File No. CT - 2006 - 010

The Competition Tribunal

In the matter of The *Competition Act*, R.S., 1985, c. C-34;

And in the matter of an inquiry pursuant to subsection 10(1)(b)(ii) of The *Competition Act* relating to the marketing practices of Imperial Brush Co. Ltd. and Kel Kem Ltd. (c.o.b. as Imperial Manufacturing Group)

Between:

The Commissioner of Competition

Applicant

- and -

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

Respondents

Respondents' Final Memorandum of Argument

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1. Evidence was heard in this matter between July 9 and 16, 2007 in Halifax. Written submissions on the constitutional issue were subsequently filed. This final submission deals only with the substantive issues before the Tribunal.

Background

2. At the hearing, evidence of the history of Kel Kem Ltd. and its products was given by Abe Kelly [Pre-filed direct testimony of Abe Kelly; Exhibit R-1] It showed that the company was founded by Abe Kelly in the early 1980s. It made and distributed a number of products for wood-burning appliances, including Chimney Creosote Conditioner ("Conditioner"), Creosote Cleaner ("Cleaner") and Powdered Soot Remover ("Powder"). These were composed of ingredients which were widely used for the purpose of controlling creosote build-up in chimneys; the products were not proprietary.

3. Mr. Kelly is a chemist. He was in communication with a number of professional chimney sweeps and consulted with them with respect to the effectiveness of the various products. Based on his observations and their reports on these products in actual use, he concluded that the products were effective for their intended purposes[1]. The products have been in continuous production since then. The company was sold by Mr. Kelly in 1993, and was purchased by Imperial Brush Limited from the new owner in 2002-03. Imperial Brush engaged Mr. Kelly as a consultant at the time of the purchase to verify, among other things, that the products were still being made according to his initial formulations. The Cleaner, the Conditioner and the Powder had been in use for over 20 years. Kel Kem considers that this long experience in the hands of consumers and professional sweeps constitutes adequate and proper testing in the field to support the representations made for these products.

4. Shortly after acquiring the company, Imperial Brush introduced a value-added product. The Powder is intended to be sprinkled in a hot fire. Imperial added this Powder to a hot-burning compressed-wood fire log and marketed the product as the Supersweep Chimney Cleaning Log (the "Log"). The Log was a delivery mechanism for the Powder. Later versions of the Log were developed by increasing the amount of Powder contained in the product and, eventually, adding iron filings as an additional ingredient.

5. Subsequently, Kel Kem and Imperial Brush conducted additional testing in their facility at Richibucto, New Brunswick. This testing involved the operation of stoves and chimneys in a controlled environment, and observing the creosote before and after use of the product, and in control stoves where no product was used. Reports including the results of these tests were presented as Exhibits A-28, A-32, A-33, A-34, A-35, and A-38. The Respondents submit that these are adequate and proper tests supporting the representations made.

6. The Commissioner's application is based solely on Section 74.01(1)(b) – representations with respect to efficacy or performance not based on adequate and proper tests. There is no complaint under Section 74.01(1)(a) – representations that are false and misleading in a material respect.

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[1] Mr. Kelly's evidence on the substance of the reports of these sweeps was not admitted on the hearing, but the fact of the consultation was admissible.

The Representations

7. The representations at issue, as outlined in the Commissioner's amended Notice of Application, are as follows:

Log:

(a) *Product name: Chimney Cleaning Log*

(b) *"Helps Prevent Chimney Fires"*

(c) "*Helps Eliminate Dangerous Creosote In Your Chimney*"

(d) *Images on the packaging making the above representations or in support thereof.*

Cleaner:

(a) *Product name: Chimney Creosote Cleaner*

(b) "*Reduces hard or glazed creosote to an ash.*"

(c) *"Non-corrosive"*

(d) *"Non-combustible"*

Conditioner:

(a) *Product name: Chimney Creosote Conditioner*

(b) "*It can inhibit the rate of creosote build-up and reacts with most chimney deposits to reduce their adhesiveness.*"

(c) *"Non-corrosive"*

(d) *"Non-toxic"*

8. The Respondents admit that certain representations (namely (b) and (c) with respect to the Log, and (b) with respect to each of the Cleaner and Conditioner), are true statements of efficacy of those products. However, others (namely (c) and (d) with respect to the Cleaner and Conditioner) are not representations with respect to efficacy or performance, and merely indicate properties or attributes of the products. They are thus not within the provision under which the application is made. The Oxford English Dictionary defines efficacy as the "power to effect the object intended."[2] Accordingly, the other statements

[2] Efficacy: 1. Power or capacity to produce effects; power to effect the object intended (Not used of personal agents.). 2. A process or mode of effecting a result. 3. Effect. (Oxford English Dictionary - 1971). Webster's, alternatively, provides as follows: Efficacy: the power to produce an effect: effectiveness. (Webster's Third New International Dictionary - 1976). Other dictionaries' definitions of "efficacious" are also helpful:

regarding the mere properties of the products should not be at issue for the purposes of this proceeding.

9. Notwithstanding the above, the Respondents have responded to any safety concerns raised by the Commissioner with respect to the Cleaner and Conditioner through her inclusion of the representations "non-corrosive", "non-combustible", and "non-toxic." The labels on the product which Kevin McCollum purchased [Exhibits A-3 and A-4] are those which were in use by Kel Kem before it was acquired by Imperial Brush. As indicated in the evidence of Mr. McCollum [Exhibit A-1] at para. 21-22, the products were purchased in early 2004. Kel Kem revised the labels for the 2003-2004 product season [Exhibits R-7 and R-8], and again for the 2005-06 marketing year [Exhibits R-9 and R-10]. These revisions include clear language on the side of the package indicating that the products can irritate the eyes and skin. They also include the words "CAUTION" and "IRRITANT" prominently on the front of the label.

10. It is also worth noting that all of the labels at issue (i.e. those on the products purchased by Mr. McCollum and on the revisions) make it very clear that the products are not to be used as substitutes for professional chimney sweeping. For example, the packaging for the Cleaner (Exhibit A-12a), notes as follows:

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

11. This qualification was even noted in the respective affidavits of the Commissioner's experts, Dr. Michael Pegg and Dr. Paul Stegmeir. [Exhibit A-14, para. 7; Exhibit A-42, para. 7].

Issues

12. In the view of the Respondents, the issues are as follows:

    a) What are the respective onuses on the Commissioner and Respondents?

    b) What constitutes "adequate and proper" tests?

13. Once these questions of law have been determined, the Tribunal must determine whether the testing relied on by the Respondents is adequate and proper.

The Law

14. As stipulated in *Commissioner of Competition* v. *Gestion Lebski Inc.*, 2006 Comp. Trib. 32 at para. 152, the Commissioner has the burden of proof on a balance of probabilities, as this is a civil proceeding. The Commissioner must demonstrate, on a balance of probabilities, that the Respondents made representations to the public with respect to the "performance, efficacy, or length of life" of the products. The onus then shifts to the

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Efficacious: producing or sure to produce the described effect (Oxford Concise English – 1995). Efficacious: producing the intended result, effective (Collins Pocket Reference English Dictionary – Canadian – 1998).

Respondents to demonstrate, on a balance of probabilities, that the statements of efficacy are based on "adequate and proper" testing.

15. The plain English meaning of "adequate and proper" denotes a standard of reasonableness - not one of perfection. Indeed, the French version of s. 74.01 (1) (b) refers to "une épreuve suffisante et appropriée", or "sufficient and appropriate". "Sufficient" certainly suggests a reasonableness standard, as opposed to perfection. Judicial consideration provides even further clarity.

