Court File No. CT-2012-003

THE COMPETITION TRIBUNAL

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

DIRECT ENERGY MARKETING LIMITED

Respondent

- and -

NATIONAL ENERGY CORPORATION

Intervener

MEMORANDUM OF FACT AND LAW
OF DIRECT ENERGY MARKETING LIMITED
(returnable December 16, 2014)

PART I - OVERVIEW

1. Direct Energy responds to the Commissioner's motion for a preliminary determination of questions of law, namely, whether the Tribunal may make an order under sections 79(1)(a) or 79(3.1) against Direct Energy in the circumstances of this case.

2. Direct Energy also brings its motion for summary disposition on the grounds that in the present circumstances, there is no genuine basis for the Commissioner's Application.

3. The Commissioner's Application is brought pursuant to the abuse of dominance provisions of the *Competition Act*. The Commissioner alleges that Direct Energy has a

dominant position in the supply of natural gas water heaters and related services to residential consumers (the "**Residential Water Heater Business**") in certain local markets in Ontario, and that it abused and continues to abuse that position by implementing various return policies and procedures. Direct Energy denies all of the Commissioner's allegations.

4. As of October 20, 2014, Direct Energy sold its Residential Water Heater Business to EnerCare Inc. ("**EnerCare**"), and entered into a Non-Competition Agreement, effectively precluding it from re-entering the residential water heater rental market in Ontario for a period of eight years.

5. In order to succeed in the Application, the Commissioner must prove, pursuant to section 79(1)(a) of the *Competition Act*, that Direct Energy "substantially or completely controls, throughout Canada or any area thereof, a class or species of business". Having sold its home and small commercial services business to EnerCare, including its Residential Water Heater Business, it is clear that Direct Energy does not control, substantially, completely, or at all, a Residential Water Heater Business in Ontario. As such, there can be no basis for an order against it under section 79.

6. In addition, in this case, Direct Energy is effectively precluded from engaging in the Residential Water Heater Business in Ontario for a further period of eight years, in accordance with its contractual obligations under the Non-Competition Agreement. In these circumstances, the remedies sought by the Commissioner are moot, would serve no purpose, and on a proper interpretation of the *Act* are not available to the Commissioner.

7. While there is no suggestion in this case that Direct Energy sold its business to avoid the Commissioner's Application, the Commissioner makes the *in terrorem* argument that applying the plain meaning of section 79 could allow respondents to avoid the consequences of an abuse application by exiting the market. In effect, the Commissioner seeks to preserve the ability to punish respondents for their past actions.

8. This position is contrary to the goals and express provisions of the *Competition Act*, which provide that the purpose of the remedies pursuant to section 79 are to preserve competition in the market, to promote practices in compliance with the *Act*, and expressly ***not to punish*** a respondent.

9. Direct Energy respectfully submits that the Commissioner's position must be rejected. This is a case in which summary disposition should be granted, and the Application dismissed.

PART II - THE FACTS

A. Background

10. On December 20, 2012, the Commissioner of Competition filed a notice of application pursuant to section 79 of the *Competition Act*, R.S.C. 1985, c. C-34, (the "**Application**") against Direct Energy. The Commissioner alleges that Direct Energy has a dominant position in the Residential Water Heater Business in certain local markets in Ontario, and that it abused that position by implementing various return policies and procedures.

11. The Commissioner seeks the following relief pursuant to subsections 79(1), 79(2), and 79(3.1):

(a) An order prohibiting Direct Energy from abusing its allegedly dominant position by imposing exclusionary water heater rental return policies and procedures;

(b) An order directing Direct Energy to take certain other actions necessary to overcome the effects of its alleged practice of anti-competitive acts; and

(c) An order directing Direct Energy to pay an administrative monetary penalty in the amount of $15,000,000.

12. Direct Energy filed its Response to the Application on August 26, 2013. Direct Energy denies all the Commissioner's allegations and submits, among other things, that it was never dominant in any market, and that its water heater rental return policies were a commercially reasonable response to the ongoing deceptive marketing practices of door-to-door marketers of its competitors.

B. Sale of Direct Energy's Business

13. At the time the Commissioner filed the Application, Direct Energy operated a rental Residential Water Heater Business in Ontario. The water heaters rented by Direct Energy to consumers were owned by EnerCare. Pursuant to a contractual agreement between Direct Energy and EnerCare, Direct Energy provided services and managed the customer relationships in return for 35% of the rental revenue.

14. On July 24, 2014, Direct Energy entered an acquisition agreement with EnerCare for the purchase by EnerCare of Direct Energy's home and small commercial services business (the "**Transaction**"). The Transaction included EnerCare's purchase of Direct Energy's Residential Water Heater Business in Ontario.

15. As part of the Transaction, Direct Energy entered into a non-competition agreement in favour of EnerCare, effectively precluding Direct Energy from re-entering the Residential Water Heater Business in Ontario for a period of 8 years (the "**Non-Competition Agreement**").

16. The Competition Bureau reviewed the Transaction and on or about September 19, 2014, the Competition Bureau issued a "No-Action Letter" clearing the Transaction.

17. The Transaction closed on October 20, 2014. As a result of the Transaction, Direct Energy no longer operates a Residential Water Heater Business in Ontario (including the areas the Commissioner alleges to be the relevant market). Further, pursuant to the Non-Competition Agreement, Direct Energy is effectively precluded from re-entering the Residential Water Heater Business in Ontario for a period of eight years after October 20, 2014.

PART III - ISSUES

18. The questions to be answered on the Commissioner's motion are whether the Tribunal can make orders under sections 79(1)(a) or 79(3.1), in the current circumstances as set out in the parties' Statement of Agreed Facts.

