Competition Tribunal Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. Imperial Brush Co. Ltd. and Kel Kem Ltd. (c.o.b. as Imperial Manufacturing Group)*, 2008 Comp. Trib. 02
File No.: CT-2006-010
Registry Document No.: 0101

IN THE MATTER of the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER of an inquiry pursuant to subparagraph 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)

Dates of hearing: 20070709 to 20070713, 20070716, 20070905 to 20070907
Presiding Judicial Member: Phelan J.
Date of Reasons and Order: February 7, 2008
Reasons and Order signed by: Mr. Justice M. Phelan

REASONS AND ORDER

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I. INTRODUCTION

[1] The Commissioner of Competition (the "Commissioner") alleges that the Respondents have engaged in reviewable conduct by making representations to the public that are not based on proper and adequate tests.

[2] The representations at issue are found on the labels of four stove and fireplace maintenance products. According to some of these representations, the products are said to eliminate creosote, reduce some creosote to an ash, or react with chimney deposits to reduce their adhesiveness. The Commissioner submits that the Respondents failed to perform proper and adequate tests before making the representations to the public and that the Respondents therefore engaged in reviewable conduct pursuant to paragraph 74.01(1)(*b*) of the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act") .

[3] The Respondents deny the Commissioner's allegations and assert that the representations are based on proper and adequate tests.

[4] They further submit that paragraph 74.01(1)(*b*), the provision upon which the Commissioner relies in this application, infringes section 2(*b*) of the *Canadian Charter of Rights and Freedoms* and is not justified under section 1.

[5] In these reasons, I find that:

(a) paragraph 74.01(1)(*b*), while it infringes freedom of expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms* is justified under s. 1; and

(b) the Respondents failed to conduct proper and adequate tests and therefore engaged in reviewable conduct.

II. BACKGROUND FACTS

[6] The Respondent Kel Kem Ltd. ("Kel Kem") is incorporated under the laws of Ontario and was founded in 1977 by Abraham Kelly, a chemist.

[7] In the early 1980s, Mr. Kelly recognized a demand for products for maintenance of wood burning appliances and, as more people began again to use wood heating, formulated a line of chemical maintenance products. These products included the Chimney Creosote Conditioner, the Chimney Creosote Cleaner and the Powdered Soot Remover.

[8] Mr. Kelly sold his interest in Kel Kem in 1993. The Respondent Imperial Brush Co. Ltd. ("Imperial Brush") acquired the shares of Kel Kem in 2002-2003 from the new owner and continued to sell the Chimney Creosote Conditioner (the "Conditioner") and the Chimney Creosote Cleaner (the "Cleaner"). Imperial Brush is incorporated under the laws of New Brunswick.

[9] After acquiring Kel Kem, Imperial Brush introduced the Supersweep Chimney Cleaning Log (sometimes called the "Supersweep Log"). The Supersweep Log consists of compressed hardwood material to which the Kel Kem Powdered Soot Remover is added during manufacture. The Respondents admit that the Supersweep Log was distributed by Imperial Brush beginning in the fall of 2003 and has not been manufactured since January 15, 2004. Distribution in Canada is alleged to have ceased on July 11, 2006.

[10] Imperial Brush and Kel Kem are both members of the Imperial Manufacturing Group. The Imperial Manufacturing Group provides management services, including research and development services, to Imperial Brush.

[11] In the spring of 2004, the Research and Development Department of the Imperial Manufacturing Group started researching various chemical compositions for the next generation of products for Kel Kem and Imperial Brush. A new log, known as the Imperial Chimney Cleaning Log (the "Imperial Log"), was developed through in-house development and testing in consultation with Mr. Kelly. The Imperial Log was UL certified in the fall of 2004.

A. The Bureau Investigation

[12] In October 2003, the Competition Bureau started an investigation into the sales of the Supersweep Log. The purpose of the Bureau's investigation was to determine whether the representations made about the performance and efficacy of the Supersweep Log were based on adequate and proper testing. In response to the Bureau's request for information, Imperial Brush sent a written statement signed by Mr. Kelly and dated January 23, 2004.

[13] The Competition Bureau, having found the response to be inadequate, in the spring of 2004, expanded its investigation to other Kel Kem products that were advertised as helping to reduce creosote. These products were the Chimney Creosote Conditioner and the Chimney Creosote Cleaner. Shortly thereafter, Imperial Brush sent other documents to the Bureau regarding the Supersweep Log. In response to the Bureau's request for information about the Cleaner and Conditioner, Kel Kem provided the Bureau with a report dated September 20, 2004, by Mr. Kelly.

[14] The Commissioner of Competition apparently found the information provided by the Respondents insufficient and as a consequence filed this application with this Tribunal.

B. The Application

[15] On September 11, 2006, the Commissioner filed a notice of application with the Tribunal for an order under section 74.1 of the Act. The notice referred to representations made by the Respondents in respect of the Supersweep Log, the Creosote Conditioner and the Creosote Cleaner. Following the exchange of documents, the Commissioner became aware of the Respondents' Imperial Log. On January 8, 2007, the Tribunal granted the Commissioner leave to amend her Statement of Grounds and Material Facts and the Commissioner, in her amended Statement of Grounds and Material Facts of January 15, 2007, made reference to the Respondents' Imperial Log.

III. THE PRODUCTS AND REPRESENTATIONS – CHARTER ISSUES

[16] The following is a general description of the products and representations at issue. The descriptions are set forth here to give context to the first matter – the Charter challenge. A more complete but somewhat repetitive description of the same information is found at Section IX where the Tribunal analyses the issues of a "proper and adequate test".

A. Supersweep Cleaning Log

[17] The Supersweep Log consists of compressed hardwood material to which 75 grams of the Kel Kem Powdered Soot Remover is added during manufacture. It is a product shaped and packaged as a log. The Respondents thus consider the Supersweep Log as a "delivery mechanism for the Kel Kem Powdered Soot Remover". The Soot Remover consists nominally of copper sulphate (4%), sodium chloride (89%), zinc dust (1%) and limestone (6%). The log is intended for occasional use. The burning of the log sends the Soot Remover chemicals up the chimney allegedly causing the removal of creosote build-up on chimney walls.

[18] The instructions found on the carton packaging of the Supersweep Log read as follows:

> For maximum effect, place the SUPERSWEEP log on a HOT fire. Follow instructions below and inside the carton.
>
> 1. FULLY open the stove or fireplace damper.
> 2. Light a normal wood fire. Wait until the fire becomes HOT!
> 3. Place one SUPERSWEEP log on the HOT fire.
> 4. Close stove or fireplace doors, screens or enclosures.
>
> Keep air intakes open and maintain a high temperature.
>
> NOTE: The SUPERSWEEP Chimney Cleaning Log requires high flue temperatures (minimum 350ºF) to be fully effective.

[19] According to the statements made on the packaging, the log "Helps Eliminate DANGEROUS CREOSOTE in your Chimney" and "HELPS PREVENT CHIMNEY FIRES". The packaging also includes the following:

> 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 qualified professional.

[20] Under the heading "How it works", one can read as follows on the carton packaging:

> 1. The SUPERSWEEP Chimney Cleaning Log contains powdered combustion catalysts that require high flue temperatures (minimum 350ºF) to be fully effective.
> 2. When burned as directed, it lowers the combustion point of the creosote and soot deposits in the chimney flue by up to 500ºF.

3. As a result, the creosote and soot deposits are burned to a fine ash and fall back into the woodstove or fireplace where they are dissipated by the fire.
4. While burning fires over the next 7 days, the treated creosote and soot flue deposits will continue to be burned to a fine ash.
5. It can also aid in the loosening and breaking away of hard, scaly or glazed creosote deposits that are difficult or impossible to remove by chimney brushing.

(1) Representations

[21] The Commissioner asserts that the following representations are not based on adequate and proper tests:

1. "Chimney Cleaning Log" (i.e. the name of the product);

2. "Helps prevent Chimney Fires";

3. "Helps eliminate dangerous creosote in your chimney";

4. Images on the packaging making the above representations or in support thereof.

B. Imperial Chimney Cleaning Log

[22] The Imperial Log is a product in form similar to the Supersweep Log and it performs a similar function. It is prepared by adding 150 grams of the Powdered Soot Remover and 4 grams of iron filings.

[23] The instructions found on the carton packaging of the Supersweep Log read as follows:

> For maximum effect, place the Imperial log on a HOT fire. Follow instructions below and inside the carton.
>
> 1. Open the stove or fireplace damper to ensure adequate supply of air.
> 2. Light a normal wood fire. Wait until the fire becomes HOT!
> 3. Place one Imperial log on the HOT fire.
> 4. Close stove or fireplace doors, screens or enclosures.
> Keep air intakes open and maintain a high temperature.
>
> NOTE: The Imperial log requires high flue temperatures in excess of 180ºC (350ºF) to be fully effective. Flue temperatures should be maintained between 180ºC-285ºC (350ºF- 550ºF). DO NOT burn more than one Imperial log at a time.

[24] According to the statements made on the packaging, the log "Helps Reduce DANGEROUS CREOSOTE in your Chimney" and "REDUCES RISK OF CHIMNEY FIRES". The packaging also includes the following representation:

> The Imperial log can be of benefit in a proper chimney-cleaning program. It is not intended as a substitute for inspection and cleaning by a qualified professional.

[25] Under the heading “How it works”, one can read as follows on the carton packaging:

> The Imperial log contains chemical compounds that act as combustion catalysts. In order to be effective, these combustion catalysts require high flue temperatures in excess of 180ºC (350ºF). When the log is burned as directed, these combustion catalysts help facilitate the burning of creosote and soot which can build up in chimneys. These catalysts can also help to weaken, loosen and break away some of the hard, scaly or glazed deposits that may be difficult to remove by chimney brushing alone.

(1) Representations

[26] The Commissioner takes issue with four representations:

1. “Chimney Cleaning Log” (i.e. the name of the product);

2. “Reduces risk of Chimney Fires”;

3. “Helps reduce dangerous creosote in your chimney”;

4. Image of a chimney on fire with the statement that the product “Reduces risk of chimney fires”.

C. Creosote Cleaner

[27] The Creosote Cleaner is a liquid product sold in a one litre spray bottle. The Cleaner consists of water (77%), manganese nitrate (8%) and isopropyl alcohol (15%). The product is intended to be used regularly and continuously.

[28] When the manganese hits the flame zone, it allegedly converts to manganese oxide, and is then in condition to be a catalyst and promote the more rapid combustion of carbonaceous materials.

