

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF an inquiry pursuant to subsection 10(1)(b)(ii) 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);

BETWEEN:

COMPETITION TRIBUNAL
TRIBUNAL DE LA CONCURRENCE

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March 10, 2008

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106

THE COMMISSIONER OF COMPETITION

Applicant

-and-

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

Respondents

APPLICANT'S ARGUMENTS ON THE ISSUES OF THE PUBLIC
NOTICE, PRODUCT RECALL, PRODUCT WITHDRAWAL,
CHANGE IN PACKAGING AND COSTS

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I. Introduction

- 1) On February 7, 2008, for the reasons issued on that day, Mr. Justice Phelan allowed the Amended Notice of Application regarding representations made about the Supersweep Chimney Cleaning Log, the Imperial Chimney Cleaning Log, the Kel Kem Creosote Cleaner, the Kel Kem Creosote Conditioner and any similar products.
- 2) Mr. Justice Phelan issued an order pursuant to paragraph 74.1(1)(a) of the *Competition Act* prohibiting the Respondents from making the subject representations about these products or any similar products.

- 3) Also, Mr. Justice Phelan ordered the Respondents to pay an administrative monetary penalty pursuant to paragraph 74.1(1)(c) of the *Competition Act*.
- 4) Further, Mr. Justice Phelan gave the parties 30 days to make submissions regarding the following issues:
 - a) The nature, form and dissemination of the public notice;¹
 - b) Product recall/withdrawal and/or change in packaging;²
 - c) The proper award of costs.³
- 5) These issues will be discussed hereafter in the following order:
 - a) Public notice (Section II);
 - b) Product recall, product withdrawal and change in packaging (Section III);
 - c) Costs (Section IV).

II. Public notice

- 6) Mr. Justice Phelan says as follows in his reasons regarding the public notice:

[225] It is necessary for there to be some public dissemination of the Tribunal's Order to the people most directly affected and who may have relied upon the representations and felt some degree of comfort and security by using the products. The section 1 Charter justification is based in part on the asymmetrical information base between seller and ultimate purchaser. In this case, the potential harm flowing from inadequately tested representations accrues to the consumer not to others in the supply chain.

[226] The Commissioner has not proposed the nature, content or distribution/publication of such a notice and requested an opportunity to deal with this matter after receipt of the Tribunal's Reasons. Submissions should thus be made on this issue.

¹ Subparagraph 233(c) of the Reasons and Order.

² Ibid.

³ Ibid.

- 7) The Tribunal's jurisdiction to order a public notice is found at subparagraph 74.1(1)(b) of the *Competition Act* that provides as follows:

74.1 (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person

(...)

(b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including

(i) a description of the reviewable conduct,

(ii) the time period and geographical area to which the conduct relates, and

(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed;

- 8) Accordingly, the Applicant submits that the public notice should read as follows:

*Important Notice About Imperial Manufacturing Group's
Chimney Cleaning And Creosote Conditioning Products*

Pursuant to the order dated February 7, 2008 of the Competition Tribunal of Canada, Imperial Brush Co. Ltd. and Kel Kem Ltd. (carrying on business as Imperial Manufacturing Group) make this notice about their products sold as:

- Supersweep Chimney Cleaning Log*
- Imperial Chimney Cleaning Log*
- Kel Kem Creosote Cleaner*
- Kel Kem Creosote Conditioner*

Since 2002, Imperial Brush Co. Ltd. and Kel Kem Ltd. have advertised these products as having the capacity to

- *Clean or assist in cleaning chimneys, as advertised in particular by the products' names above*
- *Reduce, remove, condition, or otherwise affect creosote, as advertised in particular by the product's names above*
- *Prevent, eliminate or otherwise affect chimney fires*
- *Help prevent chimney fires*
- *Help eliminate dangerous creosote in a chimney*
- *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*
- *Be non-corrosive*
- *Be non-toxic*

However, the Competition Tribunal has determined that Imperial Brush Co. Ltd. and Kel Kem Ltd. have contravened the Competition Act because these representations are not based on adequate and proper tests. The Tribunal has ruled that the breach is serious because the products are to be used to "address, in some measure, the dangerous situation of chimney fires". The Tribunal added that a "high standard of testing and analysis" would have been needed regarding representations made about the products.

The representations were found directly on the packaging of the products, in print advertisements and on Imperial Manufacturing Group's website. Retail stores across Canada have been carrying the products at least since 2002.

