COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT
Date: March 17, 2020
CT- 2020-003

Annie Ruhlmann for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT. # 11

CT-2020-003

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an application by the Commissioner of Competition for an order pursuant to section 74.11 of the *Competition Act* regarding conduct reviewable pursuant to paragraph 74.01(1)(b) of the *Competition Act*;

BETWEEN:

COMMISSIONER OF COMPETITION

Applicant

and

NUVOCARE HEALTH SCIENCES INC. and RYAN FOLEY

Respondents

COMMISSIONER OF COMPETITION'S WRITTEN SUBMISSIONS
Commissioner's Application for an Order under section 74.11 of the *Competition Act*

DEPARTMENT OF JUSTICE CANADA
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau, Quebec, K1A 0C9

Talitha A. Nabbali
Ellé Nekiar

Telephone: 819-953-3884
Fax: 819-953-9267

Counsel to the Commissioner of Competition

OVERVIEW

1. This is an application by the Applicant pursuant to s. 74.11 of the Competition Act (the "**Act**"). The Applicant seeks an order requiring the Respondent not to engage in conduct that is reviewable under the Act, as outlined below.

2. The Respondents promote and sell certain Products (defined below) that they claim will cause weight loss or burn fat, along with seven other related claims. Although the Respondents have made and continue to make these claims systematically, and across a wide range of platforms, there is no evidence that the Respondents have relied on adequate and proper testing of the Products to make these claims.

3. Consequently, in making unsubstantiated performance and efficacy claims the Respondents are making misrepresentations to the public, contrary to Part VII.1 of the *Competition Act*.

4. The Respondents' conduct is systematic, widespread, and ongoing, and serious harm to consumers and competition is likely to ensue unless the temporary order sought by the Commissioner of Competition is issued. In particular: consumers are suffering economic harm commensurate with the price paid for the Products; the Products can pose risks to consumers who use the Products for serious conditions and/or delay proper treatment by relying on the Products; and the misrepresentations made by the Respondents affect the proper functioning of the market.

5. In contrast, should the temporary order sought be issued, there is little if any inconvenience to the Respondents. Even if complying with the Tribunal's order did cause inconvenience to

the Respondents, the public interest in having the Act obeyed outweighs any hardship that compliance with the Act may cause to the Respondents.

PART I – FACTS

A. The Parties

6. The Respondent, Nuvocare Health Sciences Inc. ("**Nuvocare**") is a private corporation federally incorporated under the *Canada Business Corporations Act* on November 12, 2006.[1] Nuvocare markets and sells a variety of natural health products, making various health-related claims. Four Nuvocare products (the "**Products**") are at issue in this application:

   a) WeightOFF Max! sold under the Nutracentials brand;

   b) WeightOFF Max! sold under the SlimCentials brands;

   c) Forskolin Nx sold under the NutraCentials brand; and

   d) Forskolin+ sold under the SlimCentials brand.[2]

7. Mr. Ryan Foley ("**Mr. Foley**") is the President and the CEO of Nuvocare[3], and holds himself out as the founder, creator and formulator of Nuvocare products[4] Moreover, Mr. Foley personally markets, sells, and makes representations to the public relating to Nuvocare products, including the Products.[5]

---

[1] Affidavit of Danielle McKenzie sworn on February 28, 2020 [McKenzie Affidavit], Application Record, Tab 2, at para 11.
[2] *Ibid.*, at para 20.
[3] *Ibid.*,, at para 14.
[4] *Ibid.*, at para. 16.
[5] *Ibid.*, at paras 16, 28-33, 37-41.

8. The Commissioner of Competition ("**Commissioner**") is appointed under section 7 of the Act and is responsible for the administration and enforcement of the Act.[6]

B. The Commissioner's Investigation

9. On February 8, 2019, the Bureau issued a warning to sellers and marketers of natural health products in Canada to ensure weight loss claims are not false, misleading, or unsubstantiated.[7]

10. On March 20, 2019, the Bureau sent a letter by registered mail to the Respondents requesting that testing be provided to the Bureau to substantiate performance claims made about the Products. The letter specifically set out that, under the Act, the onus is on the advertiser to base any claims about the performance or efficacy of a product on adequate and proper testing.[8]

11. On April 5, 2019, Mr. Foley responded to Competition Law Officer Danielle McKenzie of the Bureau, requesting clarification of the Bureau's request and offering to "provide claim substantiation back up if claims are supported".[9]

12. On April 25, 2019, Ms. McKenzie responded to Mr. Foley and provided clarification of the Bureau's request and of his and Nuvocare's responsibilities under the Act. Ms. McKenzie offered to extend the Bureau's deadline to provide the testing to substantiate the performance

---

[6] *Ibid.*,, at para 9.
[7] *Ibid.*,, at para 61.
[8] *Ibid.*,, at para 62.
[9] *Ibid.*,, at para 64.

claims made about the Products to May 3, 2019. No response or testing was ever received in response to this correspondence.[10]

13. On February 14, 2020, the Commissioner commenced an inquiry under subparagraph 10(1)(b)(ii) of the Act on the basis that he has reason to believe that grounds exist for the making of an order under Part VII.1 of the Act, specifically pursuant to paragraphs 74.01(1)(a), 74.01(1)(b) and subsection 74.011(2) of the Act.[11]

14. For the purposes of this application, the Commissioner's Inquiry is focused on the representations made by the Respondents relating to the Products.[12]

C. Health Canada Regulatory Approvals

15. The Products are approved by Health Canada as Natural Health Products ("**NHPs**"). Consequently, they are subject to the *Natural Health Products Regulations*.[13]

16. All NHPs approved by Health Canada have met safety, efficacy and quality requirements under their recommended conditions of use. An NHP's recommended conditions of use can be found on its product licence which is available online on Health Canada's website.[14]

17. Health Canada permitted the Products for the following uses:

    a) WeightOFF Max! sold under Nuvocare's NutraCentials brand: Helps in the function of the thyroid glad. Provides support for healthy glucose metabolism.

---

[10] *Ibid.*,, at paras 59-60.
[11] *Ibid.*,, at para 77.
[12] *Ibid.*,, at para 78.
[13] Notice of Application, Application Record, Tab 1, at para 18.
[14] Affidavit of Virginie Treyvaud Amiguet affirmed on February 27, 2020 [Treyvaud Amiguet Affidavit], Application Record, Tab 3, at para 17.

Helps the body to metabolize carbohydrates and fats. Could be a complement to a healthy lifestyle that incorporates calorie-reduced diet and regular physical activity for individuals involved in a weight management program. Helps maintain healthy blood pressure levels. Helps support cardiovascular health. Provides antioxidants.[15]

b) WeightOFF Max! sold under Nuvocare's SlimCentials brand: Helps in the function of the thyroid gland. Provides support for healthy glucose metabolism. Helps the body to metabolize carbohydrates and fats. Could be a complement to a healthy lifestyle that incorporates a calorie reduced diet and regular physical activity for individuals involved in a weight management program. Provides antioxidants. Helps (temporarily) to promote alertness and wakefulness, and to enhance cognitive performance. Helps (temporarily) to relieve fatigue, to promote endurance, and to enhance motor performance. Used (temporarily) as a mild diuretic.[16]

c) Forskolin Nx sold under Nuvocare's NutraCentials brand: Source of antioxidants.[17]

d) Forskolin+ sold under Nuvocare's SlimCentials brand: Source of antioxidants.[18]

18. Health Canada did not approve the Products to make weight loss health claims. It approved the WeightOFF Max! sold under both the SlimCentials and NutraCentials brand to make a lower level claim related to a potential complement to a healthy lifestyle that incorporates a

[15] *Ibid.*, at para 25.
[16] *Ibid.*, at para 33.
[17] *Ibid.*, at para 40.
[18] *Ibid.*, at para 40.

calorie-reduced diet and regular physical activity for individuals involved in a weight management program.[19] Health Canada does not consider general weight management claims to be comparable to weight loss claims, which fall under the high risk category.[20]

19. Health Canada also did not approve the Products to make fat burn, targets belly far or increases metabolism health claims.[21]

D. The Impugned Representations made by the Respondents

20. For the purposes of this application, the Commissioner's investigation is focused on the representations made by the Respondents to the public relating to the performance or efficacy of the Products ("**Impugned Representations**"). The Impugned Representations have been made on:

a) on the Products' labels or packaging;

b) on the websites Nuvocare.ca, Nuvocare.com, Nutracentials.com and Slimcentials.com (the "Websites");

c) on social media sites (including YouTube, Facebook, and Instagram);

d) in promotional emails;

e) at consumer expos;

f) in online or print magazines.[22]

---

[19] *Ibid.*, at paras. 29 and 37.
[20] *Ibid.*
[21] *Ibid.*, at paras 26, 30, 34 and 38.
[22] McKenzie Affidavit, *supra* note 1, at paras 21, 23 and 42.