[29] The directions found on the label of the Creosote Cleaner provide that the product is to be sprayed on “all creosote-coated surfaces in the combustion area and into the flue as far as possible” if there is no fire in progress. The wood is also to be sprayed before lighting.

[30] If the fire is already in progress, the directions on the label provide that the Cleaner can be sprayed on “new wood before adding it to the fire” and that it also can be sprayed directly into a flame at low fire conditions. The directions on the label provide that “to activate this product, flue surface temperature has to be at 300ºF.”

[31] The label of the Creosote Cleaner for the 2003-2004 heating season provided that:

> IMPERIAL KEL KEM CHIMNEY CREOSOTE CLEANER reduces hard or glazed creosote to an ash when used as directed.

[32] The label also provided the warning “CAUTION IRRITANT” and that for a “clean safe chimney, remove residue by brushing”.

[33] Changes were made to the label for the 2005-2006 season. References to Kel Kem were removed. The label indicated that the Creosote Cleaner "helps reduce dangerous creosote in your chimney". A note in smaller print indicated that the "IMPERIAL SUPERSWEEP Creosote Cleaner reduces hard or glazed creosote to an ash when used as directed." The following note was also found on the label:

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

[34] The label always indicated that the product is "non-corrosive" and "non-combustible".

(1) Representations

[35] The Commissioner asserts that the following representations are not based on adequate and proper tests:

1. "Chimney Creosote Cleaner" (i.e. the name of the product);

2. "reduces hard or glazed creosote to an ash";

3. "non-corrosive";

4 "non-combustible".

D. Creosote Conditioner

[36] The Creosote Conditioner is a powder composed of trisodium phosphate (60%) and bentonite clay (40%); it is sold in a 450 gram container. The trisodium phosphate is said to be the active ingredient. The product is intended to be used regularly and continuously.

[37] The directions on the 2004 label of the Creosote Conditioner provided as follows:

> DIRECTIONS: If creosote accumulation reaches ¼" or more, the chimney should be brushed. Remove ashes or cinders. Sprinkle onto hot coals or low fire. High fires severely reduce Chimney Conditioner's effectiveness. Stoves & Inserts – 1 tbsp (15 mL) at least twice per week. Furnaces & Boilers – 1 tbsp. (15mL) daily.

[38] The label of the Creosote Conditioner for the 2003-2004 heating season provided that it "helps keep chimneys clean and safe". According to the note in smaller print found on the label:

> IMPERIAL KEL KEM Chimney Conditioner aids chimney cleanliness when used regularly between professional brush cleanings. 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. A cleaner surface will also increase heat exchange. When burning daily we recommend monthly chimney examinations.

[39] Changes were made to the label for the 2005-2006 season. References to Kel Kem were removed. The 2005-2006 label indicates that the Creosote Cleaner "helps reduce dangerous creosote in your chimney". The note in smaller print was similar to that found on the 2003-2004 label.

[40] It should be noted that the label on the Creosote Conditioner purchased by Mr. McCollum on February 26, 2004, and filed as exhibit A-4 indicated that it "reacts with sticky, runny creosote".

[41] The label also indicated that the product is "non-corrosive" and "non-toxic".

(1) Representations

[42] The Commissioner asserts that the following representations are not based on adequate and proper tests:

1. "Creosote Conditioner" (i.e. the name of the product);

2. "It can inhibit the rate of creosote build-up and reacts with most chimney deposits to reduce their adhesiveness";

3. "non-corrosive";

4 "non-toxic".

IV. DEFENCES

[43] As to the Commissioner's contention, the Respondents' principal defence is that they conducted "proper and adequate tests". These tests included research and in-house testing by comparisons of creosote results as between the use of the products and without. The details of the defence and the nature and quality of the tests are described later in these Reasons.

V. THE APPLICABLE LEGISLATION

[44] As noted above, the Commissioner has brought her application pursuant to paragraph 74.01(1)(*b*) and section 74.1 of the Act. Paragraph 74.01(1)(*b*) reads 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,	**74.01** (1) Est susceptible d'examen le comportement de quiconque donne au public, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques :
[…]	[…]
(*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

b) ou bien, sous la forme d'une déclaration ou d'une garantie visant le rendement, l'efficacité ou la durée utile d'un produit, des indications qui ne se fondent pas sur une épreuve suffisante et appropriée, dont la preuve incombe à la personne qui donne les indications;

[45] Section 74.1 of the Act sets out the remedies available:

74.1 (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person

(a) not to engage in the conduct or substantially similar reviewable conduct;

(b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including

(i) a description of the reviewable conduct,

(ii) the time period and geographical area to which the conduct relates, and

(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed; and

(c) to pay an administrative monetary penalty, in such manner as the court may specify, in an amount not exceeding

(i) in the case of an individual, $50,000 and, for each subsequent order, $100,000, or

(ii) in the case of a corporation, $100,000 and, for each subsequent order, $200,000.

74.1 (1) Le tribunal qui conclut, à la demande du commissaire, qu'une personne a ou a eu un comportement susceptible d'examen en application de la présente partie peut ordonner à celle-ci :

a) de ne pas se comporter ainsi ou d'une manière essentiellement semblable;

b) de diffuser, notamment par publication, un avis, selon les modalités de forme et de temps qu'il détermine, visant à informer les personnes d'une catégorie donnée, susceptibles d'avoir été touchées par le comportement, du nom de l'entreprise que le contrevenant exploite et de la décision prise en vertu du présent article, notamment :

(i) l'énoncé des éléments du comportement susceptible d'examen,
(ii) la période et le secteur géographique auxquels le comportement est afférent,

(iii) l'énoncé des modalités de diffusion utilisées pour donner les indications ou faire la publicité, notamment, le cas échéant, le nom des médias — notamment de la publication — utilisés;

c) de payer, selon les modalités que le tribunal peut préciser, une sanction administrative pécuniaire maximale :

(i) dans le cas d'une personne physique, de 50 000 $ pour la première ordonnance et de 100 000 $ pour toute ordonnance subséquente,

(ii) dans le cas d'une personne morale, de 100 000 $ pour la première ordonnance et de 200 000 $ pour toute ordonnance subséquente.

[46] Orders issued pursuant to paragraph 74.1(1)(*a*) apply for ten years unless the Tribunal specifies a shorter period (subsection 74.1(2)). The Tribunal cannot order a person to publish a corrective notice or to pay an administrative monetary penalty if that person establishes that they exercised due diligence to prevent the reviewable conduct from occurring (subsection 74.1(3)).

VI. THE CONSTITUTIONAL CHALLENGE

[47] As outlined below, this Tribunal previously found, in *Commissioner of Competition v. Gestion Lebski Inc.*, 2006 Comp. Trib. 32, that paragraph 74.01(1)*(b)* infringes the right of freedom of expression guaranteed by paragraph 2*(b)* of the Charter. In *Lebski*, the Commissioner produced no s. 1 defence. In the present case, the Commissioner did put forward a s. 1 justification defence.

[48] The Commissioner conceded that paragraph 74.01(1)(*b*) infringes the Respondents' right of freedom of expression guaranteed under paragraph 2(*b*) of the Charter.

[49] The Supreme Court of Canada has, on a number of occasions, concluded that the freedom of expression protected by paragraph 2(*b*) of the Charter includes commercial speech such as advertising. However, the Supreme Court has also recognized that this form of speech is at the lower end of the type of speech protected under the Charter.

[50] As indicated in *Lebski*, advertising is Charter protected speech and the legislation does and is intended to restrict the Charter protected speech. The Tribunal held as follows:

> [88] 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…
>
> [89] In this case, it is clear that the activity contemplated by the Commissioner's action is the respondents' advertising. In my view, the advertising in question, in both form and content, falls within the category of activities protected by paragraph 2*(b)* of the Charter. The Supreme Court has in fact confirmed that commercial speech is protected, in decisions following *Irwin Toy*: see, *inter alia*, *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 and *R.J.R. MacDonald v. Canada (A.G.)*, [1995] 3 S.C.R. 199. With respect to the second stage of the analysis, it also seems clear to me that the purpose and effect of paragraph 74.01(1)*(b)* of the Act are to limit the respondents' advertising activities. The paragraph penalizes conduct, and imposes an obligation to justify it, for representations that may not be misleading.
>
> [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.

[51] While strictly speaking I am not bound as a matter of precedent by *Lebski*, I adopt Justice Blanchard's reasons and conclusion that paragraph 74.01(1)*(b)* infringes the right of freedom of speech. In view of the Commissioner's concession, I need not further address this aspect of the constitutional challenge. The focus of the Tribunal's consideration is whether the infringement is justified under section 1 of the Charter.

A. Proportionality Test

[52] To justify an infringement of a Charter right, the government must show that the infringement achieves a constitutionally valid purpose or objective, and that the means chosen are reasonable and demonstrably justified (*R. v. Oakes*, [1986] 1 S.C.R. 103).

[53] The analysis under section 1 of the Charter should be undertaken with a close attention to context (*Thomson Newspapers v. Canada (A.G.)*, [1998] 1 S.C.R. 877, at p. 939). These contextual factors were summarized by the Tribunal in *Commissioner of Competition v. Sears Canada Inc*., 2005 Comp. Trib. 2.

[54] In *Sears*, *supra*, Justice Dawson had to determine whether subsection 74.01(3) of the Act**,** a provision dealing with misleading representations in respect of a seller's ordinary selling price, was constitutional. She found that the nature of the activity infringed was a relevant contextual consideration:

> [74] Here, what is restricted are representations by a seller of the seller's own ordinary selling prices where the representations do not satisfy either the volume or the time test, and where any false or misleading representation is material.
>
> [75] The core values of freedom of expression include the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process: *RJR Macdonald, supra* at paragraph 72. A lower standard of justification is required where the form of expression which is limited lies further from these core values.
>
> [76] In my view, the expression limited by the impugned legislation does not fall within the core protected values. The limited expression is expression that is deceptive in a material way. This is far removed from the values subsection 2(b) of the Charter is intended to protect. In the result, a lower a standard of justification is required.

[55] In this case, the nature of the activity infringed is also a relevant contextual consideration. The speech infringed is allegedly speculative or unsupported information about the performance, efficacy or length of life of a product for the purpose of promoting the supply or use of that product. This is also far removed from the core values protected by paragraph 2*(b)* of the Charter.

[56] The Commissioner argues that a second contextual factor is the objective of the legislation. I agree. The purpose of the Act is to maintain and encourage competition in Canada.

It does so by improving the quality and accuracy of marketplace information (see *Sears*, *supra*, para. 83).

