

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE  <b>FILED / PRODUIT</b> June 29, 2007 CT- 2006-010  Chantal Fortin for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	# 0062

File No. CT - 2006 - 010

## 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:*

**The Commissioner of Competition**

*Applicant*

- and -

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

*Respondents*

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### Notice of Constitutional Question

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The Respondent intends to question the constitutional validity of Section 74.01 (1) (b) of the *Competition Act*, R.S., 1985, c. C-34.

The question is to be argued in the proceeding to commence on July 9<sup>th</sup> at Halifax, NS.

The following are the material facts giving rise to the constitutional question:

1. The Commissioner of Competition has made an application pursuant to Section 74.01(1)(b) of the *Competition Act*, which governs representations with respect to efficacy or performance not based on adequate and proper tests.
2. The Commissioner's application is made in relation to a number of products manufactured by the Respondent for wood burning appliances, including

chimney creosote conditioner (“Conditioner”), Creosote Cleaner (“Cleaner”) and powdered soot remover (“Powder”).

3. The Commissioner alleges that the above mentioned products have not been adequately or properly tested under s. 74.01 (1) (b) of the *Competition Act*.

The following is the legal basis for the constitutional question:

1. Section 74.01(1)(b) of the *Competition Act* imposes an excessive burden on anyone who makes representations concerning the performance of a product. This section provides sanctions for making such representations unless the Respondent submits evidence of an adequate and proper test.
2. 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.
3. Section. 74.01(1)(b) is therefore a *prima facie* interference with one’s freedom of expression, as guaranteed under s. 2 (b) of the *Canadian Charter of Rights and Freedoms*.

Dated this 29<sup>th</sup> day of June, 2007.

Respectfully Submitted,

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Daniel M. Campbell, Q.C.