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 74.01(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

Respondents' Reply Submissions with Respect to Remedies

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1. In the Tribunal's order of February 7, the parties were directed to provide submissions with respect to:

   (i) the nature, form and dissemination of the public notice of the Tribunal's findings,

   (ii) product recall/withdrawal and/or a change in packaging, and

   (iii) the proper award of costs.

2. The parties were given the right of reply, and these reply submissions are provided by the Respondents.

Compliance with Order / Product Recall

3. In her submissions, the Commissioner does not assert that the Tribunal has jurisdiction to order a recall. However, the Commissioner suggests that failure of the Respondents to do so would constitute a breach of the prohibition order already made. The Respondents disagree – the Tribunal's order was clear that the question of a recall or withdrawal of the products would be the subject of further comment by the parties and further decision by the Tribunal.

4. The Respondents submit this is also wrong law. The civil provisions of the Act, and in particular, Part VII.1, are prospective. The purpose of an order under 74.1 is to promote conduct in conformity with Part VII.1, and not to punish past conduct.[1] The distinction is also made clear in s. 36 of the Act – an action lies with respect to a past violation of the criminal provisions of the Act, but only with respect to future violations of the civil provisions of the Act. However, the issue is moot, in light of the fact that the three products which are the subject of this application (as well as a related product which was not the subject of the Commissioner's complaint) have been both withdrawn and recalled by Imperial Brush and Kel-Kem.

5. Since the issuance of the reasons and Order of February 7, the Respondents have:

    a. Ceased shipment of the Cleaner and Conditioner, and also the Soot Remover which, although not subject to the Application, was the active ingredient in the Log.

    b. Removed the reference to the products from Imperial Manufacturing Group's website. (The website merely listed the products by name and contained no further description.)

    c. Asked retailers not to make further shipments from their distribution centers to retail stores.

    d. Developed a recall methodology. It was decided that the products would be shipped back to Imperial Brush rather than being disposed at location. Arrangements have been made with common carriers to return the products on behalf of the Respondents.

    e. Advised all retailers to remove the products from their shelves and return them to Imperial. A 1-800 number has been provided to retailers and distributors to arrange pickup.

Publication

6. The logs were withdrawn from the market and recalled in the spring of 2007. The Respondents submit that publication of a notice at this time would have no beneficial effect whatever. If publication of the notice is ordered, there is no need to refer to the logs or to the representations made with respect to them.

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[1] Section 74.1(4).

7. The Creosote Cleaner and Creosote Conditioner have also now been withdrawn, at considerable expense to the Respondents. The representations which have been determined to be unproven are no longer in the market place, and thus no longer posing any risk of economic harm through the "lemons effect". As the products are no longer offered, there is no question of residual effect of previous representations.

8. Nevertheless, the Commissioner has proposed in her submission that a large advertisement be published, with premium positioning, in virtually every newspaper in Canada. The Respondents submit this is patently unreasonable and disproportionate to any perceived benefit of such publication. The Respondents have determined that the cost of that advertising program would be $405,034.14.

9. The Respondents reiterate that no publication order is required. A publication order is not mandatory;[2] the need for a publication order must be assessed in the circumstances of each case. However, if it is determined that a publication order would have some value in terms of the purposes of the part, the Respondents submit that the ad should be much smaller and simpler than that proposed by the Commissioner, and that it be run on one occasion only in a much smaller range of newspapers.

10. One of the factors which would be relevant in determining the scope of publication is the scope of publication of the initial representations. Normally, a corrective advertisement would be published in the same newspaper or newspapers in which the original offending representation was published. However, Imperial Brush and Kel-Kem have never published advertisements for any of these products. The Commissioner introduced into evidence copies of two flyers produced by others in 2005 and 2006 which included promotions of the Supersweep Logs. There was no evidence of any advertisement of the Creosote Conditioner or Creosote Cleaner.

11. The length of time since representations have been made is a valid consideration in determining whether and to what extent publication notice is necessary.[3] With respect to the logs, and arguably with respect to the Conditioner and Cleaner, this indicates against the appropriateness of a publication order.

12. The respondents submit that a notice in the form attached as attachment 1 is in compliance with the Act. A requirement to publish a notice of the size and in the manner sought by the Commissioner would be punitive and not remedial.

Costs

13. The award of costs is at the discretion of the Tribunal. The Respondents submit, for the reasons set out in the original submissions, that no award of costs should be made. If, however, an award of costs is to be made, the Respondents would submit as follows:

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[2] *Sears Canada; Gestion Lebski.*

[3] *PVI International Inc. v. Commissioner of Competition* (2004), 31 C.P.R. (4th) 331 (F.C.A.); 2004 FCA 197 (CanLII); *Commissioner of Competition v. Sears Canada Inc.* (2005), 37 C.P.R. (4th) 65; 2005 CACT 2 (CanLII).

a. The substantive issue and the constitutional issue should be considered separately. It would be unusual to award costs against a party seeking constitutional rights, particularly where the section in question had been held invalid in a previous proceeding.

b. With respect to the substantive issues, the issues were not particularly complex, and the Respondents had the evidentiary burden.

c. Of the hearing days on the substantive matters, one was dedicated to a motion by the Commissioner on which success was divided.

d. No costs should be permitted with respect to the evidence of Paul Stegmire. His qualifications to give expert evidence were marginal, and his evidence was not directed to matters which were relevant to the proceeding (i.e., the adequacy of the testing). The only aspect of his evidence which was referred to in the decision of the Tribunal dealt with areas which were not in issue.

14. The Tribunal might consider an award of lump sum in lieu of assessed costs, in accordance with FCR 400(4).[4]

Respectfully submitted at Halifax, Nova Scotia, this 24th day of March, 2008.

Daniel M. Campbell, Q.C.

Joseph F. Burke

[4] 400.(4) **Tariff B** – the Court may fix all or part of any costs by reference to Tariff B and may award a lump sum in lie of, or in addition to, any assessed costs.

Attachment

Important Notice about Kel-Kem Creosote Cleaner and Creosote Conditioner

Since 2002, Imperial Brush Co. Ltd. and Kel-Kem Limited (carrying on business as Imperial Manufacturing Group) have advertised these products as having the capacity to clean or assist in cleaning chimneys, help reduce or remove creosote, reduce risk of chimney fires, 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, and be non-corrosive and non-toxic. The representations were found on the packaging of the products and on Imperial Manufacturing Group's website. Various retail stores across Canada carried the products since at least 2002, until March 2008.

In a decision dated February 7, 2008, the Competition Tribunal determined that these representations are not based on adequate and proper tests. The Competition Tribunal has determined that the making of these representations was reviewable conduct under Part VII.1 of the *Competition Act*, and has ordered Imperial Brush Co. Ltd. and Kel-Kem Limited to cease making the representations, to pay $25,000.00 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.imperialgorup.ca.