(1) Legislative Objective

[57] Turning to the first stage of the *Oakes* analysis, the Tribunal must determine whether the objective of the impugned legislation is sufficiently important to justify an infringement.

[58] For the purpose of the section 1 analysis, "it is desirable to state the purpose of the limiting provision as precisely and specifically as possible so as to provide a clear framework for evaluating its importance, and the precision with which the means have been crafted to fulfill that objective" (see *Thomson Newspapers*, *supra,* at para. 98).

[59] The Commissioner has presented evidence to the Tribunal about the legislative intent of paragraph 74.01(1)(*b*). This evidence took the form of documentary evidence from various commission reports, studies and excerpts from Hansard. It is necessary to examine the legislative history of the provision to assist in determining its objectives.

[60] The legislative history shows that the predecessor of paragraph 74.01(1)(*b*) was added to section 406 of the *Criminal Code* in 1935. The relevant section provided as follows:

> **406.** (3)(*a*) Every person who publishes, or causes to be published, any advertisement containing any statement or guarantee of the performance, efficacy or length of life of any product for the purpose of either directly or indirectly promoting the sale or disposal of such product and which statement or guarantee is not based upon an adequate and proper test, shall be guilty of an offence and liable upon summary conviction to a fine not exceeding two hundred dollars or to six months imprisonment, or to both fine and imprisonment: Provided that any person publishing any such advertisement accepted in good faith in the ordinary course of his business shall not be subject to the provisions of this subsection.
>
> (b) Without excluding any other adequate and proper test, a test by the Honorary Advisory Council for Scientific and Industrial Research or any other public department shall be considered an adequate and proper test for the purposes of this subsection, but no reference shall be made in any such advertisement to the fact that a test has been made by such Council or other public department.
>
> (c) On any prosecution under this subsection, the burden of proof that an adequate and proper test has been made shall lie on the defendant.

[61] The above amendment was the result of one of the recommendations made by the Royal Commission on Price Spreads in 1935. The members of the Commission had been appointed to "inquire into and investigate the causes of the large spread between the prices received for commodities by the producer thereof, and the price paid by the consumers therefor; and the system of distribution in Canada of farm and other natural products, as well as manufactured products"(see Canada, Royal Commission on Price Spreads, *Report of the Royal Commission on Price Spreads* (Ottawa: King's Printer, 1935) at xxvi).

[62] In their 1935 report, the Commission made the following recommendation:

> We are also of the opinion that statements of performance, life or efficacy of products are generally made with uncertain knowledge and seldom on the basis of comparative experimental tests. In the field of medicines and drugs such statements are subject to the control of the *Pure Food and Drug Act* and may be left to the jurisdiction of the department enforcing that Act. Similarly, statements concerning the efficacy or performance of certain products used in agriculture or animal husbandry are subject to the jurisdiction of the Department of Agriculture. Other than this, almost any statement concerning performance or efficacy may go unchallenged unless or until a successful action is brought under the above-mentioned section of the *Criminal Code* [the section prohibiting untrue, deceptive or misleading advertising].
>
> (emphasis added)
>
> (Royal Commission on Price Spreads, *supra*, at 246)

[63] The report also alluded to the benefits of the measures for consumer protection:

> Measures for consumer protection, it must be borne in mind, are not for the benefit of the consumer alone, but constitute a safeguard also for the honest and reputable manufacturer and merchant. Price competition can only operate fairly and equitably between products of known worth. Much vicious price cutting would be checked if the purchaser were informed in clear terms of the exact nature of the commodity or service.
>
> (*Report of the Royal Commission on Price Spreads*, p. 236).

[64] In 1969, section 306 of the *Criminal Code* was transferred into the *Combines Investigation Act* as paragraph 33(d). The paragraph was renumbered over the years and in 1986, the *Combines Investigation Act* was renamed the *Competition Act*. The provision remained a criminal provision and became section 52 of the *Competition Act*.

[65] In the 1990s, various groups recommended a dual civil/criminal enforcement regime for misleading advertising.

[66] In 1991, the Working Group on Amendments to the Misleading Advertising and Deceptive Marketing Practices Provisions of the Competition Act was established to examine proposals for the modification of the misleading advertising and deceptive marketing practices provisions of the *Competition Act*. The Group recommended a dual enforcement regime for misleading advertising.

[67] In 1995, the Director of Investigation and Research circulated a discussion paper on a package of proposed amendments to the *Competition Act* as part of a consultation process directed by the Minister of Industry. The proposed amendments focused on the decriminalization of misleading advertising and deceptive marketing practices. The discussion paper noted that criminal prosecution as the sole legal instrument of government enforcement for misleading advertising had a number of shortcomings (e.g. lack of speedy decision making and consistency in decisions). The Director also established a Consultative Panel to advise on the proposed amendments.

[68] The Panel released a report in 1996 in which it concluded that misleading advertising should be addressed through two adjudicative regimes: a criminal regime and a civil regime.

[69] In 1999, the *Competition Act* was amended via the addition of Part VII.1, entitled "Deceptive Marketing Practices". This part created a new civil regime of reviewable conduct. The criminal provision setting out the substantiation requirement was repealed and section 74.01 was added to the Act.

[70] Relying on the legislative history of paragraph 74.01(1)(*b*), the Commissioner asserts that the objective of paragraph 74.01(1)(*b*) is to "redress the societal harm caused by insupportable claims respecting specified product characteristics within the knowledge of a supplier unless borne out by proof of prior substantiation." More specifically, the "protection of consumers, competitors and the proper functioning of the market from the harm caused by misleading claims that may go undetected or unchallenged absent the substantiation requirement".

[71] In her submissions, the Commissioner referred in particular to the harm resulting from "asymmetric information". That is to say the problem facing consumers who lack complete information about products that they might potentially purchase. Sellers, on the other hand, are presumed to have superior information on product attributes.

[72] This problem was explained in detail in the affidavit of Dr. Corts. Dr. Corts is an associate professor of business economics at the Rotman School of Management at the University of Toronto. He received his Ph.D. in Economics from Princeton University in 1994. His research and teaching have focused on the field of industrial organization, which includes the study of consumer demand, competition, the organization of firms, and the economic foundations of competition policy.

[73] The Respondents criticize Dr. Corts' qualifications as an expert because his field is industrial organization rather than something related to marketing or the field of false advertising. Having read his report and cross-examination thereon, I find that his evidence was clear, cogent and logical. Furthermore, there is no evidence refuting Dr. Corts. Therefore, I accept his evidence as being sufficiently weighty as to explain the infringement of the Charter rights in issue.

[74] The Commissioner has summarized, in an accurate manner, the essential elements of Dr. Corts' opinion as follows:

> The provisions on misleading advertising in the *Competition Act* counter what is known as the problem of "asymmetric information" – the fact that sellers presumably have much better information about their product's attributes than do consumers. In a well-functioning market economy, consumers base their purchase decisions on their knowledge of the qualities and prices of products offered by competing firms. Armed with this knowledge, they make trade-offs to maximize their utility. One consumer might be willing to pay less for a lower-quality product, another might be willing to pay more for a higher-quality product. Both of these consumers will obtain what they see as the ideal outcome. The result of this is to provide an incentive for firms to create quality and variety in the market, by making higher-quality products that can demand a

> higher price, and lower-quality products that can sold at a discount. The long-run effect of this is to encourage innovation in the economy through an incentive to improve product quality.

[75] The Respondents disagree with the Commissioner's description of the legislative objectives. They assert that if paragraph 74.01(1)(*b*) "is to be justified, it must be with reference to the objective of preventing false and misleading representations". According to the Respondents, the legislative history shows that the object of paragraph 74.01(1)(*b*) relates "to false, not true but untested product claims".

[76] I must disagree with the Respondents. As explained above, it is crucial to the section 1 analysis to not over-state the objective of the paragraph. I agree that the general underlying rationale of paragraph 74.01(1)(*b*) is the decrease of deceptive advertising. The word "deceptive" in this case, however, does not refer to "false" advertising, but to unsubstantiated, unsupported or speculative representations about the performance, efficacy or length of life of the product. The objective is to prevent certain unsubstantiated representations. The deception being addressed is that these representations are grounded in some objective testing. A representation that a product will perform in a specific way is designed to convince the purchaser that there is some objective basis upon which the purchaser can rely.

[77] Also, the provision sets out a substantiation requirement, the proof of which lies on the seller. The paragraph thus seeks to redress the imbalance of knowledge between the consumer and the seller. It protects the consumer by ensuring that she can rely on statements regarding the performance, efficacy or length of life of a product since those statements are to be based on proper and adequate tests.

[78] In *R. v. 671135 Ontario Ltd.*, 55 C.P.R. (3d) 204, MacKinnon J., when examining the constitutionality of an earlier version of paragraph 74.01(1)(*b*), also referred to the importance of establishing a "fair balance of power between competitors and consumers".

[79] The improvement of consumer information benefits, in turn, consumers, firms selling competing products, and the proper functioning of the market. The Royal Commission on Prices Spreads noted that measures for consumer protection also benefit sellers.

[80] On the basis of the evidence before the Tribunal, I therefore conclude that the objective of paragraph 74.01(1)(*b*) is the protection of consumers, competitors and the proper functioning of the market from the harm caused by unsubstantiated representations about the performance, efficacy or length of life of a product.

(2) Is the Objective Pressing and Substantial?

[81] The Respondents admit that preventing false advertising is a pressing and substantial objective. They assert, however, that the Commissioner has failed to establish that preventing representations which are merely untested, without reference to whether they are true, constitutes a pressing and substantial objective.

[82] Dr. Corts, in his affidavit, explains the importance of the objective of protecting consumers from speculative claims, even if these representations may prove to be true at a later stage. In his report, he refers to the "lemons" problem (para. 19-20):

> Suppose instead that consumers are more skeptical, perhaps because they understand the incentive for a firm to make false performance claims as described above. This leads to what is called an "adverse selection" or "lemons" problem. If consumers are not able to distinguish between high and low quality firms – that is, if the product exhibits at least some characteristics of experience or credence goods - then the consumer must discount the claims of all firms, even if it knows that some of the claims (but not which of them) are truthful. The result is that consumers assess their willingness to pay for the goods of both firms at a weighted average of their willingness to pay for each type of good. Again, this is a reduction in demand for the high-quality good compared to the case in which consumers are well-information (or, equivalently, there are no false performance claims), and an increase in demand for the low-quality good.
>
> […]
>
> Regardless of whether consumers believe false claims (the direct effect above) or discount all performance claims, knowing some are false (the lemons problem), the result is largely the same: high-quality firms suffer a reduction in demand relative to the case in which consumers are well-informed. Over the long run- that is, as firms consider entering and exiting the market- this has additional effects. Since the high-quality firm receives a lower price than it would with well-informed consumers, and since it is likely that the high-quality firm also incurs higher costs of production, it is possible that the high-quality firm is unable to cover its costs as a result of this asymmetric information. Over the long run, this would force out the high-quality firm, leading to the absence of high-quality products in the market.

