Competition Tribunal | Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. Reliance Comfort Limited Partnership*, 2014 Comp. Trib. 9
File No.: CT-2012-002
Registry Document No.: 127

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

AND IN THE MATTER of an application by the Commissioner of Competition pursuant to section 79 of the *Competition Act*;

AND IN THE MATTER of certain policies and procedures of Reliance Comfort Limited Partnership

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Reliance Comfort Limited Partnership
(respondent)

and

National Energy Corporation
(intervener)

Date of hearing: 20140602
Before Judicial Member: Rennie J. (Chairperson)
Date of Reasons and Order: June 13, 2014
Reasons and Order signed by: Mr. Justice Donald J. Rennie

REASONS FOR ORDER AND ORDER DISMISSING RELIANCE'S MOTION FOR FURTHER AND BETTER AFFIDAVITS OF DOCUMENTS

[1] On December 20, 2012, the Commissioner of Competition (the "Commissioner") filed a Notice of Application pursuant to section 79 of the *Competition Act*, R.S.C. 1985, c. C-34, against the respondent Reliance Comfort Limited Partnership ("Reliance"). The Commissioner's application will be heard in approximately seven months and the parties, as well as the intervenor, National Energy Corporation ("National Energy"), have exchanged affidavits of documents. In its motion, Reliance is asking the Tribunal to order the Commissioner and National Energy to conduct a reasonable review of sound recordings in their possession, and to produce those that are relevant to the proceeding. For the reasons that follow, Reliance's request is denied.

I. Background

[2] On December 20, 2012, the Commissioner filed a Notice of Application pursuant to section 79 of the *Competition Act* against Reliance. The Commissioner alleges in his Notice of Application that Reliance has implemented exclusionary water heater return policies and procedures, including the so-called "RRN Policy", that impose significant costs on competitors and prevent customers from switching to those competitors. The Commissioner asserts that under the RRN Policy, customers wishing to return a water heater must first obtain a Removal Reference Number ("RRN") from Reliance and complete to Reliance's satisfaction a "Water Heater Return Form". The Commissioner further asserts that under the policy, competitors cannot obtain the RRN on behalf of Reliance customers, RRNs are not provided to customers who contact Reliance with a competitor on the call, and agency agreements between customers and competitors are not recognized by Reliance.

[3] In his application, the Commissioner seeks an order prohibiting Reliance from implementing exclusionary water and heater return policies and procedures, directing it to take certain other actions necessary to overcome the alleged effects of its practice of anti-competitive acts, as well as an administrative monetary penalty in the amount of $10,000,000.

[4] Reliance, in its response filed on August 12, 2013, denies the allegations and alleges that the return processes and procedures at issue were, in part, introduced to protect and educate consumers against the dishonest behavior of competitors who make false and misleading

representations during door-to-door sales. Reliance explains that in December 2012, a Six Person Complaint was sent to the Acting Commissioner of Competition, alleging that some corporations had made false and misleading representations during door-to-door sales of residential water heater rental contracts.

[5] On November 6, 2013, the Tribunal granted National Energy, a supplier of natural gas and electric water heaters for rental to Quebec and Ontario homeowners, leave to intervene in these proceedings.

[6] There have been on-going legal proceedings opposing Reliance and National Energy in other legal forums and on September 10, 2013, Reliance filed a Fresh as Amended Statement of Claim against National Energy, and its parent company, Just Energy Group Inc. ("Just Energy"), with the Ontario Superior Court of Justice. Reliance asserts that National Energy and Just Energy have made false or misleading representations and is seeking damages in the amount of $50,000,000 and punitive damages in the amount of $10,000,000. In their Fresh as Amended Statement of Defence and Counterclaim, National Energy and Just Energy deny the allegations, submit, in part, that it is Reliance who has disseminated false or misleading representations to Ontario consumers regarding National Energy, and seek, in turn, damages in the amount of $50,000,000 and punitive damages in the amount of $10,000,000.

II. The Sound Recordings

[7] In the course of his investigation, the Commissioner obtained search warrants and the Bureau seized a total of approximately 227,446 sound recordings from National, morEnergy and Ontario Consumer Home Services ("OCHS"). Pursuant to the search warrants, electronic evidence must remain under the control of electronic evidence officers until the evidence has been reviewed to ensure that privileged records and records not captured by the search warrants are not distributed to anyone else.

[8] In the context of the Tribunal proceedings, the parties have exchanged affidavits of documents and the Commissioner has provided approximately 144,000 records to Reliance, including 23,000 National Energy records which include 300 audio files. These audio files were

attached to e-mails sent by or to employees of National Energy. National Energy has produced 69,625 of its own records including 1,400 audio files.

