

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

FILED / PRODUIT

January 22, 2007

Jos LaRose for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT

0026

The Commissioner of Competition

Applicant

- and -

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

Respondents

Response of Imperial Brush Co. Ltd. and Kel Kem Ltd.
Amended January 22, 2007

1. The Respondents file this Response to the Notice of Application of the Commissioner filed September 11, 2006 in accordance with the Tribunal's Order dated November 9, 2006 extending the time for serving and filing.
2. The Respondent, Imperial Brush Co. Ltd. ("Imperial Brush"), is incorporated under the laws of New Brunswick and has its head office and principal place of business at 40 Industrial Park Street, Richibucto, New Brunswick. It is principally engaged in the manufacturing and sale of brushes for sweeping of chimneys. It also sold the product known as the Supersweep™ Chimney Cleaning Log.
3. The Respondent, Kel Kem Ltd. ("Kel Kem"), is incorporated under the laws of Ontario and has its head office and principal place of business at 2430 Winston Park Drive,

Oakville, Ontario. It manufactures and distributes the products identified as Kel Kem Chimney Creosote Cleaner and Kem Kem Creosote Conditioner.

4. While the companies are described as members of the Imperial Manufacturing Group, they carry on business independently. No partnership exists between them. Kel Kem is a wholly-owned subsidiary of Imperial brush.

The Products

SUPERSWEEP™ Chimney Cleaning Log

5. The SUPERSWEEP™ Chimney Cleaning Log (the “Supersweep Log”) was distributed by Imperial Brush beginning in the fall of 2003. It has not been manufactured since January 15, 2004, and distribution in Canada ceased July 11, 2006. Imperial Brush acknowledges that representations are made on the packaging of the Supersweep Log were as follows:

- (a) The name of the product – Chimney Cleaning Log – represented that the product, when used in accordance with instructions, performed a cleaning function in a chimney;
- (b) When used in accordance with instructions, the Supersweep Log would help prevent chimney fires;
- (c) When used in accordance with instructions, the Supersweep Log would help eliminate dangerous creosote.

Those representations are fair representations of the performance and efficacy of the product, and are based on adequate and proper tests.

- 5A The Imperial Chimney Cleaning Log (the “Imperial Log”) is a product in form similar to the Supersweep Log, and it performs a similar function. It includes an additional active

ingredient. Imperial Brush acknowledges that representations are made on the packaging or the Imperial Log as follows:

- (a) The name of the product – Chimney Cleaning Log – represented that the product, when used in accordance with instructions, performed a cleaning function in a chimney;
- (b) When used in accordance with instructions, the Supersweep Log would help reduce risk of chimney fires;
- (c) When used in accordance with instructions, the Supersweep Log would help reduce dangerous creosote in the chimney.

Those representations are fair representations of the performance and efficacy of the product, and are based on adequate and proper tests.

6. The packaging of the Supersweep Log also included the following representations:

“The SUPERSWEEP™ Chimney Cleaning Log can be of benefit in a proper chimney-cleaning program. It is not intended as a substitute for inspection and cleaning by a properly qualified professional.”

6A. The packaging of the Supersweep Log also includes the following representations:

“The Imperial Chimney Cleaning Log can be of benefit in a proper chimney-cleaning program. It is not intended as a substitute for inspection and cleaning by a properly qualified professional.”

7. When taken together, the general impression conveyed by these representations are a fair description of the performance and efficacy of the product, and are based on adequate and proper tests. The words and graphics on the package do not represent that the product removes all creosote or that it alone renders the chimney totally clean and safe.

8. The Supersweep Log consisted of compressed hardwood sawdust and shavings, to which chemical substances were added. The active ingredients were those contained in Powdered Soot Remover, a product distributed by Kel Kem since the early 1980s. (Kel

Kem does not have records of when it began distribution of that product.) The Imperial Log contains the ingredients of Kel Kem Powdered Soot Remover with the addition of iron particles. The chemical substances are the active ingredients which perform the cleaning function. These substances can be – and are –used separately. The log is merely a delivery mechanism for the chemical substances. These substances have been in use for many years and their effectiveness has been described in technical literature.