16. In *R.* v. *BigMac Investments Ltd.* (1988), 24 C.P.R. (3d) 39 (Man. Q.B.) the court concluded that adequate and proper testing (in the former criminal provision of the legislation) need not be scientific in nature, making reference to the French wording cited above. In that case, the accused was charged with having made representations in a radio interview as to the effectiveness of a weight-loss machine. She was acquitted by a provincial court judge, and the Crown appealed. The Queen's Bench judge noted as follows at p. 4 of the decision:

> *What Mr. Dash actually submitted, relying on R. v. Bristol Myers of Canada Ltd. is that to be "adequate and proper" tests must be of a scientific nature. The Bristol Myers case is of little use though. To begin with it is not binding on me. More importantly it deals with a different factual situation. There scientific testing was used, but the conclusion it stated was not supported by the test performed.*
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> ***If Parliament had intended that scientific testing always be required before any kind of representation of efficacy can be made, then it would have said so. It chose instead to set "adequate and proper" as the standard. "Adequate and proper" are synonymous with the words "sufficient" and "appropriate".*** *The learned trial judge quite obviously made a careful review of the evidence to determine what knowledge, experience and data Mrs. McDonnell had available to her when she made the impugned representations. He was aware that she had used the Slendertone method herself over an extended period of time with satisfactory and significant results; that she had investigated the operations of other clinics; that she had done considerable reading and that she had monitored and recorded on client cards the "inch-loss" experience of several hundred patrons. All of this together provided the evidentiary basis for a conclusion that I am not prepared to upset.*
>
> …
>
> *In summary, the learned trial judge was presented with the personal experience, the research, the training, and the date upon which Ms. McDonnnell relied in making representations of efficacy. He considered this evidence; weighed it in light of the*

> *testimony of the competing experts from whom he heard and came to the conclusion, not that the testing was 100% reliable and not that it was the best scientific testing that could have been done under laboratory conditions, but that it was "adequate and proper" within the meaning of the Combines Investigation Act. That is all that was required.*
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> (emphasis added)

17. As will be emphasized below, the Respondents in this case relied on the experience of Mr. Kelly (the inventor of the products), and on the cumulative experience of chimney consumers and sweeping professionals, who had tested the product through years of actual use. This, combined with the historical literature as to the effectiveness of the chemical compounds contained in the products, and the positive results of the Respondents' own testing, are an adequate and proper basis for the representations made.

18. The representations made on the Respondents' product packaging do not constitute quantitative claims nor claims of superiority, unlike the majority of cases which have been brought before the courts. Such representations can surely be considered more suitable to "real world" testing by users, including consumers and industry professionals .

19. In *Fuel-O-Matic Manufacturing (Eastern) Limited et al* v. *The Queen* (1984), 13 W.C.B. 318 (Ont. Co. Ct), the court observed that formal testing is not necessary for every representation if they are self evident Rather, the court was concerned with how the "ordinary person" viewed the representation. In that case, Fuel-O-Matic was convicted in Provincial Court for failing to make proper pre-marketing tests of a gas-saving device for cars. A test by government officials confirmed that the device would increase gas mileage in vehicles experiencing certain malfunctions, which constituted an adequate and proper test, although they did not show that gas mileage would be improved for a perfectly-functioning car. The trial judge found that, while the "user" tests were not conducted properly, the section did not require a formal test of every representation. Indeed, some representations could be self-evident truths. It was self-evident that, given a significant malfunction, the use of the device could result in a possible mileage saving as represented. Accordingly, the conviction was reversed and the accused acquitted. In this case, if the representation that the Logs help reduce creosote is made out, the representation that they reduce risk of chimney fires becomes self evident.

20. In *U.L. Canada Inc*. v. *Proctor & Gamble Inc*. [1996] O.J. No. 624 (Gen. Div.), the court considered claims by Proctor & Gamble that its beauty bar was superior to "the leading beauty bar", which U.L. claimed referred to its product. The issue was the adequacy and propriety of Proctor & Gamble's testing regarding the comparative effect of the beauty bars. While most of the decision discussed the various testing techniques for that particular type of product, the court commented that because P&G's tests employed a protocol "which more closely approximates <u>real world conditions</u> than the protocol employed by U.L.", they were adequate and proper.

21. In *R.* v. *Bristol-Myers Canada Limited*, [1980] O.J. No. 2760 (Co. Ct.), Bristol-Myers was charged under the predecessor to s. 74.01(1)(a) for false and misleading

representations in relation to a TV commercial which suggested that "Fleecy gets rid of static cling." Both parties relied on the results of various tests to further their respective cases. In accepting the testing done by the defence, the court commented that they had been:

> *… re-created in a disciplined scientific method, as closely as could be without going into the homes, the "real world" of the housewife, and how she would perceive and evaluate "the degree of static cling in laundry loads on removal from a tumble dryer" with and without the addition of Fleecy.*

22. In the "Fleecy" case, the representation was an absolute one, in that the product was represented to *eliminate* static cling. The claims in the present case are not absolute. Indeed, the product packaging (as seen in various exhibits) is clear that they are to be used in conjunction with regular professional chimney maintenance to "help prevent", "help eliminate", "reduce" or "inhibit" creosote build up and, in the case of the Cleaner and Conditioner, modify the texture of the creosote.

23. *Mead Johnson Canada* v. *Ross Paediatrics* (1996), 31 O.R. ($3^{d)}$ 237 (Gen. Div.) considered a dispute between manufacturers of infant formula. There, the court was not persuaded by the "relatively modest conclusions" of a study relied upon by the respondent, nor the "guarded language" of scientific materials. Rather, it determined that those materials did not justify the "hyperbole" which characterized the Ross promotional campaign. Thus, the court appeared to suggest that the extent of testing and study required in any particular case depends upon the nature of the representations (or at least the extensiveness of the hyperbole). In this case, there is no hyperbole; there is no claim of superiority to any of the products, nor is a particular result guaranteed through use of the products in and of themselves. Rather, the representations are modest and qualitative at best.

24. The evidence of the Commissioner appears to be on the basis that the Respondent's burden is to prove, to the level of scientific certainty, that the representations are true. On this theory, an "adequate and proper test" proves the truth of the representation to that degree. The Commissioner's evidence seems to be calculated to raise doubt as to this scientific certainty, and to assert that therefore the tests are not adequate and proper.

25. The Respondents submit that this is an incorrect approach. The Act does not speak of proof of the truth of the representations, but only of the adequate and proper nature of the tests. Nowhere does the Act speak of proof to scientific certainty; nowhere is it implied that the introduction of reasonable doubt as to the conclusion of a test is sufficient to disqualify it as a reasonable or proper test. The question is simply whether the tests themselves were adequate and proper according to the standard established by the Tribunal in accordance with the Act.

26. The difference between the standards of scientific certainty, beyond reasonable doubt, and the balance of probabilities is discussed in *On Evidence, Medical and Legal*[3]. The authors note:

> *In contrast to law, medicine, particularly evidence-based medicine as it is currently practiced, aspires to a scientific standard of proof, one that is more certain than the standards of proof courts apply in civil and criminal proceedings.*

27. The Respondents submit that the testing on which they relied in the case of each of the products was "adequate and proper" as required by the statute and as defined by the jurisprudence, in the context of the actual representations.