1. SlimCentials WeightOFF Max!

21. SlimCentials WeightOFF Max! is a supplement in capsule form. It received a Health Canada Natural Health Product Number ("**NPN**") on January 21, 2015. Its NPN is 80057549.[23]

22. The Respondents have made and continue to make representations that the use of the product SlimCentials WeightOFF Max! will cause weight loss, including:

a) "EXTRA STRENGTH WEIGHT LOSS";[24]

b) "EXTRA STRENGTH WEIGHT CONTROL";[25]

c) "The world's best premium weight loss ingredients at the dosages proven to work together in one formulation";[26]

d) "The world's best premium weight loss nutrients all in dosages clinically proven to work";[27]

e) "The nutrients in WeightOFF MAX! naturally combine to deliver 6 key benefits that make weight-loss faster and easier!";[28]

f) "6-IN-1 Weight Loss Solution";[29]

g) "HELPS YOU LOSE WEIGHT 6 WAYS";[30]

h) "CUT 200% MORE WEIGHT THAN DIETING ALONE";[31]

i) "Clinical studies prove that WeightOFF Max! can cut 200% more weight than just dieting alone";[32]

j) "Lose-Weight";[33]

---

[23] *Ibid.*, at para 25; Treyvaud Amiguet Affidavit, *supra* note 13, at para 33.
[24] McKenzie Affidavit, *supra* note 1, at para 28(a).
[25] *Ibid.*, at para 28(b).
[26] *Ibid.*, at para 28(c).
[27] *Ibid.*, at para 28(d).
[28] *Ibid.*, at para 28(f).
[29] *Ibid.*, at para 28(g).
[30] *Ibid.*, at para 28(h).
[31] *Ibid.*, at para 28(i).
[32] *Ibid.*, at para 28(j).
[33] *Ibid.*, at para 28(k).

k) "Works in 6 ways for effective weight loss";[34]

l) "3X MORE Weight Control in 90 Days!"[35]

23. The Respondents have made and continue to make representations that the use of the product SlimCentials WeightOFF Max! will burn fat, release fat, and block fat including:

a) "THE ULTIMATE ALL IN ONE NATURAL FAT BURNING SOLUTION";[36]

b) "...shown to block carbohydrate usage, making it easier for the body to burn fat as energy";[37] and

c) "Burns fat as energy".[38]

24. The Respondents have made and continue to make representations that the use of the product SlimCentials WeightOFF Max! will cut appetite, including:

a) "CUTS APPETITE"[39]; and

b) Cuts appetite and curbs emotional eating. This leads to reduced calorie intake & reduced snacking by up to 30% daily"[40]

25. The Respondents have made and continue to make representations that the use of the product SlimCentials WeightOFF Max! will block carbohydrates, including:

---

[34] *Ibid.*, at para 28(l).
[35] *Ibid.*, at para 28(m).
[36] *Ibid.*, at para 30(a).
[37] *Ibid.*, at para 30(b).
[38] *Ibid.*, at para 30(c).
[39] *Ibid.*, at para 31(a).
[40] *Ibid.*, at para 31(b).

a) "BLOCKS CARBOHYDRATES";[41]

b) "Block carbohydrate usage making it easier for the body to burn fat as energy"[42].

26. The Respondents have made and continue to make representations that the use of the product SlimCentials WeightOFF Max! will decrease emotional eating, including: "Cuts appetite and curbs emotional eating".[43]

2. *NutraCentials WeightOFF Max!*

27. NutraCentials WeightOFF Max! is a supplement in capsule form. It received a Health Canada NPN on September 15, 2014. Its NPN is 80053895.[44]

28. The Respondents have made and continue to make representations that the use of the product NutraCentials WeightOFF Max! will cause weight loss, including:

a) "EXTRA STRENGTH WEIGHT LOSS";[45]

b) "EXTRA STRENGTH WEIGHT CONTROL";[46]

c) "The world's best premium weight loss ingredients at the dosages proven to work together in one formulation";[47]

d) "Our most powerful weight loss formula ever!"[48].

---

[41] *Ibid.*, at para 32(a).
[42] *Ibid.*, at para 32(b).
[43] *Ibid.*, at para 33(e).
[44] *Ibid.*, at para 26; Treyvaud Amiguet Affidavit, *supra* note 13, at para 25.
[45] McKenzie Affidavit, *supra* note 1, at para 28(a).
[46] *Ibid.*, at para 28(b).
[47] *Ibid.*, at para 28(c).
[48] *Ibid.*, at para 28(e).

29. The Respondents have made and continue to make representations that the use of the product NutraCentials WeightOFF Max! will burn fat, release fat, and block fat, including:

a) "Our most powerful fat burner";[49]

b) "Increases fat release and burning while also blocking fat storage";[50] and

c) "Speeds up your metabolism helping you burn fat easier".[51]

30. The Respondents have made and continue to make representations that the use of the product NutraCentials WeightOFF Max! will cut appetite, including: "Cut appetite and ignite metabolism".[52]

31. The Respondents have made and continue to make representations that the use of the product NutraCentials WeightOFF Max! will decrease emotional eating, including:

a) "Decreases emotional eating and reduces appetite";[53]

b) "Decreasing emotional eating and your natural desire to crave sweets";[54]

c) "Decreasing emotional eating";[55] and

d) "Decrease emotional eating".[56]

---

[49] *Ibid.*, at para 30(d).
[50] *Ibid.*, at para 30(e).
[51] *Ibid.*, at para 30(f).
[52] *Ibid.*, at para 31(c).
[53] *Ibid.*, at para 33(a).
[54] *Ibid.*, at para 33(b).
[55] *Ibid.*, at para 33(c).
[56] *Ibid.*, at para 33(d).