19. The question to be answered on Direct Energy's motion is whether, given that Direct Energy no longer operates the Residential Water Heater Business in Ontario, and is effectively precluded from re-entering the market, the Commissioner's Application raises a genuine issue.

20. The answer to all of these questions is no: the Tribunal may not make an order under sections 79(1)(a) and 79(3.1), and there is no genuine issue requiring the Commissioner's Application to be heard.

PART IV - LAW AND ARGUMENT

21. Direct Energy respectfully submits that section 79 of the *Competition Act* does not permit an Order to be made against it, on the following bases:

(a) The plain words of section 79(1)(a) require a finding that a person is presently dominant in a defined market. Further, the plain words of sections 79(2) and 79(3.3), require, as a prerequisite to making an order under those provisions, a finding of dominance under section 79(1)(a). Direct Energy is not currently dominant;

(b) The legislative intent of the *Act* is consistent with the plain words of section 79, and supports the interpretation that current dominance is a requirement under s. 79(1)(a), and that section 79 is intended to be prospective and remedial, not punitive;

(c) The Commissioner's position is contrary to Tribunal practice and process, in that the relevant date for determining a violation of section 79 of the *Act* is not the date on which the Commissioner issued his Notice of Application;

(d) The Tribunal should not make an unnecessary or redundant Order. Given that Direct Energy is no longer in the relevant market, there is no "live issue" to be adjudicated, and the questions on the Application are moot; and

(e) The Commissioner's request for an administrative monetary penalty, in the current circumstances, would be for purely punitive reasons and therefore is inappropriate and inconsistent with the express provisions and purpose of the *Competition Act*.

A. Section 79 of the Competition Act Does Not Permit an Order in these Circumstances

22. As the Commissioner has acknowledged and as established by the Supreme Court of Canada, it is appropriate for the Tribunal to apply the "modern approach" to

statutory interpretation. The "modern approach" calls for the words of an Act "to be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."[1]

23. When this multi-dimensional analysis is applied to sections 79(1), 79(2) and 79(3.1) of the *Competition Act*, in the circumstances of this case, there is no basis for an Order against Direct Energy.

i. The textual meanings of s. 79(1), 79(2) and 79(3.1)

24. The Supreme Court of Canada has endorsed the importance of textual analysis in statutory interpretation, i.e. reviewing the words of a statute. In *Canada Trustco Mortgage Co. v. Canada*,[2] the Court confirmed that "[w]hen the words of a provision are precise and unequivocal, the ordinary meaning of the words play a ***dominant role*** in the interpretive process." This conclusion was reinforced by Chief Justice MacLachlin in *R. v. D.A.I.*: "The first and cardinal principle of statutory interpretation is that one must look to the ***plain words*** of the provision."[3]

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[1] Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974), at p. 67, as found in R Sullivan, *Sullivan on the Construction of Statutes*, 6d ed (Markham: LexisNexis, 2014) at p. 7, RBOA Tab 21, adopted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27. Respondent's Brief of Authorities ("**RBOA**"), Tab 16.
[2] *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 SCR 601, 2005 SCC 54, at para. 10, RBOA, Tab 9.
[3] *R. v. D.A.I.*, [2012] S.C.J. No. 5, at para. 26. RBOA, Tab 14.

1. Textual analysis of subsection 79(1)(a)

25. There is no ambiguity in the words of section 79(1)(a). Based on the ordinary words of the provision, section 79(1)(a) allows the Tribunal to make an order prohibiting a person from engaging in a practice of an anti-competitive act, only on finding that the person is currently dominant, i.e. at the time the Tribunal is asked to make a finding.

26. Section 79(1) of the *Act* provides:

> 79. (1) Where, on application by the Commissioner, the Tribunal finds that
>
> (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
>
> (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
>
> (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
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> the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

27. In their grammatical and ordinary sense, the words of section 79(1)(a) of the *Act*, require the Commissioner to prove that Direct Energy "substantially or completely control[s], throughout Canada or any area thereof, a class or species of business". Section 79(1)(a) is deliberately cast in the present tense, meaning dominance must be proved at the time the Tribunal makes a decision.

28. The Commissioner argues that the words in section 79(1)(a) requiring that a "person or persons substantially or completely ***control***" a class of business need not be read for what they say, but should be interpreted as applying to a person that may have previously controlled a class of business. That argument must fail.

29. Section 79(1) expressly sets out differing tenses which apply to each enumerated criteria for an order to be made under this provision:

- Criteria (a) is worded solely in the present tense;
- Criteria (b) is worded in the past and present tenses;
- Criteria (c) is worded in the past, present and future tenses.

30. In considering the tense variations applicable to the criteria in each subsection of section 79(1), the Tribunal must afford deference to Parliament that it intended that each criteria apply to the time-period expressly set out. To do otherwise would run against the principle of statutory interpretation that Parliament does not speak in vain.[4]

31. Giving effect to the specific tenses that Parliament used in each subsection of section 79(1) is also supported by the statutory interpretation maxim *expressio unius est exclusio alterius* ("expression of one thing implies exclusion of the other"). Because Parliament refers only to the present tense in section 79(1)(a), but past and future tenses in the other subsections, the correct interpretation of section 79(1)(a) excludes considering past or future dominance. Accordingly, the provision expressly requires that the Commissioner prove that a firm ***is*** dominant at the time the Tribunal is asked to make a finding.

32. Notably, section 79(1) of the *Competition Act*, in its entirety, in French, reads as follows:

> 1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante :
>
> > a) une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions;
> >
> > b) cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels;
> >
> > c) la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché,

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[4] *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at para 29, RBOA, Tab 1.

> le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

33. Consistent with the English version, the French provision also expressly uses the same differing tenses in each enumerated criteria, namely:

- Criteria (a) is worded solely in the present tense
- Criteria (b) is worded in the past and present tenses
- Criteria (c) is worded in the past, present and future tenses.