28. The Respondents submit that Parliament created two separate classes of reviewable conduct, and meaning must be given to both of them. One relates to false and misleading representations. The other deals with representations concerning product performance and efficacy. The interpretation proposed by the Commissioner would make s. 74.01(1)(a) meaningless. Under s. 74.01(1)(a), the onus is on the Commissioner to prove (on a balance of probabilities) that a statement is false or misleading, and that it is material. However, the Commissioner proposes that, under s. 74.01(1)(b), the onus is on the Respondents to prove to scientific certainty that every representation is true, whether it is material or not. There is thus no situation covered by 1(a) which is not covered by 1(b) (as interpreted by the Commissioner). The range of possible consequences following a finding under either of the two sections is identical.

29. The Respondents submit that, contrary to the Commissioner's position, the correct standard is one of reasonableness, as measured by the reasonable practices of businesses. Recklessness is not to be condoned, but a standard of scientific perfection is not required. A contrary opinion or argument, or results of others which disagree with the results of the respondent, will not alone disqualify a test as "adequate and proper"

30. This is consistent with the plain language of the statute, the intent of Parliament, the interpretation of the courts, and the expert opinion of Mr. Jenkins (who has considerable experience in practical product testing). When the conduct of the Respondents is examined in light of this standard, the tests can clearly be considered "adequate and proper."

The Role of Expert Evidence in Setting the Legal Standard

31. Whether the testing in any case is "adequate and proper" within the meaning of s. 74.01(1)(b) is a mixed question of law and fact. As such, it is a question for the Tribunal alone – and not a proper matter for expert opinion. The Respondents noted this in their letter in response to the expert evidence tendered by the Commissioner, noting that Dr. Pegg purported to express an opinion on what constituted an "adequate and proper" test, and whether the tests conducted by the Respondents met that standard. In his Affidavit,

[3] Miller, D.W. and Miller, C.G.; Journal of American Physicians and Surgeons, Vol 10, No. 3, p. 70 (2005)

and again on cross examination, Dr. Pegg acknowledged that this is not a term which has a particular meaning in his area of expertise. His opinion is therefore not an expert opinion, and his evidence establishes (as he readily acknowledged) the appropriate standard for an academic research project; for graduate students and those seeking to publish in learned scientific journals.

32. This begs the question of what the legal standard of "adequate and proper tests" involves. The Respondents submit that Dr. Pegg's evidence should be of limited assistance to you in interpreting the law and evidence in this case. Dr. Pegg's evidence establishes a bookend – the maximum or ideal standard applicable for scientific experimentation. It does not establish a reasonable standard, or a standard which reflects actual industrial practice.

33. Conversely, Mr. Jenkins did not purport to give an opinion of law or to define what "reasonable and proper" means in law. Rather, he testified as to the actual practices in product testing in industry – the sort of testing on which businesses make business decisions, such as whether to proceed with production of a product (such as the fishing weir poles which he described). We submit that Mr. Jenkins' evidence established a fair and reasonable standard; a standard that reflects actual industrial practice, and that it should be a guide to the Tribunal's determination.

Twenty Years of "In-Use" Testing

34. The pre-filed evidence of Mr. Kelly [Exhibit R-1] describes his education in chemistry, his employment background with Texaco and Perolin/Bird-Acher, and the founding of Kel Kem in 1977. Mr. Kelly attained significant knowledge in the field of chemical treatment of creosote deposits from wood burning. Indeed, Mr. Kelly refers to a number of sources which suggest that the effects of certain chemical compounds on creosote were well-known to those involved in the industry.

35. The evidence of Mr. Kelly (in particular at para. 5 of his statement) indicates that, in the case of each of the Cleaner, Conditioner, and Powder, development of the product was based on scientific reasoning, experience as a chemist, and personal use. Indeed, Mr. Kelly testified that, following introduction onto the market, the products were used by many others in the chimney sweeping industry for years.

36. The products – particularly the Conditioner and the Powder – incorporate ingredients with a long history of use in products of this nature. The components of the Powder were investigated in reports by the United States Bureau of Mines in the 1930's, including Bulletin 360[4]. That report showed, inter alia, 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.[5] Based on their tests in actual stoves, the authors noted at p. 45 that the results may vary based on a number of factors:

[4] Removal of Soot from Furnaces and Flues by the use of Slats or Compounds; (1932) Exhibit A-43.

[5] Exhibit A-43, p. 42-43, Table 6; Cross examination of Mr. Stegmeir, Transcript Vol 2, p 303. Mr Stegmeir acknowledged that the US government scientists who prepared the Bulletin "did a pretty good job of putting

> *The test data therefore did not show that such treatments could be used with definite assurance that they would clean all flues of soot.* ***The soot will probably be removed[6] to some extent in all attempts****, but the amount of the action will be a matter of chance, depending on the draft available and the accidental temperatures that may occur because of the methods used by the householder in firing and adjusting the dampers.*
>
> (emphasis added)

37. In a subsequent report[7], the US Bureau of Mines described Bulletin 360 as follows:

> *The subject was covered in an earlier investigation reported in Bureau of Mines Bulletin 360, which showed that copper, lead, tin and zinc chlorides were more effective, but that the same end was accomplished more economically by using common salt mixed with cheaper salts of these metals.*

38. It is worthwhile to review Mr. Kelly's pre-filed evidence [Exhibit R-1] on the individual products. The Cleaner, which uses manganese as its active ingredient, is designed to aid in the removal of hard, glazed creosote. Mr. Kelly testifies as follows at para. 17-19:

> *17. Through my experience with Perolin/Bird-Archer, I was familiar with the research done by the Ethyl Corp. with respect to using manganese compounds as a combustion catalyst in various applications, including as a gasoline additive, to promote more complete combustion. I therefore considered how such compounds might be employed in wood burning appliances. I determined that it was desirable to deliver the manganese (in the form of manganese dioxide) to the site of the creosote in the chimney in finely dispersed form.*
>
> *18. This suggested delivery in a solution which would be rapidly vaporized by the heat of the burning fire. Accordingly, a water solution was desirable so that the solution would not be flammable in liquid or aerosol form. The solution included an alcohol to assist with the dissolution of the manganese salt, and to assist in rapid vaporization without creating problems with flammability. Manganese is available and is stable in the form of manganese nitrate, and this is the form that was selected. The heat of the fire converts the manganese to manganese dioxide, which is distributed*

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scientific method into practice here". Mr. Stegmeir also acknowledged "…I would say that it's .. the possibility dies exist for these products to work in the stove and in the stovepipe, but the minimum potent – and the farther they get from the stove, the less likely it is to work." Transcript, Vol 2, p 307, line 19.

[6] In purporting to quote this passage, Mr Stegmeir added words, changing the meaning. Transcript, Vol 2, P 308, line 5 to page 309, line 9.

