the Charter.

(3) Challenge under section 2

[77] The respondents submit that paragraphs 74.01(1)(*a*) and 74.01(1)(*b*) infringe their right to freedom of expression, which is guaranteed by paragraph 2(*b*) of the Charter, which reads as follows:

2. Everyone has the following fundamental freedoms: … (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; …	**2.** Chacun a les libertés fondamentales suivantes : … *b*) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication; …

[78] The Commissioner argues, in her memorandum, that paragraphs 74.01(1)(*a*) and 74.01(1)(*b*) of the Act do not infringe the respondents' freedom of expression, and if they do, that the infringement is justified under section 1 of the Charter.

[79] Section 1 of the Charter provides as follows:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be	**1.** La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des

demonstrably justified in a free and democratic society.	limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

[80] A court hearing a constitutional challenge under paragraph 2(b) of the Charter must first determine whether the applicant has established a *prima facie* infringement of his or her rights. If so, the court must then decide whether the person claiming justification under section 1 of the Charter, in this instance the Commissioner, has in fact succeeded in justifying the infringement.

[81] In his reply, counsel for the respondents conceded that the false and misleading representations proscribed by paragraph 74.01(1)(*a*) of the Act do not merit Charter protection:

> She [counsel for the Commissioner] said false advertising doesn't merit constitutional protection. We agree with that, but with respect to Article (b) [74.01(1)(*b*)], that, as I've said, is not about false advertising; it is about untested or insufficiently tested claims, which may be entirely true. [Transcript p. 167]

[82] The respondents are therefore challenging paragraph 74.01(1)(*b*), where an infringement of the freedom of expression cannot, they submit, be justified under section 1. The provision deals with representations that are not based on an adequate and proper test, but in respect of which a defence of truth cannot be asserted.

[83] In the respondents' submission, their freedom of expression has been infringed because the Act imposes an excessive burden on anyone who makes representations concerning the performance of a product. The Act provides sanctions for the conduct unless there is evidence of an adequate and proper test. A representation, even if it were true, may be sanctioned if the businessperson is unable to demonstrate to the Tribunal that there was adequate testing - even if he or she is honestly convinced of the product's effectiveness.

[84] The constitutionality of the provisions regarding false or misleading representations was addressed in depth in *Commissioner of Competition v. Sears Canada Inc.*, 2005 Comp. Trib. 2, [2005] D.T.C.C. No. 1. In that case, Sears was challenging the provisions of the Act concerning false and misleading representations in a material respect in relation to the regular selling price, under section 2(*b*) of the Charter.

[85] Madam Justice Dawson, writing for the Tribunal, held that the infringement of freedom of expression, which was conceded by the Commissioner, was justified under section 1 of the Charter. The provision was sufficiently clear to be a limit "prescribed by law", that is, "an adequate basis for legal debate" within the meaning of *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606.

[86] Justice Dawson then applied the tests in *R. v. Oakes*, [1986] 1 S.C.R. 103, to which I will return later, to determine whether the impugned measure related to concerns that were pressing and substantial, and whether it was proportionate to its objective. In that analysis, Justice Dawson relied on, *inter alia*, the testimony of an expert witness called by the

Commissioner to find that there was a rational connection between the measure and the objective contemplated by the legislature, that the impairment was minimal and that the benefits of the measure outweighed the harm caused to the respondent by the statutory provision.

[87] I adopt the position taken by Justice Dawson in *Sears* with respect to the justification for paragraph 74.01(1)(*a*), the wording of which is similar to the wording of the provision challenged in *Sears*, particularly since the point seems to have been conceded by the respondents. My comments here will therefore be limited to the infringement of the respondents' freedom of expression by reason of the wording of paragraph 74.01(1)(*b*) of the Act.

[88] There is no doubt that commercial speech is a form of expression protected by paragraph 2(*b*) of the Charter, as the Supreme Court of Canada held in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at page 978, where the Court sets out the two stages of the analysis of an alleged infringement under paragraph 2(*b*):

> When faced with an alleged violation of the guarantee of freedom of expression, the first step in the analysis is to determine whether the plaintiff's activity falls within the sphere of conduct protected by the guarantee. Activity which (1) does not convey or attempt to convey a meaning, and thus has no content of expression or (2) which conveys a meaning but through a violent form of expression, is not within the protected sphere of conduct. If the activity falls within the protected sphere of conduct, the second step in the analysis is to determine whether the purpose or effect of the government action in issue was to restrict freedom of expression. If the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee…

[89] In this case, it is clear that the activity contemplated by the Commissioner's action is the respondents' advertising. In my view, the advertising in question, in both form and content, falls within the category of activities protected by paragraph 2(*b*) of the Charter. The Supreme Court has in fact confirmed that commercial speech is protected, in decisions following *Irwin Toy*: see, *inter alia*, *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 and *R.J.R. MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199. With respect to the second stage of the analysis, it also seems clear to me that the purpose and effect of paragraph 74.01(1)(*b*) of the Act are to limit the respondents' advertising activities. The paragraph penalizes conduct, and imposes an obligation to justify it, for representations that may not be misleading.

[90] I therefore find that the respondents have met their burden of proving that paragraph 74.01(1)(*b*) is a *prima facie* interference with their freedom of expression, which is protected by paragraph 2(*b*) of the Charter. The Commissioner therefore has the burden of persuading the Tribunal, on a balance of probabilities, that justification for that interference can be demonstrated in a free and democratic society, in accordance with section 1 of the Charter.

[91] In order to be justified under section 1, the restriction on freedom of expression must first be "prescribed by law", that is, "give sufficient guidance for legal debate": *R. v. Nova Scotia Pharmaceutical Society*, *supra*. In this case, I am of the opinion that the provision has sufficient precision to be "prescribed by law" within the meaning of section 1.

[92] Second, the restriction must meet the test first set out by the Supreme Court of Canada in *Oakes*, *supra*. In that decision, the Court set out two fundamental tests: the objective of the measures restricting the right must be important, and the measures must be proportional:

> 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 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. … 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.
>
> 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". (*Oakes*, pp. 138-139) [Emphasis added]

[93] In her memorandum, the Commissioner offered no argument on the *Oakes* test. She merely stated that the provisions at issue satisfy the "pressing and substantial concerns" requirement as well as the three components of the proportionality test. At the hearing, in reply to the respondents' assertion that the Commissioner had presented no argument to justify the impairment of freedom of expression, counsel for the Commissioner stated:

> [TRANSLATION] [Counsel for the respondents] tells us that the applicant has not asserted any justification under section 1 for sections 74 *et seq.* undoubtedly because there is none. Our reply to that is: given that we do not believe that these are anything other than administrative monetary penalties, we did not have to take the Tribunal into the realm of justified violations under the Charter.
>
> Given that we do not believe that this is something other than administrative penalties that are – that mirror those in other legislation, we believe that much of the argument made before you today is, if not moot, at least very, very remote from the main point of the case that is before you today.
>
> Our colleagues and ourselves have often cited the same decisions. We have cited *Wigglesworth*. We have cited *Martineau*, we cite *Irwin Toy*. I did not reiterate *Oakes*,

> because I know that these decisions are so well known and that the Court knows them so well that because of what I have just said, I do not think that the *Oakes* test should be argued by us today. (Transcript pp. 108-109)

[94] In addition to the fact that the Commissioner did not make further argument to support her position that paragraph 74.01(1)(*b*) is justified under section 1 of the Charter, the Commissioner also did not offer the slightest evidence to support her position. I note that the Tribunal may be entitled to take judicial notice of certain facts in order to determine whether the infringement was justified. In *Oakes*, at page 138, Chief Justice Dickson wrote that while evidence is generally needed to justify an infringement under section 1, "…there may be cases where certain elements of the s. 1 analysis are obvious or self-evident". The Supreme Court reiterated that opinion in *R. v. Edwards Books and Art*, [1986] 2 S.C.R. 713 at pages 769-770, where the Court said that it may make findings of fact where the fact is "self-evident".

[95] At the hearing, counsel for the Commissioner referred to the decision of the Supreme Court of Canada in *R. v. Lucas*, [1998] 1 R.S.C. 439, in support of her argument that there is no right to make false representations under paragraph 2(*b*) of the Charter. In my opinion, that decision does not support the Commissioner's position. That case involved a criminal prosecution for defamatory libel. The Crown had proved that the accused knew or should have known that the statements made in public regarding a police officer were false. While paragraph 74.01(1)(*b*) does not prohibit false or misleading representations, I note that the Supreme Court of Canada in *Lucas* determined that the impugned provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, were an infringement of the accused's freedom of expression but that the infringement was justified under section 1 of the Charter. In its decision, the Supreme Court held that the *Criminal Code* provision on defamatory libel was a minimal impairment, because the Crown must prove beyond a reasonable doubt that the person charged with libel knew that his or her statements were false. In the case before us, the onus is reversed: the respondent must prove that there was an adequate test, and the truth of the respondent's statements is no defence. In the absence of any other evidence of justification on the part of the government, I am unable to determine that the obligation placed on the respondent does not go beyond minimal impairment.

[96] I agree with the respondents that the *Sears* decision can be distinguished from this case. Unlike the circumstances in this case, the Commissioner in *Sears* had conceded that subsection 74.01(3) of the Act (false and misleading representations regarding ordinary price) was an infringement of Sears' freedom of expression. In that case, Justice Dawson heard lengthy evidence on the question of the justification for the infringement, including the testimony of a marketing expert. After consideration of the reasons stated by Justice Dawson, who determined that the infringement was justified under section 1, I am of the opinion that I cannot simply adopt the evidence that was before Justice Dawson, for the purpose of this judgment, and conclude that paragraph 74.01(1)(*b*) is justifiable. The issue in *Sears* related to false and misleading representations. Here, the impugned provision relates to the respondent's obligation to provide evidence of adequate tests, regardless of the truth of the representations.

[97] In this case, there is insufficient evidence to establish justification for the infringement caused by paragraph 74.01(1)(*b*) of the Act. Accordingly, the Tribunal has no evidence as to the proportionality of the infringement. While I am prepared to accept that there is an objective involving "pressing and substantial concerns" underlying paragraph 74.01(1)(*b*), namely consumer protection, I cannot conclude that the measure meets the proportionality test set out in *Oakes*. To justify the impugned measure, it must be established that there is a rational connection between that measure and the government's objective, and that the measure constitutes minimal impairment. I have no evidence on which I could find that paragraph 74.01(1)(*b*) constitutes minimal impairment, when the provision penalizes representations that could be true, on the ground that they are not based on an adequate and proper test.

[98] I note that the Commissioner presented no evidence to justify the infringement of the respondents' freedom of expression, and in the absence of any evidence to that effect, I cannot find that the infringement can be justified in a free and democratic society. I therefore find that paragraph 74.01(1)(*b*) restricts the respondents' freedom of expression, as guaranteed in paragraph 2(*b*) of the Charter, and that this infringement is not justified under section 1 of the Charter.

[99] Section 52 of the *Constitution Act, 1982* provides that any law that is inconsistent with the Charter is of no force and effect.

52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. …	**52.** (1) La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit. …

[100] In *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, the Supreme Court of Canada confirmed that an administrative tribunal has the power to find that a law is unconstitutional, if the tribunal's enabling statute allows it to decide questions of law, as is the case here (see the *Competition Tribunal Act*, R.S. 1985, c. 19 (2nd Supp.), sections 8, 11 and 12). However, in paragraph 31 of *Martin*, the Supreme Court held that a declaration of invalidity made by an administrative tribunal is of limited effect:

> 31 ... In addition, the constitutional remedies available to administrative tribunals are limited and do not include general declarations of invalidity. A determination by a tribunal that a provision of its enabling statute is invalid pursuant to the *Charter* is not binding on future decision makers, within or outside the tribunal's administrative scheme. Only by obtaining a formal declaration of invalidity by a court can a litigant establish the general invalidity of a legislative provision for all future cases. Therefore, allowing administrative tribunals to decide *Charter* issues does not undermine the role of the courts as final arbiters of constitutionality in Canada.