[83] In my opinion, Parliament's concern with the harm resulting from unsubstantiated representations regarding the performance, efficacy or length of life can be characterized as a sufficiently important concern. The need to protect consumers from representations based on inadequate or improper testing for the purpose of promoting the product to the consumer is an important requirement.

[84] The Respondents argue that the provision is not justified because truth is not a defence. In addition to what has been said above about a pressing and substantial objective, the Respondents' argument in this regard is highly speculative and tenuous. The Respondents postulate a situation where, without any testing or basis for performance representations, there would be a happy confluence of representations and results.

[85] With respect, this is an unrealistic and serendipitous result. It is difficult to foresee an event where the promised performance/efficacy would exactly match the actual reality without some objective basis.

[86] Truth is an answer, where the performance matches the promise despite any alleged failings of a test regime. If the product works as promised, the testing must have been adequate.

(3) Rational Connection

[87] The next stage of the *Oakes* analysis is a consideration of the proportionality of the measure. One must consider whether the measures are rationally connected to the objective.

[88] It is clear that there is a rational connection between the measures enacted in paragraph 74.01(1)(*b*) and its objectives. In this regard, I agree largely with Dr. Corts' analysis.

(4) Minimal Impairment

[89] The next stage of analysis is to examine the question of whether the law impairs the right of free expression only minimally. The impugned legislation should impair the right no more than is necessary to accomplish the desired objective.

[90] In *Sears*, *supra*, the Tribunal referred to the Supreme Court of Canada decision in *R. v. Sharpe*, [2001] 1 S.C.R. 45, in which the Court noted that it is not necessary to demonstrate that Parliament adopted the least drastic means to pursue the objective:

> [104] The Supreme Court has recognized that legislative drafting is a difficult art and that Parliament cannot be held to a standard of perfection. See: *R. v. Sharpe*, [2001] 1 S.C.R. 45 at paragraph 95. In *Sharpe*, the majority of the Court described the required analysis in the following terms:
>
> > 96 The Court has held that to establish justification it is not necessary to show that Parliament has adopted the least restrictive means of achieving its end. It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account: see [...].
> >
> > 97 This approach to minimal impairment is confirmed by the existence of the third branch of the proportionality test, requiring that the impairment of the right be proportionate to the benefit in terms of achieving Parliament's goal. If the only question were whether the impugned law limits the right as little as possible, there would be little need for the third stage of weighing the costs resulting from the infringement of the right against the benefits gained in terms of achieving Parliament's goal. It was argued after *Oakes*, *supra*, that anything short of absolutely minimal impairment was fatal. This Court has rejected that notion. The language of the third branch of the *Oakes* test is consistent with a more nuanced approach to the minimal impairment inquiry – one that takes into account the difficulty of drafting laws that accomplish Parliament's goals, achieve certainty and only minimally intrude on rights. At its heart, s. 1 is a matter of balancing: see [...]. [emphasis in original] [jurisprudence and citations omitted]

[91] The Respondents argue that paragraph 74.01(1)*(b*) fails the minimal impairment test for two reasons. First, it proscribes a wider range of communication than what it seeks to prevent as it prohibits all untested commercial representations, including true ones. Second, the Commissioner has not established that the goal of reducing false advertising cannot reasonably be achieved through less rights-infringing means, such as relying on the false claims prohibition in paragraph 74.01(1)(*b*).

[92] In order to properly assess the Respondents' submissions, one must refer to the objectives of 74.01(1)(*b*). Those include the protection of consumers from unsubstantiated representations about the performance, efficacy or length of life of the product if those representations are not based on proper and adequate tests - in other words, the objective is to address speculative claims or irresponsible claims – claims made with a disregard as to their veracity.

[93] Adding a requirement to paragraph 74.01(1)(*b*) that the speculative representations must also be false would not, in my view, properly address the desired objective. The objective is the harm caused by speculative claims. This is also why I find that the objective of the impugned legislation cannot reasonably be achieved through less rights-infringing means, such as relying on the false claims prohibition in paragraph 74.01(1)(*a*). I find that the Respondents have built their arguments on the assumption that paragraph 74.01(1)(*b*) has one specific objective whereas that is not the case. When one concludes that the impugned legislation has a different objective, the Respondents' arguments cannot be sustained.

[94] I therefore find that paragraph 74.01(1)(*b*) falls within a range of reasonable alternatives.

(5) Salutary and Deleterious Effects

[95] The last part of the *Oakes* analysis is whether the deleterious effects of the limitation are outweighed by its salutary impact.

[96] The salutary effects of paragraph 74.01(1)(*b*) are clear. They are described as follows in paragraph 51 of Dr. Corts report:

> Reducing false claims through a substantiation requirement leads to an improvement in the functioning of the market. It improves the information of consumers in markets where they may have difficulty evaluating product quality prior to purchase, and it therefore improves their decision-making and helps them to maximize their well-being. It also levels the playing field for competing firms and prevents firms that do not make false claims from being punished for their honesty through a reduction in demand. Finally, by ensuring that firms are properly rewarded for improvements in quality, it helps maintain firms' incentives for producing high quality products and pursuing innovation.

[97] The deleterious effects of paragraph 74.01(1)(*b*) are not of great magnitude. The provision limits representations regarding the performance, efficacy or length of life of the product if they are not based on proper and adequate tests. Dr. Corts also concluded in his report that the provision is not likely to harm high-quality sellers or stifle innovation.

[98] The salutary effects of the legislation thus outweigh the deleterious effects.

(6) Conclusion

[99] In weighing out these points of analysis, the nature of any limitation must again be borne in mind. What Parliament limits are not expressions of ideas, principles, policies and the like but that of unsustained promises of performance and efficacy which not only cause harm in themselves but, where inaccurate, can potentially cause substantial physical harm to people. Reliance on product performance claims about something as inherently dangerous as chimney fires underscores the importance of ensuring a proper basis upon which people may rely.

[100] I therefore conclude that paragraph 74.01(1)(*b*) is a reasonable limit on section 2(b) of the Charter. The Respondents' request for a finding that the provision is of no force or effect will thus be dismissed.

VII. THE WITNESSES PRESENTED BY EACH PARTY

[101] Before turning to the substance of the allegations made by the Commissioner, it is helpful to describe briefly the witnesses who testified before the Tribunal.

A. Lay Witnesses

[102] The parties agreed to introduce their evidence in chief of lay witnesses by way of witness statements rather than *viva voce*.

[103] Mr. Kevin McCollum appeared on behalf of the Commissioner. Mr. McCollum works as a Competition Law Officer with the Competition Bureau in the City of Halifax. His statement set out the details of the Bureau's investigation.

[104] Statements written by Mr. Abraham Kelly and Mr. James Simmons were filed by the Respondents.

[105] Mr. Simmons works as the Senior Director of Research and Development for the Imperial Manufacturing Group. He described the products at issue as well as the tests conducted by the Respondents.

[106] Mr. Kelly explained in his statement the steps he had taken before introducing the Conditioner, Cleaner and Soot Remover to the marketplace. He also explained the role he played when Imperial Brush was negotiating the purchase of Kel Kem from the then-owners in 2002-2003. Although there is some confusion between Mr. Kelly's evidence and that of Mr. Simmons as to the exact time of the sale, little turns on it. Paragraphs 32 to 54 of his statement refer to the various tests performed in relation to the Respondents' products.

[107] Mr. Kelly's initial statement included observations of others as to the effectiveness of the Respondents' products. The Commissioner objected at the hearing to those statements on the basis of hearsay. For the reasons given at the time by the Tribunal, the observations were struck as hearsay which could not be tested, and the Respondents filed a revised statement.

B. Expert Witnesses

[108] Three individuals testified as experts before the Tribunal, two on behalf of the Commissioner and one on behalf of the Respondents.

[109] The Commissioner's experts were Dr. Michael Pegg and Paul Stegmeir. Dr. Pegg is a Professor of Chemical Engineering and Head of the Department of Process Engineering and Applied Science at Dalhousie University. The Respondents accepted Dr. Pegg to be qualified to give testimony as an expert on wood combustion, wood combustion testing, chemical engineering and scientific testing methodology.

[110] Mr. Stegmeir works as a consultant in the residential energy and fire safety field, focusing on issues such as heating, hearth appliances, chimneys, and indoor air quality and related codes and standards. The Respondents argued that Mr. Stegmeir was not qualified to provide expert testimony on scientific methodology. After hearing the examination and cross-examination of Mr. Stegmeir, I found that to a minor caveat, he was qualified to give expert evidence on (i) wood stove design and combustion technology; (ii) fire safety, fire behaviour, origin and cause; (iii) building science, energy efficient buildings; (iv) hearth appliances codes and standards and (v) scientific methodology.

[111] The Respondents' expert witness was George Jenkins, a research scientist for the Wood Science and Technology Centre at the University of New Brunswick. The Tribunal found that Mr. Jenkins was a properly qualified expert to opine upon research and testing methodology, product development and testing, and wood combustion.

[112] There was a conflict between the approaches to testing between Dr. Pegg and Mr. Jenkins. While both gentlemen were credible and honest in their evidence, where there is conflict, I generally preferred that of Dr. Pegg.

[113] Dr. Pegg was more studied and familiar with testing theory, methodologies and potential outcomes. He was more dispassionate, precise and logical in his approach.

[114] Mr. Jenkins seemed to approach the matter of testing as if one were asking "are there enough results to go to market or engage in product development". In that regard, he was business oriented, practical and pragmatic but less focused on the adequacy of the test and more focused on the result from a commercial sales perspective.

VIII. ANALYSIS

A. Proper and Adequate Test

[115] The Commissioner asserts that a "proper and adequate test" must meet the following conditions:

(i) the test must be done prior to the representations being made;

(ii) the test must simulate "real world" conditions in which the product will be used;

(iii) if the product will be used in varied conditions, a significant number of tests should be done in these varied conditions;

(iv) the test should be repeated to ensure that the results are not due to mere chance;

(v) the method of testing should adapt to the circumstances of each case, depending on the purpose of the test and the level of scrutiny required;

(vi) subjectivity in the testing must be eliminated as much as possible.