[7] Burning of Coal and Coke Treated with Small Quantities of Chemicals (1937) Exhibit A-44, at page 32

> *to the chimney by the flue gases and which has the desired effect on the creosote deposits if the temperature of the chimney is appropriately high.*
>
> *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 responsive to physical brushing, thereby reducing or eliminating remaining deposits. The lowered carbon content of deposits reduces the risk of a chimney fire.*

39. This evidence was not challenged on cross-examination.

40. The Conditioner, meanwhile, utilizes trisodium phosphate as its active ingredient. The product is designed to deal with wet, runny, or sticky types of creosote that can occur with flue temperatures that are often below 300 degrees Fahrenheit [Evidence of Abe Kelly, Exhibit R-1, para. 20]. Such creosote is, understandably, difficult to brush. Mr. Kelly notes at para. 21-24 of his statement as follows:

> *21. The principles behind Chimney Creosote Conditioner are basic. Creosote is acidic in nature. Reactions with an alkaline phosphate neutralizes and disrupts the bonding ability of creosote with itself and surrounding substrates.*
>
> *22. When I wished to develop a conditioner product for Kel Kem, I investigated competitive products. One in particular, called Kathite, was of long standing use and very popular, and I had the product analysed. I based the Kel Kem Chimney Creosote Conditioner on this analysis.*
>
> *23. One of the principal ingredients in Chimney Creosote Conditioner is trisodium phosphate dodecahydrate, an alkaline phosphate in a soluble form. The other major ingredient is bentonite clay, which is highly absorbent by nature. Through the combustion process, the phosphate and bentonite are delivered up the chimney by the hot flue gasses to be deposited on the creosote. Once deposited, they condition the creosote for easier removal. Runny, sticky or tacky creosote will be conditioned by the phosphate and subsequently absorbed by the bentonite clay to produce a*

> *drying out process. This drying out process renders the deposits more brushable or removable.*
>
> *24. By the time I sold the company in 1993, Kel Kem Chimney Creosote Conditioner 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 Chimney Creosote Conditioner. I have observed that the Chimney Creosote Conditioner inhibited the rate of creosote build-up and transformed the wet, runny creosote, that was essentially non-brushable, to be brushable.*

41. Once again, this evidence was not challenged on cross-examination.

42. Finally, the Log, as stated above, is simply a delivery mechanism for the Powder, which was developed by Mr. Kelly and contains sodium chloride, zinc and copper. He observes at para. 27-28 of his statement:

> *27. Soot remover products have been in common use for many years. When I sought to develop a soot remover product for Kel Kem I investigated other products in the market and found that they were based on zinc or copper for their catalytic effect. I decided to use both in my Kel Kem product, together with pulverized wood to assist in rapid combustion to promote distribution of these metals to the interior of the flue.*
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> *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.*

43. Yet again, this evidence from Mr. Kelly was not challenged on cross-examination.

44. Following Mr. Kelly's sale of Kel Kem in 1993, the products continued to be marketed and used by consumers. No evidence has been led by the Commissioner with respect to any concerns over effectiveness or consumer satisfaction. Indeed, as noted above, the Commissioner has filed no complaint under s. 74.01(1)(a) of the *Competition Act*– representations that are false and misleading in a material respect.

45. The Affidavit of Dr. Kenneth Corts, filed in relation to the constitutional question, refers at para. 16 to various categories in which economists group goods based on the ability of consumers to conduct quality assessment. He describes "experience goods" as those "whose quality is determined by the consumer only after purchase (and, typically,

consumption)." The Respondents suggest that the products at issue are "experience goods". Consumers who use the Log, Cleaner, or Conditioner have the ability to make an assessment of quality following use of the product. Admittedly, the consumer may only be capable of making such an assessment after several uses of the product, or in consultation with a professional chimney cleaner. Nonetheless, it is unlikely that the product's failure to aid in any creosote reduction would go unnoticed. At the very least, ordinary homeowners and chimney sweeping professionals would simply stop buying the products. To this end, the fact that the products have been on the marketplace for over twenty years speaks for itself. These, as Mr. Kelly testified, are the "final and most meaningful" test results [Transcript, Volume 4, p. 520-521].

Controlled Testing by Imperial

46. In addition to the evidence provided by twenty years of in-use testing, the Respondents subjected each of the products to controlled tests to validate the representations. These tests are outlined in considerable detail in the filed evidence of both Abe Kelly [Exhibit R-1] and Jim Simmons [Exhibit R-2].

47. Even before the validation tests, two creosote analysis tests were carried out to confirm that the combustion catalysts (metals) contained in the Log were actually migrating to the chimney walls when the product was burned. The first, conducted in May 2003, involved analysis of a creosote sample by Bodycote Materials Testing Canada Inc [Exhibit A-16]. The test confirmed that zinc and copper were indeed present in the creosote sample [Evidence of Abe Kelly, Exhibit R-1, para 32]. The second, conducted in December 2003, involved spectrometry testing by Maxxam Analytics of creosote samples from homes both before and after use of the Log [Exhibit A-17]. The "after" sample showed the significant presence of copper and zinc.

48. At para. 34-39, of his written evidence, Mr. Kelly describes a preliminary validation test conducted under his supervision at a wood-stove retailer in metropolitan Toronto in January 2004. The test involved measuring the amount of creosote removed from a chimney after treatment with the Log. While this was not intended as a truly "scientific" test – no control was used, for instance - the before and after comparison results show, in Mr. Kelly's words, that " the Supersweep Log reduced the amount of creosote present in the chimney section." Mr. Kelly's report to the Respondents following that test [Exhibit A-18] indicates a total weight loss of 22 grams.

49. In March of 2004, the Respondents commenced in-house validation testing at their facility in Richibucto, New Brunswick. In his evidence, Mr. Simmons indicates that he developed a test protocol in consultation with Mr. Kelly as well as the Université de Moncton [Transcript, Volume 4, p. 565]. The tests involved measuring the weight of stovepipe sections both before and after use of one of the products to determine if there had been reduction in creosote deposits. Identical control stoves and chimneys were operated at the same time without the use of the products and the results with and without the products were compared. In each case, efforts were made to control other variables that could be at play. In the initial test protocol[Exhibit A-28], the instructions with respect to wood loading apply equally to the test and control stove. The same is true for

the damper settings and, resultantly, the flue temperatures that were to be maintained. Mr. Simmons commented on these efforts further during cross-examination and indicated that employees had been briefed on the procedure prior to commencement of the testing (see, for example, Transcript, Volume 4, p. 574-576). In short, employees involved in the testing attempted to maintain similar conditions in the test and control stoves.

50. Further, the fact that the stoves were to be operated in the same ambient conditions (i.e. temperature, humidity, wind) eliminated most external variables. Due to the significant effect of such external variables, it is not possible to directly compare one test with another. In some cases there was an actual increase in the creosote deposit in the control stoves while a reduction in the test stoves (see, for example, the October 2004 test results at Exhibit A-34). In others, creosote was reduced in both the control and test stoves, although the reduction in the test stoves was greater.

51. The tests were conducted under the supervision of a representative from Genieo Solution Design, an independent engineering consulting firm based in Moncton. A certificate from Genieo confirming this was tendered as Exhibit A-29.

Imperial Test – March 2004

52. This test is described in the evidence of Jim Simmons [Exhibit R-2 at para. 11-14]. The supporting documentation can be found at Exhibit A-28. Two stoves were operated for ten days to build up creosote in the metal chimneys. The pipe sections were carefully weighed to determine how much creosote had been accumulated. A Log was burned in the "test" stove while the "control" stove continued to burn without any chemical treatment. Mr. Simmons concludes as follows:

> *13. The tests showed that the chimney of the stove in which the Supersweep log was burned had reduced creosote by 210 grams while the control stove (with no log burned) had reduced creosote by only 80 grams. As the operating conditions of the stoves were substantially similar, this shows that the log had the expected effect of reducing creosote in the chimney.*

53. A sample of chimney creosote was presented in evidence [Exhibit R-3] to demonstrate the bulk[8] of a weight of 54 grams. The 210 grams removed in the test burn can be seen to be a substantial quantity – a quantity which can readily be observed. The difference between the test and control stoves – 130 grams – is also a material, noticeable, quantity.