34. The fact that there is no discord between the English and French version, further supports that the Tribunal must defer to Parliament upon a textual reading of the statute.[5] It is the clear intention of Parliament to require present dominance.

35. Having sold its home and small commercial services business to EnerCare, including its Residential Water Heater Business, Direct Energy does not control, substantially, completely, or at all, a Residential Water Heater Business in Ontario. Whether or not Direct Energy previously held a position of dominance is irrelevant. As such, on a plain reading of the statute, section 79(1)(a) cannot apply to Direct Energy, and the Commissioner is not entitled to a remedy pursuant to that section.

36. Despite the clear language in subsection 79(1)(a), the Commissioner relies on the *Genentech Canada Inc., Re*[6] case to support his argument that use of the present tense in legislative drafting should not be given effect. *Genentech* is a decision of the Canada Patent Medicine Prices Review Board (the "**Board**") and as such is not binding on this Tribunal. In any event, the *Genentech* case involved different legislation and is entirely

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[5] *R. v. Daoust*, 2004 SCC 6, at para. 26 - 28. While the Supreme Court in *Daoust* elucidated the principles of interpreting discordant bilingual statutory provisions, in a case such as this, where the English and French versions related to tense are concordant, and the application of the tense is at issue, this further supports the conclusion that, on a textual analysis, Parliament intended that the provision be interpreted in the present tense. RBOA, Tab 15.

[6] *Genentech Canada Inc., Re,* 1992 CarswellNat 1661, 44 C.P.R. (3d) 316 ("*Genentech*"), RBOA, Tab 11.

distinguishable.

37. In Genentech, the governing legislation allowed the Board to make certain orders if it found that "a medicine pertaining to a patented invention is being sold in any market in Canada at a price that in the opinion of the Board is excessive." After being served with a notice of hearing alleging that the respondent had sold a patented medicine at excessive prices, the respondent irrevocably and retroactively dedicated its patents to the public, i.e. relinquished exclusivity of its patent. The respondent's position was that the Board therefore no longer had jurisdiction to consider the matter. This position (contrary to the Commissioner's suggestion) was ***not*** based on the present tense language in the governing statute, which required the Board to find that a "patented invention is ***being sold***". Rather, the respondent argued that the Board did not have jurisdiction because, as a result of the dedication of its patent, there was no longer a "***patented invention***...being sold."

38. The Board's conclusion that it continued to have jurisdiction was primarily based on the finding that the Board's remedial powers were not tied to patent exclusivity. Further, the governing act granted the Board jurisdiction to order additional remedies,[7] which could still apply to the respondent and further the goals of the statute, irrespective of the respondent's dedication of its patent:

> The Respondents invite the Board to interpret the term "is being sold" as meaning that, at any point in the Board's proceeding or hearing under paragraph 39.15(3)(b), ***there must be a medicine to which a patent pertains*** which is being sold. ***That is, both a patent pertaining to a medicine, and sales of the medicine are continuing prerequisites*** to the maintenance of the Board's jurisdiction

[7] Specifically, the Board was authorized to order three remedies: (1) remove exclusivity of patent from the medicine at issue; (2) remove exclusivity of patent from one other medicine held by the respondent; and (3) direct the price at which the respondent must sell the medicine at issue.

> under paragraph 39.15(3)(b) of the *Patent Act*. In the view of the Board such an approach is inconsistent with the scheme of the Act and, if adopted, would impede the Board in giving effect to the legislation.
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> ...
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> It is contended by the Respondents, in support of termination of the Board's jurisdiction, that dedication of the relevant patents at any time up to a finding of excessive price and an order under section 39.15(3) by the Board achieves the purposes for which the Board was established by Parliament in 1987. ***The Respondents submitted that removal of patent exclusivity for medicines judged to have excessive prices is the basis for the Board's regulatory activities.***
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> ***The Board considers that this approach does not consider the full scope of the Board's remedial powers, nor does it consider the role of the Board within the overall scheme of the Patent Act.***
>
> It is clear from subsection 39.15(3) that Parliament has granted three separate remedial powers to the Board, ***only one of which may be affected by patent dedication.***
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> ...
>
> ***The Board considers that the establishment by Parliament of two types of remedial orders that are unrelated to the patent exclusivity provided for a medicine by virtue of the 1987 amendments to the Patent Act confirms that the Board's jurisdiction is not derivative of, or tied to, this patent exclusivity policy***, but rather that the Board's jurisdiction is founded upon Parliament's general objective, which predates the 1987 amendments, to prevent abuse of patent and to provide the public with relief where abuse of patent occurs.[8]

39. These findings that there remained remedial orders which the Board could make, and which would further the goals of the legislation, informed the Board's decision that it retained jurisdiction. As detailed below, this is not the case in the current Application. Since Direct Energy no longer operates any Residential Water Heater Rental Business, (and is precluded from re-entering the market,) ***none*** of the remedies sought by the Commissioner can apply to Direct Energy, nor would the orders sought by the Commissioner advance the goals of the *Competition Act*.

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[8] *Genentech, supra* note 6 paras. 42, 45-47, and 57, RBOA, Tab 11.

2. Textual analysis of subsection 79(2)

40. Section 79(2) requires as a precondition, that the criteria required to make an order under section 79(1) be met, including that the respondent is dominant (i.e. a finding that a person currently controls a class or species of business in a specified market, pursuant to subsection 79(1)(a)).

41. As subsection 79(1)(a) cannot apply to Direct Energy in the circumstances, equally, section 79(2) also cannot apply. As Direct Energy is not dominant in the relevant market there can be no basis for an order under both sections 79(1) or 79(2).