[9] A sample of 140 sound recordings of the 300 sound recordings produced by the Commissioner were reviewed by counsel for the Respondent. Approximately 10% of the sound recordings reviewed were customer complaints. Another review conducted by Reliance's counsel of a random sample of 360 of the sound recordings produced by National Energy establishes that approximately 10% were customer complaints.

III. The Motions for Further and Better Affidavits of Documents

[10] Reliance has filed motions against the Commissioner and National Energy in which it seeks an order requiring National Energy to conduct a "reasonable review" of its sound recordings and produce those that are relevant. Reliance also asks that the Commissioner conduct a "reasonable review" of the sound recordings seized from National Energy, morEnergy and OCHS. In its memorandum of fact and law, Reliance describes a "reasonable review" as including a "sampling review using keyword searches, such as the one Reliance conducted on its own sound recording database." (at para. 74).

[11] At the hearing, counsel for Reliance, at the Tribunal's request, prepared a draft order which sets out the particulars it seeks and, according to the draft, Reliance asks that the Tribunal order:

- National Energy and the Commissioner to serve further and better affidavits of documents by September 19, 2014;
- National Energy to review the sound recordings in its voice recordings database of inbound and outbound calls; the Commissioner to review the sound recording seized from National, morEnergy and OCHS;
- National Energy to review the sound recordings for recordings of complaints against National's door-to-door sales persons or telephone sales agents; and the Commissioner to review the sound recordings for recordings of complaints against door-to-door sales persons or telephone sales agents of National, morEnergy and OCHS;

- National and the Commissioner may employ electronic tools and processes such as data sampling, searching or other selection criteria; and shall produce recordings in format organized by topic.

[12] Reliance submits that the audio recordings are relevant to matters in issue as the proceedings raise questions of (i) whether the circumstances of the marketplace provide a valid business justification for the implementation of Reliance's RRN policy; (ii) the determination of whether Reliance's return policies and procedures constitute a practice of anti-competitive acts; and (iii) the determination of whether Reliance's return policies and procedures substantially lessen and prevent competition. Reliance states that it is neither appropriate nor proportional for the Commissioner and National Energy to flatly refuse to undertake any review of the sound recordings in their possession.

[13] Reliance further observes that the Commissioner seeks the maximum administrative monetary penalty along with important constraints on Reliance's trade practices.

[14] The Commissioner is opposed to the relief requested by Reliance. He submits that it is impractical and unduly resource intensive to engage in the requested review given the number of records already produced, the marginal probative value of the audio files, and the Commissioner's preparation of a third party summary of information, which will include any relevant information obtained from OCHS and morEnergy and which will be delivered before the examination of the Commissioner's representative.

[15] In his affidavit, Mr. Jeffrey Chamberlain, a Competition Law Officer, affirms that the seized sound recordings include approximately 466 gigabytes of data representing an aggregate length of approximately 70,000 hours of sound recordings and that it would take 40 years for one Competition Law Officer to review the sound recordings. The Competition Bureau's Electronic Evidence Unit does not have software capable of conducting a phonetic search of sound recordings and the process to acquire and deploy it could take up to a year.

[16] The Commissioner further submits that he cannot conduct the review in the manner suggested by Reliance as he is bound by the terms of the search warrants and, according to those terms, Competition Bureau officers must review every minute of every audio file to ensure that

privileged records and records not captured by the search warrants are not improperly distributed.

[17] The Commissioner also points out that additional audio files recording customers complaints with respect to the conduct of Reliance's competitors serve no useful purpose as Reliance has acknowledged that it possesses multiple records which document these complaints. The Commissioner, in fact, states in his Memorandum that he has "reason to believe that the alleged misleading conduct has and (in some instances) continues to occur within the provinces of Ontario and Quebec". More importantly, the Commissioner asserts that the issue of alleged misleading conduct of competitors is not important to this proceeding as it his view that the Federal Court of Appeal, in *Commissioner of Competition v. Canada Pipe Co*, 2006 FCA 233, leave to appeal to SCC refused, 31637 (May 10, 2007), indicated that the alleged misleading conduct of others can never be a legitimate business justification.

[18] National Energy also asks the Tribunal to dismiss Reliance's motion. National Energy also asserts that Reliance's motion is premised on a misapprehension of the role of a business justification and adds that Reliance cannot be permitted to create a business justification after-the-fact using evidence from National Energy's internal records that it did not have at the relevant time. National Energy, like the Commissioner, submits that Reliance has failed to explain why additional documents are necessary given the large number of records, approximately 8,000, already in Reliance's possession which document consumer complaints.

