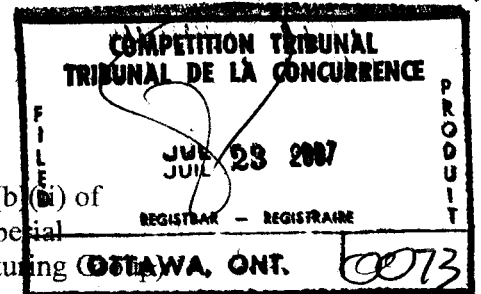


The Competition Tribunal

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) 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:

The Commissioner of Competition

Applicant

- and -

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

Respondents

Respondents' Memorandum
Constitutional Issue

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Memorandum of the Respondents, Imperial Brush Co. Ltd, and Kel Kem Ltd.

Constitutional Issue

Facts

1. The Respondents manufacture and distribute in Canada certain products including Kel Kem Chimney Creosote Cleaner, Kel Kem Creosote Conditioner, the SuperSweep Chimney Cleaning Log and the Imperial Chimney Cleaning Log, and have made certain representations with respect to those products on the packaging in which the products are distributed.
2. The Commissioner of Competition has made an application for orders imposing sanctions and penalties on the Respondents pursuant to s. 74.1 of the *Competition Act*, with respect to those representations made by the Respondents, asserting that the representations constitute reviewable conduct under s. 74.01(1)(b) of the *Competition Act*. The orders sought by the Commissioner are set out in Appendix 1.
3. Section 74.01(1)(b) of the *Competition Act* provides as follows:

74.01(1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) ...

(b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or

(c)

4. The Commissioner asserts that the Respondents are obliged to prove that the representations with respect to the above mentioned products are based on adequate and proper tests, failing which the sanctions and penalties under s. 74.01 (1) (b) of the *Competition Act* should be imposed. The Commissioner asserts that the Respondents and all persons making representations with respect to the performance, efficacy or length of life of a product are required to perform such tests before they are permitted to make such representations, that the tests must be conducted and documented with sufficient scientific rigour to ensure that there is complete certainty as to the accuracy of the representations, and that such documentation must be retained and provided to the Commissioner on demand.

5. Truth of the representations is not in issue under s. 74.01 (1) (b) and it is not asserted by the Commissioner that the representations are false or misleading in any material respect. Such assertions would be relevant and necessary in an application under s. 74.01 (1) (a), but no application has been made under that section.

Summary of Argument

6. Commercial speech, including advertising representations, are a form of expression protected by section 2 (b) of the *Canadian Charter of Rights and Freedoms*, Schedule B, *Constitution Act, 1982*.
7. Section 74.01(1)(b) of the *Competition Act* imposes an excessive burden on anyone who makes representations concerning the performance of a product, regardless of the truth of the representations. This section, through the mechanism of s. 74.1, provides sanctions and penalties for making such representations unless the Respondent performs, documents and submits evidence of an adequate and proper test.
8. Section. 74.01(1)(b) is therefore an interference with one's freedom of expression, as guaranteed under s. 2 (b) of the *Canadian Charter of Rights and Freedoms*
9. Such infringement of the guaranteed right of freedom of speech cannot be justified in a free and democratic society and section 74.01(1)(b) is therefore inconsistent with the Constitution of Canada.
10. The Respondents seek an order pursuant to s. 52 of the *Constitution Act, 1982* that section. 74.01(1)(b) is of no force or effect.

Law and Argument

11. The analytical approach to claims of infringement of the constitutionally guaranteed right of freedom of expression was set out by the Supreme Court of Canada in *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927. The first step is to determine whether the Plaintiff's activity falls within the sphere of conduct protected by the guarantee. If the activity falls within the protected sphere of conduct, the second step is to determine whether the purpose or effect of the government action in issue was to restrict freedom of expression. If the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee.
12. It is now settled law that commercial expression by persons, including corporations, is a form of expression which is protected by Section 2(b) of the *Charter*.

Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712;
Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927.

13. The Court stated in *Ford* (at pp. 766-67) and reiterated in *Irwin Toy* (at p. 971e):

Given the earlier pronouncements of this Court to the effect that the rights and freedoms guaranteed in the Canadian *Charter* should be given a large and liberal interpretation, there is no sound basis on which commercial expression can be excluded from the protection of s. 2(b) of the *Charter*.