9. The adequate and proper tests of the Supersweep Log and the Imperial Log referred to in the preceding paragraphs include:

(a) Controlled tests performed by Imperial Brush under the supervision of independent engineers and consultants, including:

(i) testing done in December 2003 consisting of samples of chimney creosote taken before and after burning of Supersweep logs to demonstrate that the catalytic chemicals (copper and zinc) were delivered to the creosote in the chimney. Samples were taken by employees of Imperial Brush and analysed by Maxxam Laboratories

(ii) Testing done in January 2004 using floor model stoves at a retail store in Toronto. The testing showed reduction in weight of flue pipe containing creosote following use of the Supersweep Log. The test was conducted by Abe Kelly, Imperial Brush's consultant.

(iii) Testing done in March and May 2004 in which sections of creosote-contaminated chimneys were examined before and after use of SuperSweep Logs and compared with results from control stoves and chimneys. The tests were performed by Imperial Brush and supervised by engineering consultants from Genieo Solution Design .

and

(b) Experience of Imperial Brush, its consultants, and persons involved in the cleaning and maintenance of chimneys over many years, as follows:

(i) Kel Kem Powdered Soot Remover had been in use for approximately twenty years when the SuperSweep log was formulated. Its effect had been observed by Abe Kelly, former principal of Kel Kem Ltd, and a consultant to Imperial Brush at the time of development of the SuperSweep Log. This twenty years of practical use represents effective field testing of the product.

(ii) Kel Kem Powdered Soot Remover consists of chemicals which are well known to have the effect of reducing the amount of creosote in chimneys including salt, copper and zinc. The effect of such chemicals has been described in trade and scientific literature.

Kel Kem Chimney Creosote Cleaner

10. Kel Kem Chimney Creosote Cleaner (“Creosote Cleaner”) is a liquid product that has been manufactured in its present form and distributed by Kel Kem since 1987. Kel Kem acknowledges that representations on the package as of 2004 are as follows:

- (a) The product name, Chimney Creosote Cleaner, represents that the product, when used as instructed, has the effect of removing creosote from chimneys;
- (b) The product has the effect of reducing the hard, glazed form of creosote, causing it to be burned and reduced to an ash;
- (c) The product is non-corrosive, in that it does not cause corrosion of the stove or chimney;
- (d) The product is non-combustible, in that, when used as instructed (or when sprayed on an open fire), it does not ignite rather, the solvents evaporate and the manganese salt is carried by the hot flue gasses to the chimney where it reacts with the creosote.

The representations referred to in (a) and (b) are a fair representation of the performance and efficacy of the product, and are based on adequate and proper tests. The

representations referred to in (c) and (d) are not representation of the performance, efficacy or length of life of the product.

11. The packaging of Creosote Cleaner also included the following statement immediately following the statement that the product reduces creosote to ash:

“... reduces hard or glazed creosote to an ash when used as directed. For a clean, safe chimney, remove residue by brushing.”

and below that on the label:

“NOTE: Chimney Creosote Cleaner nor any other chemical can eliminate the need for a brushing. Professional brushing is required at least once a year, and more often under severe buildup conditions.”

12. When taken together, the general impression conveyed by these representations are a fair description of the performance and efficacy of the product, and are based on adequate and proper tests. The words and graphics on the package do not represent that the product removes all creosote or that it alone renders the chimney totally clean and safe.
13. The Creosote Cleaner consists of a solution of manganese salts in water and isopropyl alcohol. The manganese salts (specifically manganese nitrate) are the active ingredients which perform the cleaning function. The water and alcohol are merely a solvent to operate as a delivery mechanism for the manganese salts. Manganese has been in use for many years for this purpose and its effectiveness has been described in technical literature.

14. The adequate and proper tests of the Creosote Cleaner referred to in the preceding paragraphs include:

(a) Controlled tests performed between April 20, 2005 and May 19, 2005 by Imperial Brush under the supervision of Genieo Solution Design, independent engineers and consultants; and

(b) Experience of Kel Kem Limited, its consultants, and persons involved in the cleaning and maintenance of chimneys over many years, including

(i) Kel Kem produced a solvent-based aerosol version of the Creosote Cleaner from the early 1980's until approximately 1987. This product was observed by employees of Kel Kem (including Abe Kelly) to be effective in reducing the hard-glazed form of creosote.

(ii) This product was also observed by professional chimney sweeps to have that effect and was used and recommended by them as an aide to sweeping of chimneys which contained the dangerous hard-glazed form of creosote. This was reported to Mr Kelly by those sweeps, who consulted with him from time to time with respect to specific chimney cleaning problems.