[116] In this context, the Commissioner took the position that there is no need to prove that users of the products were affected by the representations or that complaints were made.

[117] Dr. Pegg testified on behalf of the Commissioner. He set out his understanding of an adequate and proper test in paragraph 11 of his affidavit:

> […] an "adequate and proper test" needs to ensure that any measured effects are attributable to one variable (or dimensionless grouping of variables) and uninfluenced by other variables. Furthermore, the test must be reproducible and a sufficient number of tests need to be performed to ensure statistical significance of the results. Whenever measurements are made, a proper analysis of error must be considered.

[118] He also stated that the methodology and data must be documented so that the process can be subjected to peer review. This methodology is consistent with that used in testing facilities and in universities.

[119] During cross-examination, Dr. Pegg admitted that the purpose of these criteria is to ensure that the results can be expressed with certainty. He also admitted that his concept of proper and adequate test is based upon the kind of rigour that he is used to working with graduate students in research and the contract-type research he has done in the past.

[120] The Respondents, on the other hand, submit that the plain meaning of "adequate and proper" denotes a standard of reasonableness, as measured by the reasonable practices of businesses, not one of perfection. They note that the French version of paragraph 74.01(1)(*b*) ("une preuve suffisante et appropriée") suggests a reasonableness standard.

[121] The Respondents argue a contrary opinion or argument, or results of others which disagree with the Respondents' results, will not alone disqualify a test as "adequate and proper". Referring to the Manitoba Court of Queen's Bench decision in *R. v. Big Mac Investments Ltd*.(1988), 24 C.P.R. (3d) 39, they assert that adequate and proper testing need not be scientific in nature.

[122] I agree that the determination of whether or not a particular test is "adequate and proper" will depend on the nature of the claim made and the meaning or impression conveyed thereby. It does not necessarily have to be a scientific method nor do the results need to meet a test of certainty. The Courts have generally interpreted "proper" to mean fit, apt, suitable or as required by the circumstances (see *Blatchford (Litigation guardian of) v. Gardiner*, [1999] O.J. No. 3748, *Pandolfo Management Services Ltd. v. Grasslands Feeders Ltd.*, [1993] S.J. No. 189).

[123] The circumstances here are that the product is to be used to address, in some measure, the dangerous situation of chimney fires. The test must be proper and adequate given the situation in which it will be used. This speaks to a high standard of testing and analysis.

[124] I also find that testing need not be as onerous and exacting as required to publish papers in scholarly journals, but the test should clearly demonstrate that "the result claimed is not a mere chance or one time effect" (see *R. v. Alpine Plant Foods Ltd*., (June 11 1981)(Ont. Prov. Ct.).

[125] Prior jurisprudence considering the predecessor of paragraph 74.01(1)(*b*) has consistently held that the adequate and proper tests must be carried out before the representations are made (see: *R. v. Batt*, [1980] 53 C.P.R. (2d) 152, *R. v. Kachuk* (1973), 12 C.P.R. (2d) 45, and *R. v. Big Mac Investments Ltd*.(1988), 24 C.P.R. (3d) 39). That seems to be the obvious intent of the legislation.

[126] Furthermore, subjectivity should be eliminated as much as possible. Also, I note that paragraph 74.01(1)(*b*) does not require that a consumer complaint precede the testing of the product.

[127] It is essential to any such test that it establishes the product (in this case, the chemicals) causes the effect claimed (not some other factor such as high heat) and that the effect (removal of creosote) is material.

[128] In summary, and in respect of this case, I conclude that a "proper and adequate" test:

- depends on the claim made as understood by the common person;
- must be reflective of the risk or harm which the product is designed to prevent or assist in preventing;
- must be done under controlled circumstances or in conditions which exclude external variables or take account in a measurable way for such variables;
- are conducted on more than one independent sample wherever possible (e.g. destruction testing may be an exception);
- results need not be measured against a test of certainty but must be reasonable given the nature of the harm at issue and establish that it is the product itself which causes the desired effect in a material manner; and
- must be performed regardless of the size of the seller's organization or the anticipated volume of sales.

This is not intended as an exhaustive list of the factors to be considered in determining whether a test is "proper and adequate".

B. Parties' Submissions

[129] The Commissioner asserts that the Respondents should have followed the scientific method approach in this case because of the nature of the products, the nature of the performance

representations and the complex processes involved. Relying on the evidence before the Tribunal, she argues that many factors can affect creosote reduction and accumulation.

[130] For example, in his affidavit and testimony, Dr. Pegg described the wood-burning process and stressed that the nature and rate of formation of deposits on the inner surface of the flue depends on many factors. They include the type of surface, the temperature of the flue gases, the temperature of the surface, the flue gas velocity, and the nature of the flue gases. In light of the "complex nature of the wood-burning process", Dr. Pegg stated that the scientific method is required for the testing of the products. "Otherwise, you don't know whether you had simply burned off the creosote by having a high temperature or by ensuring a fairly high oxygen concentration in the flue, if that had a major impact on it."

[131] The Respondents disagree. Their expert, Mr. Jenkins, testified that it is important to test the products in "a way that is as close to the way in which they will be used". He admitted that, from a scientific point of view, one must accept the fact that one can never totally duplicate what will happen in the real world. He added, however, that "putting in a control stove, one that's treated in exactly the same way at exactly the same time by the same people, carrying out the same procedure, that gives you a confidence in the results that your tests are valid."

[132] Mr. Jenkins also stated that the scientific method goes far beyond the rigour that would be applied to anything that is common in industrial testing. In his lab, they are not yet required to have full-fledged uncertainty procedures in place to state the uncertainty in their measurements. He disagreed with Dr. Pegg that a test has to be repeated a number of times so that the statistical analysis could be established to demonstrate that the results are consistent. According to Mr. Jenkins, a test only needs to be repeated if the data or the question is not answered by doing it the first time. He also disagrees that an error analysis must be done.

C. Analysis

[133] The parties agree that various factors affect the build-up and reduction of creosote.

[134] The Commissioner's expert, Mr. Stegmeir, listed some of the factors in his affidavit:

> 18) High temperature burning is good for limiting or reducing creosote. It has long been recognized that frequent firing at high temperatures, and/or minimal burning at low temperatures is good for limiting or removing creosote.
>
> 19) The materials and configuration of a connector and chimney system will also have an effect.
>
> 20) Large, oversized chimneys will be more susceptible to forming creosote, harder to prevent creosote formation within, and harder to get to.
>
> 21) Fast warming materials like mild or stainless steel can heat up faster, and through expansion and contraction create mechanical movement, causing creosote materials to often shed as they dry and modify due to the higher heat.
>
> 22) The insulation component of the connector and vent also affects the creosote. Double-walled connectors, and insulated all fuel Factory Built chimney systems heat up faster, and

stay at temperatures above condensation point longer than single wall connectors or air cooled chimneys.

23) The longer the system the more likely it will be difficult to keep clean or be cleaned.

24) The shape and surface of masonry flues will also have an effect. Round liners are less susceptible to build-up, are easier heated to aid in creosote modification and removal than square or rectangular liners. Smooth vitreous liners are more practical than brick or masonry lined portions of chimney systems and fireplace throat areas.

25) The type of appliance will also have an impact. Open, traditional fireplaces have much less chance of building creosote. High efficiency stoves, typically of the type certified by the EPA for clean burning, by definition are less susceptible to forming creosote, burn with a higher temperature.

26) Specialized appliances such as fireplace inserts are affected by their installations regarding materials for chimney and size. If appropriate sized reliners are not used, creosote formation is more likely.

27) The type and condition of fuel burned can also have an impact. Well seasoned wood always burns better than moist wood. Wood conditioned to room temperature will perform bettor [sic]. Size of wood pieces will impact burn conditions, larger pieces burning at lower temperatures. Very dry and/or very small pieces of wood will volatilize very rapidly, often requiring draft settings to be reduced to avoid over heating or run-a-way fires.

28) In an air tight stove, reducing air controls too much will limit the oxygen needed for combustion and excess smoke can be generated. The more the smoke the more the creosote can be generated.

29) Deposits in the venting system will depend upon its configuration, materials, and condition, as mentioned above.

[135] The Respondents' witnesses agreed that various factors can influence the build-up and reduction of creosote.

[136] In his evidentiary statement, Mr. Kelly wrote that the "major factors influencing the level and amount of creosote deposited in a chimney are a) the amount of smoke, b) the fire temperature, and c) air regulation to the woodstove or fireplace". Mr. Kelly admitted during his cross-examination that other factors also influence the level and amount of creosote deposit in a chimney.

[137] In respect of the factors influencing the reduction of creosote, Mr. Kelly admitted that high temperatures could reduce creosote:

> MR. S. LILKOFF: With respect to reduction of creosote without the use of chemicals, just naturally burning wood, what can you tell us about this? For example, would a hot fire naturally reduce creosote?
> MR. A. KELLY: If the temperature is sufficient then in fact this is the practice of many experienced wood burning households or people. They'll do once a day, once a week; that type of thing. And reduction of creosote due to high temperatures -- I'll put it the other way. Very high temperatures reaching the combustion point of carbonaceous material is one of a number of factors that can actually reduce the creosote content in a chimney.

[138] Mr. Simmons made a similar statement in cross-examination:

> MR. R. NASSRALLAH: So you would agree with the conclusion that just by burning regular wood, you can get a great reduction in creosote by just simple wood burning?
> MR. J. SIMMONS: Yes.
> MR. R. NASSRALLAH: About 80 percent?
> MR. J. SIMMONS: I'm not going to talk percentages, but I agree with you.
> […]
> MR. R. NASSRALLAH: […] will you also agree with me that very hot temperatures have a creosote reduction capacity?
> MR. J. SIMMONS: Yes.

[139] I accept that the temperature of the burning is a critical aspect of the creosote process and its removal. Low temperature burning can create creosote. Creosote, being the unburned residue of a fire, can also be removed or burned off by high temperature burning. It was essential in this case to be able to distinguish between removal of creosote as a result of a hot fire and removal of creosote caused by the use of the particular product. The Respondents' products refer to burning at a high heat but it cannot be the high heat rather than the chemicals which reduce or eliminate the creosote.

[140] The Respondents' products are said to reduce creosote or inhibit the rate of creosote build-up. The evidence shows that the real danger of creosote is that it can cause chimney fires. Chimney fires can cause houses and other structures to burn.

[141] As said earlier, given the above, the Respondents' test had to be conducted under specific conditions so that external variables affecting the results could be excluded. If a comparison-method was to be used by the Respondents, the use and behaviour of the appliances should be as identical as reasonably possible.