3. Textual analysis of subsection 79(3.1)

42. There is similarly no basis on which to order that Direct Energy pay an administrative monetary penalty. Section 79 (3.1) is equally clear on a textual reading:

> (3.1) ***If the Tribunal makes an order against a person under subsection (1) or (2)***, it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding $10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding $15,000,000. [emphasis added]

43. Per the plain language of section 79(3.1), a prerequisite to ordering an administrative monetary penalty is an order under section 79(1) or 79(2). As no order can be made against Direct Energy under those provisions, equally no order can be issued against Direct Energy pursuant to subsection 79(3.1).

44. This conclusion is further supported by the plain wording in section 79(3.3), which provides that the purpose of an administrative monetary penalty is to promote practices in conformity with section 79, and "***not to punish that person***." As detailed in paragraphs 58 to 82 below, since Direct Energy is not dominant, and no longer engaged in any practices related to a Residential Water Heater Business, there are no practices to

promote. Ordering an administrative monetary penalty in these circumstances could only be for punitive reasons, which is prohibited by the *Act.*

ii. Legislative Intent supports Direct Energy's interpretation of s. 79

45. The modern approach to statutory interpretation also requires consideration of legislative intent. This entails" identify[ing] the intended goals of the legislation and the means devised to achieve those goals".[9]

46. The plain and ordinary meaning of the words in section 79, which are determinative of this case, are also consistent with the legislative intent of section 79.

47. The purpose of the *Competition Act* is set out in section 1.1:

> 1.1. The purpose of this Act is to ***maintain and encourage competition*** in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

48. Further, the purpose of orders under sections 79(1) and (2) is reflected in in the language of section 79(2):

> Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that ***an order under subsection (1) is not likely to restore competition in that market***, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and ***as are necessary to overcome the effects of the practice in that market.***

49. Section 79 is intended to be forward-looking, and is only intended to apply to persons who are presently dominant. Business practices that can constitute a "practice

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[9] *Sullivan, supra* note 1, at p. 8, RBOA, Tab 21.

of anti-competitive acts" when engaged in by a dominant person are generally perfectly legal and often pro-competitive when engaged in by others. As such, it is a necessary pre-condition to an order under section 79 that the Respondent be proven to be dominant at the time of the Tribunal's decision. It is the requirement of present dominance, in accordance with the plain wording of section 79(1)(a) that gives effect to Parliament's intent that the abuse of dominance provisions be forward-looking.

50. The Commissioner's interpretation that prior dominance may be the basis for an order under section 79, would mean section 79 orders can be issued in circumstances where they have no positive, or indeed any, impact on the market, and are made for a solely punitive purpose. Such an interpretation runs contrary to the legislative intent of section 79, as expressed by the *Competition Act,* Parliament, and the Competition Bureau itself, discussed below.

1. Section 79 is prospective and requires a finding of current dominance

51. The Commissioner's guidelines confirm that he will generally not pursue an investigation against an entity that is not currently dominant. In the *2012 Guidelines*,[10] when discussing market power, the Competition Bureau notes that it will generally not investigate allegations under section 79 of the *Act* "where a firm ***does not presently appear to have market power and is not likely to acquire it through the alleged conduct within a reasonable period of time.***"[11] The only differentiating factor in this

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[10] *Enforcement Guidelines, The Abuse of Dominance Provisions, Sections 78 and 79 of the Competition Act.* Competition Bureau of Canada. 2012. RBOA, Tab 22.
[11] *Ibid,* at p. 1, 6, RBOA, Tab 22.

case is timing: it is only after the Application has been commenced that the Commissioner now agrees Direct Energy does not have market power.

52. The Competition Bureau's prior *Enforcement Guidelines on the Abuse of Dominance Provisions, 2001* also did not interpret these sections of the *Act* as retrospective. The *Guidelines* state:

> The abuse provisions establish the bounds of competitive behaviour for dominant firms and provide for corrective action where such firms go beyond legitimate competitive behaviour in order to damage or eliminate competitors so as to maintain, entrench or enhance their market power.[12]

53. "Corrective action" implies a forward-looking, or prospective, approach, which is consistent with Direct Energy's interpretation of the abuse provisions. There must be behaviour to correct in order to implement "corrective action". No such behaviour exists in this case as Direct Energy no longer operates in the market.

54. The requirement for a finding of current dominance is further reinforced by section 106 of the *Competition Act,* which forms part of the context within which section 79 is interpreted. Section 106 of the *Act* allows the Tribunal to rescind or vary an order ***after it is made if circumstances have changed***:

> 106 (1) ***The Tribunal may rescind or vary*** a consent agreement or ***an order made under this Part*** other than an order under section 103.3 or a consent agreement under section 106.1, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, if the Tribunal finds that
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> > (a) ***the circumstances that led to the making of the agreement or order have changed and, <u>in the circumstances that exist at the time the application is made,</u> the agreement or order would not have been made or would have been ineffective in achieving its intended purpose***; [emphasis added]

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[12] *Ibid*, at p. 6, RBOA Tab 22.