[101] Based on my reading of *Martin*, I am of the opinion that the Tribunal may find paragraph 74.01(1)(*b*) is an infringement of the respondents' freedom of expression which

has not been demonstrated to be justified under section 1 of the Charter. Accordingly, the law in question is of no force or effect, under section 52 of the *Constitution Act, 1982*. That finding applies only to this case. It may be that in a different case the Commissioner would be able to demonstrate that paragraph 74.01(1)(*b*) is justifiable in a free and democratic society.

[102] Accordingly, for the purposes of this decision, I allow the respondents' motion in part, and I find that the Commissioner's allegations against the respondents under paragraph 74.01(1)(*b*), which is of no force and effect pursuant to section 52, cannot stand.

(4) Conclusion on the constitutional challenge

[103] The Tribunal grants the motion under paragraph 2(*b*) of the Charter. The Tribunal dismisses the motions under sections 7 and 11 of the Charter.

[104] Paragraphs 74.01(1)(*a*) and 74.01(1)(*b*) and section 74.1 of the Act apply in administrative and regulatory proceedings, in order to ensure compliance with the Act, and not to secure a criminal conviction. Accordingly, the respondents cannot challenge the application under section 11 of the Charter.

[105] Section 7 of the Charter is not in issue because it has not been shown that there is any threat to the right to life, liberty and security of the person guaranteed by that section.

[106] Paragraph 74.01(1)(*b*) infringes the freedom of expression guaranteed by subsection 2(*b*) of the Charter, and it has not been shown that the infringement is justified under section 1 of the Charter. Accordingly, for the purposes of this decision, paragraph 74.01(1)(*b*) is held to be of no force and effect.

B. MOTION FOR REMOVAL OF PARTIES

[107] The respondents have moved to have the following respondents removed: Lebski, Vanoit, Maigrissimo, 9083-8434 and Sylvain Leblanc in his personal capacity and his capacity as director of Distribution Minceur Inc., Centres de santé minceur Inc., Gestion Centre de Santé Minceur Inc., 9044-0413 Québec Inc. and Maigrissimo.

[108] The respondents argued that only Tamalia, the franchisor of Centres de santé minceur, should be a respondent in this case.

[109] I determined that the motion was premature, because evidence of the role played by each of the respondents could only be adduced at the hearing. I therefore dismissed the motion. I will come back to the question of the liability of the respondents in this case later.

IV. ANALYSIS OF THE APPLICATION

[110] Having regard to the decision on the constitutional challenge finding that paragraph 74.01(1)(*b*) is of no force and effect for the purposes of this decision, the analysis will deal only with the Commissioner's application under paragraph 74.01(1)(*a*) of the Act.

A. EVIDENCE

(1) Advertising

[111] Advertising for the Centres de santé minceur products and apparatus was effected through national or corporate advertising or local advertising. In this case, the Commissioner's application relates only to the corporate advertising.

[112] During the period covered by the application, and more specifically from 1999 to 2003, Centres de santé minceur flooded Quebec with repetitive, wide-scale advertising of their products and apparatus. The Commissioner and the respondents submitted, for information purposes, many examples of advertising representative of the advertisements that were running during the period covered by the notice of application. The examples included audiovisual materials and a sample of print advertising, consisting of about 100 pages selected from several hundred pages of advertising compiled by the Commissioner.

[113] The corporate advertising was effected in various ways: print media, Internet and television. The respondents used major large-circulation daily newspapers such as the *Journal de Montréal* and the *Journal de Québec*, as well as popular weekly publications (*Le Lundi*, *Sept Jours*, *Dernière Heure*). Sometimes, advertising materials in the form of brochures or the *Santé Minceur* magazine were inserted in magazines like *Clin d'œil* or *Femme Plus* or delivered to homes in flyer bags.

[114] I note that according to the evidence before the Tribunal, the weekly circulation of *Le Lundi* and *Dernière Heure* exceeds 500,000, while *Sept Jours* has a circulation of 982,000. The evidence also shows that the magazines *Clin d'œil* and *Femme Plus* sell 238,000 and 178,000 copies, respectively.

[115] As well, Centres de santé minceur had an Internet site where they offered their products and services. Television advertising took the form of infomercials broadcast on TQS or TVA, 15- to 30-second commercials and sponsoring programs by using "billboards" showing the company's logo on the screen when the program sponsored was broadcast.

[116] According to the evidence, there were very extensive television advertising campaigns between 1999 and 2001. Advertising for Centres de santé minceur was broadcast on TVA, TQS, Radio Canada, Canal Évasion and a number of other television stations during prime time. The Centres sponsored popular programs like *Diva* that were watched by over a million viewers.

[117] From about 1999 to 2002, Centres de santé minceur invested heavily in advertising throughout Quebec. In the advertising Co-op's first year of existence, i.e. between 1998 and 1999, there was a $300,000 advertising budget. In 2000-2001 this budget doubled, to about $600,000, and by 2001 had reached $2.5 million. From 2002 to 2003 the money allocated to corporate advertising gradually decreased to below $1.5 million.

[118] The final corporate advertising campaign took place in 2003, the year in which Vanoit experienced serious financial difficulties. The respondents did little advertising in 2004, 2005 and 2006. In June 2006, the Internet site ceased operating and the few centres that were still opened closed down.

[119] The corporate advertising was orchestrated by the franchisor, Tamalia. Mr. Leblanc, in his capacity as sole director, managed the advertising file and decided: (i) how the corporate advertising would be paid for by the franchisees; (ii) the advertising concepts; and (iii) where the advertising would run.

[120] The franchisees discussed the advertising at the annual meetings. Mr. Leblanc presented advertising montages that had been prepared in advance and asked them which they preferred.

[121] Mr. Leblanc decided where the advertising would be run. He dealt with the media and received their offers. He was therefore in a position to decide which would be submitted to the franchisees.

[122] Mr. Leblanc also handled the development of the advertising concepts. As well, he submitted new concepts and montages to the franchisees when they had to vote on the advertising budget.

[123] It was he who suggested and proposed how the advertising would be paid for. Under the franchise contract with Tamalia, the franchisees had to approve the advertising budgets by a 75 percent majority. The evidence is that if the franchisees did not agree, the budget could not be approved. This was the case when there was a problem with certain franchisees who were unhappy to learn that Maigrissimo was receiving a 15% commission on the advertising. The evidence nonetheless shows that during the period to which the application relates the franchisees approved large corporate advertising budgets. What is clear is that despite sporadic difficulties in having the budget approved, Mr. Leblanc was at all times responsible for corporate advertising concepts.

[124] Under their franchise contract, the franchisees authorized Maigrissimo to handle the advertising and paid a fee for this purpose. According to the evidence, around 2001 Vanoit became the advertising agency responsible for representing the franchisees and for this received a 15 percent commission.

(2) Experts retained by the Commissioner

[125] The Commissioner retained four experts: Professor Angelo Tremblay, Professor Benoît Lamarche, Professor Simone Lemieux and Dr. Denis Prud'homme.

[126] Professor Tremblay was retained by the Commissioner to provide the following services:

> **[i]** evaluate the capacity of the Cellotherm apparatus to induce localized loss of fat, contribute to weight loss and increase the oxidation of fat and energy expenditure;
>
> **[ii]** comment on and evaluate studies relating to the performance and efficacy of the Cellotherm on acceleration of the metabolism when body temperature rises and on oxidation of fat and energy expenditure.

[127] Professor Tremblay is a professor at Laval University and holds a bachelor's degree in physical education, a master's in dietetics and a doctorate in physiology. His areas of study include the relationship between body fat and energy expenditure.

[128] The Tribunal recognized Professor Tremblay as an expert on nutrition, energy balance and physical activity, and ruled that he could state opinions on the relationship between body temperature, energy expenditure and stimulation of human metabolism.

[129] Dr. Prud'homme was retained by the Commissioner to provide the following services:

> **[i]** do a comprehensive evaluation of the efficacy of the respondents' weight-loss method in relation to (a) a low-calorie diet; (b) Cure de départ; and (c) capacity of the Cellotherm to cause localized weight loss;
>
> **[ii]** evaluate the efficacy of the low-calorie diet and its contribution in relation to the weight-loss method;
>
> **[iii]** evaluate the efficacy of Cure de départ and its contribution in relation to the weight-loss method;
>
> **[iv]** evaluate the efficacy of Noctoslim and Nopasim for inducing weight loss.

[130] Dr. Prud'homme is the Dean of the Faculty of Health Sciences at the University of Ottawa and is an associate professor at the University's medical school. He holds bachelor's and master's degrees in human kinetics and a doctorate in medicine from Laval University. Dr. Prud'homme is a practicing sports medicine clinician and does extensive research into the treatment of obesity. His expertise relates to the prevention or treatment of certain health problems such as obesity and diabetes through exercise.

[131] The Tribunal recognized Dr. Prud'homme as an expert witness competent to offer an opinion on matters relating to obesity and the treatment of obesity, and on matters relating to medical research. The Tribunal also ruled that Dr. Prud'homme could state

opinions as an expert to identify flaws in the scientific studies provided by the respondents in respect of Cellotherm.

[132] The Commissioner retained Professor Lemieux to provide the following services.

> **[i]** assess the scientific merit of the documentation provided by the respondents and the validity of the information set out in the documentation;
>
> **[ii]** determine the need for detoxification for losing weight and do a study of the products used in Cure de départ;
>
> **[iii]** state an opinion on the ability of the treatment to produce localized weight loss solely in the desired locations;
>
> **[iv]** provide an assessment of the nutritional aspect referred to in the advertising.

[133] Professor Lemieux is a professor in the department of food sciences and nutrition at Laval University. She holds a bachelor's degree in dietetics, a master's in human kinetics and a doctorate in physiology. Her primary research subject is obesity and the treatment of obesity.

[134] Professor Lemieux was recognized by the Tribunal as an expert witness in the field of nutrition, the nutritional characteristics of a weight-reduction diet and the clinical treatment of people seeking to lose weight. The Tribunal also ruled that Professor Lemieux could give expert testimony specifically regarding Cure de départ and the products used in the slimming program, and on the nutritional aspects of the program.

[135] Professor Lamarche was retained by the Commissioner to determine whether the methodology used by the respondents and the statistical studies they submitted were based on adequate and proper tests, to the standards recognized by the scientific community, for the claim that their customers lost weight in 82 percent of cases. Professor Lamarche was also instructed to state an opinion on the following subjects:

> **[i]** the scientific merit of the studies provided by the respondents and the validity of the studies' content;
>
> **[ii]** the research protocol and selection criteria for participants used by the respondents in designing their statistical study;
>
> **[iii]** whether the sample data collected by the respondents was sufficient and representative.

[136] Professor Lamarche holds a bachelor's degree in biochemistry from Laval University and a master's in human kinetics and doctorate in physiology from the same

university. He is an associate professor at Laval University and has taught a number of courses in methodology. As well, he teaches in the department of food sciences and nutrition. His research relates to the relationship between obesity, nutrition, cardiovascular disease and health.

[137] The Tribunal recognized Professor Lamarche as an expert for the purpose of testifying and stating his opinion on research methodology.