3. SlimCentials Forskolin+

32. SlimCentials Forskolin+ is a supplement in capsule form. It received a Health Canada NPN on February 13, 2015. Its NPN is 80058127.[57] It has the same NPN as Nutracentials Forskolin Nx.[58]

33. The Respondents have made and continue to make representations that the use of the product SlimCentials Forskolin+ will burn fat, including:

a) "When it comes to burning body fat and preserving muscle, forskolin should be your solution";[59]

b) "Clinically proven fat burning solution";[60]

c) "This powerful formula delivers potent fat burning effects";[61]

d) "DUAL-ACTION effect that stimulates the Body's KEY fat-burning enzyme via 2 distinct mechanisms";[62]

e) "Stimulates an enzyme responsible in the body for fat burning";[63]

f) "Increases KEY Fat-Burning enzyme";[64] and

g) "Speeds up your metabolism helping you burn fat easier".[65]

34. The Respondents have made and continue to make representations that the use of the product SlimCentials Forskolin+ will target belly fat, including:

---

[57] Treyvaud Amiguet Affidavit, *supra* note 13, at para 39.
[58] *Ibid.*; McKenzie Affidavit, *supra* note 1, at para 34.
[59] *Ibid.*, at para 37(a).
[60] *Ibid.*, at para 37(b).
[61] *Ibid.*, at para 37(c).
[62] *Ibid.*, at para 37(d).
[63] *Ibid.*, at para 37(e).
[64] *Ibid.*, at para 37(f).
[65] *Ibid.*, at para 37(g).

a) "DUAL BELLY-FAT MELTING REMEDY";[66]

b) "Dual action belly-fat melting remedy is designed to effectively help you shed those extra pounds faster";[67] and

c) "Forskolin helps decrease belly fat and overall body fat levels by increasing the enzyme HSL".[68]

4. *NutraCentials Forskolin Nx*

35. NutraCentials Forskolin Nx is a supplement in capsule form. It received a Health Canada NPN on February 13, 2015. Its NPN is 80058127.[69] It has the same NPN as SlimCentials Forskolin+.[70]

36. The Respondents have made and continue to make representations that the use of the product NutraCentials Forskolin Nx will burn fat, including:

a) "When it comes to burning body fat and preserving muscle, forskolin should be your solution";[71]

b) "Stimulates an enzyme in the body responsible for fat burning";[72]

c) "Speeds up your metabolism helping you burn fat easier";[73]

d) "Helps release and burn stored body fat";[74]

e) "Stimulates enzyme to Help Burn More Fat";[75]

---

[66] *Ibid.*, at para 39(a).
[67] *Ibid.*, at para 39(b).
[68] *Ibid.*, at para 39(c).
[69] Treyvaud Amiguet Affidavit, *supra* note 13, at para 39.
[70] *Ibid..;* McKenzie Affidavit, *supra* note 1, at para 35.
[71] McKenzie Affidavit, *supra* note 1, at para 37(a).
[72] *Ibid.*, at para 37(e).
[73] *Ibid.*, at para 37(g).
[74] *Ibid.*, at para 37(h).
[75] *Ibid.*, at para 37(i).

f) "Lose an average of 9.9 lbs of body fat in 12 weeks";[76]

g) "Forskolin is lightning in a bottle and a miracle flower to help you fight fat";[77]

h) "…support a key fat-burning enzyme in the body known as HSL";[78]

i) "This fat melting nutrient ignites metabolism and fat burning and promotes leaner, tighter muscle tone";[79]

37. The Respondents have made and continue to make representations that the use of the product NutraCentials Forskolin Nx will target belly fat, including:

a) "DUAL BELLY FAT MELTING REMEDY";[80] and

b) "Forskolin helps decrease belly fat and overall body fat levels by increasing the enzyme HSL"[81].

5. Combination of the Products

38. The Respondents have made and continue to make representations about the performance or efficacy of the Products in combination, these representations include the following:

a) "For even more powerful weight loss results, try combining WeightOFF Max! with SlimCentials Forskolin+";[82]

b) "Weight Loss Results with this Perfect Pair WeightOFF MAX! & Forskolin Nx";[83]

c) "INCREASE WEIGHT LOSS EVEN FASTER";[84]

---

[76] *Ibid.*, at para 37(j).
[77] *Ibid.*, at para 37(k).
[78] *Ibid.*, at para 37(l).
[79] *Ibid.*, at para 37(m).
[80] *Ibid.*, at para 39(a).
[81] *Ibid.*, at para 39(c).
[82] *Ibid.*, at para 41(a).
[83] *Ibid.*, at para 41(b).
[84] McKenzie Affidavit, at para 41(c).

d) "Combining Forskolin Nx with WeightOFF! MAX will ignite your metabolism while promoting leaner tighter muscle tone while reducing body fat & curbing your appetite";[85]

e) "Burn MORE Body Fat Maintain MORE Muscle";[86]

f) "Combine Multi-Award Winning WeightOFF MAX! + Forskolin Nx and Achieve Even More Dramatic LEAN BODY RESULTS!";[87]

g) "MEET YOUR NEW FAT-BURNING DREAM TEAM";[88]

h) "CLINICAL STRENGTH WEIGHToff MAX! + Forskolin Nx = YOUR DREAM BODY";[89]

i) "This potent combination tackles weight-loss from 7 angles".[90].

PART II - POINTS IN ISSUE

39. The issues for determination on this application are whether it appears to the Tribunal that:

a) the Respondents are engaging in conduct reviewable under Part VII.1 of the *Act*;

b) serious harm is likely to ensue unless the order sought by the Commissioner is issued; and

c) the balance of convenience favours issuing the order sought by the Commissioner.

[85] McKenzie Affidavit, at para 41(d).
[86] McKenzie Affidavit, at para 41(e).
[87] McKenzie Affidavit, at para 41(f).
[88] McKenzie Affidavit, at para 41(g).
[89] McKenzie Affidavit, at para 41(h).
[90] McKenzie Affidavit, at para 41(i).

PART III - SUBMISSIONS

A. TRIBUNAL'S AUTHORITY TO ISSUE THE TEMPORARY ORDER SOUGHT

1. The Tribunal may issue an Order where "it appears" the elements in 74.11 of the Act are met

40. Subsection 74.11(1) of the Act establishes a three part test; it reads:

Temporary order	**Ordonnance temporaire**
74.11 (1) On application by the Commissioner, a court may order a person who it appears to the court is engaging in conduct that is reviewable under this Part not to engage in that conduct or substantially similar reviewable conduct if it appears to the court that (a) serious harm is likely to ensue unless the order is issued; and (b) the balance of convenience favours issuing the order.	74.11 (1) Sur demande présentée par le commissaire, le tribunal peut ordonner à toute personne qui, d'après lui, a un comportement susceptible d'examen visé par la présente partie de ne pas se comporter ainsi ou d'une manière essentiellement semblable, s'il constate que, en l'absence de l'ordonnance, un dommage grave sera vraisemblablement causé et que, après l'évaluation comparative des inconvénients, il est préférable de rendre l'ordonnance.

41. This current version of section 74.11 of the Act has not been interpreted judicially. In interpreting this provision, the Tribunal should look to the provision's text, context and purpose. As the Supreme Court of Canada explained in *Canada Trustco Mortgage Co v Canada*:[91]

> It has been long established as a matter of statutory interpretation that "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.

[91] *Canada Trustco Mortgage Co v Canada*, [2005] 2 SCR 601, 2005 SCC 54 [*Canada Trustco*] at para 10. See also *65302 British Columbia Ltd v Canada*, [1999] 3 S.C.R. 804, at para. 50.

42. The Commissioner submits that, applying this principle, it is clear that section 74.11 of the Act establishes a low standard for the Tribunal to issue the requested order.

a) Legislative purpose

43. The legislative history of section 74.11 makes it clear that Parliament removed the requirement for a "strong *prima facie* case" in the previous version of section 74.11 and replaced it with the requirement that "it appears to the Court" in order to lower the standard for the Tribunal to issue an order under section 74.11 of the Act.