[19] National Energy asserts that any review would be costly and very onerous. In his affidavit of May 22, 2014, the Chief Information Officer of Just Energy explains that telephone conversations between National Energy's call centre employees and customers or prospective customers are recorded and stored in a voice recording system. According to the Chief Information Officer, National cannot conduct searches of the system for calls relating to particular issues, but can retrieve specific calls based, for example, on a phone number and date of the call. He swears that it would take a person approximately 442 years to listen to the audio files recorded for the period from 2003 to present. He adds that it would cost approximately $9,200,000 to conduct a review of audio recordings stored since 2010.

[20] National Energy also asserts that the review conducted by Reliance was flawed as it failed to capture potentially relevant telephone calls and resulted in the production of irrelevant telephone calls.

[21] Reliance asserts that it was able to conduct a reasonable review of its database of recorded calls from customers to its call centres by first using a filtering process, by which calls were filtered, using SQL (Structured Query Language) scripts, resulting in a subset of approximately 360,000 recordings. The subset was subsequently reviewed with the assistance of an external phonetic search software provider. Reliance submits that its review of its sound recording database, which is over five times the size of National's sound recording database, was completed within 15 weeks, resulting in the identification of approximately 8,000-10,000 relevant sound recordings.

[22] Reliance further submits that an order requiring the Commissioner and National Energy to conduct a reasonable review would not result in any delay in the proceeding as it only seeks the production of relevant sound recordings after the examinations for discovery have taken place (by September 19, 2014).

IV. Analysis

[23] Rule 60 of the *Competition Tribunal Rules*, SOR/2008-141, provides that an affidavit of documents shall include a list of all documents that are relevant to any matter in issue and that are or were in the possession of a party. Sound recordings are amongst the documents to be listed (see: Rule 1).

[24] Pursuant to Rule 34, the Tribunal may refer to the *Federal Courts Rules*, SOR/98-106. Under Rule 230 of those Rules, the Court may relieve a party from production for inspection of any document, having regard to "whether it would be unduly onerous to require the person to produce the document". Certain Federal Court decisions have held that when examining the propriety of any question on discovery or a request for a production of a document, the Court must weigh, in particular, the probability of its usefulness with the time, trouble, expense and difficulty involved in obtaining it (see: *Anglehart v. Canada*, 2011 FC 825; *Reading & Bates Construction Co. and al. v. Baker Energy Resources Corp. and al.* (1988), 24 C.P.R. (3rd) 66).

This means that "[w]here on the one hand both the probative value and the usefulness of the answer to the examining party would appear to be, at the most, minimal and where, on the other hand, obtaining the answer would involve great difficulty and a considerable expenditure of time and effort to the party being examined, the court should not compel an answer" (see: *Reading & Bates Construction Co. v. Baker Energy Resources Corp*. (1988), 24 C.P.R. (3rd) 66).

[25] In an earlier decision, I reminded counsel in this case of the principle of proportionality and that it informs the relevancy inquiry (see: *The Commissioner of Competition v. Reliance Comfort Limited Partnership*, 2013 Comp. Trib. 18, at para. 8). The Supreme Court of Canada has recently recognized the importance of the principle of proportionality in *Hryniak v. Mauldin*, 2014 SCC 7.

[26] The parties agreed at the hearing of Reliance's motion that the principle of proportionality is applicable in this case.

[27] In the context of electronic discovery, Master Short of the Ontario Superior Court of Justice adopted an eight-factor proportionality test for e-discovery (*Warman v. National Post Co.*, 2010 ONSC 3670, at para. 82):

(1) the specificity of the discovery requests;

(2) the likelihood of discovering critical information;

(3) the availability of such information from other sources;

(4) the purposes for which the responding party maintains the requested data;

(5) the relative benefit to the parties of obtaining the information;

(6) the total cost associated with production;

(7) the relative ability of each party to control costs and its incentive to do so; and

(8) the resources available to each party.

[28] The principle of proportionality is also recognized in the Sedona Canada Principles Addressing Electronic Discovery:

> 2. In any proceeding, the parties should ensure that steps taken in the discovery process are proportionate, taking into account (i) the nature and scope of the litigation, including the importance and complexity of the issues, interest and amounts at stake; (ii) the relevance of the available electronically stored information; (iii) its importance to the court's adjudication in a given case; and (iv) the costs, burden and delay that may be imposed on the parties to deal with electronically stored information.