[138] The four experts retained by the Commissioner are well known to one another because they have studied and taught at Laval University in related fields and have been professional peers for years. As their respective curricula vitae attest, they have published a number of scientific articles together. Two of the experts, Professor Lamarche and Professor Lemieux, are spouses. For those reasons, the respondents questioned the experts' independence and the Commissioner's decision not to approach other experts attached to other research institutions.

[139] However, the evidence shows that these experts are recognized in their respective fields of research. They all stated under oath that they had not discussed the content of their reports or consulted with one another in writing their reports. The Tribunal is satisfied, having regard to each of the experts' reports, their research and their testimony at the hearing, that the testimony they gave is independent and trustworthy.

(3) Factual witnesses

(a) Witnesses for the Commissioner

[140] The Commissioner called three investigators from the Bureau: Raymond Malo, who headed the inquiry starting in 2000, as well as Diane Beaupré and Richard Tellier, who worked as investigators. All three testified regarding the conduct of the inquiry.

[141] It was agreed that the testimony heard on the motion for the removal of parties would be part of the hearing record. On that motion, the Tribunal heard the following witnesses. Liliane Bebnowski, wife of Mr. Leblanc and president of Vanoit, testified regarding the activities of Vanoit. Manon Bélanger, Marie-Josée Dugré, Joanne Fecteau and Lyne Mondor had Tamalia franchises and operated their own Centres de santé minceur, and testified as to how the advertising for the Centres worked. Mario Turcotte, a producer with Global Video, testified regarding the television advertising produced for Centres de santé minceur between 1999 and 2002. Francine Lavallée, an advertising consultant for TVA publications, testified regarding advertising for Centres de santé minceur inserted in various Quebec magazines in the form of advertising brochures.

(b) Witnesses for the respondents

[142] The respondents produced no expert evidence, but called Mr. Leblanc and two franchise owners, Diane Nadeau and Josée Lavictoire, and also Julie Lapointe, Mr. Leblanc's assistant from 2000 to 2005.

[143] Mr. Leblanc testified that he had training in acupuncture and phytotherapy, and had taken courses in health sciences at CEGEP but did not obtain his Diploma of Collegial Studies. He told the Tribunal that he had practised acupuncture from 1981 to 1989. He also stated that from 1994 to 1997 he met with and provided services to numerous customers who wanted to lose weight, in a number of cities in Quebec.

[144] Mr. Leblanc said that he had done a lot of reading on the causes of obesity since 1980. He read strategies developed by the physiologist Thierry Verson and gathered documentation on basal metabolism. Mr. Leblanc also said that as a phytotherapist he had training in natural products, and read a lot on the subject and continues to read nearly everything written in relation to natural products. Mr. Leblanc also pointed out that he had made extensive use of the Internet to do his research and find documentation and that he sometimes bought books about cellulite or weight loss in bookstores in order to keep up on new developments in those fields.

[145] Mr. Leblanc said that he always reviewed customer files. For example, he asked the franchisees to send him randomly selected customer files so that he could examine them and prepare statistics.

[146] Diane Nadeau was a weight-loss consultant for over 10 years and has been the co-owner of the Centre de Santé Minceur in Cap-de-la-Madeleine since December 1995.

[147] Josée Lavictoire, a former Centres de santé minceur franchisee, was also the owner of the centre in Pointe-aux-Trembles from October 1997 to February 2003. Ms. Lavictoire was first a customer of Centres de santé minceur before buying a franchise.

[148] Mr. Leblanc testified that the weight-loss consultants took 84 hours of training at the head office, in anatomy, physiology, pathology, interactions between medications and natural products, and the composition of natural products. The consultants learned how to administer the products and deal with reactions to them. Ms. Nadeau's testimony also explained that the training was given by several people, including Mr. Leblanc, a nutritionist and a physician. Mr. Leblanc confirmed what Ms. Nadeau's statements and added that for a while, a nurse also provided training for the consultants. Mr. Leblanc also stated that continuing education was offered to employees and that there were easily three or four training seminars a year.

[149] The evidence indicates that the weight-loss consultants and franchisees also received training given by the product manufacturers. It was then that the manufacturers of Noctoslim and Nopasim explained things such as the design, composition and use of the products.

[150] The weight-loss consultants used medical scales to weigh customers and filled out standardized client profiles. They also handed out information sheets on the products, supplied by head office, and received ongoing training. As well, to ensure standardized practices, the franchisees took part in regular meetings.

[151] Ms. Lapointe essentially testified as to the duties she performed as Mr. Leblanc's assistant.

B. CASE LAW

[152] The Commissioner has the burden of proof on a balance of probabilities, since this is a civil proceeding.

[153] In *Commissioner of Competition v. Sears Canada Inc.*, 2005 Comp. Trib. 2, Justice Dawson first examined the criminal case law under the present and previous Acts to determine the meaning of the expression "false or misleading in a material respect". She concluded, at paragraph 325, that an impression will be false or misleading in a material respect if it "… readily conveys an impression to the ordinary citizen which is, in fact, false or misleading and if that ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered". In this case the ordinary citizen is standing in for the reasonable person. On that point, Justice Dawson quoted the following paragraph from *R. v. Kenitex Canada Ltd. et al.* (1980), 51 C.P.R. (2d) 103 (Ontario County Court), at paragraph 326:

> The ordinary citizen is, by definition, a fictional cross-section of the public lacking any relevant expertise, but as well possessing the ordinary reason and intelligence and common sense that such a cross-section of the public would inevitably reveal. In the last analysis, therefore, it is for the trier of fact to determine what impression any such representation would create, not by applying his own reason, intelligence and common sense, but rather by defining the impression that that fictional ordinary citizen would gain from hearing or reading the representation.

[154] Justice Dawson also referred, at paragraph 335 of *Sears*, to *R. v. Kellys on Seymour Ltd.* (1969), 60 C.P.R. 24 (Vancouver Magistrate's Court, B.C.), in which the Court held that the word "material" refers to the degree to which the purchaser is affected by the words used in coming to a conclusion as to whether or not he should make a purchase.

[155] In another case about false or misleading representations in a material respect, Mr. Justice Delong of the Alberta Provincial Court, in *R. v. Envirosoft Water Inc.* (1995), 62 C.P.R. (3d) 365, stressed the importance of the context in which the representations are made and the public to which the advertising is directed; he wrote, at page 373:

> As Clement J.A. stated in *R. v. Imperial Tobacco Products Ltd*. (1971), 3 C.P.R. (2d) 178 at p. 195, 22 D.L.R. (3d) 51, 4 C.C.C. (2d) 423 (Alta. C.A.):
>
> The learned trial Judge adopted as his, a phrase appearing in *Aronberg et al. v. F.T.C.* (1943), 132 F. 2d 165 at p. 167. The paragraph in which that phrase occurs is in these terms:

> "The law is not made for experts but to protect the public, -- that vast multitude which includes the ignorant, the unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions. Advertisements must be considered in their entirety, and as they would be read by those to whom they appeal."

[156] In *R. v. Corp. Immobilière Cote St-Luc,* [1983] C.S. 12, the Quebec Superior Court concluded that the words "in a material respect" mean something that is relevant, that affects a constituent or fundamental element. In the view of that Court, the usable floor space of a house is a fundamental element when someone is buying a house. Accordingly, any false representation regarding the usable floor space of a house is a misleading representation in a material respect.

[157] In *Canada (A.G.) v. Beurre Hoche du Canada Inc.*, J.E. 97-435 (C.Q.), the accused were charged with violating paragraph 52(1)(*a*) of the Act by advertising that their butter contained 85 percent less cholesterol than ordinary butter. The Court found that this information was false or misleading in a material respect because saturated fat is the determining factor in the formation of cholesterol. The evidence was that Hoche butter contained as much saturated fat as all other brands of butter sold by competitors. The advertising stating that Hoche butter contained 85 percent less cholesterol was therefore misleading because it was shown that based on that representation, consumers tended to believe that Hoche butter contained less saturated fat. In fact, contrary to what consumers might think, Hoche butter did not protect them against cholesterol any more than other brands of butter.

[158] In *R. v. Contour Slim Ltd*. (1972), C.C.C. (2d) 982 (Ont. Prov. Ct.), 9 C.P.R. (2d) 107, Judge Beaulne found the accused guilty of misleading advertising under section 37(1)(*b*) of the *Combines Investigation Act*, the applicable provision at the time. In that case, the accused company had advertised a method consisting of applying hot algae and a skin cream, which produced weight loss and reduced body measurements. The expert witness stated that what was lost was water, not fat, and that any weight lost would be regained in the next few days with a normal consumption of liquids. The advertisement said: "Lose: Unwanted Fat in only 90 Minutes..." and promised the loss of fatty tissue without effort, without dieting and without any method other than a relaxing algae bath.

[159] The judge concluded that these were misleading representations, because the expert evidence showed that the weight loss was only temporary. He expressly rejected the defence that the issue was loss of weight and not loss of fat. The expression "lose unwanted fat" was clear and unambiguous, in the judge's eyes, and meant more than a temporary weight loss resulting from water loss.

[160] The section regarding misleading representations includes the following provision:

74.01(6) In proceedings under this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining	74.01(6) Dans toute poursuite intentée en vertu du présent article, pour déterminer si les indications sont fausses ou trompeuses sur un point important, il est tenu compte

whether or not the representation is false or misleading in a material respect.	de l'impression générale qu'elles donnent ainsi que de leur sens littéral.

[161] In *Commissioner of Competition v. P.V.I. International Inc.*, 2002 Comp. Trib. 24 (aff'd by the Federal Court of Appeal, [2004] F.C.J. No. 876), the only other decision by the Tribunal concerning paragraph 74.01(1)(*a*), the Tribunal cited other decisions in which the importance of the overall aspect of the advertising message was stressed, at paragraph 24:

> Both parties suggested that the applicable law is set out in *F.T.C.* v. *Sterling Drug, Inc.* (1963) 317 F. 2d 669 at 674, which is cited with approval by the Alberta Supreme Court, Appellate Division, in *R.* v. *Imperial Tobacco Products Ltd.*, (1971), 4 C.C.C. (2d) 423 at 441:
>
> > It is therefore necessary in these cases to consider the advertisement in its entirety and not to engage in disputatious dissection. The entire mosaic should be viewed rather than each tile separately. "The buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied."
>
> The Court in *Sterling Drug* also stated, before this passage:
>
> > ...since the purpose of the statute is not to punish the wrongdoer but to protect the public, the cardinal factor is the probable effect which the advertiser's handiwork will have upon the eye and mind of the reader.

[162] It is therefore important, in analyzing the meaning of the representations made to the public, to consider the general impression conveyed by the advertising. For example, exaggeration is not in itself a "false or misleading representation in a material respect", if it occurs within a particular context. In *R. v. Big Mac Investment* (1988), Man. R. (2d) 150 (Man. Prov. Ct.), the trial judge had held that the representation that 30 minutes of electrical stimulation was equivalent to 900 sit-ups was an exaggeration that the public would be able to interpret as a figure of speech, and not take literally. That judgement was upheld on appeal.

[163] I take from the case law that a representation in advertising that induces a purchase by misleading on a constituent or fundamental element will be held to be "false or misleading in a material respect".

C. APPLICATION OF THE LAW

(1) Cellotherm

[164] The Cellotherm apparatus consists of rubber bands placed around the customer's chest and legs to the knee. The customer lies flat on a horizontal table for the bands to be put on, and they are connected to a control unit that allows them to be heated. Through the action of infrared waves, the apparatus is supposed to raise body temperature and thereby activate the metabolism and the lipid oxidation.

[165] The question is whether the evidence shows that false or misleading representations were made concerning the ability of the Cellotherm to:

[i] produce localized weight loss;
[ii] perform liposuction without surgery;
[iii] stimulate burning of fat; and
[iv] reshape the figure.