44. When it was originally adopted in 1999, subsection 74.11(1) stated:

74.11 (1) Where, on application by the Commissioner, a court finds a strong *prima facie* case that a person is engaging in reviewable conduct under this Part, the court may order the person not to engage in that conduct or substantially similar reviewable conduct if the court is satisfied that (a) serious harm is likely to ensue unless the order is issued; and (b) the balance of convenience favours issuing the order. [emphasis added]	74.11 (1) Le tribunal qui constate, à la demande du commissaire, l'existence d'une preuve *prima facie* convaincante établissant qu'une personne a un comportement susceptible d'examen en application de la présente partie peut ordonner à celle-ci de ne pas se comporter ainsi ou d'une manière essentiellement semblable, s'il est convaincu que, en l'absence de l'ordonnance, un dommage grave est susceptible d'être causé et que, après l'évaluation comparative des inconvénients, il est préférable de rendre l'ordonnance. [surligné ajouté]

45. Amendments to this provision were initially introduced in 2009 as part of Bill C-27,[92] under clause 76. The legislative summary of Bill C-27 states:[93]

> The existing powers in the Act that permit the Commissioner of Competition to apply to the court for an order similar to an injunction are updated so that they can also be used against those who supply products facilitating the commission of an offence under the Act, or who fail to prevent an offence. The requirement that the court meet the standard of a "strong *prima facie* case" before issuing this order would be replaced by a less stringent standard of "if it appears to the court" (clause 76). [emphasis added]

46. The French version of the legislative summary reads as follows[94]:

> Les pouvoirs actuels prévus par la LC pour autoriser le commissaire de la concurrence à demander au tribunal une ordonnance assimilable à une injonction sont mis à jour afin de pouvoir être également utilisés contre quiconque fournit un produit facilitant la perpétration d'une infraction à la LC ou n'empêche pas une telle infraction. L'exigence que le tribunal « constate [...] l'existence d'une preuve *prima facie* convaincante » avant de rendre cette ordonnance est remplacée par une norme moins stricte, c'est-à-dire que le tribunal « constate que [...] un dommage grave sera vraisemblablement causé » (art. 76). [emphasis added]

47. The French version of the legislative summary evinces the same intention as the English version of the legislative summary, to replace the previous "strong *prima facie* case" with a lower standard. This is the case even though the French version of the current section 74.11 uses two different phrases in place of "it appears to the court", that is, "d'après lui" and "constate que". Indeed, by explicitly referring to « dommage grave », the French version of

---

[92] Bill C-27, 40th Parliament, 2nd Session, First reading, section 76.
[93] Legislative Summary of Bill C-27: Electronic Commerce Protection Act, May 27, 2009, clause 76.
[94] Résumé législatif du projet de loi C-27 : Loi sur la protection du commerce électronique, 27 mai 2009.

the legislative summary also makes clear that the standard is intended to be lower for all three elements of the test.

48. Bill C-27 died on the order paper and was re-introduced as Bill C-28, with the same amendments to section 74.11. Bill C-28 was adopted in 2010[95] and the amended section 74.11 came into force on July 1, 2014.[96]

b) Context and Text

49. The phrase "it appears to the Court" has not been considered by the Tribunal or a court in the context of section 74.11.[97] While the phrase is used elsewhere in the *Act*,[98] jurisprudence interpreting those sections does not assist in interpreting section 74.11 of the Act.[99]

50. The same phrase "it appears to the Court" also appears in the *Federal Courts Rules*[100] related to security for costs. Rule 416 reads as follows:

Where security available	**Cautionnement**

[95] 2010, 59 Elizabeth II, Chapter 23, section 80.
[96] Bill C-28, 40th Parliament, 3rd Session, Coming Into Force.
[97] The Commissioner has been successful in at least two prior cases in obtaining temporary orders under section 74.11 of the Act. However, these cases were decided before Parliament amended the language of this provision to remove the requirement to prove a "strong *prima facie* case", and they both provide limited reasons for granting the temporary orders. These cases include *Commissioner of Competition and Yellow Page Marketing BV et al, The Commissioner of Competition and Universal Payphone Systems Inc.*, 1999 CanLII 26 (CT). *Kobo Inc v The Commissioner of Competition*, 2014 Comp. Trib. 14, aff'd 2015 FCA 149 also discussed briefly the threshold under the previous section 74.11 (at para 112), although the main question was on subsection 106(2) of the Act.
[98] For example, sections 33 and 123.1 use the expression "it appears to the court"; Section 34(2) uses "it appears to a superior court of criminal jurisdiction"; and Section 100 uses "it appears to the Tribunal".
[99] For example, in *Canada (Director of Investigation and Research) v. Superior Propane Inc.* (1998), 85 C.P.R. (3d) 194 (Comp. Trib.) [*Superior Propane*], the Tribunal considered section 100, which read differently at that time, but under both the former and the current version, provides that "[...] the Tribunal may issue an interim order forbidding any person named in the application from doing any act or thing <u>that it appears to the Tribunal may</u> constitute or be directed toward the completion or implementation of the ["a", under the current version] proposed merger" [emphasis added].[99] The Tribunal repeated this part of section 100 and then held that "[t]he focus is on forbidding any act or thing <u>that may</u> constitute or be directed toward the completion or implementation of the proposed merger" [emphasis added] (at paras 12-13), without discussing what "it appears to the Tribunal" requires of the parties or envisages for the Tribunal.
[100] SOR/98-106

416 (1) Where, on the motion of a defendant, it appears to the Court that […] (g) there is reason to believe that the action is frivolous and vexatious and the plaintiff would have insufficient assets in Canada available to pay the costs of the defendant, if ordered to do so, or […] the Court may order the plaintiff to give security for the defendant's costs. [emphasis added]	416 (1) Lorsque, par suite d'une requête du défendeur, il paraît évident à la Cour que l'une des situations visées aux alinéas a) à h) existe, elle peut ordonner au demandeur de fournir le cautionnement pour les dépens qui pourraient être adjugés au défendeur : […] g) il y a lieu de croire que l'action est frivole ou vexatoire et que le demandeur ne détient pas au Canada des actifs suffisants pour payer les dépens s'il lui est ordonné de le faire; [surligné ajouté]

51. In *Maheu v IMS Health Canada*,[101] Prothonotary Hargrave considered the meaning of the expression "it appears to the court" under the above rule and wrote:

> [18] A second and more reasoned approach to this submission that security for costs has been foreclosed lies in the necessary elements of Rule 416(1)(g). The elements are first, that it must appear to the Court that there is reason to believe that the action is frivolous and vexatious and second, that the plaintiff is without Canadian assets to pay costs. This wording, an appearance of vexatiousness or frivolousness, is very different from the absolute standard of frivolousness and vexatiousness which the Court has used in applying Rule 221 on an application to strike out.
> […]
> [21] From all of this IMS, which alleges that the Act is being subverted for a commercial advantage, submits that the situation falls clearly within Rule 416(1)(g), for it need only show that "it appears" that "there is reason to believe" that this Application "is frivolous and vexatious". From a plain reading of the rule, it is apparent that IMS need not show, in absolute terms, that Mr. Maheu's Application is in fact frivolous and vexatious. This is a very different standard than that required to strike out a pleading. […]
>
> [emphasis added]

[101] *Maheu v IMS Health Canada* 2002 FCT 558 (rev'd 2003 FCT 1; 2003 FCA 462) [*Maheu*].

52. On appeal, the Federal Court of Appeal did not disturb this finding. While focusing on the words "there is reason to believe" rather than the phrase "it appears to the court", the Federal Court of Appeal agreed that Rule 416 sets a lower standard.[102]

53. The phrase has been judicially considered in other statutory contexts but without explicitly considering the standard established by the phrase. Therefore, this case law is of limited utility in interpreting section 74.11 of the *Act*.[103]

54. In sum, the phrase "it appears to the court" in section 74.11 of the Act should be interpreted in accordance with Parliament's purpose and the plain meaning of its text, and sets a low standard for the Tribunal to grant a temporary order that requires compliance with the Act's deceptive marketing provisions.

B. THE RESPONDENTS ARE ENGAGING IN REVIEWABLE CONDUCT

1. Representations not based on Adequate and Proper Testing are Reviewable under the Act

55. Paragraph 74.01(1)(b) of the Act states:

Misrepresentations to public	**Indications trompeuses**
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 : […]

[102] *Maheu* at paras 53 and 54.

[103] The Supreme Court has dealt on a few occasions with provisions containing this expression but has not given it any specific meaning. See for example: *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 28; *Nova Scotia (Minister of Health) v JJ*, 2005 SCC 12 at paras 15-25; *Gronnerud (Litigation Guardians of) v Gronnerud Estate*, 2002 SCC 38 at paras 14, 18.