Consequently, we must proceed to the second step of the inquiry and ask whether the purpose or effect of the government action in question was to restrict freedom of expression.

14. The approach of this inquiry into the purpose and effects of the impugned government action was set out by Dickson, J (as he then was) in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (at p. 334), and this was adopted by the court in *Irwin Toy* (at page 972h):

Dickson J. went on to specify how this inquiry into purpose and effects should be carried out (at p. 334):

In short, I agree with the respondent that the legislation's purpose is the initial test of constitutional validity and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test. If the legislation fails the purpose test, there is no need to consider further its effects, since it has already been demonstrated to be invalid. Thus, if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity. In short, the effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose.

If the government's purpose, then, was to restrict attempts to convey a meaning, there has been a limitation by law of s. 2(b) and a s. 1 analysis is required to determine whether the law is inconsistent with the provisions of the Constitution. If, however, this was not the government's purpose, the court must move on to an analysis of the effects of the government action.

15. The Court in *Irwin Toy* discussed the analytical approach to the purpose of the impugned governmental action. It noted that one must be beware of drifting to either of two extremes. On the one hand, it might be asserted that most human activity has an "expressive element" and thus an aspect of governmental purpose is virtually always to restrict expression. On the other hand, the government can almost always claim that its subjective purpose was to address some real or purported social need and not to restrict

expression. To avoid both extremes, the government's purpose must be assessed from the standpoint of the guarantee in question (at page 974):

If the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression. Archibald Cox has described the distinction as follows (*Freedom of Expression* (1981), at pp. 59-60):

The bold line . . . between restrictions upon publication and regulation of the time, place or manner of expression tied to content, on the one hand, and regulation of time, place, or manner of expression regardless of content, on the other hand, reflects the difference between the state's usually impermissible effort to suppress "harmful" information, ideas, or emotions and the state's often justifiable desire to secure other interests against interference from the noise and the physical intrusions that accompany speech, regardless of the information, ideas, or emotions expressed.

16. The distinction is between restriction on the harmful consequences of the manner of expression and a restriction on expression which is "tied to content". The example given by the court is a rule against handing out pamphlets (purportedly to control litter) and a rule against littering. The former is a restriction on access by others to a meaning being conveyed (and infringement of the constitutional right), while the latter relates to the physical consequences of certain conduct regardless of whether the conduct attempts to convey meaning.

17. The court went on at page 975e:

If the government is to assert successfully that its purpose was to control a harmful consequence of the particular conduct in question, it must not have aimed to avoid, in Thomas Scanlon's words ("A Theory of Freedom of Expression", in Dworkin, ed., *The Philosophy of Law* (1977), at p. 161):

a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful

acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing.

18. The Respondents submit that section 74.01(1)(b) of the *Competition Act* is an infringement on the freedom of expression guaranteed by Section 2(b) of the *Charter*. It restricts all expressions of meaning of a specific type (representations with respect to the performance, efficacy or length of life of a product), presumably with the subjective governmental intention of preventing harmful consequences (use of a product which might be ineffective) where the connection between the expression and the harmful consequences consists merely in the fact that the act of expression led the users to believe that the products might be effective. The restriction applies to all acts of expression, and not merely those which are false or misleading.

19. The Court summarized (at pp. 975-976):

In sum, the characterization of government purpose must proceed from the standpoint of the guarantee in issue. With regard to freedom of expression, if the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity.

20. If it is determined that the purpose of impugned government action infringes upon the guarantee, the inquiry ends there and it falls to the government to justify its actions pursuant to Section 1 of the *Charter*.

21. In *Commissioner v. Gestion Lebski Inc.* (2006), Comp. Trib. 32, Blanchard, J considered whether Section 74.01(1)(b) infringed a guaranteed freedom of expression. He said:

82. The respondents are therefore challenging paragraph & 4.01(1)(b), where an infringement of the freedom of expression cannot, they submit, be justified under section 1. The provision deals with representations that are not based on an adequate and proper test, but in respect of which a defence of truth cannot be asserted.