[166] The Commissioner's evidence clearly shows that representations were made regarding the ability of the Cellotherm to have an effect similar to liposuction, without surgery, and to induce localized weight loss. In the exhibits introduced in evidence, we see numerous examples of weight loss attributed to the Cellotherm, often with the statement [TRANSLATION] "liposuction without surgery". As noted earlier, the representations were published repeatedly and on a wide scale.

[167] The general impression created by this advertising is that solely by using the Cellotherm, customers can lose an impressive amount of weight (20 pounds, 58 pounds, in some people's experience) and have "liposuction without surgery" performed. As well, those statements give the impression that it is possible to lose weight in specific places such as the thighs or stomach. That impression is reinforced by statements such as: [TRANSLATION] "Infra therapy targets the parts of the body that are most affected".

[168] As well, the advertising contains numerous representations about the ability of the Cellotherm to make fat melt and reshape the figure. In *Talk Show Femmes # C594TE2A*, the following representations are made:

> [TRANSLATION] One of the high tech treatments offered by Centre de Santé Minceur is the Body Liner or infra therapy. … The weight-loss consultant wraps the body and activates the apparatus [the Cellotherm] which raises body temperature by two degrees for 50 minutes, to help stimulate fat to melt and reshape the figure.

[169] In the infomercial *Centre de santé minceur, pléthorique et androïde*, the following representations were made:

- [TRANSLATION] It [the Cellotherm] lets us reduce the abdomen, thighs and hips, the very heavy areas of a woman's body.

- How exactly does it work, so that the bands [of the Cellotherm] can melt away cellulite?

- Well the bands give off infrared light. That is a deep heat. It lets us raise the body temperature by two degrees Celsius. This will create higher enzyme activity, which lets us burn fat.

[170] According to Professor Tremblay, liposuction [TRANSLATION] "is a surgical approach by which a physician removes fat, lipids, fat cells, in a particular deposit". In his experience, that is the only way of [TRANSLATION] "inducing localized loss of fat". Dr. Prud'homme defined liposuction as [TRANSLATION] "a surgical method in which a

pump is used … that aspirates fat cells under the skin using a sweeping motion … [in order] to spontaneously reduce the amount of fat in the region where … [the] liposuction is done".

[171] Both Dr. Prud'homme and Professor Tremblay are of the opinion that apart from liposuction there is no effective program or method that produces localized weight loss. Professor Tremblay concludes in his report that it is very unlikely that the Cellotherm could contribute to localized weight loss.

[172] Mr. Leblanc said that he had used and tested the Cellotherm on at least a hundred people. His testimony was that he started using the Cellotherm in about 1984, when he was an acupuncturist. According to his testimony, he first tested the apparatus on his friends, family members and customers, for several weeks, and took measurements. The results were so conclusive that he decided to buy more Cellotherm apparatuses despite the high price. As a result, he owned about 10 to 12 apparatuses at that time.

[173] Mr. Leblanc also explained that he continued to use the Cellotherm in his business, "Métamorphose Beauté", from 1989 to 1992, because it produced good results. Then he personally tested the Cellotherm on customers of the Centres de santé minceur and they told him that they were thinner in the abdomen and thighs. Mr. Leblanc verified his customers' claims by taking measurements and observed localized slimming. Based on his findings, Mr. Leblanc made representations about how effective the apparatus was for reshaping the figure.

[174] Mr. Leblanc testified that he had done research to learn about new machines apart from the Cellotherm. His goal was to keep up-to-date on new technologies and products that might complement those offered by Centres de santé minceur. He therefore tried out various machines, but the results were not always as conclusive for many apparatuses, such as Vibrathermie, ThermoSlim and Vacuodermie. Mr. Leblanc did not continue to use these apparatuses and got rid of them because they broke down quickly or did not produce good results, or because the centres' customers did not like them. Mr. Leblanc also explained that these decisions were motivated by the fact that, in order to be approved, the apparatuses had to produce results and attract 7 out of 10 customers; otherwise, it was not worthwhile to keep them.

[175] Ms. Nadeau met thousands of clients and said she had personally observed that the use of the Cellotherm could be used to [TRANSLATION] "work on slimming and not weight loss" and to "reshape the figure". Based on these results, Ms. Nadeau purchased four Cellotherm apparatuses, even though each one required an investment of about $20,000.

[176] As a franchise owner, Ms. Lavictoire had about 5,000 customers. She confirmed Ms. Nadeau's testimony on all points regarding the effectiveness of the Cellotherm for slimming [TRANSLATION] "in the right places".

[177] The respondents produced documents and studies to support their assertion that the Cellotherm produced localized weight loss. The first study, entitled *Hyperthermie légère (pour le traitement) de maladies chroniques douloureuses. Les changements de température*

périphérique et centrale du corps, de l'irrigation sanguine microvasculaire et du rythme cardiaque [Slight hyperthermia (for treatment) of chronic pain. Peripheral and core body temperature changes, microvascular blood flow and cardiac rhythm], by Dr. V. Lüben, L. Conrad, W. Becker, and H.F. Herget. That study does not appear to me to be relevant, since it does not deal either with weight or fat loss or with liposuction.

[178] The study entitled *A New Treatment Against Local Corpulence*, by M. Dufrane and J.M. Masson, deals with a weight-loss program that combines use of the Cellotherm and a low-calorie diet. That study does not deal with localized weight loss. As well, Professor Tremblay concluded not only that the restricted diet on which the study subjects were put explains all of the weight loss reported by itself, but also that the Cellotherm had only a very weak impact on energy expenditure. Professor Tremblay said that it is [TRANSLATION] "unlikely that it [the Cellotherm] could promote significant localized fat loss that would be independent of what is normally observed in response to a restricted diet alone". I accept that expert evidence and find that the respondents may not rely on that study to conclude that use of the Cellotherm will produce localized weight or fat loss.

[179] Between 1999 and 2001, Mr. Leblanc's research led him to read about the Thermojet. That apparatus competes with the Cellotherm and also uses deep heat, more specifically infrared heat, for the alleged purpose of raising the metabolism, facilitating the melting of fat and producing weight loss. The Thermojet therefore seems to have characteristics similar to the Cellotherm.

[180] Two documents and a clinical study on the Thermojet were produced. The two documents are entitled *Thermojet: Introduction and Bibliographic Summary* and *Thermojet Set up and Basic Cellulitis and Obesity Treatment*. The clinical study was conducted by Dr. K. Radke and Dr. A. Medina and is entitled *Clinical Study on the Effectiveness of the Thermojet In-Depth Thermic Treatment in Obesity*.

[181] The respondents also produced another study on infra therapy, dealing with an apparatus called Formostar, which, like the Cellotherm, uses infrared heat to raise the metabolism, melt fat and produce weight loss. Dr. A. Medina and Dr. K. Radke are the authors of that document, entitled *Clinical Study for the Effectiveness of the FORMOSTAR In Depth Thermal Treatment For Weight (And Size) Loss and Degenerative Joint and Spinal Column Illness*.

[182] The Tribunal also admitted into evidence a study by Dr. A.M. Flickstein entitled *Infrared Thermal System for Whole-Body Regenerative Radiant Therapy*, and a letter addressed to the manufacturer of the Cellotherm by a German physician, Dr. Theo de la Camp. That document is dated September 16, 1985, and entitled *Appareils "CELLOTHERM" avec bandages à chauffage électrique pour la "perte de poids par chaleur profonde"* ["CELLOTHERM" apparatuses with electric heading bands for "weight loss through deep heat"].

[183] In response to the order to produce documents, Mr. Leblanc prepared a summary of the documents he had read on the Cellotherm. Mr. Leblanc apparently wrote the document

entitled *Dossier résumé – Métabolisme et perte de poids* [Summary – Metabolism and weight loss] and submitted it to the Bureau at the end of 2002.

[184] A number of the studies submitted are based on van't Hoff's law to explain how fat melts when metabolism is raised by heat. Professor Tremblay defined van't Hoff's law as [TRANSLATION] "a physiological principle … holding that with an increase of 10 degrees Celsius in body temperature, metabolism [and thus energy expenditure] is doubled", and, on the other hand, a "10 degree Celsius decrease will halve the metabolism". The respondents relied on this principle to claim that by raising body temperature, the Cellotherm apparatus increased energy output, thereby stimulating the burning of fat.

[185] According to Professor Tremblay and Dr. Prud'homme, van't Hoff's law does not apply to human beings, whose reaction to changes in the external temperature is to compensate in the opposite direction, based on the principle of homeostasis. In fact, contrary to van't Hoff's law, in human beings the effect of a temperature increase will be to produce a physiological reaction to reduce internal temperature. Human physiology seeks to maintain a constant temperature, and this is called homeostasis. Consequently, the metabolism rises in reaction to cold, in order to maintain body temperature.

[186] Professor Tremblay also explained that in order to produce loss of weight and fatty tissue, an individual's energy balance must be altered. In other words, the number of calories consumed must be lower than the number of calories expended, to create an energy deficit so that the body will draw energy from fat. The expression "energy balance" uses the analogy of a bank account to illustrate the difference between what is taken in by the organism in calories and what is expended by the organism in calories. According to Professor Tremblay, weight loss is proportional to the calorie deficit maintained over a period of time.

[187] Professor Tremblay's testimony showed that the Cellotherm had [TRANSLATION] "only very little potential impact by itself on the energy balance, and consequently that it" was "also unlikely that it could promote significant localized fat loss".

[188] After considering the studies on the Thermojet, the Formostar and infrared heat, and of the document *Métabolisme et perte de poids*, I accept Professor Tremblay's testimony that those documents provide no [TRANSLATION] "solid additional arguments for believing that the Cellotherm treatment substantially raises cellular metabolism to the point that major changes in daily energy expenditure are observed" such as could result in loss of weight or fat.

[189] The respondents also produced internal studies done by Centres de santé minceur. None of them isolates the effect of the Cellotherm, and accordingly they are of no use in this analysis.

[190] I accept the expert evidence regarding localized weight loss and liposuction without surgery. The respondents' evidence, in the documents and studies submitted, is insufficient. The respondents' testimony is credible regarding the "slimming" effect of the Cellotherm,

because it might be that sweating had the effect of temporarily reducing the circumference of the hips or thighs. The expert evidence effectively showed that water loss results in temporary weight loss. However, the respondents' evidence is insufficient to support their allegations regarding the ability of the Cellotherm to reshape the figure. Localized weight loss and liposuction without surgery are not possible, according to the experts whose testimony I accept. With respect to the ability to stimulate fat to melt, I am also of the opinion that the expert testimony, based on the principle of the energy balance and homeostasis, is more persuasive.

[191] I therefore find, on a balance of probabilities, that the representations made by the respondents concerning the ability of the Cellotherm to produce localized weight loss, to perform liposuction without surgery, to stimulate fat to melt and to reshape the figure are false or misleading in a material respect. As the jurisprudence teaches, the "material aspect" is that the representations induce consumers to engage in conduct by misleading them on a fundamental point. I find that those representations could influence ordinary citizens to make the decision to pay for Cellotherm treatments based on the representations made, believing that mere thermal stimulation will help them to lose weight permanently in a specific location, to lose fat or to reshape their figure, when the evidence shows that the Cellotherm cannot produce those results.

(2) Cure de départ

[192] Cure de départ was advertised as a detoxification treatment, an important first step in a weight-reduction process. Cure is composed of three products: Tonique dépuratif, Laxo and Digesto. The composition of each of those products was analyzed by Professor Lemieux, and I accept her analysis finding that the constituent elements of Cure de départ were largely made up of laxatives and diuretics.