54. As indicated in Mr. Simmons' evidence at para. 16, the Supersweep Log was eventually replaced by a "second generation" log known as the Imperial Chimney Cleaning Log. Mr. Simmons testified that development of this new log began in the Spring of 2004, and that it was market-ready by the Fall of that year Mr. Simmons testified that the new log eventually contained twice the amount of Powder as the original, and also incorporated iron filings. Several pre-market tests were conducted on the "second-generation" Log.

[8] A visual inspection of the sample material will show that it is very fragile, and may well have compacted since it was originally presented. When presented in court it had considerable bulk.

Imperial Tests #1, 2, &5 – May 2004 to October 2004

55. These tests are described in the evidence of Jim Simmons [Exhibit R-2] at para. 17-25. The supporting documentation can be found at Exhibits A-32, A-33, and A-34. In each case, four stoves were used. Mr. Simmons notes at para. 18 that tests # 3 and 4 were abandoned due to contamination in the course of testing (rain in one case, and misintroduced Logs in the second case). As noted in the Affidavit of George Jenkins [Exhibit R-5 at para. 25], this speaks to the integrity of the Respondents' testing protocols.

56. Mr. Simmons describes the successful tests as follows:

> *19. The Supersweep Pro test of May 2004 employed four stoves. One was used as a control stove, two were used to test the Supersweep Pro (a Supersweep log with a double amount of Powdered Soot Remover chemical added) and the remaining one was used to test the Supersweep Pro with an addition of iron filings (powdered iron). A procedure similar to the one undertaken in the tests described above was followed, and the results showed that the Control stove had reduced creosote of 20 grams, while the Supersweep Pro stoves had reductions of 180 and 540 grams respectively. The Supersweep Pro with iron filings had a reduction of 680 grams.*
>
> *20. The test results showed that both formulations of the product were effective at removing creosote from chimneys. The company decided to proceed with manufacture of the new log incorporating the iron filings.*
>
> *21. Further tests were performed in August 2004 to verify that the new log (now renamed the Supersweep Plus) was effective in both matte chimneys and stainless steel chimneys. Once again, the same procedure was followed, with a control stove and a test stove each fitted with stovepipes of the two types. The results for the stainless steel chimneys showed that the control stove had reduced creosote of 880 grams while the Supersweep Plus stove had a reduction of 1600 grams. Similarly, 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.*
>
> *22. The test results showed that the Supersweep Plus log was effective in reduction of creosote in both stainless steel and matte black chimneys.*
>
> *23. A further test of the Supersweep Plus log was conducted in October-November 2004 (Test # 5). In this case two control stoves were used and two stoves burned the Supersweep Plus log. One of*

> *the stoves used as a control in the previous test was used as a test stove, and one of the previous test stoves was used as a control stove.*
>
> *24. Once again, the test results showed the effectiveness of the Supersweep Plus log. The control stoves each had an increase of 360 and 140 grams of creosote, while the Supersweep Log stoves had reductions of 460 and 300 grams.*
>
> *25. The log which was designated the "Supersweep Plus" or the "Supersweep Pro with iron filings" in our testing was introduced to the market as the Imperial Chimney Cleaning Log.*

57. The Respondents submit that the validation tests carried out on the "second generation" Log were adequate and proper. The Log would not have been introduced to the market if it had not been felt that the representations associated were anything but true and accurate.

Tests of Cleaner and Conditioner

58. The Respondents also engaged in testing of the Cleaner and Conditioner, as described in the written evidence of Jim Simmons [Exhibit R-2]. Admittedly, these were products that had been on the market for years prior to any formal validation testing. The Respondents submit, as highlighted above, 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. That being said, the validation tests serve to confirm the effectiveness of the products.

59. The protocol/results from the tests of the Cleaner and Conditioner can be found in Exhibits A-35 and A-38 respectively. Mr. Simmons provides commentary on these tests at para. 33-36 of his written evidence [Exhibit R-2] as follows:

> *33. These products are intended to be used regularly and continuously (unlike the log, which is intended for occasional use). Accordingly, the tests differed from the tests of the logs in that they compared the buildup of creosote with and without use of the products, rather than measuring a reduction in creosote following use.*
>
> *34. The test of the Creosote Cleaner used two control stoves and two test stoves, one of each with matte black stovepipes and one with stainless steel stovepipes. The results showed that for the stainless steel pipes, the control stoves had a buildup of 880 grams while the Creosote Cleaner stove had a buildup of only 640 grams. For the matte black pipes, the control stoves had a buildup of 740 grams while the Creosote Cleaner stove had a buildup of only 540*

> *grams. (Note that the results page of the report of the Creosote Cleaner tests refers, in error, to Creosote Conditioner.)*
>
> *35. The test of the Creosote Conditioner used two control stoves and two test stoves, one of each with matte black stovepipes and one with stainless steel stovepipes. The results showed that for the stainless steel pipes, the control stove had a buildup of 460 grams while the Creosote Conditioner stove had a buildup of only 380 grams. For the matte black pipes, the control stoves had a buildup of 380 grams while the Creosote Conditioner stove also had a buildup of 380 grams.*
>
> *36. The tests of these products confirmed that the expectation of creosote reduction were accurate.*

60. It is important to point out that both the primary objective of both the Cleaner and Conditioner is to modify creosote deposits and make them more responsive to chimney cleaning. The representations themselves speak to this. Mr. Kelly, when responding to questions relating to the test of the Conditioner, pointed out that its essence was not to reduce the weight of deposits, but rather to "condition them so that they are more brushable" [Transcript, Volume 4, p. 518]. The representation on the label is:

> *[Creosote 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 deposits reduces the chance of a dangerous chimney fire. A cleaner surface will also increase heat exchange. Monthly chimney examinations are recommended when burning wood daily.*[9]

Commissioner's Concerns re Testing

61. As understood by the Respondents, the Commissioner takes the position that an adequate and proper test is one that demonstrates the accuracy of the impugned representation to a degree of scientific certainty. Accordingly, if any doubt is created as to the certainty of the testing, the Commissioner would take the position that the test is not adequate and proper. This, in the submission of the Respondents, is the core of the issue between the parties. However, the Commissioner's evidence is consistent with this apparent approach.

62. The expert witnesses for the Commissioner criticized the testing done by the Respondents on the basis that aspects of the tests, or lack of documentation or information, prevented them from providing the degree of certainty which those witnesses expected.

[9] See Exhibits A-4 and A-11 (2002-2003 label), R-8 (2003-2004 label), and R-10 (2005-2006 label).

63. Mr. Simmons' evidence spoke to the safeguards put in place throughout the testing to ensure that external variables were controlled. At para. 27 of his pre-filed evidence [Exhibit R-2], he said:

> *27. Buildup of creosote in operation of a wood stove can vary with a number of factors, including the moisture content and quality of the firewood fuel, ambient conditions including temperature, atmospheric pressure, wind and humidity, and the manner of operation of the stoves. In each of our tests firewood for all stoves came from a single supply. Care was taken to maintain equal operating conditions in all four stoves, with temperatures recorded. The ambient conditions were, of course, identical for all stoves. However, these conditions could vary from test to test, and the results between tests are not properly comparable.*

64. Dr. Pegg acknowledged on cross-examination [Transcript, Volume 2, p. 213] that if external variables such as insulation, atmospheric pressure, and humidity were the same for all of the stoves in any particular test, those factors would indeed be eliminated.