As a consequence, the Competition Tribunal has ordered Imperial Brush Co. Ltd. and Kel Kem Ltd. to cease making the representations and to pay \$25,000 as an administrative monetary penalty.

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>.

- 9) Regarding the dissemination of the public notice to the customers of the products, the Applicant submits as follows:
- a) The Applicant submits that the most efficient way to disseminate the notice would have been at the retail stores, where the customers initially purchased the products. However, the Tribunal does not have the jurisdiction to order retail stores to post the notice at their premises. It also cannot order the Respondents to post the notice at the retailers' premises because they do not have legal access there. In any event, it might be some time before the affected customers would return to the store and

read the notice, and there would also be no effective way of controlling that retailers would post the notice.

- b) In the present matter, a sound and viable alternative of notifying customers could be by publishing the notice in newspapers. The products were sold at retail outlets across Canada. The Tribunal has ruled that there are serious safety issues raised in the present matter because the products are advertised as addressing the dangerous situation of chimney fires. There is a need to reach customers wherever they are. However, the Applicant does not have geographic sales data for the Respondents' products. If the Respondents provide this data, finding the appropriate newspapers will be a simple task. In the absence of such information, the Applicant will assume that the products have been distributed in the fifty (50) largest metropolitan areas in Canada. This represents approximately two thirds of the national population. Further, the Applicant submits that the notice should appear in at least one newspaper in each provincial or territorial jurisdiction, in at least one French language newspaper in New Brunswick, Ontario and Manitoba, and in newspapers in other areas in which consumers may have been able to purchase the products specifically, Bathurst New Brunswick, Corner Brook and Labrador City, Newfoundland and Labrador. The Applicant submits the notice should be published as follows:
- i) The Respondents would publish the public notice in each of the newspapers named below for four (4) consecutive Saturdays;
 - ii) The notice would appear within the first five (5) pages of the cover section or within the first four (4) pages of the business section of the newspaper(s);
 - iii) The notice would appear in a space no less than 6 inches x 4.5 inches in size when published in the newspapers named below;
 - iv) The title of the notice would be capitalized and would appear in 16-point bold font unembellished print;
 - v) The text of the notice would appear in 10-point font unembellished print in the newspapers named above;
 - vi) The notice would be published in the newspapers as listed in Appendix A.
- 10) Further, the Applicant respectfully submits that the Tribunal should order the Respondents to send the notice to all retailers and/or wholesalers that have purchased their products. These retailers and/or wholesalers would then be informed of the Tribunal's findings and they would be in a position to in turn

provide appropriate information to customers, the people most directly affected by the prohibited representations. Further, while they are less affected by the conduct, the retailers and/or wholesalers are also a “*class of persons likely to have been reached or affected by the conduct*”⁴ because they also purchased the products for resale to consumers on the basis of the prohibited representations. There is also “*asymmetrical information*” between them and the Respondents. Finally, as it will be discussed hereafter, the Applicant submits that the Respondents must take all actions necessary to remove the products from sale and such task will be more readily achieved if the retailers and/or wholesalers are informed about the Tribunal’s findings.

III. Product recall, product withdrawal and change in packaging

- 11) The Tribunal has ordered as follows:

[233] FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

(a) the Respondents (...) shall (...) cease making, causing to be made, or permitting to be made, by any means whatsoever, representations to the public for the purpose of promoting the use of the products (...) or any similar products, in the form of a statement, warranty or guarantee of performance or efficacy of the products, made on the packaging of the products or elsewhere (...);

(Emphasis added)

- 12) Pursuant to this order, the prohibited representations must stop. Where representations are found on a web site, or in a television advertisement or in print advertising, compliance measures are self-evident: the Respondents must cease and/or remove the representations forthwith. Failure to take these steps would risk contempt. Accordingly, the Applicant submits that it is not necessary for the Tribunal to detail which steps must be taken to ensure that the prohibited representations are removed because this will be the ultimate effect of the order found at subparagraph 233(a).
- 13) The more difficult issue involves the prohibited representations that appear on the labels and the packaging of the products. The Applicant submits that these representations are the most important representations to address in order to eliminate the risk of further consumer deception.

⁴ See subsection 74.1(1)(b) of the *Competition Act*.