(b) makes a representation to the public in the form of a statement, warranty, or guarantee of the performace, efficacy or length of life of a product that is not based on 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;

56. It is not necessary that the Commissioner establish that any person was deceived or misled,[104] nor that any member of the public to whom the representation was made was within Canada.[105]

57. In the present case, the Respondents make misrepresentations to the public on their Products' labels, on their websites, on their social media pages, in their promotional emails, at consumer shows, in print magazines; and in retail stores. It is indisputable that these representations are made to promote the use of the Products, and to promote the Respondents' business interests generally.

a) Materiality

58. A representation is material if it could influence consumer conduct. As the Competition Tribunal observed in *Commissioner of Competition v Gestion Lebski Inc*:[106]

> [191] […] 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,

[104] Paragraph 74.03(4)(a) of the Act.
[105] Paragraph 74.03(4)(b) of the Act.
[106] *The Commissioner of Competition v Gestion Lebski Inc*, 2006 CACT 32 [*Gestion Lebski*] at para 191 and 288.

> 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.
>
> [...]
>
> [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 <u>material</u> respect" – "*fausses ou trompeuses sur un point <u>important</u>*". In other words, account must be taken of the extent to which the representations were in fact misleading, <u>in the sense in which the courts have defined the word "material", that is, likely to induce the consumer to engage in conduct.</u> [emphasis added]

59. The Impugned Representations are clearly material. Consumers looking to lose weight or burn fat may be induced into buying the Products based on the Impugned Representations made by the Respondents.

b) General Impression to be taken into account

60. Subsection 74.03(5) of the Act provides that in proceedings under section 74.01, the general impression conveyed by a representation as well as its literal meaning shall be taken into account. The Supreme Court of Canada interpreted similarly worded legislation in *Richard v Time*.[107] In that case, the Supreme Court emphasized the importance of the layout of an advertisement:

> [55] In our opinion, <u>the respondents are wrong to downplay the importance of the layout of an advertisement. It must be remembered that the legislature adopted the general impression test to take account</u>

[107] *Richard v Time Inc*, 2012 SCC 8 [*Time*]. The provision, art. 218 of the Quebec *Consumer Protection Act* CQLR c P-40.1 reads: "To determine whether or not a representation constitutes a prohibited practice, the general impression it gives, and, as the case may be, the literal meaning of the terms used therein must be taken into account." The French version reads: « Pour déterminer si une représentation constitue une pratique interdite, il faut tenir compte de l'impression générale qu'elle donne et, s'il y a lieu, du sens littéral des termes qui y sont employés. »

> of the techniques and methods that are used in commercial advertising to exert a significant influence on consumer behaviour. This means that considerable importance must be attached not only to the text but also to the entire context, including the way the text is displayed to the consumer.[108]
>
> [emphasis added]

61. The Supreme Court also found that in the case of false or misleading advertising, the general impression is formed after initial contact with the entire advertisement:[109]

> [57] In sum, it is our opinion that the test under s. 218 *C.P.A.* is that of the first impression. In the case of false or misleading advertising, the general impression is the one a person has after an initial contact with the entire advertisement, and it relates to both the layout of the advertisement and the meaning of the words used. [...]
>
> [emphasis added]

62. The Supreme Court further found:[110]

> [67] The general impression test provided for in s. 218 *C.P.A.* must be applied from a perspective similar to that of "ordinary hurried purchasers", that is, consumers who take no more than ordinary care to observe that which is staring them in the face upon their first contact with an advertisement. The courts must not conduct their analysis from the perspective of a careful and diligent consumer.
>
> [emphasis added]

63. Finally, the Supreme Court found that the relevant consumer is described by the words "credulous and inexperienced". Under this standard, "credulous" reflects the fact that the average consumer is "prepared to trust merchants on the basis of the general impression conveyed" by the representations.[111] "Inexperienced" refers to a consumer as "someone who

[108] *Ibid.*, at para 55.
[109] *Ibid.*, at para 57.
[110] *Ibid.*, at para 67.
[111] *Ibid.*, at para 72.

is not particularly experienced as detecting the falsehoods or subtleties found in commercial representations." [112]

64. The Ontario Superior Court applied a modified version of the Supreme Court's test in *Chatr* in the context of the *Competition Act*,[113] on the basis of its view that the Act and the *Consumer Protection Act* serve different purposes.[114] The Ontario Superior Court modified the test to read "credulous and technically inexperienced consumer of wireless services" to account for the fact that the consumers targeted by the representations belonged to a particular market segment comprising consumers who wanted unlimited talking and texting wireless services.[115]

65. Prior to *Time*, courts had also referred to the appropriate consumer standard in terms of the "ordinary citizen",[116] the "average purchaser",[117] and the "public" which includes "the ignorant, the unthinking and the credulous".[118]

---

[112] *Ibid.,* at para 71.
[113] *Canada (Competition Bureau) v Chatr Wireless Inc* 2013 ONSC 5315 [*Chatr*].
[114] *Ibid.,* at paras 126-127.
[115] *Ibid.,* at paras 131 and 132.
[116] *Commissioner of Competition v Sears Canada Inc.,* 2005 Comp. Trib. 2, at para 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."
[117] See for example *R v Bussin* (1977), 36 C.P.R. (2d) 111 (Ont. Co. Ct.) at para 7: "[…] [T]he test to use is the average person who is an amalgam somehow of all the various characteristics that one might reasonably consider and so I look at it from the basis of the "average purchaser" of this device. […]".
[118] For example, see *R v Tremco Manufacturing Co.* (1973), 15 C.P.R. (2d) 232 (Ont. Co. Ct.) at para 25: "The decided cases have determined that "the ignorant, the unthinking and the credulous" are included in the "public". One must be governed by public's understanding of the meaning conveyed by words used in an advertisement, and not the meaning assigned by those engaged in a particular calling or industry." See also *R. v. Kraft Foods Ltd.* (1972), 11 C.P.R. (2d) 240 (Que. Q.B.) at para 14: "[…] The standard to be used ... is that of the public, which includes the ignorant, the unthinking and the credulous and not the standards of the skeptical who have learned by bitter experience to beware of commercial advertisements."

66. The Commissioner submits that the Supreme Court's interpretation of the (average or ordinary) consumer in *Time* ought to be followed. As noted by the Supreme Court, "inexperienced" means "someone who is not particularly experienced as detecting the falsehoods or subtleties found in commercial representations",[119] not whether the consumer has experience with a particular product or market. Further, the objective of the *Competition Act* is similar to that under consumer protection legislation: to prevent harm to consumers and competition caused by deceptive marketing practices by enabling consumers to assume that the general impression conveyed by an advertisement is accurate and not the opposite.[120]

67. In any event, the Commissioner submits that consumers looking to lose weight or burn fat are not more sophisticated than the credulous and inexperienced consumer referred to in *Time*.

2. *Misleading Representations*

68. The Respondents make representations that the SlimCentials WeightOFF Max! will cause weight loss, burn fat, cut appetite, block carbohydrates and decrease emotional eating. Yet, there is no evidence that the Respondents have relied on adequate and proper testing of SlimCentials WeightOFF Max! and found it to have any of these effects.[121]

69. The Respondents make representations that the NutraCentials WeightOFF Max! will cause weight loss, burn fat, release fat, block fat storage, cut appetite, and decrease emotional

---

[119] *Time, supra* note 107, at para 71.
[120] See *Time, supra* note 107, at para 60; see also *Commissioner of Competition v Premier Career Management Group Corp*, 2009 FCA 295 [*Premier*] at para 61.
[121] McKenzie Affidavit, *supra* note 1, at paras 62-66 and 68.

eating. Yet, there is no evidence that the Respondents have relied on adequate and proper testing of NutraCentials WeightOFF Max! and found it to have any of these effects.[122]

70. The Respondents make representations that the SlimCentials Forskolin+ will burn fat, target belly fat, and increase metabolism. Yet, there is no evidence that the Respondents have relied on adequate and proper testing of SlimCentials Forskolin+ and found it to have any of these effects.[123]

71. The Respondents make representations that the NutraCentials Forskolin Nx will burn fat, target belly fat, and increase metabolism. Yet, there is no evidence that the Respondents have relied on adequate and proper testing of NutraCentials Forskolin Nx and found it to have any of these effects.[124]

72. The Respondents make representations that, by combining one or more of the Products together, consumers will achieve more powerful weight loss results, burn more calories, increase weight loss, ignite metabolism, and tackle weight loss from 7 different angles, among other claims. Yet, there is no evidence that the Respondents have relied on adequate and proper testing of the use of any combination of the Products and found them to have these effects when used together.[125]

---

[122] *Ibid.*, at paras 62-66 and 68.
[123] *Ibid.*, at paras 62-66 and 68.
[124] *Ibid.*, at paras 62-66 and 68.
[125] *Ibid.*, at paras 62-66 and 68.