65. Dr Pegg also criticized the tests on the basis that the protocol was not followed precisely. This, however was based in part on his misinterpretation of the protocol. Dr. Pegg wondered, in his Affidavit [Exhibit A-14] at para. 65, why flue temperatures appeared to vary from the temperature range identified in the protocol. On cross-examination, however, he acknowledged basing his analysis on the temperatures recorded at the top of the fire box rather than 18 inches up the flue. Thus, his analysis was based on the wrong set of readings [Transcript, Volume 2, p.216]:

> *MR. D. CAMPBELL:* *…So, your table, Table 5 which purports to show temperature excursions outside the range down at the level just above the fire box is not where one would normally control the stove and not – one would monitor for purposes of controlling the stove.*
>
> *DR. M. PEGG:* *If you are trying to control the stove at home, no, you would use the dial thermometer about halfway up the first section of the stovepipe, yes.*

66. Notwithstanding questionable analyses of his own[10], Dr. Pegg went on in his Affidavit (and oral evidence) to question the accuracy and reliability of the Respondents' test data on a number of bases. For example, he hypothesized that loose creosote may have been lost during dismantling of the stovepipe segments following each test burn. Mr.

[10] Dr Pegg acknowledged that one of his arguments "could be specious" [Transcript, Volume 2, p. 226]

Simmons, conversely, spoke at length on cross-examination about the safeguards put in place in this regard [Transcript, Volume 4, p 595-600]. Further, at para. 28 of his written evidence, he speaks to the accuracy of the weighing:

> *28. In each of the tests the stovepipes were weighed on a Mettler-Toledo scale. The scale was placed on the stovetop and accuracy was verified by using a certified standard weight.. The stovepipes were lifted from the collar and held over the scale as the pipes were disassembled and placed on the scale. In this way any dislodged creosote would fall to the scale pan and be weighed there. In fact, very little actually fell on the pan.*

67. Mr. Simmons confirmed these efforts on cross-examination (see, for example, Transcript, Volume 4, p. 596), reiterating that the Respondents were "trying to do this carefully so we weren't losing creosote."

68. Dr. Pegg also criticised the accuracy of the weighing by pointing out that, on one particular day, the wood loads were very close and, in a couple of cases, identical. He suggests at para. 49 of his Affidavit [Exhibit A-14] that this is "remarkable" because the loads resulted from logs "selected from a wood pile." On cross examination, Dr. Pegg discounted the Respondents' argument that the wood loads were carefully selected and weighed in an attempt to make them equal, and that the weights were recorded only within 10 grams. Perhaps most interesting, however, is his admission that his opinion that the data is suspicious is based on a single day's figures [Transcript, Volume 2, p. 203-204]:

MR. D. CAMPBELL:	*…But in any case you have done your analysis on one day of data. Is that correct?*
DR. M. PEGG:	*That's correct.*
MR. D. CAMPBELL:	*With respect to a series of tests that have gone on for many weeks.*
DR. M. PEGG:	*That's correct.*

69. Ironically, this statement (and other similar admissions on cross examination) came from a witness who stressed the importance of rigorous repetition and proper error analysis in any scientific test. Nevertheless, Dr Pegg purported to do a statistical analysis of this single day's data, and to draw a conclusion from it. Dr. Pegg's proposed standard for "adequate and proper testing" will be discussed in greater detail below.

70. Dr. Pegg, while questioning the reliability of the validation test data, admitted that he placed little or no value on the presence of the independent observer from Genieo for the critical points of the tests (including, significantly, the weighings). Mr. Jenkins, meanwhile, recognized in his oral evidence [Transcript, Volume 5, p.718] the significance of such impartial supervision to the reliability of the tests. The Genieo letter

[Exhibit A-29] indicates that the tests were carried out in accordance with the protocol. Mr. Simmons also pointed out on cross-examination that Genieo personnel calibrated the scale prior to the weighing of stovepipe sections during each test [Transcript, Volume 4, p. 602].

71. On cross-examination of the various witnesses for the Respondents, the Commissioner also questioned why multiple tests were undertaken for the Log, while only a single round of testing occurred for each of the Cleaner and Conditioner. The Respondents felt that, in the case of the Kel Kem products, which had been on the market and thus tested "in-use" for over twenty years, only validation testing was required [Transcript, Volume 5, p. 655-657]. The Imperial Log, conversely, was a new product. Accordingly, multiple tests were carried out before the product went to market. Mr. Jenkins has voiced his approval to this approach, noting, for example, that the Cleaner and Conditioner tests were adequate and proper not only on the basis of the validation test results, but also because the products had been used for 20 years [Transcript, Volume 6, p.861, 885].

72. At the end of the day, the Respondents submit that the validation tests consistently demonstrate that greater reduction of creosote occurs with use of the products. While the numerical reduction may vary from test to test, **the qualitative result is the same in each case**. The Respondents have not made quantitative representations about the products. None of the product labels contain claims to reduce creosote (or inhibit its accumulation) by a particular percentage or amount. As pointed out in Mr. Jenkins' Rebuttal Affidavit [Exhibit R-6] at s. 3.4: "The claims by IBC are qualitative and as such must only have qualitative support."

73. Mr. Jenkins' opinions with respect to the validation testing can be found in his Affidavit, and his evidence on direct examination (in particular, at Transcript, Volume 5, p.717-719). Mr. Jenkins, having considered the protocol, empirical data, third party supervision, and the fact that the testing closely resembled "average household" conditions, concludes that the testing was adequate and proper in light of the representations made.

The Standard

74. The Commissioner takes that the position that the Respondents must produce tests that demonstrate to a level of scientific certainty that the representations (and their theoretical underpinnings) are proved true. The standard asserted is the standard of a peer-reviewed academic journal. This is a standard higher even than the "beyond reasonable doubt" standard.

75. Despite counsel's suggestion to the contrary, the Commissioner's own expert, Dr. Pegg, confirmed this on cross-examination [Transcript, Volume 2, p.175]:

> *MR. D. CAMPBELL:* *… You're only presenting your concept of "adequate and proper" testing?*

DR. M. PEGG: *Yes.*

And it's based upon the kind of rigour that – that I'm used to working with both graduate students in research, and also based on a lot of the contract-type research that I've done in the past.

76. Indeed, at para. 25-30 of his Affidavit [Exhibit A-14], Dr. Pegg makes note of various requirements for an adequate and proper test employing the scientific method. These include control of background variables, proper documentation of the methodology and data "so that both can be scrutinized by peers", repetition "to withstand peer review", and a properly documented error analysis. In reviewing the various criteria which he felt were crucial to an adequate and proper test, Dr. Pegg reiterated on cross-examination [Transcript, Volume 2, p. 178] that the purpose of same was to ensure that the results could be expressed with certainty:

MR. D. CAMPBELL: *And those are your criteria for an adequate and proper test?*

DR. M. PEGG: *Yes.*

MR. D. CAMPBELL: *And any test that doesn't meet all four of those criteria would, in your view, not be adequate and proper?*

DR. M. PEGG: *Correct.*

MR. D. CAMPBELL: *And the purpose of these criteria is to ensure that the results can be expressed with certainty?*

DR. M. PEGG: *That is correct.*

MR. D. CAMPBELL: *And "certainty" is your criteria of -- of -- of an adequate and proper process; it must be -- it must result in certainty?*

DR. M. PEGG: *That is correct.*

77. Mr. Stegmeir, at para. 18 of his Affidavit [Exhibit A-42], similarly asserts that "valid testing and experimentation must be able to stand up to peer review, or the acceptance methods and protocols used and the analysis applied to verify the results." The respondents submit that Dr. Pegg and Mr. Stegmeir are describing testing that is adequate and proper in an academic environment, and not practical testing for the purposes of industry.