- 14) The Applicant submits that the impact of the subparagraph 233(a) order is the same for those prohibited representations found on the labels and the packaging of the products, as for representations found elsewhere, i.e. that they must no longer be made to the public.
- 15) In practical terms, this means that the Respondents must take whatever steps are necessary to ensure that the prohibited representations found on the products are removed, whichever route the Respondents will take to achieve this result, i.e. be it the withdrawal or recall of their product from store shelves and distribution channels, or the re-labeling or repackaging of the products in such a manner that the order is complied with.
- 16) Therefore, the Applicant submits that the Tribunal need not attempt to craft an order directing the Respondents as to how to comply with the subparagraph 233(a) order.
- 17) Rather, the Applicant submits that it is for the Respondents to take all steps necessary to comply with the subparagraph 233(a) order, and failure to take immediate and effective actions on their part is a breach of that order.

IV. Costs

- 18) Section 8.1 of the Competition Tribunal Act provides as follows:

8.1. (1) The Tribunal may award costs of proceedings before it in respect of reviewable matters under Parts VII.1 and VIII of the Competition Act on a final or interim basis, in accordance with the provisions governing costs in the Federal Court Rules, 1998.

(2) The Tribunal may direct by whom and to whom any costs are to be paid and by whom they are to be taxed and allowed.

(3) The Tribunal may award costs against Her Majesty in right of Canada.

(4) Costs adjudged to Her Majesty in right of Canada shall not be disallowed or reduced on taxation by reason only that counsel who earned the costs, or in respect of whose services the costs are charged, was a salaried officer of Her Majesty in right of Canada performing those services in the discharge of that counsel's duty and remunerated for those services by salary, or for that or any other reason was not entitled to recover any costs from Her Majesty in right of Canada in respect of the services so rendered.

(5) Any money or costs awarded to Her Majesty in right of Canada in a proceeding in respect of which this section applies shall be paid to the Receiver General.

- 19) *The Federal Court Rules 1998 have now been amended as the Federal Courts Rules.*
- 20) *Rule 400 of the Federal Courts Rules provides as follows:*

400. (1) The Court shall have full discretionary power over the amount and allocation of costs and the determination of by whom they are to be paid.

(2) Costs may be awarded to or against the Crown.

(3) In exercising its discretion under subsection (1), the Court may consider

- (a) the result of the proceeding;*
- (b) the amounts claimed and the amounts recovered;*
- (c) the importance and complexity of the issues;*
- (d) the apportionment of liability;*
- (e) any written offer to settle;*
- (f) any offer to contribute made under rule 421;*
- (g) the amount of work;*
- (h) whether the public interest in having the proceeding litigated justifies a particular award of costs;*
- (i) any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;*
- (j) the failure by a party to admit anything that should have been admitted or to serve a request to admit;*
- (k) whether any step in the proceeding was*
 - (i) improper, vexatious or unnecessary, or*
 - (ii) taken through negligence, mistake or excessive caution;*
- (l) whether more than one set of costs should be allowed, where two or more parties were represented by different solicitors or were represented by the same solicitor but separated their defence unnecessarily;*
- (m) whether two or more parties, represented by the same solicitor, initiated separate proceedings unnecessarily;*
- (n) whether a party who was successful in an action exaggerated a claim, including a counterclaim or third party claim, to avoid the operation of rules 292 to 299; and*
- (o) any other matter that it considers relevant.*

(4) *The Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lieu of, or in addition to, any assessed costs.*

(5) *Where the Court orders that costs be assessed in accordance with Tariff B, the Court may direct that the assessment be performed under a specific column or combination of columns of the table to that Tariff.*

(6) *Notwithstanding any other provision of these Rules, the Court may*

(a) award or refuse costs in respect of a particular issue or step in a proceeding;

(b) award assessed costs or a percentage of assessed costs up to and including a specified step in a proceeding;

(c) award all or part of costs on a solicitor-and-client basis; or

(d) award costs against a successful party.

(7) *Costs shall be awarded to the party who is entitled to receive the costs and not to the party's solicitor, but they may be paid to the party's solicitor in trust.*

21) The Applicant submits that the Tribunal should allow costs in her favor for the following reasons:

a) The Amended Notice of Application was allowed against the Respondents;⁵

b) The issues were important and complex.⁶ In particular:

i) Mr. Justice Phelan himself has confirmed the importance of the issues raised, in particular at paragraph 123 of his reasons:

The circumstances here are that the product is to be used to address, in some measure, the dangerous situation of chimney fires. The test must be proper and adequate given the situation in which it will be used. This speaks to a high standard of testing and analysis.

ii) Four (4) products were at issue;