3. *Lack of Adequate and Proper Testing*

73. Whether a particular test is "adequate and proper" will depend on the nature of the representation and the meaning or general impression conveyed by that representation.[126]

74. The words adequate and proper have been held to be synonymous with sufficient and appropriate.[127] The courts have generally interpreted "proper" to mean fit, apt, suitable or as required by the circumstances.[128]

75. In order for a test to be adequate and proper, it must establish the effect claimed. Subjectivity in testing must be eliminated as much as possible.[129]

76. The testing need not be as onerous and exacting as required to publish papers in scholarly journals, but the test should clearly demonstrate that "the result claimed is not a mere chance or one time effect".[130]

77. The adequate and proper testing must be done prior to the representation to the public.[131] In *Chatr*, the Court found that performance claims that were made prior to the relevant testing were not based on an adequate and proper test and thus failed. Any performance or efficacy claim must be supported by testing before the representation is made; otherwise, the Tribunal will find the representations were not based on an adequate and proper test.[132]

---

[126] *Chatr, supra* note 113, at para 295; *The Commissioner of Competition v Imperial Brush Co Ltd and Kel Kem Ltd (c.o.b. as Imperial Manufacturing Group)*, 2008 CACT 2 [*Imperial* Brush] at para 122.
[127] *Chatr, supra* note 113, at para 455.
[128] *Imperial Brush, supra* note 126 at para 122.
[129] *Chatr, supra* note 113, at paras 124 and 295.
[130] *Ibid.,* at paras 124, 295, and 344.
[131] *Ibid.,* at para 293; *Imperial Brush, supra* note 126, at para 125.
[132] *Chatr, supra* note 113, at paras 440-445.

78. The Respondents have failed to adduce any evidence of testing they undertook in advance of, and to support, the representations they made with respect to the performance or efficacy of the Products. Therefore, as in *Chatr* and *Imperial Brush,* the Commissioner submits the Respondents have engaged in reviewable conduct.

79. In the alternative, if the Respondents are able to point to some form of testing that was undertaken in advance of the representations, the Commissioner submits that, as in *Imperial Brush,* that testing must take into account the following non-exhaustive factors in order to be considered adequate and proper testing:

a) depends on the claim made as understood by the common person;

b) must be reflective of the risk or harm which the product is designed to prevent or assist in preventing;

c) must be done under controlled circumstances or in conditions which exclude external variables or take account in a measurable way for such variables;

d) are conducted on more than one independent sample wherever possible (e.g. destruction testing may be an exception);

e) results need not be measured against a test of certainty but must be reasonable given the nature of the harm at issue and establish that it is the product itself which causes the desired effect in a material manner; and

f) must be performed regardless of the size of the seller's organization or the anticipated volume of sales.[133]

---

[133] *Imperial Brush, supra* note 126, at para 128.

80. One of the cornerstones for adequate and proper testing is to “replicate or even approximate the conditions” under which the product is to be used/operated.[134] In *Imperial Brush,* the Tribunal noted that the testing conducted on stoves was insufficient because it was conducted outdoors, which did not replicate the actual conditions in which the stoves and the products would be used, and therefore did not constitute adequate and proper testing.[135]

81. Merely relying on unsupported premises is insufficient. For example, in *Imperial Brush,* the Tribunal noted:

> The Bulletins may be interpreted by a person to provide some type of support for the premise that sodium chloride based products (salt) may reduce creosote. It may well lead to a further and more detailed analysis to determine whether the promise has significant reality. However, this premise is not sufficient to support the Respondents’ representations. The premise needs to be tested in light of the Respondents’ products.[136]

82. Therefore, the Respondents cannot rely simply on untested premises to allege that the Products work as advertised.

83. Moreover, anecdotal stories do not constitute “tests” under the Act.[137]

84. Despite representations made by the Respondents that Nuvocare products are supported by research, the Bureau has not received any testing to substantiate the representations that they make about the Products.

---

[134] *Ibid.,* at para 177.
[135] *Ibid.*.
[136] *Ibid.,* at para 158.
[137] *Ibid.,* at para 217.

85. The SlimCentials.com website invites consumers to read three “studies” relating to SlimCentials WeightOFF Max!. None of the three studies appear to examine SlimCentials WeighOFF Max![138] None of the three studies appear to explicitly address the representations that SlimCentials WeightOFF Max! will block fat storage, cut appetite, block carbohydrates, increase fat release or decrease emotional eating.[139]

86. The NutraCentials.com website invites consumers to read three “studies” relating to NutraCentials WeightOFF Max!. None of the studies appear to examine NutraCentials WeightOFF Max![140] None of the studies appear to explicitly address the representations that NutraCentials WeightOFF Max! will block fat storage, cut appetite, block carbohydrates, increase fat release or decrease emotional eating.[141]

87. The SlimCentials.com website invites consumers to read one “study” relating to the SlimCentials Forskolin+.[142] The study does appear to explicitly address the representations that SlimCentials Forskolin+ or NutraCentials Forskolin Nx will target belly fat, or increase metabolism.[143]

88. The Nutracentials.com website invites consumers to read one “study” relating to the Nutracentials Forskolin Nx.[144] The study does appear to explicitly address the

---

[138] McKenzie Affidavit, *supra* note 1, at paras 69-70.
[139] *Ibid.*, at para. 70.
[140] *Ibid.*, at paras 71-72.
[141] *Ibid.*, at para. 72.
[142] *Ibid.*,, at para 73.
[143] *Ibid.*
[144] *Ibid.*

representations that SlimCentials Forskolin+ or NutraCentials Forskolin Nx will target belly fat, or increase metabolism.[145]

89. Should the Respondents not provide any testing in response to this Application, the Tribunal ought to conclude that none of the statements as to the performance or efficacy of the Products are substantiated by adequate and proper testing. Alternatively, should the Respondents provide testing in response to the Application, the Commissioner will have it reviewed by an expert in the field and will seek to tender an expert report forthwith.

4. Respondents' Burden

90. Once the Applicant has demonstrated that the alleged representations were made, the onus shifts to the Respondents to demonstrate that the relevant statement, warranty or guarantee has been substantiated by an "adequate and proper test".[146]

91. Despite the Commissioner's request for testing, the Respondents have failed to provide any evidence that they tested any one or more of the Products and found it to have any of the effects claimed in the Impugned Representations.

92. Had the Respondents performed testing on the Products and if this testing were available, the Respondents would have provided it to the Commissioner, given that Mr. Foley was made aware of his obligations in the Bureau's request for this information.

---

[145] *Ibid.*
[146] *Canada (Commissioner of Competition) v. PVI International Inc,* 2002 CACT 24 at paras 45, 46, 51; *Chatr*, *supra* note 113,at paras 292 and 303.