[142] Against this background, the central issue is whether the Respondents' representations are based on "proper and adequate tests".

IX. THE PRODUCTS AND REPRESENTATIONS – PROPER AND ADEQUATE TEST

[143] For ease of reference and reading, I have repeated some of the information described in Section III but in this case have focused on the issue of "proper and adequate test".

A. Supersweep Cleaning Log

[144] As described earlier, the Supersweep Log consists of compressed hardwood material to which 75 grams of the Kel Kem Powdered Soot Remover is added during manufacture. It is a product shaped and packaged as a log. The Respondents thus consider the Supersweep Log as a "delivery mechanism for the Kel Kem Powdered Soot Remover". The Soot Remover consists nominally of copper sulphate (4%), sodium chloride (89%), zinc dust (1%) and limestone (6%). The log is intended for occasional use.

[145] The central ingredient of the Soot Remover is salt. There was evidence of a practice in some areas of the country where people sprinkled salt on a fire in hopes that the salt would remove the creosote. An apparent disadvantage of that method, in addition to its questionable utility, is that the salt accelerates the rusting out of stoves.

[146] The instructions found on the carton packaging of the Supersweep Log read as follows:

> For maximum effect, place the SUPERSWEEP log on a HOT fire. Follow instructions below and inside the carton.
>
> 1. FULLY open the stove or fireplace damper.
> 2. Light a normal wood fire. Wait until the fire becomes HOT!
> 3. Place one SUPERSWEEP log on the HOT fire.
> 4. Close stove or fireplace doors, screens or enclosures.
>
> Keep air intakes open and maintain a high temperature.
>
> NOTE: The SUPERSWEEP Chimney Cleaning Log requires high flue temperatures (minimum 350ºF) to be fully effective.

[147] According to the statements made on the packaging, the log "Helps Eliminate DANGEROUS CREOSOTE in your Chimney" and "HELPS PREVENT CHIMNEY FIRES". The packaging also includes the following:

> 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 qualified professional.

[148] Under the heading "How it works", one can read as follows on the carton packaging:

> 1. The SUPERSWEEP Chimney Cleaning Log contains powdered combustion catalysts that require high flue temperatures (minimum 350ºF) to be fully effective.
> 2. When burned as directed, it lowers the combustion point of the creosote and soot deposits in the chimney flue by up to 500ºF.
> 3. As a result, the creosote and soot deposits are burned to a fine ash and fall back into the woodstove or fireplace where they are dissipated by the fire.
> 4. While burning fires over the next 7 days, the treated creosote and soot flue deposits will continue to be burned to a fine ash.
> 5. It can also aid in the loosening and breaking away of hard, scaly or glazed creosote deposits that are difficult or impossible to remove by chimney brushing.

(1) <u>Representations</u>

[149] The Commissioner asserts that the following representations are not based on adequate and proper tests:

1. "Chimney Cleaning Log" (i.e. the name of the product);

2. "Helps prevent Chimney Fires";

3. "Helps eliminate dangerous creosote in your chimney";

4. Images on the packaging making the above representations or in support thereof.

(2) Respondents' Evidence

[150] The Respondents assert that the representations rely upon proper and adequate tests; they refer to the following:

(i) Mr. Kelly's evidence about the use of the Powdered Soot Remover;

(ii) The absence of evidence with respect to consumer dissatisfaction. The Respondents submit that it is unlikely that the product's failure to aid in any creosote reduction would go unnoticed - the fact that the product has been on the market place for over twenty years speaks for itself;

(iii) United States Bureau of Mines Bulletins 360 and 404 which show that a mixture of common salt and zinc produced observable results for removal of soot, including moderate results in the horizontal portion of the flue;

(iv) A May 2003 analysis of a creosote sample by Bodycote Materials Testing Canada Inc. which confirmed that zinc and copper were present in the creosote sample;

(v) A December 2003 analysis of creosote samples by Maxxam Analytics which confirmed that the sample showed a significant presence of copper and zinc;

(vi) A January 2004 test conducted by Mr. Kelly in a wood-stove retailer in Toronto;

(vii) A March 2004 test conducted under the supervision of a representative from Genieo Solution Design.

(3) Analysis

[151] I find that the evidence relied upon by the Respondents does not show that the representations at issue are based on proper and adequate tests before the representations were made to the public.

[152] Although the Supersweep Log has been in use for many years; this, in itself, does not constitute a proper and adequate test. A test is a "procedure intended to establish the quality, performance or reliability of something" (*Concise Oxford English Dictionary*, s.v. "test". The *Canadian Oxford Dictionary* defines test as "a critical examination or trial of the qualities, genuineness, or suitability of a person or thing"). The use to which Mr. Kelly refers is not a test much less adequate or proper.

[153] Paragraph 74.01(1)(*b*) does not set out an exception for products which have been in use for 5, 10, 15 years or any other period. The provision requires proper and adequate tests. This is not a case of false advertising where the defence is that the product is effective. Indeed, the Respondents did not attempt to prove that the product works as advertised.

[154] As a counter to the suggestion that lack of consumer complaints is an endorsement, the absence of endorsement evidence makes the lack thereof equivocal. For a product in use for so many years, if it worked as represented, one would reasonably expect not only customer endorsement but industry and academic acceptance.

[155] In his affidavit, Mr. Kelly merely affirms the following:

> 28. By the time I sold the company in 1993, Kel Kem Powdered Soot Remover had been tested in over ten years of actual use. I have witnessed such uses and have been informed by others in the chimney sweeping community who observed chimney conditions before and after applications of Kel Kem Powdered Soot Remover. I have observed that the Powdered Soot Remover reduced the amount of sooty creosote in the chimney thereby reducing the risk of chimney fires.

[156] No specific detailed tests were referred to by Mr. Kelly.

[157] The United States Bureau of Mines Bulletins were published seventy years ago - in 1932 and 1937. The bulk of the testing apparently was conducted on coal and coke burning appliances. The evidence before the Tribunal is that there is a significant difference between coal and coke burning appliances compared with wood burning appliances. The Bulletin itself refers to the significant difference in test results caused by different types of fuel. This difference is further compounded because the design of wood burning appliances has evolved significantly since the 1930s.

[158] The Bulletins may be interpreted by a person to provide some type of support for the premise that sodium chloride-based products (salt) *may* reduce creosote. It may well lead to a further and more detailed analysis to determine whether the promise has significant reality. However, this premise is not sufficient to support the Respondents' representations. The premise needs to be tested in light of the Respondents' products.

[159] The Maxxam analysis and Bodycote analysis cannot be considered to be reasonable and adequate tests upon which the representations are based. As the Commissioner's expert, Dr. Pegg, has noted, the presence of the noted chemicals is not an indication that they performed any creosote reduction effects. There is insufficient (indeed no) evidence of a causal connection between the chemicals in creosote samples and the reduction of creosote.

[160] The January and March 2004 tests were conducted "after" the commencement of the Bureau's investigation and well after the representations to the public were made. I also note that Mr. Kelly admitted during cross-examination that the test he conducted in January 2004 was "not particularly credible".

B. Imperial Chimney Cleaning Log

[161] The Imperial Log is a product in form similar to the Supersweep Log and it performs a similar function. It is prepared by adding 150 grams of the Powdered Soot Remover (twice the amount in the Supersweep Chimney Log) plus the addition of a new additive, 4 grams of iron filings.

[162] The instructions found on the carton packaging of the Supersweep Log read as follows:

> For maximum effect, place the Imperial log on a HOT fire. Follow instructions below and inside the carton.
>
> 1. Open the stove or fireplace damper to ensure adequate supply of air.
> 2. Light a normal wood fire. Wait until the fire becomes HOT!
> 3. Place one Imperial log on the HOT fire.
> 4. Close stove or fireplace doors, screens or enclosures.
> Keep air intakes open and maintain a high temperature.
>
> NOTE: The Imperial log requires high flue temperatures in excess of 180ºC (350ºF) to be fully effective. Flue temperatures should be maintained between 180ºC-285ºC (350ºF- 550ºF). DO NOT burn more than one Imperial log at a time.

[163] According to the statements made on the packaging, the log "helps reduce DANGEROUS CREOSOTE in your Chimney" and "REDUCES RISK OF CHIMNEY FIRES". The packaging also includes the following representation:

> The Imperial log can be of benefit in a proper chimney-cleaning program. It is not intended as a substitute for inspection and cleaning by a qualified professional.

[164] Under the heading "How it works", one can read as follows on the carton packaging:

> The Imperial log contains chemical compounds that act as combustion catalysts. In order to be effective, these combustion catalysts require high flue temperatures in excess of 180ºC (350ºF). When the log is burned as directed, these combustion catalysts help facilitate the burning of creosote and soot which can build up in chimneys. These catalysts can also help to weaken, loosen and break away some of the hard, scaly or glazed deposits that may be difficult to remove by chimney brushing alone.

(1) <u>Representations</u>

[165] The Commissioner takes issue with four representations:

1. "Chimney Cleaning Log" (i.e. the name of the product);

2. "Reduces risk of Chimney Fires";

3. "Helps reduce dangerous creosote in your chimney";

4. Image of a chimney on fire with the statement that the product "Reduces risk of chimney fires".

(2) Respondents' Evidence

[166] In addition to the literature and evidence referred to, the Respondents also rely upon three different in-house tests. These tests were conducted in May, August, and October-November of 2004. Importantly, they were made before the above representations were made to the public. The May 2004 test was the Supersweep Pro Chimney Cleaning Log Validation Test ("Pro Test"). The August 2004 test was the Supersweep Plus Chimney Cleaning Log Validation Test ("Plus 1 Test"). The November test was called "Plus 2 Test".

[167] The name and numbering of the tests in these Reasons are done for ease of reference. The names of the tests and their results were respectively May 2004 – "Supersweep Pro Chimney Cleaning Log Validation Test", Exhibit A-32; August 2004 – "Supersweep Plus Chimney Cleaning Log Validation Test Number Two", Exhibit A-33; November 2004 "Supersweep Plus Chimney Cleaning Log Validation Test Number Five", Exhibit A-34.

[168] All three tests were observed by personnel from Genieo. The first test (the Pro Test) employed four stoves: one was used as a control stove, two were used to test a log with 150 grams of powdered soot remover (the "Supersweep Pro") and the remaining stove was used to test a log with 150 grams of powdered soot remover and an addition of iron filings.

[169] The Respondents assert that the results showed that the control stove had reduced creosote by 20 grams, while the Supersweep Pro stoves had reductions of 180 and 540 grams. The Supersweep Pro with iron filings had a reduction of 680 grams.