[193] The question is whether the respondents made representations that created a false or misleading general impression regarding the ability of Cure de départ to cause a loss of three to nine pounds in seven days.

[194] The respondents used the print media (daily and weekly newspapers and magazines), produced infomercials and maintained a Web site to promote and advertise Cure de départ. The Commissioner submitted a number of advertising materials in evidence, in support of her allegations. She also filed three recordings of television commercials and a CD-ROM on which the content of the Centres de santé minceur Internet site was saved.

[195] The Cure de départ advertising, in the print media, was generally accompanied by the slogan [TRANSLATION] "Lose 3 to 9 pounds in 7 days". In advertisements in newspapers and magazines, there are examples in which Cure seems to be the only explanation for the weight loss. For example, an advertisement published on December 11, 1999, in the magazine *Le Lundi*, starts with the headline: [TRANSLATION] "I can choose different clothes now!" It shows two photographs of Sylvie P., before and after she lost 28 pounds, and the caption: [TRANSLATION] "With CURE, I can wear clothes I could never wear before!"

[196] In another advertisement published on October 9, 1999, in the magazine *Sept Jours*, there is a quotation that reads: [TRANSLATION] "I lost 13¾ pounds in 30 days, with the cleansing treatment alone!" In an edition of *Sept Jours* published on October 16, 1999, the ad recounts another real-life case, this one saying: [TRANSLATION] "I lost 44 pounds! I lost 15 pounds in one month thanks to CURE. I have a new lease on life!" And in the magazine *Le Lundi* published on December 25, 1999, there are before and after photographs of Karine with the caption [TRANSLATION] "lost 43½ pounds", showing bottles of Cure.

[197] At times, the advertising shows a number of real-life cases together, with the shock value of images to convey the message: in *Le Lundi* on January 8, 2000, there are three bottles of Cure together with photographs of satisfied customers and the weight lost, ranging from 20 to 44 pounds. The advertisement says: [TRANSLATION] "Here it is, the famous CURE. Lose 3 to 9 pounds in the first week. We are satisfied that no other CURE is more effective." In other words, the print advertising for Cure presents it as the only explanation for the weight loss.

[198] On the respondents' Internet site and in the television advertising, Cure de départ is put in the broader context of a weight-reduction plan. It is the first step, which detoxifies the system and promotes weight loss.

[199] Cure de départ is also presented as a solution for backsliding, which prevents weight from being regained. In the magazine *Santé Minceur*, available on the Web site, the following passages appears regarding Cure de départ:

> [TRANSLATION] The first week normally shows a loss of 3 to 9 pounds. That result can vary from one person to another. For anyone who is afraid of temporary results, here is some good advice: take Cure every Monday to eliminate weekend overindulgence.
>
> Because slimming and maintaining your weight do not always go hand in hand, it is recommended that the Cure days be grouped for greater impact. Are you wondering whether you will have to live with the cleansing trio forever? The answer is the same as it is for your home. Once you have scrubbed it, do you still need your cleaning products?

[200] The respondents also used infomercials to promote Cure de départ. An example is the audiovisual document *Gros pour la vie, non merci* [Fat for life, no thanks], in which Line C.C., a customer, attests to the efficacy of Cure for maintaining her weight, saying: [TRANSLATION] "You cheat a bit, you take a little Cure, bingo, it's gone!"

[201] Professor Lemieux cautioned against advertising about detoxification, a poorly defined term. In fact, Cure de départ is composed of products that, according to the expert evidence, are well known for their laxative and diuretic effects. The experts concede that it is possible to lose a few pounds by taking Cure de départ. But that weight loss, Professor Lemieux and Dr. Prud'homme explained, is largely composed of water and body fluids, and is only temporary.

[202] Dr. Prud'homme stated that [TRANSLATION] "it is important to note that the weight loss secondary to use of these products [the products that make up Cure] are in fact a result of water loss (laxative and/or diuretic effect) and not a loss of body fat".

[203] Dr. Prud'homme added that [TRANSLATION] "because the organism is capable of regulating its water volume, this weight loss (resulting from the use of diuretics and laxatives) is normally temporary with the weight regained when use of the product stops". Regarding the effects of laxatives, Dr. Prud'homme was just as categorical: they are as temporary as the effects of diuretics.

[204] Dr. Prud'homme testified that, in his experience, people who want to lose weight are trying to lose fat, not water. Professor Lemieux was of the same opinion, and said that in her opinion, in order to act directly on controlling their weight, [TRANSLATION] "people expect to lose their excess weight in the form of fat" since weight lost in the form of liquid is not permanent.

[205] Professor Lemieux also confirmed that diuretics and laxatives do not act directly on weight loss because [TRANSLATION] "weight lost in the form of body fluids will necessarily be regained when use of the products stops because the water content of the body has a natural tendency to remain constant". In her view, the Cure de départ products do not have slimming effects.

[206] Professor Lemieux also explained why Cure could not have produced a three- to nine-pound weight loss in a week. In the scientific community, according to Professor Lemieux, it is clearly acknowledged that [TRANSLATION] "weight gain results from a positive energy balance". Accordingly, when energy expenditure is lower than caloric intake, the body stores [TRANSLATION] "the extra energy, primarily in the form of fat". Conversely, Professor Lemieux said, energy expenditure that is higher than caloric intake results in fat loss.

[207] According to Professor Lemieux, the average woman consumes 2000 calories a day. If that person wants to lose fat, she will have to consume 1500 calories a day while still expending 2000, in order to create an energy deficit of 500 calories a day. At that rate, it will take her at least seven days to lose a pound of fat, or 3500 calories.

[208] Professor Lemieux concluded that it is impossible for Cure de départ to produce a fat loss of three to nine pounds in a week, because there is no evidence that the ingredients act on the energy balance.

[209] The respondents say that the print advertising refers to [TRANSLATION] "weight loss" and not "fat loss". In Mr. Leblanc's submission, what is important to the public is to lose weight, because [TRANSLATION] "that is often the phenomenon that will give a person positive motivation … so that she can lose weight."

[210] The respondents submitted in evidence an internal study entitled *Résultats bruts de la compilation statistique portant sur la perte de trois à neuf livres en sept jours* [Gross results of statistical compilation relating to loss of three to nine pounds in seven days]; the study deals specifically with the efficacy of Cure de départ. It was done in late 2000, and it

is a handwritten compilation of the data from the files of 6,578 customers at 21 Centres de santé minceur, and confirms that the customers lost weight.

[211] The data in that initial study are summarized in table form and presented in decreasing order, *Compilation par ordre de perte de poids en sept jours* [Compilation by weight lost in seven days], or in alphabetical order by customer name, *Compilation par ordre alphabétique des résultats bruts portant sur la perte de trois à neuf livres en sept jours* [Compilation of gross results relating to loss of three to nine pounds in seven days, in alphabetical order].

[212] The results of the study are also set out in the document *Résultats de la compilation statistique portant sur la perte de trois à neuf livres en sept jours* [Results of statistical compilation relating to loss of three to nine pounds in seven days], which sets out averages showing that more than 82 percent of customers lost three pounds or more in the first week of treatment using Cure.

[213] I would note that under the Act, in order to determine whether representations are false or misleading in a material respect, the general impression they convey is considered as well as their literal meaning and the context in which they are made.

[214] I accept the evidence that Cure de départ is composed of diuretics and laxatives. I also accept the expert evidence showing that Cure has the potential to cause weight loss, temporarily, in the form of water and body liquids, given its composition.

[215] I accept the experts' opinion that in a weight-reduction program, weight loss must involve loss of fat, not water loss.

[216] Notwithstanding the determination that Cure de départ could have caused a weight loss of three to nine pounds in seven days, the false or misleading representation aspect lies in the fact that a general impression is conveyed, particularly in the print advertising, that the weight loss from Cure is true weight loss, that is, that it is permanent and thus is fat loss, and not a temporary loss of body fluids.

[217] It should be noted that in the more general advertising (including things other than Cure de départ), that is, information on the site, in the centres or on television, Cure is shown as part of a process in which diet plays an important role. The fact that eating habits must be changed in order for permanent weight-loss to occur is not concealed. On that point, I would quote the magazine *Santé Minceur* published by the respondents:

> [TRANSLATION] 82 percent of Centre de Santé Minceur customers achieve their objective and many do it in less than a year. They keep their appointments faithfully and are careful to control their weight and their diet, and do at least a minimum amount of exercise, and that is how they achieve their objectives and a more balanced lifestyle.

[218] We can talk about confounding factors in attempting to show the effect of Cure de départ, particularly since the explanatory leaflet that comes with Cure explains that for best results, it is recommended that users eliminate sweets and fats as far as possible, drink lots

of water (1 to 1.5 litres/day), cut down on salt, sugar, soft drinks and fat, and not eat after 7 p.m. Those factors will in fact play a role in the initial weight loss, as Dr. Prud'homme stated.

[219] It would be difficult to say that it is misleading to promise that a laxative and diuretic compound will cause weight loss, as the first step in a slimming process. However, the representations are false or misleading because they falsely give people the impression that the weight loss promised will be real and lasting, when the evidence shows that it is, rather, temporary and fleeting. I therefore find that the representations regarding Cure de départ are false or misleading in a material respect.

(3) Noctoslim and Nopasim

[220] The respondents claim that Noctoslim, which was first manufactured in 1997, has the ability to break down fat. In 1998, it became Noctoslim II, when an ingredient was changed. In her application, the Commissioner refers to the product Nocto Slim. The change in an ingredient did nothing to change the nature of the representations made regarding the product, which is still presented as a [TRANSLATION] "fat reducer" that acts during the night. For the purposes of this analysis, Noctoslim and Noctoslim II are the same product. Noctoslim was composed of various ingredients, including aloe vera and lipase.

[221] Nopasim was also sold as a "fat reducer" that acts during the day. Nopasim includes, *inter alia*, nopal and orthosiphon, or Java green tea.

[222] It is a matter of determining whether the evidence shows that false or misleading representations were made concerning Noctoslim's capability to [TRANSLATION] "burn fat during the night" and Nopasim's capability to attack [TRANSLATION] "excess fat on the abdomen, buttocks, hips and thighs".

[223] Nopasim and Noctoslim were promoted on the Centre de Santé Minceur Internet site and in explanatory leaflets.

[224] The evidence is that the representations made on the Centre de Santé Minceur Internet site concerning Noctoslim read as follows:

> [TRANSLATION] Positive effects:
>
> Burns fat during the night. It is a powerful fat reducer that works at night, and a compound of ingredients that stimulate stomach function.

[225] Also on the Internet site the following representations were made regarding lipase, one of the ingredients of Noctoslim:

> [TRANSLATION] **LIPASE**
>
> An enzyme that aids in the digestion of fat, thus promoting weight loss, a reduction in the level of fat in the organism, and reduction in cellulite accumulation.

[226] The explanatory leaflet given to customers who bought the product made the same representations regarding the positive effects of Noctoslim.

[227] For Nopasim, the representations were made in the explanatory leaflets given to employees of the centres and on the Internet site. Nopasim is described as a "fat reducer" that enables fat to be lost from specific locations. Nopal, one of the ingredients, is also described as a marvellous plant, a [TRANSLATION] "fat thief", that helps to "fight effectively against … obesity".

[228] Mr. Leblanc testified regarding the development of Noctoslim and the ingredients it contains. He said that the agent for the manufacturer of Noctoslim had described the product to him as being effective for weight loss. The manufacturer's agent had also given him documentation regarding certain ingredients such as lipase and hydrolyzed collagen, but he did not keep it.

[229] Ms. Nadeau explained that her knowledge of Noctoslim and Nopasim was limited to the information provided by Mr. Leblanc. She said that she had not used Noctoslim a lot.