93. The Respondents identify four (4) specific categories of consumers that are intended to benefit from the use of the Products, namely: "obese", "overweight", "spare tire", and "those who want to lose those last few lbs".[147] There is no evidence that the Respondents tested the use of the Products on these categories of consumers and found the Products to have any effect for these category of people.[148]

94. The Respondents also identify the following four (4) types of consumers that should use NutraCentials brand products. These include: [149]

a) Males and females over the age of 18 who want to lose body fat and maintain muscle;

b) Individuals taking diabetic, heart, thyroid and other medications;

c) Individuals taking vitamins and other medications, and;

d) Anyone who wants to use the purest, cleanest, highest quality, most potent nutrients clinically proven to have powerful fat loss benefits while also improving overall health.

95. There is no evidence that the Respondents tested the use of any NutraCentials products on these category of consumers and found that NutraCentials products had any effect on these categories of consumers.

96. Additionally, the Respondents make representations that they are a research-based company and Nuvocare products are supported by research. These representations create the general impression that the Products are clinically-proven[150] to lead to weight loss, and that

---

[147] McKenzie Affidavit, *supra* note 1 at para 49.
[148] *Ibid.*.
[149] *Ibid.*, at para 50.
[150] *Ibid.*, at para 28(d).

Nuvocare has done human clinical trials[151] on their products. Yet, there is no evidence that the Products have been tested, through human clinical trial or otherwise.

C. SERIOUS HARM IS LIKELY TO ENSUE UNLESS THE ORDER IS ISSUED

1. Section 74.11 sets out a low harm threshold

97. Section 74.11 sets out a low standard for the Tribunal to conclude that harm will occur absent the order sought. This is clear from the wording of the provision itself, and is confirmed by the fact that the Commissioner brings an application in the public interest to stop conduct Parliament has made reviewable and subject to administrative monetary penalties.

98. Under section 74.11 of the Act, it must appear to the Tribunal that "serious harm" is "likely" absent the order sought by the Commissioner. "Serious harm" is a different and lower standard than "irreparable harm", the standard for injunctions at common law. Moreover, the Tribunal need only conclude that it appears that "serious harm" is "likely"; the Tribunal need not conclude that harm has occurred or will necessarily occur if the order is not issued.

99. In considering the issue of "serious harm", the Applicant's role in administering and enforcing the Act must be considered. The Commissioner is presumed to bring this application in the public interest.[152] In bringing this application, the Applicant is not seeking to enforce a private right or interest. The Applicant is seeking to uphold the Act and, ultimately, to protect certain public rights. In light of that fact, it is submitted that the test for

---

[151] *Ibid.*, at para 16(c).

[152] *Commissioner of Competition v Parkland Industries Ltd.*, 2015 Carswell Nat 1878, 2015 Comp. Trib. 4 [*Parkland*] at paras 59, 62 and 63.

establishing whether serious harm is likely to ensue in the instant application is different from that applied in cases involving between private litigants.

100. Finally, Parliament has clearly indicated that false or misleading representations are likely to lead to serious harm, not only by making it reviewable under the Act, but also by rendering the conduct subject to administrative monetary penalties. As the Tribunal has observed, the improvement of consumer information benefits consumers, competitors, and the proper functioning of the market.[153] By contrast, the continuation of false or misleading consumer information in itself constitutes a serious harm to consumers, competitors, and the proper functioning of the market.

2. *Serious Harm will Ensue Absent the Order Sought*

101. Serious harm is clearly made out in this case. The reviewable conduct in this case is systemic, ongoing, and widespread. It has caused and continues to cause serious harm both to consumers and to competition.

102. The conduct is systemic, as reflected in the Respondents' Websites, on social media sites, in promotional emails, at consumer expos, in print magazines, and on product labels or packaging.[154] Indeed, it is integral to the Respondents' business. The Respondents target Canadians seeking to lose weight or burn fat. [155]

---

[153] *Imperial Brush, supra* note 126, at para 79.
[154] McKenzie Affidavit, *supra* note 1, at paras 21 and 23.
[155] *Ibid.*, at paras 48-50.

103. The conduct is ongoing across a number of platforms including the Respondents' Websites, on social media sites, in promotional emails, at consumer expos, in print magazines, and on product labels or packaging. [156]

104. The conduct is widespread. The Impugned Representations are made via their Websites, on social media sites, in promotional emails, at consumer expos, in print magazines, and on product labels or packaging.[157] Through the Internet alone, the Impugned Representations are available to all Canadians with an Internet-connected device, and can reach a large number of Canadians. This means that untold numbers of consumers are being exposed to the Impugned Representations.

a) Harm to consumers

105. Economic loss to consumers can constitute "serious harm". In *Yellow Pages*, "serious harm" under section 74.11 was found where the evidence established that money was being paid by Canadian businesses to the Yellow Respondents.[158]

106. The Products are available to Canadian consumers nationally through a wide array of retailers and channels. This includes major retail stores, health food retailers, as well as online through a number of websites controlled by the Respondents.[159]

---

[156] *Ibid.*, at paras 21 and 23.
[157] *Ibid.*, at paras 21 and 23.
[158] Factum of the Moving Party, the Commissioner of Competition, August 4, 2011, paragraph 64; *Canada (Commissioner of Competition) v Yellow Page Marketing B.V.*, 2012 ONSC 927, 2012 CarswellOnt 2837
[159] McKenzie Affidavit, *supra* note 1, at paras 42, 45 and 47

107. The Respondents also make representations that they have conducted clinical trials[160] on the Products to induce consumers into buying the Products. [161] Yet, there is no evidence that the Respondents have ever tested the Products.

108. The Respondents target vulnerable consumers seeking to lose weight or burn fat and other similar benefits. The reviewable conduct is causing direct harm to these consumers as:

a. These consumers purchase the Products to obtain the weight loss, fat burn and other benefits of the Products touted by the Respondents[162], and they therefore suffer an economic loss commensurate with the price they paid for the Products;
b. These consumers may use the Products for serious conditions and/ or may delay proper treatment of a condition based on the representations made by the Respondents.[163]

109. There is also harm associated with risk to health. Health Canada has categorized certain products according to levels of risk.[164] These levels are proportionate to the standard of evidence necessary to support the safety and efficacy of a product.[165] The Products are not authorized by Health Canada to make the high risk claims they are making.[166] . However, the Respondents' Impugned Representations go beyond the parameters of the health claims the Respondents are authorized to make.

b) Harm to competition

110. The reviewable conduct also causes harm to competition generally.

---

[160] *Ibid.*, at paras 16(c), 28(d), 28(j) and 37(b).
[161] *Ibid.*, at para 67.
[162] *Ibid.*, at paras 48-49.
[163] *Ibid.*, at para 50; Treyvaud Amiguet Affidavit, *supra* note 13, at para 20.
[164] Treyvaud Amiguet Affidavit, *supra* note 13, at para 13.
[165] *Ibid.*, at para. 21 and Exhibit C.
[166] *Ibid.*, at para. 21, 29, 30, 37, 38, 41.

111. If the Tribunal is satisfied that the Applicant has demonstrated that a strong *prima facie* case exists that the Respondent has engaged and continues to engage in conduct contrary to s. 74.01 of the Act, then, on the basis of that finding, the Tribunal can infer that serious harm is likely to ensue if the Respondent is permitted to continue to make the representations at issue.