[170] Plus 1 Test was performed to verify that the new log was effective in both matte and stainless steel chimneys. Mr. Simmons stated during cross-examination that he was not necessarily afraid that this test would not show the same results; he "just wanted to prove that it would show the same results."

[171] The test results for the stainless steel chimneys showed that the control stove had reduced creosote by 880 grams while the Supersweep Plus stove had a reduction of 1600 grams. In the matte black chimneys, the control stove had a reduction of 1780 grams while the Supersweep Plus stove had a reduction of 2900 grams.

[172] Plus 2 Test was performed in October-November 2004. Mr. Simmons stated that he conducted this test "[j]ust to satisfy [his] curiosity". According to the test results, the control stoves had each an increase of 360 and 140 grams of creosote, while the Supersweep Plus Log stoves had reductions of 460 and 300 grams.

[173] The Commissioner argues that various factors could have affected the test results. She asserts that these three tests failed to isolate the alleged chemical cleaning effects of the Powdered Soot Remover found in the Logs and can therefore not qualify as "proper and adequate" tests.

(3) Analysis

[174] It should be noted that all three tests were performed outside, just like the March 2004 test of the Supersweep Log. When asked why the tests had been conducted outside, Mr. Simmons stated that "[i]t was the only space we had available at the time and, looking at it from the point of view of, I guess, inside versus outside, it seemed as though as long as they were both in the same environment, we would be okay.".

[175] In cross-examination, Mr. Simmons admitted that the test did not fully represent real world conditions:

> MR. R. NASSRALLAH: Okay. And do you think that the testing the stoves outside represent real world conditions?
> MR. J. SIMMONS: With the exception of the first four or six feet of pipe, I would say yes.
> […]
> MR. R. NASSRALLAH: Well, can you please expand?
> MR. J. SIMMONS: Typically, the majority of a stove pipe is on the outside of a home or on the outside of a structure.

[176] Eventually, subsequent tests were performed inside as a facility had been built for long term testing.

[177] I find that the Respondents have not shown that these tests were proper and adequate. As explained above, in order for a comparison-method to constitute a fair comparison, the use and behaviour of the appliances should be as identical as possible. An outside test does not replicate or even approximate the conditions under which the stoves would be operated. This replication is a cornerstone of a proper and adequate test. In this case this was not done.

[178] In respect of the Pro Test, no temperature readings were recorded for the control stove on the most important day of the test: the day on which the logs were added to the stoves. It is extremely difficult to compare test results if one does not know whether the creosote in the chimneys was exposed to similar temperatures.

[179] The evidence also shows that the appliances behaved very differently. For example, the results for the Plus 2 Test show that after the creosote build-up phase, woodstove 1 had a creosote build-up of 1640 grams whereas woodstove 2 had a build-up of 860 grams.

[180] In light of this difference, Mr. Simmons extended the creosote build-up phase with the hopes of increasing the amount of creosote for woodstove 2 ("just to balance the amount of creosote"). He was, however, not successful as the results for the end of the second stage of creosote build-up show that there was a reduction of creosote in all four stoves, without the use of the Respondents' log. Mr. Simmons had no explanation for this.

[181] The protocols of the tests as well as the tests themselves do not show that the difference in creosote reduction between the stoves and recorded by the Respondents can be attributed to the burning of the Respondents' logs. The appliances were not used in a similar fashion, damper adjustments were not recorded, temperatures varied greatly from one stove to another, and fuel moisture contents were not recorded.

[182] It is true that in practice the systems may not behave identically. Nevertheless, the authors of the *Research Report on Chemical Chimney Cleaners* write as follows:

> In practice the systems may not behave identically despite efforts to the contrary. Two experimental approaches are available to deal with this problem. One can operate the stoves without any chemicals and establish any difference in creosoting tendencies (due, for instance, to differing air leakage into the chimneys), and then use the results to correct the actual results from the cleaner testing. The other approach is to repeat the experiments with the chemicals, each time changing the assignment of the chemicals to the chimneys, and then average the results. In this way any biases associated with one system will be averaged out.
>
> (Jay W. Shelton and Cathleen Barczys, "Research Report on Chemical Chimney Cleaners", (1981) at p. 6 [Exhibit E to Mr. Jenkins' affidavit])

[183] The Respondents did not consider the above options.

[184] For all these reasons, I find that the representations made to the public were not based on proper and adequate tests.

C. Creosote Cleaner

[185] The Creosote Cleaner is a liquid product sold in a one litre spray bottle. The Cleaner consists of water (77%), manganese nitrate (8%) and isopropyl alcohol (15%). The product is intended to be used regularly and continuously.

[186] When the manganese hits the flame zone, it allegedly converts to manganese oxide, and is then in condition to be a catalyst and promote the more rapid combustion of carbonaceous materials.

[187] The directions found on the label of the Creosote Cleaner provide that the product is to be sprayed on "all creosote-coated surfaces in the combustion area and into the flue as far as possible" if there is no fire in progress. The wood is also to be sprayed before lighting.

[188] If the fire is already in progress, the directions on the label provide that the Cleaner can be sprayed on "new wood before adding it to the fire" and that it also can be sprayed directly into a flame at low fire conditions. The directions on the label provide that "to activate this product, flue surface temperature has to be at 300ºF."

[189] The label of the Creosote Cleaner for the 2003-2004 heating season provided that "IMPERIAL KEL KEM CHIMNEY CREOSOTE CLEANER reduces hard or glazed creosote to an ash when used as directed". The label also provided the warning "CAUTION IRRITANT" and that for a "clean safe chimney, remove residue by brushing".

[190] Changes were made to the label for the 2005-2006 season. References to Kel Kem were removed. The label indicated that the Creosote Cleaner "helps reduce dangerous creosote in your chimney". A note in smaller print indicated that the "IMPERIAL SUPERSWEEP Creosote Cleaner reduces hard or glazed creosote to an ash when used as directed." The following note was also found on the label:

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

[191] The label always indicated that the product is "non-corrosive" and "non-combustible".

(1) Representations

[192] The Commissioner asserts that the following representations are not based on adequate and proper tests:

1. "Chimney Creosote Cleaner" (i.e. the name of the product);

2. "reduces hard or glazed creosote to an ash";

3. "non-corrosive";

4 "non-combustible".

(2) Respondents' Evidence

[193] The Respondents assert that the first two representations are based on proper and adequate tests. They refer to the following evidence:

(i) Mr. Kelly's experience and observations:

> 19. By the time I sold the company in 1993, Kel Kem Chimney Creosote Cleaner had been tested in actual use for over ten years. I have witnessed such uses and have been informed by others in the chimney sweeping community who observed chimney conditions before and after applications of Kel Kem Chimney Creosote Cleaner. I have observed that the Chimney Creosote Cleaner reduces the hard-glazed creosote in the chimney by causing it to be burned essentially to an ash which either falls or is more easily removed through brushing. By burning away some of the carbon-containing creosote and exposing more of the non-combustible ash, the deposit becomes more responsible to physical brushing, thereby reducing or eliminating remaining deposits. The lowered carbon content of deposits reduces the risk of a chimney fire.

(ii) The *Residential Wood Heating – A Homeowner's Guide Canada* (Exhibit A-46) which states that "some liquid chimney treatments containing manganese can help to break down shiny, glazed creosote deposits, making them easier to remove by sweeping".

(iii) The *Wood Energy Technical Training Program Reference Manual* (Exhibit A-47). One can read in this Manual that "manganese sprays can be effective if intimate contact between the spray and the creosote is assured, and the temperature exceed 150ºC (300ºF)".

(iv) United States patent held by William Pfefferle – Methods of treating flue deposits and composition (Exhibit F to Mr. Jenkins' affidavit).

(v) Other products which also consist of a solution of manganese nitrate and isopropyl alcohol and which are said to have similar effects to the Cleaner.

[194] In addition to the above, the Respondents also rely upon a test conducted in April 2005. They admit that the Cleaner "had been on the market for years prior to any formal validation testing", but assert that this "validation test" confirms the effectiveness of the products. In cross-examination, Mr. Simmons admitted that this test was conducted in response to the Bureau's questions. The test results recorded by the Respondents indicate that for the stainless steel pipes, the control stove had a build-up of 880 grams while the Creosote Cleaner stove had a build-up of 640 grams. For the matte black pipes, the control stove had a build-up of 740 grams while the Creosote Cleaner stove had a build-up of only 540 grams.

[195] In respect of representations no. 3 and no. 4, the Respondents explained in their Amended Response of January 22, 2007, that the cleaner is non-corrosive "in that it does not cause corrosion of the stove or chimney" and that it 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 gases to the chimney where it reacts with the creosote."

[196] The Respondents assert, however, that these are not representations of performance, efficacy or length of life of the product and are therefore not caught by paragraph 74.01(1)(*b*) of the Act. They are indicators of the properties or attributes of the Cleaner. In the alternative, the Respondents submit that the Cleaner essentially consists of water and is therefore not combustible.

(3) Analysis

[197] There is no doubt that the books referred to by the Respondents (The *Residental Wood Heating – A Homeowner's Guide Canada* and *Wood Energy Technical Training Program Reference Manual)* as well as the William Pfefferle patent do not constitute adequate and proper tests. These documents do not substantiate the Respondents' claims in respect of the Cleaner. Even the Respondents' expert, Mr. Jenkins, made this admission. He stated the following with respect to the Pfefferle patent:

> MR. G. JENKINS: As I have stated before, you look to see if the compounds in question are chemically active. That was what the literature search was for. And if they are, then you can abbreviate some of your testing, or ---.
> […]
> That was what I wanted to find in the literature, not -- then you would test to see if it has catalytic capability with respect to creosote.
> […]
> Now, this does not mean that their product works; they have to do a test and make sure that the way they mix it, the way they apply it, the procedure that they use works. But for this -- this seems to be

> reasonable support for the theory or the premise that using a Manganese-based material will give you creosote reduction.
>
> [emphasis added]

[198] The publications and patent are like the earlier referenced U.S. Bureau of Mines Bulletins in the 1930s in that they may be sufficient to embark on a line of inquiry as to lead to prototype testing but they are not the proper and adequate tests required by law. The fact that other products which consist of a solution of manganese nitrate and isopropyl alcohol are also being sold falls within the same category.

[199] Regarding the April 2005 test, the Respondents have admitted that the test was conducted well after the representations to the public were made. They thus engaged in reviewable conduct in respect of the first two representations made about the performance of the Cleaner.