[230] Ms. Lavictoire said that she had administered Noctoslim to some of her customers who were not on a diet but who practised good nutrition and that by using that treatment they [TRANSLATION] "got slimmer" in the buttocks and thighs. She also said that before becoming a franchisee she had first been a customer of Centres de santé minceur and had lost weight convincingly using [TRANSLATION] "the products, and the apparatuses".

[231] With respect to Nopasim, Mr. Leblanc said that it had been created at his request because he needed a product that could [TRANSLATION] "work on fat". His manufacturer's agent proposed Nopasim, one ingredient of which, nopal, [TRANSLATION] "would give great satisfaction in terms of reducing fat" and breaking down fat. Mr. Leblanc also said that the manufacturer's agent gave him documentation regarding nopal that he did not keep.

[232] Mr. Leblanc did not testify as to the efficacy of Noctoslim or Nopasim. As well, unlike his testimony regarding Cure de départ, he did not tell the Tribunal what his findings might have been in terms of the results of Noctoslim or Nopasim for the centres' customers. Moreover, although Mr. Leblanc said he had received documentation regarding the two products, that documentation was not submitted in evidence.

[233] The Noctoslim product line was not sold for long; sales stopped after 2001. As well, in percentage terms, those products accounted for less than one percent of sales made by Centres de santé minceur.

[234] Marketing of Nopasim by Centres de santé minceur began in 2000 and it was still being sold in capsule (tablet) form at the time of the hearing in May 2006. According to Mr. Leblanc, Nopasim accounted for two to three percent of sales, out of the other products sold by Tamalia.

[235] Ms. Nadeau testified that some clients were not sure that Nopasim was really working. However, many customers told her that the product produced good results.

[236] As well, Ms. Lavictoire said she had used Nopasim on her customers thousands of times, with success. She said that Nopasim had the same localized slimming effect as Noctoslim.

[237] In the respondents' submission, there was very little advertising for Noctoslim, although a few advertisements could have been published in *Le Lundi* or *7 Jours*. Mr. Leblanc also said that the explanatory leaflet regarding Nopasim was not distributed to the public because that document was reserved for employee use and training.

[238] With respect to the representations made on the Internet, Mr. Leblanc explained that he had assigned the task of designing the Centres de santé minceur site to the company Compuware. The respondents provided the company with [TRANSLATION] "all of the documents relating to the products" they sold. Mr. Leblanc also said that the Internet site had been active since the middle of 2001 and had not been changed, apart from removing the names of centres that closed. The Tribunal notes that the Internet site was still active at the time the hearing was held, and that there were still representations about Nopasim and Noctoslim on the site.

[239] According to the information provided by the respondents, Noctoslim was active at night because of its composition. Professor Lemieux stated the opinion that there was nothing in the Noctoslim ingredients that gave it the ability to act during the night. She also explained that if Noctoslim was active at night and had the potential to raise the metabolism to burn fat, sleep would be disturbed.

[240] Dr. Prud'homme gave an opinion regarding lipase, an enzyme that aids in the digestion of fat and that is one of the ingredients in Noctoslim. Lipase, he explained, is an enzyme released by the human organism during physical exercise. In his opinion, although it is possible that lipase ingested by taking Noctoslim releases fat into the bloodstream, that fat could not be burned during the night because the metabolism is resting, whereas the metabolism must be raised in order to burn fat that is released.

[241] Dr. Prud'homme added that there were no scientific studies, to his knowledge, that confirmed that Noctoslim had the ability to burn fat at night, and no product for which scientific evidence was available to validate that it had the ability to promote localized loss of body fat.

[242] Professor Lemieux said that Nopal, one of the ingredients in Nopasim, had been used in a study on rats in which Nopal had a significant slimming effect. However, she noted that there had been no [TRANSLATION] "study showing Nopal to have an effect on regulating body weight in humans".

[243] With respect to the other ingredients that make up Nopasim, Professor Lemieux explained that they had no recognized effect on weight or fat loss. Professor Lemieux

concluded by saying that not only did Nopasim have no effect on weight loss, but this product cannot reduce fat in localized places.

[244] The respondents submitted a series of documents to support their assertions regarding the potential effects of the ingredients in Nopasim and Nocto Slim II. Those documents relate to various products that have an effect on fat metabolism, and apparently came from research institutes. They include a document entitled *Les nutriments anti-graisse* [Anti-fat nutrients], published by the Association Nutrition et Prévention in March 1998, which deals with various products that may contribute to fat loss. The documents submitted also included studies conducted on Nopal and Java green tea (ingredients of Nopasim).

[245] According to Professor Lemieux, the studies submitted were mostly done properly, but they deal not with weight loss but rather with other subjects such as the metabolism of glucose and blood lipids.

[246] In her report, after studying the documents submitted, Professor Lemieux concluded that the ingredients of Noctoslim and Nopasim have no effect on weight or fat loss because [TRANSLATION] “the efficacy of these weight loss products has not been proved and certainly cannot explain the virtually miraculous weight loss that is promised”. She said, in her supplementary report, that [TRANSLATION] “the potential weight loss observed in customers of Centre de santé minceur apparently results from the low-calorie diet plan that must be followed with the arsenal of slimming products consumed”.

[247] The representations made regarding the ability of Noctoslim to burn fat during the night convey the general impression that solely by using that product a customer can get rid of the fat she wants to lose, without making any effort. The advertising says that lipase, one of the ingredients, is an “enzyme that aids in the digestion of fat”.

[248] I accept the expert testimony, to the effect that none of the ingredients would raise basal metabolism in such a way as to burn the fat released by the lipase.

[249] Having regard to the foregoing, I find that the representations made by the respondents regarding the ability of Noctoslim to burn fat during the night are false or misleading in a material respect because they convey the general impression that because of the lipase it contains, Noctoslim can eliminate fat without any physical exercise being necessary. I believe this to be a "material" point.

[250] With respect to Nopasim, the representations convey the general impression that solely by using this product a customer will be able to lose fat in localized places. That impression is reinforced by the fact that the representations describe nopal, one of the ingredients of Nopasim, as a “fat thief” that helps to “fight effectively against … obesity”. Notwithstanding the testimony of Ms. Nadeau and Ms. Lavictoire regarding the beneficial effects of Nopasim, the Tribunal finds from the expert testimony that it is impossible to have a product that attacks fat in a targeted manner.

[251] Once again, the representations made induce the consumer to purchase a product that cannot do what is promised. I therefore find that the representations made by the respondents regarding the ability of Nopasim to attack [TRANSLATION] "localized excess fat" are false or misleading in a material respect.

D. DETERMINATION ON THE APPLICATION

[252] I therefore find, for the reasons set out above, that the respondents made false and misleading representations in a material respect concerning the Cellotherm apparatus and the Cure de départ, Noctoslim and Nopasim products, and thereby engaged in reviewable conduct within the meaning of paragraph 74.01(1)(*a)* of the Act.

V. LIABILITY OF THE RESPONDENTS

[253] Before the hearing on the merits, the respondents made a motion to have certain respondents removed. As I said earlier, I dismissed that motion because it was premature and I said that the question of the respondents' liability would be decided after the hearing on the merits and argument. I turn now to that question.

[254] In her closing argument, the Commissioner informed the Tribunal that she was withdrawing the arguments relating to Distribution Minceur Inc., Centre de santé minceur Inc., Gestion Centre de santé minceur Inc., 9044-0413 Québec Inc. and 9083-8434 Québec Inc.

[255] The Commissioner submitted that the following respondents are responsible for the representations made to the public under paragraphs 74.01(1)(*a*) and (*b*) of the Act: Maigrissimo, Tamalia , Gestion Lebski, Vanoit and Sylvain Leblanc, as director of Tamalia and Maigrissimo.

[256] The defendant companies Vanoit and Maigrissimo were not involved in creating or publishing the representations in issue. There is no evidence that they were involved in decisions relating to advertising. They acted solely as financial backers. Accordingly, I find that they cannot be held liable for the representations made to the public. Gestion Lebski was the sole shareholder of Tamalia, but there is no evidence that the company played the slightest role in the representations in issue. Accordingly, I reject the allegations against Vanoit, Gestion Lebski and Maigrissimo.

[257] Tamalia, however, played a major role in making representations to the public, and the respondents do not dispute this. Under the franchise contracts, Tamalia, as the franchisor, had to sign the contracts for the advertising to be published. On the evidence, there is no doubt that Tamalia was directly responsible for making representations to the public, and I therefore find that it is liable.

[258] The remaining question is whether Mr. Leblanc must also be held liable for making the representations to the public as alleged by the Commissioner.

[259] The respondents submit that Mr. Leblanc cannot be held liable for the acts of Tamalia, a duly constituted legal person. The respondents rely on the rule that a company is distinct from its shareholders, who cannot be held liable for the debts or faults of the company. The respondents submit that the rule is codified in article 309 of the *Civil Code of Québec*, S.Q., 1991, c. 64 (the "Civil Code"), which reads as follows:

> 309. Legal persons are distinct from their members. Their acts bind none but themselves, except as provided by law.

[260] The respondents submit that in order for Mr. Leblanc to be held liable for the acts of Tamalia, there would have to be evidence that he created the company for a fraudulent purpose or in an attempt to contravene a rule of public order. Because there is no evidence on that point, Mr. Leblanc cannot, in the respondents' submission, be held liable for representations made by Tamalia. The respondents cite article 317 of the Civil Code, which reads as follows, on this point:

> 317. In no case may a legal person set up juridical personality against a person in good faith if it is set up to dissemble fraud, abuse of right or contravention of a rule of public order.

[261] The Commissioner submits that Mr. Leblanc, as a director of Tamalia, is liable under article 1457 of the Civil Code, which deals with extra-contractual fault, and which reads as follows:

> 1457. Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.
>
> Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.
>
> He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.

[262] The Commissioner also argues that article 317 may apply, because Mr. Leblanc is setting up his company's juridical personality to deny his liability for contravening a rule of public order.

[263] While the principles of company law may perhaps be applied to the legal analysis in this case, I am of the opinion that they are of only tangential assistance. In my view, the analysis of the question of whether Mr. Leblanc is liable here must begin with interpretation of the Act, which sets out the circumstances in which liability may arise. As I interpret subsection 74.01(1) of the Act, I am bound by the principles stated by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27: the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[264] The purpose of the Act is to maintain and encourage competition in the Canadian market. The Act is clearly public law, not private law. Section 74.01 appears in Part VII.1 of the Act, Deceptive Marketing Practices, the purpose of which is to ensure the quality and accuracy of commercial information and to prevent deceptive marketing practices. The legislative intention of the government in enacting those provisions was clear: to create a civil regime for the protection of the public, with a more flexible process than criminal proceedings. Earlier, we quoted what the Hon. John Manley said when he introduced Bill C-20 in the House at second reading, regarding the government's desire to create a civil regime to foster "quick and efficient compliance" with the Act.

[265] As well, the words of Part VII.1 clearly show that Parliament intended that violations of the provisions of that Part would be sufficient to prove liability, without the need to prove intent. Reviewable conduct is, in this sense, comparable to a strict liability offence. Having considered the intention of Parliament and the object of the Act, and I shall now turn to the words of the Act.

[266] Paragraph 74.01(1)(*a*) provides 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,	**74.01** (1) Est susceptible d'examen le comportement de quiconque donne au public, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques :
(*a*) makes a representation to the public that is false or misleading in a material respect; ...	*a*) ou bien des indications fausses ou trompeuses sur un point important; ...