55. The fact that the *Competition Act* provides for variation or rescission of an order after it is made if there is a change in circumstances, confirms that the provisions of the *Act* must be considered in light of the facts as they currently exist. Section 106 highlights that the intent of the *Competition Act* is to address present and indeed on-going market conditions, and orders are to be made with a view as to whether the criteria required to establish a violation of the *Act*, can presently be made out. Where a prior order or consent agreement no longer supports the goals of the *Act*, or the allegations can no longer be made out, the Tribunal has rescinded such orders.[13]

56. In contrast to these clear statements of legislative intent, the Commissioner relies on section 10 of the Federal *Interpretation Act*, to argue that use of the present tense in legislation does not limit the legislation's application to present conduct. Section 10 reads:

> 10. The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

57. Section 10 of the *Interpretation Act* does not have the effect of interpreting present tense language as incorporating past behaviour, as the Commissioner suggests. Rather, section 10 requires consideration of the provision in the circumstances, and according to its "true spirit, intent and meaning". Understood this way, section 10 of the

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[13] See *RONA Inc. v. Canada (Commissioner of Competition)*, (2005), 42 C.P.R. (4th) 53, where the applicant, RONA, applied to rescind a Consent Agreement entered into following a merger, pursuant to which it agreed to divest a store in the Sherbrooke market. After the Consent Agreement was in effect, a competitor, Home Depot, confirmed its intent to open a store in Sherbrooke. RONA applied to the Tribunal under s. 106 of the Act to rescind the Consent Agreement. The application was granted and the Consent Agreement rescinded. The Tribunal found, *inter alia*, that the circumstances which led to the making of the Consent Agreement had changed, and that the parties would not have signed the Consent Agreement based on the new circumstances (i.e. a competitor's presence in the market). The arrival of the competitor suitably addressed concerns regarding any substantial lessening of competition, and therefore there was no reason to enforce the terms of the Consent Agreement. RBOA Tab 17.

Interpretation Act supports Direct Energy's interpretation of section 79, for the reasons set out above.

2. Section 79 is remedial, not punitive

58. In addition to being forward-looking, section 79 is wholly remedial. Importantly, section 79(3.3) provides that the purpose of an administrative monetary penalty – which may only be ordered if the Tribunal also makes an order under section 79(1) or (2) – is specific behaviour modification, and expressly not punitive:

> (3.3) The purpose of an order made against a person under subsection (3.1) is to promote practices by that person that are in conformity with the purposes of this section and ***not to punish that person***.

59. This interpretation is supported by comments made by the Federal Minister of Consumer and Corporate Affairs when the abuse of dominance provisions were enacted in 1986. The amendments to the *Competition Act* in 1986 shifted the abuse provisions from criminal law to civil law. The area of mergers underwent a similar change. The Honourable Michel Côté, described the purpose of these changes as follows:

> Mr. Speaker, this Bill also provides for a comprehensive change of approach in the area of mergers and their impact on competition. In the first place, those moves would be considered as coming under civil law rather than criminal law, as is now the case under the present statute.
>
> For years we have had the opportunity to realize that the criminal law is quite inappropriate where that kind of operations are concerned. Its inherent principles, procedures and penalties are simply out of place. ***Mergers and other relevant practices are trade practices in the normal course of business activities which, under examination, may or may not affect competition. Our objective is not to mete prison terms nor to levy fines but to protect public interest by setting out specific game rules based on realities and enforce them strictly thereafter.***[14]
>
> ...
>
> The purpose of this tribunal will be to adjudicate ***non-criminal competition matters.***[15]

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[14] *House of Commons Debates*, 33rd Parl, 1st Sess: Vol 8 at 11928 (Hon. Michel Côté), RBOA, Tab 23.
[15] *Ibid,* at 11927, RBOA, Tab 23.

60. If the Commissioner's position is accepted, and orders under section 79 could be made against Direct Energy when it is no longer present in the market, the purpose of such an order would be strictly punitive. Interpreting section 79 in this manner is clearly contrary to the express legislative intent.

61. Taken together, the goals of the Act as stated in the legislation, commentary from Parliament, and the Competition Bureau *Guidelines*, supports the interpretation that the abuse of dominance provisions of the *Competition Act* are prospective and not punitive. Accordingly, an order pursuant to section 79 only serves its purpose if a respondent is ***currently*** dominant and either is, or was, engaging in anti-competitive acts which prevent or lessen competition. Where, as here, Direct Energy is not dominant, and is effectively precluded from operating in the alleged market at all, no order under section 79 can be made.

B. Commissioner's Position is Contrary to Tribunal Practice and Process

62. The Commissioner argues that the relevant date for determining a violation of section 79 of the *Act*, is a date no later than the date on which the Commissioner issued his Notice of Application. In addition to being contrary to the goals and the plain meaning of the *Competition Act*, the Commissioner's position is contrary to Tribunal practice in this and other cases.

63. The *Competition Act* is concerned with competition in the market. It is accepted that the market is organic, and changes to the market are relevant in determining whether there is a breach of the *Competition Act*, including in respect of the abuse of dominance provisions.

64. To date, the Tribunal has determined six applications pursuant to section 79 of the *Act*. In all of these applications, the Tribunal has considered facts and evidence relevant to the abuse of dominance analysis, ***at the time of the hearing***.

65. For example:

(a) In *Canada Pipe*, the Tribunal considered evidence of the ***current state*** of competition among various products and the ***current state of regulations*** applicable to the use of various materials in Drain, Waste and Vent applications;[16]

(b) In *Tele-Direct*, the Tribunal recognized the temporal nature of the Act by considering whether there was evidence that niche competitors ***currently*** limited Tele-Direct's pricing or encourage better service by their presence;[17] and

(c) In *D & B*, the Tribunal considered ***current evidence*** on competition between different tracking services in coming to its conclusion that "scanner-based tracking services" was the relevant product market.[18]

66. These cases confirm that facts as they exist up to the time of the decision, are admissible, and are routinely considered by the Tribunal in the analyses required under the provisions of the *Competition Act*. Indeed, section 106 of the *Competition Act*, in permitting the Tribunal to vary an order based on a change in circumstances, further

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[16] *Canada (Commissioner of Competition) v. Canada Pipe*, [2005] C.C.T.D. No. 3, para 75-80, RBOA, Tab 4.
[17] *Canada (Competition Act, Director of Investigation and Research) v. Tele-Direct (Publications) Inc.*, [1997] C.C.T.D. No. 8, para 237, RBOA, Tab 6.
[18] *Canada (Competition Act, Director of Investigation and Research) v. The D & B Companies of Canada Ltd.*, [1995] C.C.T.D. No. 20, p. 18 ("*D & B*"), RBOA, Tab 7.

