

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).

**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**

COMPETITION TRIBUNAL	
TRIBUNAL DE LA CONCURRENCE	
FILED	PRODUIIT
SEP 11 2006	
REGISTRAR - REGISTRAIRE	
OTTAWA, ON	0001

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**NOTICE OF APPLICATION**

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**TAKE NOTICE** that the Applicant will make an Application to the Competition Tribunal (the "Tribunal") pursuant to subsection 74.1(1) of the *Competition Act* (the "Act") for a determination that the Respondents have engaged, and continue to engage, in reviewable conduct contrary to paragraph 74.01(1)(b) of the Act, and for an order in relation to the Respondents, the particulars of which are set out in paragraphs 20-25 of this Application.

**AND TAKE NOTICE** that in support of this Application, the Applicant will rely on the following Statement of Grounds and Material Facts.

## **STATEMENT OF GROUNDS AND MATERIAL FACTS**

### **I. GROUNDS FOR APPLICATION**

1. The Applicant submits that in connection with the promotion and sale of the products described in paragraphs 4-9 of this Application, the Respondents have engaged, and continue to engage in reviewable conduct, contrary to paragraph 74.01(1)(b) of the Act. Specifically, the Respondents, for the purpose of promoting, directly or indirectly, the supply or use of the SUPERSWEEP Chimney Cleaning Log, the KEL KEM Chimney Creosote Cleaner, and the KEL KEM Creosote Conditioner (collectively the “Products”), and/or their business interests, have made and continue to make representations to the public in the form of statements regarding the performance or efficacy of the Products, which statements are not based on adequate and proper tests.

### **II. MATERIAL FACTS**

#### **(a) The Parties**

2. The Applicant is the Commissioner of Competition, appointed under section 7 of the Act.
3. The Respondent Imperial Brush Co. Ltd., is a company incorporated in the province of New Brunswick. The Respondent Kel Kem Ltd. is a company incorporated in the province of Ontario. The Respondents are part of a group of companies which operate under the name Imperial Manufacturing Group.

**(b) The Products**

**(i) SUPERSWEEP Chimney Cleaning Log**

4. The SUPERSWEEP Chimney Cleaning Log (henceforth the “Log”) is a product shaped and packaged as a log, intended to be burned in fireplaces, wood stoves, and other similar wood burning appliances. Representations are made on the packaging of the Log, in the form of text and images, as to its performance and efficacy in chimney cleaning.
5. These representations include, but are not limited to, the following:
  - (a) Product name: Chimney Cleaning Log;
  - (b) Helps Prevent Chimney Fires;
  - (c) Helps Eliminate Dangerous Creosote In Your Chimney;
  - (d) Images on the packaging making the above representations or in support thereof.

**(ii) KEL KEM Chimney Creosote Cleaner**

6. The KEL KEM Chimney Creosote Cleaner (henceforth the “Cleaner”) is a liquid product sold in a one litre spray bottle. Representations are made on the packaging of the Cleaner as to its performance and efficacy in modifying creosote in chimneys.
7. These representations include, but are not limited to, the following:
  - (a) Product name: Chimney Creosote Cleaner;
  - (b) Reduces hard or glazed creosote to an ash;
  - (c) Non-corrosive;
  - (d) Non-combustible.

**(iii) KEL KEM Creosote Conditioner**

8. The KEL KEM Creosote Conditioner (henceforth the “Conditioner”) is a product, in powder form, sold in a 450 gram container. Representations are made on the packaging of the Conditioner as to its performance and efficacy in modifying creosote in chimneys.
9. These representations include, but are not limited to, the following:
  - (a) Product name: Creosote Conditioner;
  - (b) It can inhibit the rate of creosote buildup and reacts with most chimney deposits to reduce their adhesiveness;
  - (c) Non-corrosive;
  - (d) Non-toxic.

**(c) Reviewable Conduct under paragraph 74.01(1)(b) of the Act**

10. Paragraph 74.01(1)(b) reads as follows:

Misrepresentations to public

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,

[...]

(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...

**(d) Form of Representations**

11. The Respondents are responsible for the packaging, marketing and distribution of the Products, and have distributed them for sale or re-sale in various locations across Canada since the respective introduction of each Product. The representations made on the packaging of the Products have been consistent throughout the period the Products have been sold in Canada.
12. The Log was introduced into the Canadian market in or around July, 2003. The precise dates of introduction into the Canadian market of the Cleaner and Conditioner are unknown to the Applicant.
13. The representations include statements and/or guarantees as to the performance and/or efficacy of the Products as set out in paragraphs 4-9 of this Notice of Application.

**(e) Testing**

14. In December 2003, the Applicant, pursuant to her mandate to administer and enforce the Act, requested that the Respondents provide information to prove that statements made about the performance and/or efficacy of the Log were based on adequate and proper testing, as required by the Act.
15. In May 2004 the Applicant, pursuant to her mandate to administer and enforce the Act, requested that the Respondents provide information to prove that statements made about the performance and/or efficacy of the Cleaner and the Conditioner were based on adequate and proper testing, as required by the Act.
16. In response to each request, the Respondents provided certain documents which did not

satisfy the Applicant that what testing was done met the requirements of the Act.

17. Without attempting to limit in any way the general obligation of the Respondents to prove the adequacy and propriety of any test upon which statements regarding the performance and efficacy of the Products are based, the Applicant provides the following observations. With respect to the Log, documents provided by the Respondents suggest that limited testing was done before and after the product was released into the Canadian market. The testing done by the Respondents did not appear to establish reliable results as it lacked repetition and did not account for factors which could affect the performance of the Log.
18. With respect to the Cleaner and Conditioner, the testing done by the Respondents amounted to anecdotal information and did not account for factors which could affect the performance of the Cleaner and Conditioner.
19. The Applicant makes the foregoing statements after having had the benefit of reviewing all of the information provided and relied upon by the Respondents in substantiation of the statements, warranties or guarantees made with respect to the performance and/or efficacy of its Products. This information was provided at the Commissioner's request and with the assurance of confidentiality as required by ss. 10(3) and 29(1) of the Act.

### **III. Order Sought**

The Applicant seeks the following:

20. 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.

21. 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.

22. 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 times 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.
23. 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;
24. An order that Respondents, within 30 days of the issuance of 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;
25. 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; and,



26. Such further and other order as to this Honourable Tribunal seems just.

#### IV. Procedural Matters

27. The Commissioner requests that this proceeding be conducted in the English language.

28. The Commissioner requests the hearing of this application be heard in the City of Ottawa.

29. The address of the Respondents is: Imperial Brush Co. Ltd. and Kel Kem Ltd.  
40 Industrial Park Street  
Richibucto, NB E4W 4A4

DATED at Gatineau, Quebec, this 11<sup>th</sup> day of September, 2006.

“Lorne Ptack”

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**Respondent**

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