

INFORMATION NOTE*

The Commissioner of Competition v. Imperial Brush Co. Ltd. and Kel Kem Ltd. (c.o.b. as Imperial Manufacturing Group)

On February 7, 2008, the Competition Tribunal issued its reasons and order allowing the Commissioner of Competition's application pursuant to paragraph 74.01(1)(b) and section 74.1 of the *Competition Act* against Imperial Brush Co. Ltd. and Kel Kem Ltd. (c.o.b. as Imperial Manufacturing Group).

The Commissioner of Competition alleged in this application that the Respondents had engaged in reviewable conduct by making representations to the public that were not based on proper and adequate tests. The representations at issue were found on the labels of four stove and fireplace maintenance products. According to some of these representations, the products were said to eliminate creosote, reduce some creosote to an ash, react with chimney deposits to reduce their adhesiveness, or help prevent chimney fires. The Commissioner submitted that the Respondents had failed to perform proper and adequate tests before making these representations to the public.

The Respondents denied the Commissioner's allegations and asserted that the representations were based on proper and adequate tests. They further submitted that paragraph 74.01(1)(b) infringed section 2(b) of the *Canadian Charter of Rights and Freedoms* and was not justified under section 1.

The Tribunal found that paragraph 74.01(1)(b), while infringing section 2(b) of the *Charter*, was justified under section 1.

The Tribunal also concluded that the Respondents' representations were not based on proper and adequate tests before they were made to the public. Justice Phelan provided the following non-exhaustive list of factors to be considered in determining whether a test is "proper and adequate":

- 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.

The Tribunal issued a cease-and-desist order and also ordered the Respondents to pay an administrative monetary penalty of \$25,000.00.

On May 14, 2008, the Tribunal ordered that the Respondents insert a notice of the Tribunal's findings in one English and one French national newspaper and that they pay the Applicant's costs in the amount of \$40,000.00.

* This is an unofficial summary prepared by the Registry of the Tribunal.