highlights the importance and necessity of the Tribunal considering current facts in making any order.[19]

67. The Commissioner's position is also contrary to the approach he has taken in this case. The Commissioner's Application specifically alleges ongoing conduct by Direct Energy. The discovery process has included discovery of facts which occurred after the Application was issued. [20]

68. In addition, it is uncontroverted that there have been significant developments in the water heater business since the Application was issued. These include Direct Energy's sale of its business to Enercare, and Reliance's recently confirmed acquisition of National, both of which were reviewed by the Commissioner.[21] In addition, the Commissioner entered into a Consent Agreement with Reliance in respect of the allegations brought in a similar application against it, and also entered into a Consent

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[19] Notably, in *Southam,* Justice Rothstein discussed the interplay between section 106 of the *Competition Act* and the doctrine of *res judicata.* He confirmed that *res judicata* would apply if a party "held back evidence or failed to advance a particular argument or that ***facts existed prior to the original decision*** that the applicant now attempts to introduce under the guise of changed circumstances." It is clear from this analysis that the expectation is all relevant facts up to the date of the decision ought to be tendered in evidence, and considered by the Tribunal in coming to a decision. *Southam Inc. v. Director of Investigation and Research,* 78 CPR (3d) 341, at para. 24, RBOA, Tab 19. See also, *Commissioner of Competition v. Canadian Waste Services Holdings Inc.,* [1992] C.C.T.D. No. 1, where, on a s. 106 Application, the Tribunal did not accept alleged changes as bona fide changes as they existed only because the Applicant failed to provide the Tribunal with all of the relevant facts at the time of the initial hearing. RBOA, Tab 10.

[20] For example, in the Reasons and Order of the Tribunal dated October 17, 2014, a decision on refusals motions brought by the parties, the Tribunal noted that events that took place in 2013, after the Application was commenced, could be relied on at the hearing on the merits. At paragraph 12 of its Reasons the Tribunal held: "Further, Direct Energy will be able to rely on the Commissioner's concessions with respect to the existence of the alleged misleading conduct. Direct Energy will also be able to point out that the Commissioner executed search warrants in 2013 against those allegedly engaged in misleading practices and that the conduct necessitated an intervention by the Government of Ontario, through the introduction of Bill 55, the Stronger Protection for Ontario Consumers Act, 2013." *The Commissioner of Competition v Direct Energy Marketing Limited,* [2014] C.C.T.D. No. 17, 2014 Comp. Trib. 17, File No: CT-2012-003, October 17, 2014, at para. 12, RBOA Tab 20.

[21] "Reliance closes acquisition of National Home Services" November 24, 2014: Toronto, ON, Morningstar News <http://news.morningstar.com/all/printNews.aspx?article=/CNW/20141124C6108_univ.xml>. RBOA Tab 27.

Agreement with National in regard to National's practices of misleading consumers, which Direct Energy's return policies were intended to address.[22]

69. On the Commissioner's approach, the Tribunal would not be able to consider any of that evidence, or anything else that happened in the market since the Application was issued in December, 2012.

70. In short, accepting the Commissioner's submission that the relevant date for determining a violation of section 79 is no later than the date on which a Notice of Application is issued, would be arbitrary and would lead to absurd results.

C. The Tribunal Should Not Make An Unnecessary Order

71. In the current circumstances, no goal or purpose of the *Competition Act* would be furthered by the orders which the Commissioner seeks in this Application. Direct Energy is no longer in the market, and is effectively precluded from re-entering, so the question as to whether it was dominant, and the nature of the conduct at issue, has become academic and the issues rendered moot.

72. The Supreme Court of Canada outlined the doctrine of mootness in *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342.

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract

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[22] "Competition Bureau Strengthens Competition in Ontario's Water Heater Industry." November 6, 2014, Ottawa, ON: *Competition Bureau*, < http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03836.html> and "Fact Sheet: Competition Bureau Strengthens Competition in Ontario's Water Heater Industry" November 6, 2014, Ottawa, ON: Competition Bureau, < http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03837.html>, RBOA Tab 24; "Competition Bureau clears Reliance's acquisition of National." November 17, 2014, Ottawa, ON: *Competition Bureau*, < http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03837.html>, RBOA Tab 25; "National Home Services to pay $7 million for misleading door-to-door water heater promotions." November 24, 2014, Ottawa, ON: *Competition Bureau* < http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03849.html>, RBOA, Tab 264.

> question. ***The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision.*** Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.[23]

73. The facts in the immediate case are similar to cases where parties have sought injunctions to prohibit certain behaviours by other parties, only to have their questions rendered moot upon a change of circumstances.

74. For example, in *Law Society of British Columbia v. Mangat*,[24] the Law Society of British Columbia sought, *inter alia*, an injunction to prohibit the Respondent, Mangat, who was not a licenced lawyer in B.C., from engaging in the ongoing practice of law in contravention of the B.C. *Legal Profession Act*. Mangat had been providing legal advice as an immigration consultant at the time the application was brought. On appeal to the Supreme Court, Justice Gonthier found that the question as it pertained to Mangat was moot because he had since become a licenced lawyer in Alberta and Ontario, and had no intention of returning to his former work of immigration consultant.[25] The Court dismissed the appeal.

75. The availability of a remedy is not to be determined in a vacuum, but must be considered in light of the present facts. The purpose of an order under section 79 is corrective and remedial. The goal of section 79 orders is to "restore competition in the market" or "overcome the effects of an anti-competitive practice". Given Direct

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[23] *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342 at para 15-16, RBOA Tab 2.
[24] *Law Society of British Columbia v. Mangat* , [2001] 3 SCR 113, 2001 SCC 67, RBOA, Tab 13.
[25] *Ibid*, at para. 75, RBOA, Tab 13; see also *Ruby Trading S.A. v. Parsons*, [2001] 2 FCR 174, RBOA Tab 18.