78. The Respondents' expert, George Jenkins, is a Research Scientist with UNB's Wood Science and Technology Centre. His career has included research in large industry (Nortel, Bell Northern Research) and small industry (including a company of which he was the owner). His recent career is providing research and development advice and assistance to small businesses through the WSTC. He is regularly involved in testing products developed by small and medium-sized businesses in Atlantic Canada. Mr. Jenkins' opinion on what constitutes "adequate and proper" testing contrasts markedly with Dr. Pegg's. At para. 11 of his Affidavit [Exhibit R-5], he opines that the qualitative nature of the Respondents' representations means that their reasonableness can be assessed simply by reviewing the information available on the specific active ingredients, together with observing the products' satisfactory performance in wood burning appliances. Indeed, in his Rebuttal Affidavit [Exhibit R-6] at s. 3.1 he takes great issue with the standard suggested by Dr. Pegg and Mr. Stegmeir:

> *…The authors then define a standard which in my opinion is more consistent with that which would be expected in a more academic research paper suitable for publication in a peer reviewed journal. They propose this be applied to testing of the commercial products being considered here. It is obvious that the testing must be scientific but it is my opinion that such a position is not only wrong, but puts onerous burden on the company to undertake experimentation and testing which is irrelevant with respect to whether the products work or not.*
>
> …
>
> *Such a rigorous approach has little if any relevance to a test carried out on a specific product for a company operating in an industrial setting.*

79. Mr. Jenkins responds to the detailed commentary by Dr. Pegg and Mr. Stegmeir on tests conducted by the Respondents by concluding as follows at s. 3.5 of his Rebuttal Affidavit [Exhibit R-6]:

> *The point is not whether the tests can be improved. The question is whether they were adequate and proper and whether IBC's own statements about its products were reasonable based on the literature available and on its own observations. In my opinion they were.*

Due Diligence

80. Even if Your Lordship determines that the initial work done by Mr. Kelly in the 1980's, together with the cumulative field use, was not "adequate and proper" testing, no order is to be made against the Respondents if you are satisfied that they exercised due diligence to prevent the reviewable conduct from occurring [*Competition Act*, s. 74.1(3)].

81. Imperial Brush purchased Kel Kem in 2002-03 [Evidence of Jim Simmons, Exhibit R-2, para 4]. At that time the Conditioner, Cleaner and Powder had been on the market for approximately 20 years. Imperial Brush engaged Mr Kelly as a consultant, and relied on his advice. Imperial submits that this was reasonable, in light of Mr Kelly's knowledge in this area, and his special knowledge about Kel Kem as the former owner of the company.

82. Mr. Kelly's pre-filed evidence [Exhibit R-1] at para 5 is particularly relevant:

> *…Based on my experience with Texaco Canada Limited and Perolin/Bird-Archer and on my own investigations, I formulated a line of chemical maintenance products, including Chimney Creosote Cleaner, Powdered Soot Remover, and Chimney Creosote Conditioner, each of which is discussed below. In preparation for the introduction of these Kel Kem products to the market place, I made investigations which brought me into close contact with chimney sweeps, installers and other trades people within the chimney and chimney cleaning industry. Through these contacts, I studied residential chimneys and flues to better understand the various stages of creosote deposit, and to observe and better understand the effects of various types of chimney treatments. I was able to witness and assess first hand the functionality of the chimney treatments that I formulated for Kel Kem. I was able to observe their effectiveness based on actual consumer usage conditions. I also received numerous testimonials from trades people attesting to the functionality of each of these products.*

83. Mr. Kelly goes on to outline various pieces of literature which, in his view, speak to the "well-established effectiveness" of the various chemicals contained in the products at issue. In addition, he notes at para. 19, 24 and 28 that, by the time he sold Kel Kem in 1993, the Cleaner, Conditioner, and Powder had been tested in actual use for over ten years. He goes on to testify that he himself had witnessed the use of the various products, as did others in the industry with whom he was in contact. In the case of each product, he personally observed that the results were consistent with the representations. Mr. Kelly explains at para. 20 that he was in personal contact with the Respondents when they were in negotiations for the purchase of Kel Kem several years ago:

> *When Imperial Brush was negotiating the purchase of Kel Kem from the then-owners in 2003, I was consulted by the principals of Imperial Brush for advice, including advice with respect to the product line of Kel Kem. I verified, based on a review of the records of the new owners of the company, that they continued to use the formulas which I had created in the 1980s. I advised them, based on my experience in the industry and my personal knowledge of those products, that they were effective for their intended purposes*

84. The Respondents submit that their reliance on Mr. Kelly's advice and experience, and on the long history of use of the products, was reasonable and prudent under the circumstances. Indeed, Mr. Jenkins' expert opinion, found at para 23 of his Affidavit [Exhibit R-5], was that, based on knowledge in the public domain at least as far back as 1984, it was reasonable to predict and expect that all the products would "have some degree of creosote reducing capacity in a wood burning appliance."

85. It should also be noted that, as per the evidence of Jim Simmons, once the Respondents were made aware of the potential concerns over the products, they promptly engaged in testing with a view to validating the representations. These tests were conducted in good faith, with care to establish a reasonable protocol. Control procedures were included to attempt to eliminate external factors. An independent professional was engaged to observe the testing and ensure objectivity. The results of those tests were consistently supportive of the effectiveness of the products. When unfavourable results were seen in later testing, the Respondents promptly investigated and, when product problems were identified, the product was withdrawn. The Respondents have acted reasonably and in good faith to ensure that they were in compliance with all laws.

86. In *R.* v. *Envirosoft Water Inc.*, (1985), 62 C.P.R. (3d) 365 (Alta Prov. Ct.), the methodology of the respondent's tests was criticized. Although it found that the tests were not adequate and proper, the court found that the due diligence defence was made out, noting at p. 17:

> *The science involved in this case is complex and experts in the field are divided on the basic principles involved. The validity of the tests conducted and the significance and reliability of the test results was and will no doubt continue to be fiercely debated. Although a large company with professional research and advisory resources might be held to a higher level of understanding of the principles and the need for more in-depth and scientific testing requirements, I find the two accused before me were reasonably diligent in relying on Dr. Barile's research and defence of the Stabilizer, although I have now found the accused were in error in doing so.*
>
> *In future, the accused will not be able to resort to the defence of due diligence unless and until new and better testing is conducted with results that clearly support such representations.*

87. In short, the Respondents' acted reasonably in purchasing an established, Canadian company that had been making a series of products for roughly twenty years. The products were of a common type, based on chemicals which were long known in the industry to be combustion catalysts, and Kel Kem's products were similar to those which were available from a variety of other suppliers. Beyond this, the Respondents' sought out the advice of an experienced consultant – the founder of Kel Kem – who assured that the products were effective.

Summary of the Respondents' Position

88. The Respondents submit that the Commissioner's standard – requiring proof of the truth of the representations to a degree of scientific certainty, with a reverse onus - is not correct. Rather, the correct standard is one of reasonableness, in conformity with the plain language of the statute, the intention of Parliament, the reading of the statute as whole, and consideration of the jurisprudence. Accordingly, the Respondents must prove, on a balance of probabilities, that their testing was adequate and proper, or put another way, sufficient and appropriate.