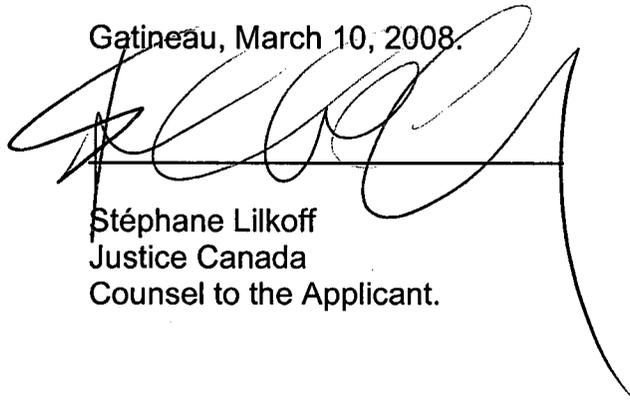
iii) Expert evidence was heard regarding these four (4) products;

⁵ Subsection 400(3)(a) of the *Federal Courts Rules*.

⁶ Subsection 400(3)(c) of the *Federal Courts Rules*.

- iv) Expert evidence was heard on the constitutional issue;
 - v) Approximately nine (9) full days of hearing took place;
 - c) The amount of work was significant, both for the Applicant's officers and legal counsel.⁷
- 22) Further, pursuant to subrule 400(5) of the *Federal Courts Rules*, the Applicant asks the Tribunal to order that the costs be assessed in accordance with Tariff B.
- 23) Furthermore, the Applicant asks the Tribunal to allow the payment of costs for a second counsel, considering the amount of work that was involved and the number and complexity of the issues. The Applicant submits that no counsel alone could have provided the legal services in the present matter.
- 24) Finally, unless such an order is not expressly needed, the Applicant asks the Tribunal to order that the taxation of costs be done by a taxation officer of the Federal Court of Canada and that the procedure to be followed in that regard be the one provided in the *Federal Courts Rules*.

Gatineau, March 10, 2008.



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⁷ Subsection 400(3)(g) of the *Federal Courts Rules*.

Appendix A

1	Toronto	Toronto Star
2	Montreal	Montreal Gazette
3	Montreal	La Presse
4	Vancouver	Vancouver Sun
5	Ottawa	Ottawa Citizen
6	Calgary	Calgary Herald
7	Edmonton	Edmonton Journal
8	Quebec City	Le Soleil
9	Winnipeg	Winnipeg Free Press
10	Hamilton	Hamilton Spectator
11	London	The London Free Press
12	Kitchener	Kitchener-Waterloo Record
13	St. Catherines	St. Catherines Standard
14	Halifax	The Chronicle Herald
15	Victoria	Victoria Times Colonist
16	Windsor	Windsor Star
17	Saskatoon	Saskatoon Star Phoenix
18	Regina	Regina Leader-Post
19	Sherbrooke	Sherbrooke Record
20	St. John's	St. John's Telegram
21	Barrie	The Barrie Examiner
22	Kelowna	Daily Courier
23	Abbotsford	Abbotsford Times
24	Sudbury	Sudbury Star
25	Kingston	Kingston Whig Standard
26	Saguenay	Le Quotidien
27	Trois-Rivières	Le Journal de Trois-Rivières
28	Guelph	The Guelph Mercury
29	Moncton	Moncton Times & Transcript
30	Thunder Bay	Chronicle Journal
31	Saint John	Telegraph Journal
32	Peterborough	The Peterborough Examiner
33	Chatham Kent	Wallaceburg Courier Press
34	Cape Breton	The Cape Breton Post
35	Lethbridge	The Lethbridge Herald
36	Kamloops	The Kamloops Daily News
37	Belleville	Belleville Intelligencer
38	Sarnia	The Sarnia Observer
39	Fredericton	The Fredericton Daily Gleaner
40	Prince George	Prince George Citizen
41	Red River	Red River Advocate
42	Chilliwack	Chilliwack Times

43	Sault St. Marie	The Sault Star
44	Drummondville	L'express
45	Kawartha Lakes	The Lindsay Post
46	Grand Prairie	The Daily Herald-Tribune
47	Canada	The Globe and Mail
48	Prince Edward Island	The Guardian
49	Nunavut	Nunatsiq News
50	North West Territories	Yellowknifer
51	Yukon	Whitehorse Star
52	Corner Brook	The Western Star
53	Bathurst	Northern Light (Weekly)
54	Labrador	Labradorian (Weekly)
55	New-Brunswick (French)	L'Acadie Nouvelle
56	Ontario (French)	Le Droit
57	Manitoba (French)	La Liberté (Weekly)