[200] I further note that the April 2005 test relied upon by the Respondents appears to have focused on the alleged creosote-reducing effects of the Cleaner and not on the alleged capacity of the Cleaner to reduce hard or glazed creosote to an ash.

[201] With respect to the third representation, I find that the statement that the Cleaner is "non-corrosive" is a representation in the form of a statement of the performance of the product. It refers to the manner in which the Cleaner will perform; it will not cause corrosion of the chimney. The *Shorter Oxford English Dictionary*, vol. II, defines "performance" as "1. The carrying out of a command, duty, etc. […] 2. The accomplishment, carrying out, doing of any action or work; working; action [….]".

[202] This representation, like all others, must be interpreted as it would be by the average consumer. In my view, the average consumer would consider that the representation is that the product will perform without corrosive effect. It is part of the statement of performance.

[203] The Respondents have not referred to any test upon which the representation of non-corrosiveness is based. They have thus engaged in reviewable conduct.

[204] The Respondents also claim that the Cleaner is non-combustible. Accepting that this representation is in the form of a statement of the performance of the product, I find that it is based on proper and adequate tests. For example, the Material Safety Data Sheet prepared by Gerry van Konynenburg with respect to the Creosote Cleaner provides that the product is not flammable.

D. Creosote Conditioner

[205] The Creosote Conditioner is a powder composed of trisodium phosphate (60%) and bentonite clay (40%); it is sold in a 450 gram container. The trisodium phosphate is said to be the active ingredient. The product is intended to be used regularly and continuously.

[206] The directions on the 2004 label of the Creosote Conditioner provided as follows:

> DIRECTIONS: If creosote accumulation reaches ¼" or more, the chimney should be brushed. Remove ashes or cinders. Sprinkle onto hot coals or low fire. High fires severely reduce Chimney Conditioner's effectiveness. Stoves & Inserts – 1 tbsp (15 mL) at least twice per week. Furnaces & Boilers – 1 tbsp. (15mL) daily.

[207] The label of the Creosote Conditioner for the 2003-2004 heating season provided that it "helps keep chimneys clean and safe". According to the note in smaller print found on the label:

> IMPERIAL KEL KEM Chimney Conditioner aids chimney cleanliness when used regularly between professional brush cleanings. 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. A cleaner surface will also increase heat exchange. When burning daily we recommend monthly chimney examinations.

[208] Changes were made to the label for the 2005-2006 season. References to Kel Kem were removed. The 2005-2006 label indicates that the Creosote Cleaner "helps reduce dangerous creosote in your chimney". The note in smaller print was similar to that found on the 2003-2004 label.

[209] It should be noted that the label on the Creosote Conditioner purchased by Mr. McCollum on February 26, 2004, and filed as exhibit A-4 indicated that it "reacts with sticky, runny creosote".

[210] The label also indicated that the product is "non-corrosive" and "non-toxic".

(1) Representations

[211] The Commissioner asserts that the following representations are not based on adequate and proper tests:

1. "Creosote Conditioner" (i.e. the name of the product);

2. "It can inhibit the rate of creosote build-up and reacts with most chimney deposits to reduce their adhesiveness";

3. "non-corrosive";

4 "non-toxic".

(2) Respondents' Submissions

[212] In respect of the first two representations, the Respondents admit that the Conditioner "had been on the market for years prior to any formal validation testing." They submit that "existing industry knowledge in relation to the active ingredients, the experience of Mr. Kelly in developing the products, and the twenty years of practical, in-use testing by chimney sweeps and consumers, were more than sufficient to constitute adequate and proper tests".

[213] The Respondents also refer to the following evidence:

(i) The *Wood Energy Technical Training Program Reference Manual* which indicates that powders composed of alkaline phosphate and highly absorptive clay are effective on wet or sticky tar-like creosote deposits. According to the Manual, the phosphate penetrates the tarry deposit and then the clay absorbs the creosote, drying it into particles or flakes;

(ii) The Nassar and MacKay study entitled "Effect of Fire Retardant Chemicals on Chimney Creosote Deposit" (Exhibit D to Mr. Jenkins' affidavit) which found that chimney cleaning products "Co-Mate" and "Kathite-H" (both mixtures of trisodium phosphate and silica clay) were effective;

(iii) Other products that also consist of trisodium phosphate and absorbent clay and that are said to have similar effects to the Conditioner.

[214] The Respondents further submit that the validation test conducted in May 2005 confirm the effectiveness of the Conditioner.

[215] With respect to the last two representations referred to by the Commissioner, the Respondents stated in their Amended Response of January 22, 2007, that the conditioner is non-corrosive "in that it does not cause corrosion of the stove or chimney" and that it 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".

[216] Again, they submit that these representations are not representations of performance, efficacy or length of life of the product and are therefore not caught by paragraph 74.01(1)(*b*) of the Act. They are indicators of the properties or attributes of the Conditioner.

(3) Analysis

[217] For the reasons set out above, I find that the *Wood Energy Technical Training Program Reference Manual*, the sale of allegedly similar products, and Mr. Kelly's evidence are not sufficient. It is not sufficient to rely on a manual unless it is based on proper tests. Anecdotal stories are clearly not tests.

[218] There is no evidence showing that the Respondents were familiar with the study performed by Nassar and MacKay until Mr. Jenkins referred to it in his report.

[219] I find that the manner in which the chemicals were tested in the study does not reflect the manner in which the Conditioner is to be used. In the test, ten grams of the chemical was dissolved in 300 ml of distilled water. Sixty grams of air-dried sawdust was soaked in the solution for 1 hour and was then spread on pans and then dried overnight at 50ºC. The wood fuel used by the consumer, on the other hand, will not be impregnated with the Conditioner prior to being burned and will not be used under fully pyrolyzing conditions.

[220] The May 2005 test relied upon by the Respondents was conducted after the first representations were made to the public. I also note that the test did look at the rate of creosote build-up but not at the Conditioner's reaction with chimney deposits to reduce their adhesiveness.

[221] The representations that the conditioner is "non-toxic" and "non-corrosive" can be interpreted as referring to the performance of the product. The Conditioner, when used pursuant to the instructions, will not cause corrosion of the stove or chimney and will not release or cause the release of any substances which are hazardous to human or animal health. The Respondents have not provided any tests upon which those representations are based.

[222] The Respondents therefore also engaged in reviewable conduct by stating to the public that the Conditioner was non-toxic and non-corrosive.

X. REMEDIES

[223] As I have found that the Respondents have engaged in reviewable practices by failing to have proper and adequate tests performed prior to the making of the representations, it is necessary to fashion an order; one which does more than merely make a declaration.

[224] The Commissioner asks for a prohibition order, and the providing of a notice in the form of this Order to most levels of trade in the product other than the ultimate consumer. In her final written arguments, the Commissioner apparently veered off from seeking some kind of notice to the public – or at least that was the Tribunal's understanding of the Commissioner's position. In oral argument, however, counsel for the Commissioner admitted that her written arguments should have referred to a notice to the public.

[225] It is necessary for there to be some public dissemination of the Tribunal's Order to the people most directly affected and who may have relied upon the representations and felt some degree of comfort and security by using the products. The section 1 Charter justification is based in part on the asymmetrical information base between seller and ultimate purchaser. In this case, the potential harm flowing from inadequately tested representations accrues to the consumer not to others in the supply chain.

[226] The Commissioner has not proposed the nature, content or distribution/publication of such a notice and requested an opportunity to deal with this matter after receipt of the Tribunal's Reasons. Submissions should thus be made on this issue.

[227] The Respondents had limited submissions as to a remedy. This is not all together surprising since it is difficult to address sentencing while still protesting innocence. The Respondents did indicate that they would want to make further submissions if the Tribunal was contemplating a product recall or withdrawal order. The Tribunal is considering such a remedy even though the Supersweep Logs are no longer marketed.

[228] A recall until proper and adequate tests are performed or a change in packaging and promotion to remove the infirmed representations is consistent with the nature of remedial orders. The Tribunal would be prepared to take submissions with respect to such a recall or change in packaging and the details thereof.

[229] Lastly, the Commissioner asks for an administrative penalty of $100,000 from each Respondent. I am not satisfied that the Respondents have a due diligence defence. The Tribunal recognizes that the products were sold all over Canada, some for over 20 years and that people were intended to rely on the representations in respect of an inherently dangerous situation. However, there is really only one respondent; in fact, the representations were based on a sincerely held belief without any intended deception. This is the first of such cases under the civil provisions and there does not appear to be any intent to flaunt the law.

[230] As serious as the breach by the Respondents is, which might otherwise justify a larger administrative penalty, the other remedies which may be ordered will have a more profound effect than an administrative penalty. Therefore, a penalty of $25,000 to be assessed jointly and severally against the Respondents is appropriate. Future breaches of the requirement for proper and adequate testing are likely to attract larger administrative penalties in the future now that the Tribunal has determined this case.

[231] The Commissioner reserved her rights in respect of costs and requested an opportunity to deal with this matter after receipt of the Tribunal's Reasons. Such an opportunity will be accorded to each party.

[232] The parties shall have time to consider and make submissions as to the terms of a public notice of this determination and as to the appropriateness of a product withdrawal.

X. ORDER

[233] FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

(a) 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 ten (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:

(i) clean or assist in cleaning chimneys;

(ii) reduce, remove, condition, or otherwise affect creosote;

(iii) prevent, eliminate or otherwise affect chimney fires;

(iv) help prevent chimney fires;

(v) help eliminate dangerous creosote in a chimney;

(vi) reduce hard or glazed creosote to an ash;

(vii) inhibit the rate of creosote build-up and react with most chimney deposits to reduce their adhesiveness.

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

(i) non-corrosive;

(ii) non-combustible;

(iii) non-toxic.

(c) the Commissioner and the Respondents shall within 30 days hereof serve and file their submissions in respect of (i) the nature, form and dissemination of the public notice of the Tribunal's findings, (ii) product recall/withdrawal and/or change in packaging, and (iii) the proper award of costs. The parties shall have a right of reply to be served and filed 15 days thereafter.

(d) The Respondents are jointly and severally liable for an administrative penalty to be paid within 60 days of this Order or such other time as may be appropriate.

DATED at Ottawa, this 7th day of February, 2008.

SIGNED on behalf of the Tribunal by the presiding judicial member.

(s) Michael L. Phelan

APPEARANCES:

For the applicant

Commissioner of Competition

William Miller
Roger Nassrallah
Stéphane Lilkoff

For the respondents

Imperial Brush Co.Ltd. and Kel Kem Ltd (carrying on business as Imperial Manufacturing Group)

Daniel M. Campbell
Joseph Burke