[267] Determining the meaning of the word "person" ("*quiconque*" in French) is an exercise in statutory construction. As noted earlier, the words of the Act are to be read in their grammatical and ordinary sense, in the entire context. There is no ambiguity in the words of subsection 74.01(1). It covers any person who makes representations to the public. The Act provides for monetary penalties and allows for a due diligence defence. The Act clearly covers anyone who is liable, be it a natural person, a legal person, or both. The Act further provides for different monetary penalties in each case. In my opinion, the company and the natural person who are respondents in this case are both in the same position: their liability is direct, and does not arise from the attribution of the misconduct of others to it or him. This concept of direct liability was described in the decision of the Supreme Court of Canada in *R. v. Canadian Dredge & Dock Co.* ([1985] 1 S.C.R. 662, at page 674:

> As in the case of an absolute liability offence, it matters not whether the accused is corporate or unincorporate, because the liability is primary and arises in the accused according to the terms of the statute in the same way as in the case of absolute offences. It is not dependent upon the attribution to the accused of the misconduct of others. This is so when the statute, properly construed, shows a clear contemplation by the Legislature that a breach of the

> statute itself leads to guilt, subject to the limited defence above noted. In this category, the corporation and the natural defendant are in the same position. In both cases liability is not vicarious but primary. [Emphasis added]

[268] A too narrow interpretation of the words "a person … who … makes a representation to the public" would result in liability being assigned solely to the person who expressly made the representations, and in my opinion this would be contrary to the object of the Act and particularly the Part of the Act in which the impugned provisions appear. Having regard to the intention of Parliament and the context of the scheme created by the Act, I am of the opinion that these provisions should be interpreted more broadly. A person who makes representations to the public may also be the person who planned, directed and was, ultimately, essential to the representations being made, even if that person did not make them expressly himself or herself. I therefore find that paragraph 74.01(1)(*a*) covers any person who is "effectively" responsible for the representations made to the public.

[269] I now turn to the facts of this case. The evidence is that the corporate advertising was orchestrated by the franchisor, Tamalia. Mr. Leblanc was responsible for that advertising, and decided on the concept of the advertising, the places where the advertising would be placed and how the national advertising would be paid for by the franchisees. The franchisees discussed the advertising at the annual meetings. Mr. Leblanc presented them with advertising montages that had been prepared in advance and asked them which they preferred. At the meetings, it was Mr. Leblanc who proposed the advertising concepts he had developed himself for the print media or television, to promote Centres de santé minceur. The evidence is that the franchisees voted on the annual advertising budgets. For example, they had to choose the proposal they preferred from the various budget proposals associated with a particular advertising program, and vote for it.

[270] It is beyond question that Mr. Leblanc was the prime mover behind Tamalia and Centres de santé minceur, that he was the person who made the decisions about the approach to be taken in marketing the products and apparatuses. In his testimony, he clearly said that he chose the products and apparatuses marketed by Centres de santé minceur. It is clear, from the testimony of the franchisees and of Mario Turcotte, who produced infomercials for Centres de santé minceur, that Mr. Leblanc was involved in all stages of the corporate advertising.

[271] The evidence is that Mr. Leblanc was the prime mover behind the development and publication of the representations in issue. I find that he is effectively responsible for making those representations to the public. He is therefore directly liable, on the same basis as Tamalia, for engaging in reviewable conduct as provided in paragraph 74.01(1)(*a*) of the Act.

VI. CONSIDERATIONS RELATING TO THE ORDER

A. LEGISLATIVE CONSIDERATIONS

[272] For the purpose of determining what order should be made, the Act provides that the Tribunal must have regard to three factors. First, under subsection 74.1(3) of the Act, no order requiring publication of a corrective notice or payment of an administrative monetary penalty may be made if the person against whom it is made establishes that he or she exercised due diligence to prevent the reviewable conduct from occurring. The relevant provision reads as follows:

74.1 (3) No order may be made against a person under paragraph (1)(*b*) or (*c*) where the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.	74.1 (3) L'ordonnance prévue aux alinéas (1)*b*) ou *c*) ne peut être rendue si la personne visée établit qu'elle a fait preuve de toute la diligence voulue pour empêcher un tel comportement.

[273] With regard to the respondents' diligence, I note that Mr. Leblanc testified that he had made efforts to obtain more information from the Bureau regarding the impugned conduct.

[274] The evidence is that in 1998 and 1999, Mr. Leblanc contacted the Bureau, which he was not legally required to do, after receiving the letter stating that some of the respondents' advertising raised problems under the Act.

[275] Mr. Leblanc testified that during the discussions held in 1999 with representatives of the Bureau, they did not seem to be able to explain to him exactly what the problems were, in particular the problems caused by the advertising regarding the Cellotherm, Noctoslim and Cure de départ (Nopasim was not yet being marketed at that time).

[276] As well, Mr. Leblanc testified that the same thing happened in October 2001 after he was officially informed of the inquiry, when he received the order for production of documents. At that point, Mr. Leblanc again asked the representatives of the Bureau to identify the problems raised by the representations made in the advertising that is the subject of this application, but in vain. On that point, Raymond Malo, the investigator, admitted that until 2003 the Bureau was as yet unable to state an opinion about the representations made by the respondents because they were still missing an expert opinion, an opinion that was obtained in 2004.

[277] When he could not obtain information from the Bureau to determine how to correct the corporate advertising, Mr. Leblanc, however, took the initiative of correcting the advertisements. He testified that starting in late 2001 or very early 2002, the respondents added the statement [TRANSLATION] "Results may vary. We recommend that you consult your doctor before beginning a weight-loss program" to their advertising, so that it would

better meet the Bureau's expectations. The changes affected advertising both in the print media and on television.

[278] Although the respondents made changes to some advertisements, the advertisements were still false or misleading in a material respect, as we found earlier, in that they suggested that the use of the products and apparatus would result in a permanent weight loss, as described in the preceding paragraphs. The changes made by the respondents were not an attempt to dispel that impression. Accordingly, they did not exercise due diligence to prevent the advertisements published from making representations regarding fat loss that quite simply was not possible through the use of the products and the Cellotherm.

[279] The fact that the Bureau did not tell the respondent how his advertising was false and misleading is irrelevant. The advertisements promised an impossible result. The fact that customers had lost weight by following a diet does not correct the false impression conveyed by the representations regarding the products and the Cellotherm.

[280] The Tribunal therefore finds that the respondents did not exercise due diligence to prevent the reviewable conduct from occurring.

[281] The second factor that the Tribunal must consider is the principle stated in subsection 74.1(4) of the Act, which is that the purpose of an order for a corrective notice, or of monetary penalties, is not to punish the respondents but to promote conduct on their part that is in conformity with the purposes of the Act. This moderating principle reads as follows:

(4) The terms of an order made against a person under paragraph (1)(*b*) or (*c*) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.	(4) Les conditions de l'ordonnance rendue en vertu des paragraphs (1)*b*) ou *c*) sont fixées de façon à encourager le contrevenant à adopter un comportement compatible avec les objectifs de la présente partie et non à le punir.

[282] And third, before imposing an administrative monetary penalty, the Tribunal must take into account the factors listed in subsection 74.1 (5) of the Act:

74.1 (5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(*c*):	74.1 (5) Pour la détermination du montant de la sanction administrative pécuniaire prévue in paragraph (1)*c*), il est tenu compte des éléments suivants :
(*a*) the reach of the conduct within the relevant geographic market;	*a*) la portée du comportement sur le marché géographique pertinent;
(*b*) the frequency and duration of the conduct;	*b*) la fréquence et la durée du comportement;
(*c*) the vulnerability of the class of persons likely to be adversely affected by the conduct;	*c*) la vulnérabilité des catégories de personnes susceptibles de souffrir du comportement;

(*d*) the materiality of any representation;	*d*) l'importance des indications;
(*e*) the likelihood of self-correction in the relevant geographic market;	*e*) la possibilité d'un redressement de la situation sur le marché géographique pertinent;
(*f*) injury to competition in the relevant geographic market;	*f*) le tort causé à la concurrence sur le marché géographique pertinent;
(*g*) the history of compliance with this Act by the person who engaged in the reviewable conduct; and	*g*) le comportement antérieur, dans le cadre de la présente loi, de la personne qui a eu un comportement susceptible d'examen;
(*h*) any other relevant factor.	*h*) toute autre circonstance pertinente.

[283] With respect to the reach of the impugned conduct, the Tribunal finds that the false or misleading representations regarding the products and apparatus that were the subject of the inquiry were made throughout Quebec.

[284] The evidence is that from 1999 to 2003, as a result of carefully orchestrated advertising campaigns, the respondents invested and spent millions to ensure that their advertising had exceptionally broad, repetitive, wide-scale reach, by flooding the entire province of Quebec. They advertised their products and apparatuses using a variety of methods, including large-circulation newspapers and magazines, brochures given to customers in stores, advertising brochures inserted in magazines, an Internet site, sponsorships referred to as "billboards" and infomercials broadcast on several television networks several times a day. The concept of massive advertising was later abandoned, and the advertising became more sporadic in 2004 and 2005 and during the first six months of 2006. Ultimately, after mid-June 2006, no advertising was taken out, and all the centres closed.

[285] The advertising about Noctoslim and Nopasim was effected mainly via the Internet site and in brochures given to customers. It should be noted, first, that there was very little advertising to promote these products, and second, that Noctoslim was sold for a very short time between 1998 and 2001. However, Nopasim, which was not widely advertised or sold, was available from 2000 to 2006.

[286] Paragraph 74.1(1)(*c*) refers to the vulnerability "of the class of persons likely to be adversely affected by the conduct". In other words, a distinction should be made between the vulnerability of anyone inclined to listen to the vendor's promises and the special vulnerability of certain classes of persons. The problem of excess weight illustrates the issue well. I take judicial notice of the fact that in our society, many people want to lose weight, and those people are not necessarily motivated by the same goals. For some, it is a health issue; for others, it is vanity. When Parliament speaks of a "class of persons", it is referring to people who are especially vulnerable, and not just people who are easily affected by advertising.

[287] The Commissioner attempted to adduce evidence regarding the vulnerability of persons drawn to weight-loss programs, but the respondents objected to qualifying the experts recognized in their respective scientific fields as experts in psychology, and therefore able to testify regarding the vulnerability of Centres de santé minceur customers. I allowed that objection, and I therefore did not receive any evidence regarding the classes of persons likely to be adversely affected by the conduct. Accordingly, I do not consider this factor in my analysis.

[288] Paragraph (*d*) refers to the materiality of the representations. In order to better understand what is meant by "*l'importance des indications*" in the French version, we should consider the English version, which refers to "the materiality of any representation", a reference back to the expression "false and misleading in a material respect" – "*fausses ou trompeuses sur un point important*". In other words, account must be taken of the extent to which the representations were in fact misleading, in the sense in which the courts have defined the word "material", that is, likely to induce the consumer to engage in conduct.

[289] For the products and apparatus in question, I have found that the representations were misleading on the essential point, by conveying a false impression as to what could produce weight loss. For the Cellotherm apparatus, the representations falsely conveyed the impression that the heat generated by the apparatus could burn fat, reshape the figure and induce localized weight loss. For Cure de départ, the representations suggested that Cure offered a permanent solution, when the action of Cure could produce only temporary weight loss. The main representation regarding Noctoslim was that it acts during the night, when there is nothing in its ingredients that could produce such a result. As well, for Nopasim, the representations suggested targeted weight loss, when again the ingredients could not justify that claim.

[290] Accordingly, I find that the representations were material, in the sense that they falsely attributed weight loss to the products advertised, when the real weight loss, according to the experts, was essentially attributable to diet, and not to the products sold or to the Cellotherm apparatus.