112. The Federal Court of Appeal has held that harm to competition is presumed whenever the elements of 74.01(1)(a) are made out:[167]

> [61] With the purpose clause in mind, it becomes clear that the objective of the deceptive marketing provisions in section 74.01 is to incent firms to compete based on lower prices and higher quality, in order "to provide consumers with competitive prices and product choices." Importantly, the deceptive marketing provisions—unlike many other provisions of the Act—do not list actual harm to competition as an element of the offence. Since harm to competition is not listed as an element of the offence in this case, but it is a truism that the Act always seeks to prevent harm to competition, it is presumed that whenever the elements of paragraph 74.01(1)(*a*) are made out, there is *per se* harm to competition.
>
> [62] When a firm is permitted to make misleading representations to the public, putative consumers may be more likely to choose the inferior products of that firm over the superior products of an honest firm. When consumer information is distorted in this manner, firms are encouraged to be deceitful about their goods or services, rather than to produce or provide higher quality goods or services, at a lower price. Therefore, as the appellant contends, when a firm feeds misinformation to potential consumers, the proper functioning of the market is necessarily harmed, and the Act is rightly engaged, given its stated goals.
>
> [emphasis added]

113. Although this application is brought pursuant to paragraph 74.01(1)(b) of the Act, it is the Applicant's submission that the same reasoning applies, as Phelan J. indicated in *Imperial Brush* "... the objective of paragraph 74.01(1)(b) is the protection of consumers,

---

[167] *Premier, supra* note 120.

competitors, and the proper functioning of the market from the harm caused by unsubstantiated representations about the performance, efficacy or life of a product".[168] In the circumstances of this case, there is further reason that harm to competition should be assumed. Any consumers, that choose to purchase Products from the Respondents due to their impugned misrepresentations, will by definition affect the proper functioning of the market.

D. THE BALANCE OF CONVENIENCE FAVOURS ISSUING THE ORDER

114. For this final element under s. 74.11 of the Act, the Tribunal is required to consider whether the balance of convenience favours issuing the order.

115. Under this part of the test, the Tribunal must determine which of the parties will suffer the greater harm from the granting or refusal of the interim order, pending a decision on the merits.[169] Here, it is consumers that will suffer the greater harm if the interim order is not granted. In this case, any hardship imposed on the Respondents by the issuance of the temporary order sought by the Commissioner are far outweighed by the harm occasioned by a failure to issue such order, in essence by public interest in having the Impugned Representations stop.

116. As outlined above, there is compelling evidence that reviewable conduct is taking place, and that this conduct is causing and will continue to cause serious harm to consumers if it is allowed to continue. In a situation such as this, particularly where the relief is being sought

---

[168] *Imperial Brush, supra* note 126, at para 80.
[169] *RJR-MacDonald Inc v Canada (Attorney General),* [1995] 3 SCR 199 at p. 342; *Parkland, supra* note 147 at para 103

by a public law enforcement official with a mandate to protect the public interest, [170] the balance of convenience should strongly favour issuing the temporary order sought.

117. Where an injunction is sought to protect the public interest or to enforce public rights, courts will rarely conclude that the public interest in having the law obeyed is outweighed by the hardship the injunction would impose upon the person subject to the injunction. As stated in Sharpe's "*Injunctions and Specific Performance*":

> It seems clear that where the Attorney General sues to restrain breach of statutory provision and is able to establish a substantive case, the courts will be very reluctant to refuse [an injunction] on discretionary grounds. In one case, it was held that the general rule no longer operates; the dispute is no longer one between individuals, it is one between the public and a small section of the public refusing to abide by the law of the land.[171]

118. Any competitive harm to the Respondents from loss of revenues that result from the misrepresentations is offset by the harm to the consumers caused by the misrepresentations. In *Bell Canada v Cogeco Cable Canada*,[172] Bell was seeking an interlocutory injunction against Cogeco. The defendant Cogeco argued that the balance of convenience lied in its favour, since the interlocutory injunction would prevent it from making certain representations during a critical period for marketing to prospective customers – the "back to school" marketing season. The Court rejected this argument, noting that if it is a critical period for marketing to prospective customers, Bell, a competitor, could also be significantly affected by the advertising campaign.[173]

---

[170] *Parkland, supra* note 147 at para 107.

[171] Robert Sharpe, *Injunctions and Specific Performance*, 2nd ed. (Toronto: Canada Law Book, 1996); *The Queen in the right of British Columbia v. Alpha Manufacturing Inc. et al.*, 150 D.L.R. (4th) 193.

[172] *Bell Canada v Cogeco Cable Canada*, 2016 ONSC 6044 [*Cogeco*]

[173] *Ibid.*, at para 38

119. Any inconvenience caused to the Respondents by the issuance of the Order sought by the Commissioner is minimal. Issuance of the order sought by the Commissioner would require that the Respondents modify the content of their Websites, social media sites, promotional emails, promotional material at consumer expos, print magazines, and their product labels or packaging.

120. The Ontario Superior Court in *Cogeco* found that the cost of modifying websites (in that case) did not tip the balance of the convenience compared to the harm that would occur if the representations were allowed to continue.

E. DURATION OF THE ORDER SOUGHT

121. The Commissioner acknowledges his duty under subsection 74.11(6) to "proceed as expeditiously as possible to complete the inquiry under section 10 arising out of the conduct in respect of which the order was issued".

122. As set out above, the Commissioner's inquiry is ongoing. The temporary order sought is necessary to stop the misleading representations being made by the Respondents, which are identified above, from continuing to cause serious harm to consumers, competitors and to competition while the Commissioner completes his inquiry. If the order is granted, the Commissioner shall proceed as expeditiously as possible, during the period of interim relief, while having regard for the anticipated need for the use of formal powers to gather additional evidence in order to advance his investigation.[174]

[174] McKenzie Affidavit, *supra* note 1, at para. 80.

F. LIABILITY OF MR. FOLEY DIRECTLY

123. For the purposes of s. 74.01(1) of the Act, "a person" covers anyone who makes representations to the public, be it a natural person, a legal person, or both.[175]

124. Respondents, whether a company or a natural person, 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/her. [176]

125. Liability is assigned to (1) a person who expressly made the representations, and/or (2) a person who is "effectively" responsible for the representations made to the public. For the latter, this can be a person who planned, directed and was ultimately essential to the representations being made. This is the case even if the person did not expressly make the representations himself or herself. [177]

126. In *Gestion Lebski,* a director of one of the respondents was held liable for the impugned representations. The Tribunal found he was "the prime mover" behind the representations as he was the one making decisions about the approach to be taken in marketing the relevant products. As such, he was found effectively responsible for making the impugned representations to the public and was therefore found directly liable on the same basis as the company for which he was the director.[178]

---

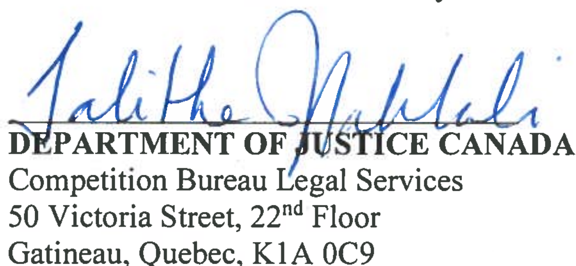
[175] *Gestion Lebski, supra* note 126, at para 268 and 271
[176] *Ibid.*, at para 268 and 271
[177] *Ibid.*, at para 267
[178] *Ibid.*, at paras 263-265.

127. Mr. Foley is the President and CEO of Nuvocare[179]. He also claims to be the founder, creator and formulator of the Products[180]. Mr. Foley expressly makes several of the Impugned Representations to the public in his capacity as President and CEO of Nuvocare. Where he does not expressly make the representation, he is "effectively" responsible for the representations being made the public by virtue of being President and CEO of Nuvocare.[181]

PART IV - ORDER SOUGHT

128. The Commissioner submits he has met the test for relief under section 74.11 of the Act and requests that the Tribunal exercise its discretion to issue the Order set out in paragraph 1 of the Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of March, 2020.



DEPARTMENT OF JUSTICE CANADA
Competition Bureau Legal Services
50 Victoria Street, 22nd Floor
Gatineau, Quebec, K1A 0C9

Talitha A. Nabbali
Ellé Nekiar
Telephone: 819-953-3884
Fax: 819-953-9267

Counsel to the Commissioner of Competition

---

[179] McKenzie Affidavit, *supra* note 1, at para 14.
[180] ,*Ibid.*, at para 16.
[181] *Ibid.*, at para. 14.