...

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

...

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

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

...

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

22. Blanchard, J went on to determine that it had not been demonstrated that the impugned decision could be justified under Section 1 of the Charter. However, pursuant to Nova Scotia (Workers' Compensation Board) v. Martin, [2003] 2 S.C.R. 504, his determination applied only in that case. The Commissioner has the opportunity in this case to demonstrate that paragraph 74.01(1)(b) is justifiable in a free and democratic society.

Justification

23. Once infringement has been established, the burden is on the government (in this case, the Commissioner) to establish justification under Section 1 of the *Charter*. The Respondents submit that the impugned provision cannot be so justified because:

(a) the objective which the impugned measure is designed to serve is not of sufficient importance to warrant overriding a constitutionally protected right or freedom.

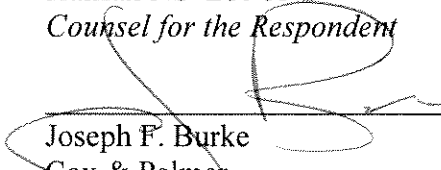
(b) the measures imposed in the impugned provision are not proportional in that they are not rationally connected to, and greatly exceed, the apparent objective, they do not minimally impair the right or freedom in question, and there is not appropriate proportionality between the effects of the measures which infringe the charter right and the objective.

24. The Respondents will respond to any justification asserted by the Applicant in its memorandum of argument.

Respectfully submitted July 23, 2007.



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Appendix 1 : Orders sought by the Commissioner:

(1) An order that the Respondents and any person acting on their behalf or for their benefit, including all directors, officers, employees, agents or assigns of the Respondents, or any other person or corporation acting on behalf of the Respondents or any successors thereof (hereinafter the foregoing persons are referred to as the "Respondents"), shall for a period of 10 years from the date of such order, 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 known as the Supersweep Chimney Cleaning Log, Kel Kem Chimney Creosote Cleaner and/or Kel Kem Creosote Conditioner or any similar product, 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, unless or until the Respondents perform such adequate and proper tests as are necessary to substantiate such statements, warranties or guarantees. Without limiting the generality of the foregoing, such representations include representations regarding the products', or any similar product's, capacity to:

- (a) Clean or assist in cleaning chimneys;
- (b) Reduce, remove, condition, or otherwise affect creosote;
- (c) Prevent, eliminate or otherwise affect chimney fires;
- (d) Help prevent chimney fires;
- (e) Help eliminate dangerous creosote in a chimney;
- (f) Reduce hard or glazed creosote to an ash;
- (g) Inhibit the rate of creosote build-up and react with most chimney deposits to reduce their adhesiveness.

(2) And further, without limiting the generality of the foregoing, such representations include representations regarding the products', or any similar product's, characteristics as:

- (a) Non-corrosive;
- (b) Non-combustible;
- (c) Non-toxic.

(3) An order requiring the Respondents, within 30 days of the issuance of any order the Tribunal makes in connection with this Application, to publish a notice or notices, in such manner and at such time as the Tribunal may specify, to bring to the attention of the class of persons likely to have been reached or affected by the Respondents' conduct: the name under which the Respondents carry on business; and, the Tribunal's determination with respect to this Application. The notice or notices would include:

- (a) a description of the reviewable conduct;
- (b) the time period and geographical area to which the conduct related; and
- (c) a description of the manner in which any representation or advertisement was disseminated.

(4) An order that the Respondents, within 30 days of the issuance of any order the Tribunal makes in connection with this matter, provide a copy of that order to all distributors, agents or other persons who are engaged or have been engaged in the promotion, marketing, distribution or sale of the products during the period the products have been marketed in Canada through to the date of the issuance of the Tribunal's order;

(5) An order that Respondents, within 30 days of the issuance or any order the Tribunal makes in connection with this matter, withdraw all promotional materials which are in the possession of the Respondents' distributors, agents or other persons who are engaged or have been engaged in the promotion, marketing, distribution or sale of the products, including any units of the products;

(6) An order that the Respondents pay an administrative monetary penalty or monetary penalties in an amount to be determined by the Tribunal upon hearing submissions from the Applicant.

(7) Such further and other order as to this Honourable Tribunal seems just.