[291] I find that, on the evidence, it is clear that the situation in the relevant geographic market has been corrected, since all the centres have closed and no advertising is being done today about the products and apparatus that are the subject of this application.

[292] With respect to injury to competition, I am not taking that factor into account, because no evidence was introduced on that point. I also note that there is nothing in the record regarding the prior conduct of the parties in relation to the Act.

[293] Paragraph (*h*) provides that the Tribunal must have regard to "any other relevant factor". On that point, the length of the inquiry and the present situation of Centres de santé minceur should be noted. While I do not regard the "Garrel affair" as a relevant factor, I cannot completely ignore it, because it was referred to numerous times over the course of the hearing.

[294] Briefly, the evidence shows that around February 2001 the Bureau retained Dr. Dominique Garrel, an endocrinologist in Montreal, to verify some of the advertising done by the respondents. Dr. Garrel then produced a report including his comments on the advertising that had been submitted to him. In July 2001, despite his confidentiality agreement with the Bureau and without the Bureau's knowledge, Dr. Garrel engaged in a virulent attack on Centres de santé minceur in the media.

[295] Dr. Garrel said, at the press conference, that he had been retained by the Bureau to do a study of certain advertising. Mr. Leblanc testified that Dr. Garrel said that the Centres de santé minceur concept did not work and amounted to [TRANSLATION] "fraud". In the respondents' submission, the reputation of Centres de santé minceur was seriously undermined by Dr. Garrel's statements, which were widely broadcast on radio and television and published in the print media.

[296] The respondents tied Dr. Garrel's attack in the media to the beginning of the decline of Centres de santé minceur, which until then had been growing exponentially. They believe that the centres started to become unstable as a result of their customers' concerns and the loss of customers that occurred after the Garrel affair. I express no opinion as to the causal connection, having no evidence in that regard, and I find only that beginning in 2001 the centres experienced a dramatic downturn and ultimately closed completely in 2006.

[297] The respondents claim that they suffered injury because of the length of the inquiry. In their submission, they had to live with a sword of Damocles hanging over their heads for several years. I note that no evidence regarding that injury was presented by the respondents. The respondents continued to advertise their products and services, and to sell them, and their business was not obstructed by the conduct of the inquiry, which was in fact confidential before the application was filed in 2005. As well, I note that there was no unreasonable delay in this case, since the time started to run when the application was filed, and not when the inquiry was commenced.

[298] I do note, however, that the inquiry did last a very long time. Mr. Leblanc received an initial letter in 1998, the inquiry officially began in 2000, advertisements were collected for three years, the expert opinions were obtained in about 2002, another was obtained in 2004, and finally, in 2005, the Commissioner filed her application. In the meantime, most of the Centres de santé minceur closed down. I am aware of the fact that the reviewable conduct may be past conduct; nonetheless, out of a concern for efficiency, it would be preferable for a process that is meant to discourage misleading advertising, with a view to protect the public, to be completed in a timely manner. Of course, this decision holds for the future and provides guidance for preventing conduct by others who might want to exploit the credulity of the public. Nonetheless, it would be desirable, in order to carry out the responsibility assigned by the Act, for the order to have actually served the purpose of ending the conduct while it was still going on. From the standpoint of protecting the public, I am therefore not inclined to impose an "exemplary" penalty, given that the advertising is no longer running.

B. CONTENT OF THE ORDER

(1) Case law

[299] There is little case law regarding orders made under subsection 74.1(1) of the Act. The only case before the Tribunal in which an order has been made to give effect to a decision under paragraph 74.01(1)(*a*) was *PVI*, *supra*.

[300] In that case, two individuals and a company were alleged to have made false and misleading representations regarding an apparatus that was supposed to reduce fuel consumption. The advertising that was the subject of the application had been done in Canada for at least two years. Each of the two individuals was given an administrative monetary penalty of $25,000, and the respondent company, P.V.I. International Inc., had to pay an administrative monetary penalty of $75,000, for making false or misleading representations and making representations as to performance without adequate tests. The Tribunal did not order that corrective notices be published, because the subject matter did not lend itself to a simple notice, since the evidence was quite complex. The Tribunal also noted the advertisements only took place in Canada over two years, while they had been around in the United States over a 20-year period, but no prohibition had ever been issued by an American court.

[301] The Tribunal did not think that it was appropriate to impose the maximum penalty on the respondents, who had relied on a misinterpretation of an American decision.

[302] In a subsequent appeal, the Federal Court of Appeal upheld the Tribunal's decision (2004 FCA 197), dismissing the respondents' appeal. The Court nonetheless allowed the Commissioner's cross-appeal in part, holding that the Tribunal had erred in the reasons stated for declining to order that a corrective notice be issued, that is, that the notice would be too complex and had not been ordered by the U.S. authorities. The complexity of the notice was not a relevant factor, because the Act sets out what the notice must include, and the Tribunal should have informed the parties that it intended to take judicial notice of U.S. practice.

[303] In the only other decision of the Tribunal relating to misleading advertising, *Sears*, *supra*, the Tribunal examined the factors that applied to the order under section 74.1. In *Sears*, the issue was misleading advertising relating to ordinary price, but the same provisions applied regarding the order itself.

[304] As in *PVI*, the Tribunal ordered the company in *Sears* not to engage in misleading advertising for a period of 10 years. It did not order that a corrective notice be published, having regard to the time that had passed since the cessation of the advertising, which went back five years before the decision and had occurred only in November and December 1999. Five years later (the decision was issued in January 2005), as Justice Dawson said, the notice would be punitive and not remedial. In the decision, the Tribunal postponed determination of the amount of the administrative monetary penalty to a later date, because

it had already given Sears leave to make submissions on that issue once the decision was made. In a decision dated April 1, 2005, the Tribunal approved the joint submission by the Commissioner and Sears for an administrative monetary penalty of $100,000, noting that the quantum reflected the policy considerations stated in the decision of January 11, 2005.

(2) Remedies sought by the Commissioner

[305] The Commissioner is seeking a prohibition on making representations to the public that are similar to the representations that are the subject of this application in relation to the Cellotherm, Cure de départ, Noctoslim and Nopasim or any other similar product, publication of a corrective notice and payment of an administrative monetary penalty.

[306] The Commissioner is asking the Tribunal to impose the maximum administrative monetary penalties on the respondents: $50,000 for the respondent Sylvain Leblanc and $100,000 for each of the respondent companies (Tamalia, Gestion Lebski, Maigrissimo and Vanoit).

(**3) Determination**

[307] As stated in the preceding paragraphs, little advertising was done for Noctoslim and Nopasim, little of which was in fact sold. The evidence also is that the respondents did very little advertising in 2004, 2005 and 2006 regarding the products and apparatus that are the subject of the inquiry. The decline of Centres de santé minceur, which began in about 2001, is not in dispute. In 2005, the year the application was filed, more than three quarters of the centres that were in existence in 2001 had closed, and at the time of the hearing in May 2006 there were only eight centres still open. All of them had to close by June 15, 2006, at the latest. As part of that process, the Centre de santé minceur Internet site ceased operating around the end of May or beginning of June 2006.

[308] The products and apparatus that are the subject of the application are no longer being sold by the respondents and no advertising is being done regarding them. In this case, a corrective advertising order would serve no purpose, since the market has corrected itself with the closing of Centres de santé minceur. If the respondents had to publish corrective notices in the same media they used to promote the products and apparatus that are the subject of this application, they would undoubtedly have to spend large amounts of money, at a time when the centres seem to have closed down because they are no longer profitable. Having regard to the situation, I am of the opinion that if a corrective advertising order were made it would be more punitive than remedial.

[309] I have found, however, that the respondents made numerous false or misleading representations in a material respect regarding their products and apparatus. To protect the public, a prohibition order should be made. Under 74.1(2) of the Act, an order made under paragraph (1)(*a*) applies for a period of 10 years unless the Tribunal considers it appropriate to shorten that period. In this case, the prohibition order will apply for a period of 10 years.

[310] As well, having regard to the extent and duration of the advertising, I am of the opinion that an administrative monetary penalty should also be imposed.

[311] The Tribunal is satisfied that Tamalia and Mr. Leblanc made false or misleading representations. The order will therefore apply to Tamalia and Mr. Leblanc.

[312] On the question of the amount of the administrative monetary penalty, the Tribunal keeps in mind that the reach of the representations and the frequency with which they were made by the respondents were exceptional. As well, the representations were made over several years throughout the province of Quebec. However, the Tribunal notes that the situation has been remedied with the closing of all of the Centres de santé minceur.

[313] I have identified the aspects of the Centres de santé minceur advertising that the Tribunal considers to be misleading and that should be penalized. To the extent that people were made to believe in sensational results that were attributed, by the advertising, to the Cellotherm or to Cure de départ, Noctoslim or Nopasim, the representations were false and misleading in a material respect. However, having regard to the considerations set out above, I find that there is no need to impose the maximum monetary penalty. I am of the opinion, however, that the respondents' conduct must be penalized, keeping in mind that the purpose of the order set out in the following paragraphs is not to punish them, but to promote their compliance with the Act.

[314] The Commissioner did not ask for costs, although the respondents did claim costs in their closing argument. Having regard to the fact that the constitutional challenge has been allowed in part, and having regard to my findings in this case, the parties will bear their own costs.

VII. ORDER

FOR THESE REASONS, THE TRIBUNAL

[315] **ORDERS** that the respondents Gestion Finance Tamalia Inc. and Sylvain Leblanc and any other person acting on their behalf or for their benefit, including all directors, officers, employees, agents or assigns of the respondents, or any other person or corporation acting on behalf of any of the respondents, for a period of 10 years from the date of this order, not make or allow to be made, in any manner whatsoever, false or misleading representations to the public regarding the capabilities, performance or efficacy of the **Cellotherm** or any other similar apparatus to induce localized weight loss, to do liposuction without surgery, to stimulate the burning of fat and to reshape the figure, for the purpose of promoting the use of the apparatus.

[316] **ORDERS** that the respondents Gestion Finance Tamalia Inc. and Sylvain Leblanc and any other person acting on their behalf or for their benefit, including all directors, officers, employees, agents or assigns of the respondents, or any other person or corporation

acting on behalf of any of the respondents, for a period of 10 years from the date of this order, not make or allow to be made, in any manner whatsoever, false or misleading representations to the public regarding the capabilities, performance or efficacy of **Noctoslim and Nopasim** or any other similar product that supposedly makes it possible for fat to be burned during the night or to target localized excess fat, for the purpose of promoting those products.

[317] ORDERS that the respondents Gestion Finance Tamalia Inc. and Sylvain Leblanc and any other person acting on their behalf or for their benefit, including all directors, officers, employees, agents or assigns of the respondents, or any other person or corporation acting on behalf of any of the respondents, for a period of 10 years from the date of this order, not make or allow to be made, in any manner whatsoever, false or misleading representations to the public regarding the capabilities, performance or efficacy of **Cure de départ** or any other similar product to cause lasting weight loss, for the purpose of promoting that product.

[318] ORDERS the respondent Sylvain Leblanc to pay an administrative monetary penalty of $20,000, to be paid within 60 days of the date of this order.

[319] ORDERS the respondent Gestion Finance Tamalia Inc. to pay an administrative monetary penalty of $50,000, to be paid within 60 days of the date of this order.

[320] ORDERS that each party bear its own costs.

DATED at Ottawa, this 8th day of September 2006.

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

(s) Edmond P. Blanchard

APPEARANCES

For the Commissioner of Competition, applicant:

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Anne-Marie Desgens

For Gestion Lebski Inc., société de Financement Vanoit Inc., Maigrissimo Inc., Gestion Finance Tamalia Inc., 9083-8434 Québec Inc., Sylvain Leblanc, respondents:

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