Energy's current position, there is no behaviour to correct and there are no market conditions to restore. Any order would not further the objectives of the *Act*. Accordingly, there is no "live controversy" in this case.[26]

76. The issues have become moot and the circumstances do not warrant a determination by this Tribunal.

77. The mootness of the issue is further highlighted by the principle that a remedy ordered pursuant to the *Competition Act* should go no further than necessary to address the competitive effect proven by the Commissioner. The Supreme Court confirmed this principle in *Canada (Director of Investigation and Research) v. Southam Inc.,* in the merger context, where it recognized that, under s. 92(1), "the appropriate remedy for a substantial lessening of competition [was] to restore competition to the point at which it [could] no longer be said to be substantially less than it was before the merger."[27]

78. A similar limitation on the Tribunal to make an order to only the extent necessary to achieve its purpose, is found in the express words of section 79(3):

> 79(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it ***only to the extent necessary to achieve the purpose of the order.***

79. Where, as here, an Order would not serve the purposes of restoring competition or addressing the alleged conduct, no order is necessary.

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[26] *Borowski v. Canada (Attorney General)*, *supra* note 23, at para 15, RBOA Tab 2.
[27] *Southam Inc.*, supra note 19, para. 85, RBOA, Tab 19.

D. It would be inappropriate to Order an Administrative Monetary Penalty

80. The Commissioner takes the position that an administrative monetary penalty ("**AMP**") is available irrespective of whether Direct Energy is engaging in the alleged conduct, or is even in the relevant market. This position is untenable, and contrary to the express provisions of the *Competition Act.*

81. As set out above, a prerequisite to ordering an AMP is an order under section 79(1) or 79(2). As no order is available pursuant to these provisions, this Tribunal may not order an administrative monetary penalty. This is a complete response to the Commissioner's position.

82. Regardless, ordering an AMP in this case would run contrary to the purpose of AMPs as set out in s. 79 (3.3), namely to "promote practices ***by that person*** that are in conformity with the purposes of this section and ***not to punish that person.***"

83. The purpose of an AMP under s. 79(3.1) is one of specific deterrence and is non-punitive. Specific deterrence is not achieved by making an order against a person that is no longer engaging in the alleged conduct, no longer in the relevant market, and is effectively prevented from re-entering the market. Ordering an AMP in these circumstances would be punitive, and therefore prohibited by the express words of section 79(3.3).

84. Further, AMPs are not to be used for general deterrence as noted in *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*[28] Although the Tribunal

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[28] *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2014 ONSC 1146 ("*Chatr*"), RBOA, Tab 5.

ultimately awarded an AMP in that misleading advertising case, Justice Marrocco nonetheless found:

> As with any order under s. 74.1(4), an administrative monetary penalty must be imposed for the purpose of promoting compliance with the Competition Act. ***An administrative monetary penalty cannot be imposed with a view to punishment or deterring others*** who might contemplate making unsubstantiated performance claims.[29] [emphasis added]

85. Finally, the Tribunal is asked only to consider the issues before it. Any remedy must be properly responsive to the allegations that are before the Tribunal. This is consistent with the requirement that orders are to be made only to the extent necessary to address the conduct at issue and to restore competition.

86. Orders of the Tribunal cannot be made in the name of general compliance. The purpose of an Order must be responsive to the conduct it seeks to address. The Tribunal's practices are reflective of this principle. For example, in considering the decisions of *Canada (Competition Act, Director of Investigation and Research) v. The D & B Companies of Canada Ltd.*[30] and *Canada (Director of Investigation and Research, Competition Act) v. Laidlaw Waste Systems Ltd.*,[31] cases where the Tribunal made a finding against the respondent under s. 79, the remedies both sought and ordered pertained only to the conduct at issue.

87. For all of these reasons, an AMP cannot apply to Direct Energy in the current circumstances.

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[29] *Ibid*, at para. 51, RBOA, Tab 5.
[30] *D & B, supra* note 18, RBOA, Tab 7.
[31] *Canada (Director of Investigation and Research, Competition Act) v. Laidlaw Waste Systems Ltd,* [1992] C.C.T.D. No. 1. ("*Laidlaw*"), RBOA, Tab 8.

E. Legal Test applicable to Summary Disposition

88. The Commissioner's motion should be answered in the negative on a proper interpretation of the *Competition Act*. As is set out in detail above, the Commissioner's question cannot be answered in the affirmative, and as a result this Application must be dismissed.

89. By his motion, the Commissioner asks the Tribunal to determine questions of law. However, if preferable, the Tribunal can instead resolve the issues before it by granting Direct Energy's motion for summary disposition.

90. Section 9(5) of the *Competition Tribunal Act* provides for a judicial member to dismiss an application "...if the member finds that there is no genuine basis for it."[32]

91. The test for summary judgment has been set out by the Supreme Court in *Hryniak v Mauldin*[33]. In *Hyrniak*, the Supreme Court held that there will be no genuine issue requiring a trial when the court "is able to reach a fair and just determination on the merits", namely, where the process "(1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a more proportionate, more expeditious and less expensive means to achieve a just result".[34]

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[32] Notably, Rule 215 of the Federal Court Rules also provides for summary judgment and provides: "If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment."
[33] *Hryniak v Mauldin,* 2014 SCC 7, RBOA, Tab 12.
[34] *Ibid.* at para 49, RBOA, Tab 12.