(iii) In 1987 Kel Kem Limited changed the formulation of the product to use a water-based solution and pump spray rather than a solvent-based pressurized aerosol. The product continued to use a magnesium salt as the active ingredient.

(iv) This product, too, was observed by employees of Kel Kem Limited (including Abe Kelly) to be effective in reducing the hard glazed form of creosote.

Kel Kem Creosote Conditioner

15. Kel Kem Creosote Conditioner is a powder product intended to be directly added to a fire. It has been distributed by Kel Kem since the early 1980s.
16. Kel Kem acknowledges that representations made on the packaging of the Creosote Conditioner include:
 - (a) The product name, Creosote Conditioner, indicating that it conditions, or has an impact on, creosote;
 - (b) The product can inhibit the rate of creosote build up;
 - (c) The product reacts with chimney deposits to reduce their adhesiveness (thus permitting them to be brushed out);
 - (d) The product is non-corrosive, in that it does not cause corrosion of the stove or chimney;
 - (e) The product is non-toxic, in that in use it does not release or cause the release of any substances which are hazardous to human or animal health.

The representations referred to in (a) and (b) are a fair representations of the performance and efficacy of the product, and are based on adequate and proper tests. The representations referred to in (c), (d) and (e) are not representation of the performance, efficacy, or length of life of the product.

17. The packaging of Creosote Conditioner also included the following statements (including the statement with respect to :

“Imperial Kel Kem Chimney Conditioner aids chimney cleanliness when used regularly between professional brushings. It can inhibit the rate of creosote buildup and reacts with most chimney deposits to reduce their adhesiveness. Removal of creosote and deposits reduces the chance of a dangerous chimney fire. ...”

18. When taken together, the general impression conveyed by these representations are a fair description of the performance and efficacy of the product, and are based on adequate and proper tests.
19. The Creosote Conditioner consists of a mixture of TSP and Bentonite Clay. These interact with the creosote and convert the sticky, semi-liquid form to a brushable form. They also restrict the build-up of creosote in chimneys. These substances have been in use for many years for this purpose and their effectiveness has been described in technical literature.
20. The adequate and proper tests of the Creosote Conditioner referred to in the preceding paragraphs include:
 - (a) Controlled tests performed by Imperial Brush between May 19, 2005 and June 23, 2005 under the supervision of Genieo Solution Design independent engineers and consultants; and
 - (b) Experience of Imperial Brush, its consultants, and persons involved in the cleaning and maintenance of chimneys over many years including:
 - (i) Kel Kem Creosote Conditioner has been in use for over twenty years. It was introduced in the early 1980's following examination of other products in the market at that time. Its was observed by Abe Kelly, former principal of Kel Kem Ltd., to be effective in use to convert the sticky, semi-liquid form of creosote to a dry, brushable form, and to reduce the build-up of creosote. This twenty years of practical use represents effective field testing of the product.
 - (ii) this product was also observed by professional chimney sweeps to have that effect and was used and recommended by them as an aide to sweeping of chimneys which contained the sticky, semi-liquid form of creosote. This was reported to Mr Kelly by those sweeps, who consulted with him from time to time with respect to specific chimney cleaning problems.

21. These substances have been in use for many years and their effectiveness has been described in technical literature.
22. The respondents, Imperial Brush Co. Ltd. and Kel Kem Ltd., ask that the application be dismissed.

Due Diligence

23. The principal business of Imperial Brush is the manufacture and distribution of wire brushes for cleaning chimneys. In late 2002, Imperial Brush acquired Kel Kem, which was in the business of manufacturing and distributing chemical products for cleaning of wood-burning appliances and chimneys, including the Creosote Cleaner, the Creosote Conditioner, and the chemical substances which were the active ingredient in the Supersweep Log. In acquiring Kel Kem and in making the representations with respect to the performance and efficacy of the products, Imperial Brush and the new management of Kel Kem relied on the advice of Mr Abe Kelly, a founder and former owner of Kel Kem and a person with extensive knowledge and practical experience with respect to these products. The respondents Imperial Brush and Kel Kem have exercised due diligence to prevent reviewable conduct from occurring.

Procedural matters

24. The Respondents, Imperial Brush Co. Ltd. and Kel Kem Ltd. request that the proceeding be conducted in the English language.

25. The Respondents, Imperial Brush Co. Ltd and Kel Kem Ltd., request that the hearing of this application be held in the City of Moncton, New Brunswick.

Dated at Halifax, Nova Scotia, January 22, 2007.



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