

Competition Tribunal



Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. Imperial Brush Co. Ltd. and Kel Kem Ltd. (c.o.b. as Imperial Manufacturing Group)*, 2008 Comp. Trib. 8
File No.: CT-2006-010
Registry Document No.: 0115

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

AND IN THE MATTER of an inquiry pursuant to subparagraph 10(1)(b)(ii) of the *Competition Act* relating to the marketing practices of Imperial Brush Co. Ltd. and Kel Kem Ltd. (c.o.b. as Imperial Manufacturing Group);

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

B E T W E E N:

The Commissioner of Competition
(applicant)

and

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



Date of hearing: 20080512
Presiding Judicial Member: Phelan J.
Date of Reasons for Order and Order: May 14, 2008
Reasons for Order and Order signed by: Justice Michael Phelan

REASONS FOR ORDER AND ORDER REGARDING PUBLIC NOTICE AND COSTS

I. PRELIMINARY

[1] Following the Tribunal's findings that the Respondents had engaged in reviewable conduct, contained in its Reasons and Order of February 7, 2008 (the "February 7 Order"), there were certain remedies issues to be resolved. On May 12, 2008, the Tribunal conducted a Remedies Hearing. These are the Reasons and Order consequent upon this hearing.

II. ISSUES

A. Recall

[2] In the February 7 Order, the Tribunal briefly addressed the possible remedy of product recall and/or repackaging of the products in such manner as would address the issue of the performance representations.

[3] While the Respondents question the Tribunal's jurisdiction to order a recall, the issue need not be decided. Furthermore, any jurisdictional challenge would depend on whether the Respondents, rather than third parties, would be ordered to take such action as part of an order not to continue to engage in making the reviewable representations.

[4] Since all parties are satisfied that the cease and desist order is sufficiently effective and having regard for the fact that all products have been recalled by the Respondents, to the best of its ability, there is no utility in any further order.

[5] In my view, any delay in implementing a recall of products already in the hands of third parties was in good faith and not an attempt to circumvent the cease and desist provision of the February 7 Order.

[6] The Respondents have asked that the Tribunal clarify that its February 7 Order applies only in respect of the Respondents and particularly not to individuals. This concern arose from the breadth of the cease and desist provision which was designed to ensure that persons acting for and on behalf of the Respondents were caught by the provision or more directly put, that the Respondents did not attempt to continue the reviewable conduct through surrogates.

[7] I see nothing that precludes the Tribunal from ordering a respondent to cease and desist, both directly or indirectly through its agents, associates and other such surrogates. However, it should be made clear that in respect of the reviewable conduct, only the Respondents were held to have engaged in such conduct.

B. Publication

[8] At paragraph 225 the Tribunal concluded that some form of dissemination of its February 7 Order was necessary. While time and circumstances have influenced the scope and dissemination of the contents of its February 7 Order, the basic rationale remains.

[9] The Applicant has proposed putting a notice of the February 7 Order in some 50 papers across the country. In the absence of details as to where the products were sold (which neither party could provide), this might be a rational approach. However, the cost of such approach, given the withdrawal of the sale of these products, would make such an order punitive in nature.

[10] Under the current circumstances, including that some products were still being sold after the Tribunal's February 7 Order, the Respondents will be required to insert a notice (the precise terms of which are in Annex A to these Reasons and Order) on one Friday within three (3) weeks of these Reasons and Order within either the first five (5) pages of the first section or first four (4) pages of the business section of one of either of the Globe and Mail or National Post and one of either of La Presse or Le Devoir.

C. Costs

[11] The parties agree that a lump sum award (if any award is to be made) is preferable. As indicated at the hearing, I will make such an award. The Tribunal has the authority to award costs pursuant to subsections 8.1(1), (4)-(5) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.).

[12] As to quantum, there is very little material before the Tribunal upon which to assess costs or even the reasonableness of disbursements. The Tribunal does note that since the Respondents were principally represented by a single counsel (however distinguished he may be), it would be unfair to require the Respondents to also absorb all the costs of the multi-lawyer team of the Applicant.

[13] Further, I will not factor anything in respect to the constitutional challenge. These Respondents were left to deal with a burden of that issue because the Applicant had failed to raise section 1 evidence in *Commissioner of Competition v. Gestion Lebski Inc.*, 2006 Comp. Trib. 32.

[14] The expert evidence of Dr. Pegg and Mr. Stegmeir was appropriate in the circumstances of the case. It was surprising that Mr. Stegmeir's costs (even recognizing the need to travel) were more than Dr. Pegg's. Mr. Stegmeir's evidence, both that given and that which was available, was not of such a nature that it required an out of country expert.

[15] Therefore, I will award \$40,000.00 for all taxable costs in this matter.

[16] This concludes the remedies phase of this matter.

FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[17] The Respondents will insert a notice (the precise terms of which are in Annex A to these Reasons and Order) on one Friday within three (3) weeks of these Reasons and Order within either the first five (5) pages of the first section or first four (4) pages of the business section of one of either of the Globe and Mail or National Post and one of either of La Presse or Le Devoir.

[18] The Respondents shall pay to the Applicant costs in the amount of \$40,000 for all taxable costs.

DATED at Ottawa, this 14th day of May, 2008.

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

(s) Michael L. Phelan

ANNEX A

**Important Notice about Kel-Kem
Creosote Cleaner – Creosote Conditioner
Supersweep Chimney Cleaning Log –
Imperial Chimney Cleaning Log**

Since 2002, Imperial Brush Co. Ltd. and Kel-Kem Limited (carrying on business as Imperial Manufacturing Group) have advertised these products as having the capacity to clean or assist in cleaning chimneys, help reduce or remove creosote, reduce risk of chimney fires, reduce hard or glazed creosote to an ash, inhibit the rate of creosote build-up and react with most chimney deposits to reduce their adhesiveness, and be non-corrosive and non-toxic. The representations were found on the packaging of the products and on Imperial Manufacturing Group's website. Various retail stores across Canada carried the products since at least 2002, until March 2008.

In its decision of February 7, 2008, the Competition Tribunal determined that the companies had contravened the *Competition Act* because these representations were not based on adequate and proper tests. The Tribunal ruled that the breach of the Act was serious because the products are to be used to “address, in some measure, the dangerous situation of chimney fires”.

The Tribunal ordered the companies to cease making the representations and to pay an administrative monetary penalty and certain costs of the Tribunal proceeding.

A copy of the Competition Tribunal order can be found on the Tribunal's website at <http://www.ct-tc.gc.ca> . For any questions, contact information is available at <http://www.imperialgroup.ca> .

APPEARANCES:

For the applicant

Commissioner of Competition

Stéphane Lilkoff

For the respondents

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

Daniel M. Campbell