89. The Respondents submit that "adequate and proper" testing need not be strict scientific testing in a laboratory that excludes all possible doubt. Rather, it should attempt to closely approximate use in the "real world" by the average consumer.

90. The Respondents reasonably relied upon the experience and expertise of Mr. Kelly who attested that he developed the products following years of involvement in the chemical and wood-burning industries, and that the products were used for decades by satisfied chimney sweeps and homeowners. The chemical contents of the products have long been known to inhibit creosote accumulation. Both versions of the Logs are based on delivery of the Powder in a compressed hardwood log (later, with the addition of iron filings).

91. In the case of all three products, validation testing was performed by the Respondents, with independent third-party supervision. Such testing confirmed the effectiveness of the products with regard to their respective representations. All of the representations at issue are qualitative, and lack any claims of superiority.

92. The Respondents respectfully submit that the testing conducted is "adequate and proper" and therefore request that the within proceeding be dismissed. Alternatively, even if Your Lordship determines that the initial work done by Mr. Kelly in the 1980's - and the cumulative field use - was not "adequate and proper" testing, then at the very least they have exercised due diligence in relying on it.

Remedy

93. For the reasons discussed above the Respondents respectfully request that the proceeding be dismissed. However, if those submissions are not accepted and the tribunal determines that reviewable conduct has occurred, it will be necessary for the Tribunal to consider an appropriate remedy

94. The administrative remedy should be tailored to the circumstances of the case. The scope of the remedy will depend on which of the products are considered to have been the subject of reviewable conduct. Mr. Simmons testified (both in writing and verbally) that production of the Log has ceased and that the product has been recalled from the market because of production and quality control problems. To the extent that that product is considered to have been the subject of reviewable conduct, little will be required.

95. Any remedy must be in accordance with s. 74.1 (4), which makes clear that the purpose of any order is to promote compliance with the Act, and not for the purpose of punishment of past conduct.

96. The *Act* prescribes a series of mitigating and aggravating factors to be considered:

a) The reach of the conduct within the relevant geographic market: The products were distributed across Canada through national distributors and retailers. However, the total volume of product sold is small. See Exhibit R-2A and the table below.

b) The frequency and duration of the conduct: In this case, the duration of the conduct is as much a mitigating factor as an aggravating one. The length of time the products, and similar products of competitors, have been on the market testifies to the good faith of the Respondents. The present owners of Kel Kem have owned the company only since 2003.

c) The vulnerability of the class of persons likely to be affected by the conduct: There is no evidence that the likely consumers of these products suffer any special vulnerability. Indeed, they are in a position to form their own opinion of the product after use, at a modest cost.

d) The materiality of any representation: To the extent that the representations go to the effectiveness of the product, they are material, but there is nothing aggravating in this.

e) The likelihood of self-correction in the relevant geographic market: This typically would apply to correction of damage to competition. In this case, there is no damage to competition. As noted above, these products are relatively inexpensive and are intended for regular consumption. If the customer's experience is unsatisfactory, he or she can readily stop using the product.

f) Injury to competition in the relevant marketplace: There is no evidence of any impact on competition.

g) The history of compliance with this Act by the person who engaged in the reviewable conduct: There is no evidence of any past non-compliance by the Respondents.

h) Any other factor: The Respondents submit that their good faith in testing and the long-established nature of the products should be mitigating factors.

97. Any remedial order to be made should reflect the following facts:

a) The Log has been withdrawn from the market; and

b) The Conditioner and the Cleaner are minor products, with limited sales across Canada. As indicated in Exhibit R-2A, total sales of these products are:

Year	Conditioner	Cleaner
2003	647.94	285.00
2004	49,962.28	6,872.30
2005	56,457.70	10,267.72
2006	94,015.81	10,638.53

98. If it is determined that the Respondents have committed reviewable conduct, a prohibition order against the respondents under s. 74.1(1)(a) would be appropriate.

99. One of the remedial orders which the Tribunal may make is an order for publication of a notice of the finding of reviewable conduct. The Respondents submit that that is not required in this case because there would be no purpose to such an order with respect to the Log, and the market impact of the other products is not material. The cost of advertising of a notice would be disproportionate to any benefit achieved. Its only purpose would be to punish the respondents, contrary to section 74.1(4) [*Lebski, supra*, at para. 308].

100. The Applicant proposes an order that the products be recalled. With respect to that, the Respondents submit:

a) There is no basis for such an order in s. 74.1(1);

b) Such an order would be redundant in the case of the Log, in that a recall has already been issued;

c) Such an order is unnecessary with respect to the other products, in light of the small quantity of product in circulation; the cost of recall would be disproportionate to any benefit because the product is so widely dispersed in small quantities. For example, one of the principal purchasers, Home Hardware, has 1,100 stores, widely spread, with most having only a small quantity in inventory; and

d) The representations will cease with cessation of distribution of the product. Pursuant to section 74.02(3) the representation is deemed to be made through supply to a wholesaler, retailer or distributor.

101. The maximum administrative monetary penalty (AMP) permitted by s. 74.1(1)(d) of the *Competition Act* is $100,000.00 in the case of a corporation charged in the first instance. In the circumstances, the respondents submit that no AMP is appropriate:

a) Imperial Brush has acted in good faith throughout the Commissioner's investigation;

b) The deficiencies complained of are relatively minor;

c) The representations are modest and qualitative;

d) There is no claim of superiority to any of the products, nor is a particular result guaranteed through use of the products in and of themselves. The representations contain little, if any, hyperbole or fluff; and

e) There is no evidence of any damage to competition.

102. If the tribunal considers it appropriate to impose an administrative monetary penalty, such penalty should take into account the fact that the sales for the Cleaner and Conditioner have totalled less than $100,000.00 in any given year. The corresponding quantities of product are also minimal.

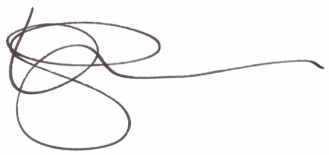
103. In *Lebski, supra*, the Tribunal imposed a $50,000.00 AMP on one of the corporate respondents. No corrective advertising order was imposed, as the products and apparatus that were the subject of the inquiry were no longer on the market, and little advertising had been done in any event.

104. In *Commissioner of Competition* v. *PVI International Inc.*, 2002 Comp. Trib. 24, an AMP of $75,000 was ordered against the corporate respondent. The Tribunal concluded that the fact that the advertisements at issue only took place over two years did not warrant a corrective advertising order. A similar approach was taken in *Commissioner of Competition* v. *Sears Canada Inc.*, 2005 Comp. Trib. 2 (with subsequent order at 2005 Comp. Trib. 13), where the parties agreed on an AMP of $100,000.00, but the Tribunal refrained from ordering a corrective notice on the basis that five years had passed since the cessation of the advertising at issue, and that such notice would be punitive rather than remedial.

105. If the Respondents' defence of due diligence is accepted, s. 74.1(3) limits the administrative remedies available to the "cease and desist" order contemplated by s. 74.1(1)(a). Neither an AMP nor corrective notice are permissible in such instance.

106. The Respondents submit that any order should simply prohibit them from making any representation to the public in the form of a statement as to the performance and efficacy of the Cleaner and Conditioner unless such statement is based on adequate and proper testing. To this end, the Respondents would certainly be willing to establish a corporate compliance program. We would be glad to discuss the specifics of that program with the Competition Bureau.

Dated at Halifax, Nova Scotia, this 30th day of August, 2007.



Daniel M. Campbell, Q.C.

Joseph F. Burke