92. The Supreme Court's test in *Hryniak* applies to this case, and confirms the Tribunal's ability to grant summary disposition dismissing the Application.[35] The necessary facts are before the Tribunal and are undisputed having been tendered in the form of a Statement of Agreed Facts. The Tribunal is readily able to apply the law to those facts, and proceeding by way of a summary disposition motion is a proportionate, expeditious and less expensive means to achieve a just result.

PART V - ORDER REQUESTED

93. For the reasons set out above, Direct Energy respectfully requests an order dismissing the Application on summary disposition, its costs of this motion, and such other relief as this Tribunal may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of December, 2014.

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Julie Parla
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Christine Wadsworth

Lawyers for the Respondent
Direct Energy Marketing Limited

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[35] The *Hryniak* case has been applied by the Federal Court despite the variant wording of the *Federal Court Rules* as compared to the *Ontario Rules of Civil Procedure*. In *Canada (Citizenship and Immigration) v. Zakaria*, the Court held that while Ontario Rule 20 differs from Rules 213 to 215 of the *Federal Courts Rules*, particularly as Rule 215(1) refers to no genuine issue for trial while Ontario Rule 20 refers to no genuine issue requiring trial, the same general analysis established in *Hyrniak* applies. Accordingly, the analysis equally applies to the test under section 9(5) of the *Competition Tribunal Act*. See *Canada (Citizenship and Immigration) v. Zakaria*, 2014 FC 864 at paras. 37-38, RBOA, Tab 3.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831.
2. *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342.
3. *Canada (Citizenship and Immigration) v. Zakaria*, 2014 FC 864.
4. *Canada (Commissioner of Competition) v. Canada Pipe*, [2005] C.C.T.D. No. 3.
5. *Canada (Commissioner of Competition) v. Chatr Wireless Inc.*, 2014 ONSC 1146.
6. *Canada (Competition Act, Director of Investigation and Research) v. Tele-Direct (Publications) Inc.*, [1997] C.C.T.D. No. 8.
7. *Canada (Competition Act, Director of Investigation and Research) v. The D & B Companies of Canada Ltd.*, [1995] C.C.T.D. No. 20.
8. *Canada (Director of Investigation and Research, Competition Act) v. Laidlaw Waste Systems Ltd*, [1992] C.C.T.D. No. 1.
9. *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 SCR 601.
10. *Canadian Waste Services Holdings Inc.v. Canada (Commissioner of Competition)*, [2004] C.C.T.D. No. 10, 2004 Comp. Trib. 10.
11. *Genentech Canada Inc., Re,* 1992 CarswellNat 1661, 44 C.P.R. (3d) 316.
12. *Hryniak v Mauldin*, 2014 SCC 7.
13. *Law Society of British Columbia v. Mangat*, [2001] 3 SCR 113, 2001 SCC 67.
14. *R. v. D.A.I.*, [2012] S.C.J. No. 5.
15. *R. v. Daoust*, 2004 SCC 6.
16. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27.
17. *RONA Inc. v. Canada (Commissioner of Competition)*, (2005), 42 C.P.R. (4th) 53.
18. *Ruby Trading S.A. v. Parsons*, [2001] 2 FCR 174.
19. *Southam Inc. v. Director of Investigation and Research,* 78 CPR (3d) 341.
20. *The Commissioner of Competition v Direct Energy Marketing Limited*, 2014 Comp. Trib. 17, File No: CT-2012-003.

Secondary Sources

1. R Sullivan, *Sullivan on the Construction of Statutes*, 6d ed (Markham: LexisNexis, 2014).

2. "Enforcement Guidelines, The Abuse of Dominance Provisions, Sections 78 and 79 of the Competition Act". *Competition Bureau of Canada*. 2012.

3. House of Commons Debates, 33rd Parl, 1st Sess: Vol 8 (Hon. Michel Côté).

4. "Competition Bureau Strengthens Competition in Ontario's Water Heater Industry." November 6, 2014, Ottawa, ON: *Competition Bureau*, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03836.html> and <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03837.html>.

5. "Competition Bureau clears Reliance's acquisition of National." November 17, 2014, Ottawa, ON: *Competition Bureau*, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03841.html>.

6. "National Home Services to pay $7 million for misleading door-to-door water heater promotions." November 24, 2014, Ottawa, ON: *Competition Bureau*, <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03849.html>.

7. "Reliance closes acquisition of National Home Services" November 24, 2014: Toronto, ON: *Morningstar News* <http://news.morningstar.com/all/printNews.aspx?article=/CNW/20141124C6108_univ.xml>.

SCHEDULE "B"
RELEVANT STATUTES

Competition Act, R.S.C., 1985, c. C-34

Prohibition where abuse of dominant position

79. (1) Where, on application by the Commissioner, the Tribunal finds that

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

Additional or alternative order

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

Limitation

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

Administrative monetary penalty

(3.1) If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding $10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding $15,000,000.

Federal Court Rules, SOR/2004-283, s. 2

If no genuine issue for trial

215. (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

Genuine issue of amount or question of law

(2) If the Court is satisfied that the only genuine issue is

(a) the amount to which the moving party is entitled, the Court may order a trial of that issue or grant summary judgment with a reference under rule 153 to determine the amount; or

(b) a question of law, the Court may determine the question and grant summary judgment accordingly.

Powers of Court

(3) If the Court is satisfied that there is a genuine issue of fact or law for trial with respect to a claim or a defence, the Court may

(a) nevertheless determine that issue by way of summary trial and make any order necessary for the conduct of the summary trial; or

(b) dismiss the motion in whole or in part and order that the action, or the issues in the action not disposed of by summary judgment, proceed to trial or that the action be conducted as a specially managed proceeding.

The Commissioner of Competition Appellant	and	Direct Energy Marketing Limited Respondent	Court File No. CT-2012-003

COMPETITION TRIBUNAL

Proceeding commenced at Toronto

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