[29] Under the Sedona Principles, a party may satisfy its obligations by using electronic tools and processes such as data sampling, searching or by using selection criteria to collect potentially relevant electronically stored information. Further, parties should anticipate and respect the rules of the forum in which the litigation takes place, while appreciating the impact any decisions may have in related actions in other forums.

[30] I am guided by the above caselaw and principles. Further, I am also guided by subsection 9(2) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19, which provides that all proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

[31] The parties and the intervenor take differing views as to the application of a business justification in this case and its meaning. At this time, it is not necessary for the Tribunal to answer this question and I have assumed, for the purposes of this motion solely, that it is possible for Reliance to raise the business justification in the manner that it wishes to do. It will be up to the Tribunal to decide, at a later stage and after the parties have had a chance to fully develop their arguments, whether the Commissioner's position, National Energy's and/or Reliance's position have any merit.

[32] However, it is very clear that the production of the relevant sound recordings would involve great difficulty and a very significant expenditure of time and effort to the Commissioner of Competition. Moreover, the Commissioner's hands are somewhat tied given the terms of the search warrants under which the sound recordings were obtained.

[33] Reliance's argument, made at the hearing of the Motion, that it would be feasible for the Commissioner to engage in a focused review given the terms of the search warrants and National

Energy's evidence, is speculative and counsel for Reliance conceded that Mr. Chamberlain had not been examined on this issue.

[34] The Commissioner has also explained that Reliance will receive, prior to the discovery of the Commissioner's representative, a third party summary of information which will include any information about the alleged misleading conduct of Reliance's competitors, both favourable and adverse to the Commissioner's case. Counsel for Reliance, at the hearing, conceded that it had produced about 8,000 to 10,000 unique files which relate to 19 different issues – half of which are alleged misleading sales tactics by National Energy.

[35] However, Reliance asserts that it needs more records documenting consumer complaints as the degree to which the alleged misconduct was widespread is important for its business justification of its policies and defence.

[36] It is evident that Reliance, through its own sources, the Better Business Bureau and the Provincial Government, already has a litany of records documenting complaints about National Energy. The Commissioner has already produced relevant information in that regard and will continue to do so through the preparation of a third party summary.

[37] Moreover, the Commissioner has already expressed the view that he has reason to believe that misleading conduct by some of Reliance's competitors has occurred. However, counsel for Reliance stated at the hearing of the Motion, that until Reliance has an "admission that this is rife throughout the market, that [the Commissioner] admits all of National sales are obtained by this and, therefore, they're not competitive, it is a contested issue".

[38] This is an application brought by the Commissioner of Competition against Reliance in which he alleges that Reliance has engaged in abuse of dominance by implementing a number of different policies including return depot policies and Reliance's exit fees and charges. National Energy is not a party and plays the role of an intervenor and has already produced almost 69,625 records. The dispute between National Energy and Reliance at the Superior Court of Justice shall not be moved to the Tribunal.

[39] Also, the review conducted by Reliance over a 15 week-period yielded in the identification of 8,000-10,000 relevant sound recordings, approximately 2.2%-2.8% of the subset

of 360,000 sound recordings. Reliance nonetheless produced all 360,000 sound recordings notwithstanding the fact that approximately 80% of these recordings had not been reviewed. This illustrates the magnitude of work involved, the degree of relevant information found after such an extensive review and the decision to disclose, notwithstanding the review, all 360,000 records. It is interesting to note that Reliance has not disclosed the costs that it has incurred with respect to its 15-week period review of sound recordings – it had, of course, no obligation to do so.

[40] Taking the above factors in consideration, I conclude that Reliance's request with respect to the Commissioner should be denied with costs. I reach a similar conclusion with respect to Reliance's Motion against National Energy.

[41] The evidence establishes that National Energy does not maintain a similar call queue structure to that operated by Reliance. It appears that customers' complaints that do not relate to a service or maintenance issue will be routed to one of approximately 70 to 80 employees located in National Energy's call centre and that National Energy's call system is not searchable based on the content of the call. National Energy has established that a review would be costly and would, in all likelihood, result in delay.

[42] Applying the principle of proportionality and considering the application of the above factors, it is clear that this principle also favours National Energy. National Energy would incur significant costs, spend a considerable amount of time, on reviewing sound recordings – and such a review would not be proportional. Taking into consideration the particular facts of this case, it appears to me disproportional to require an intervenor to spend three to four months, of the seven months before the commencement of the hearing, to incur very significant costs by listening to sound recordings of calls in a database that cannot be searched by content, for possible complaints.

FOR THESE REASONS THE TRIBUNAL ORDERS THAT:

[43] Reliance's motions are dismissed with costs.

DATED at Ottawa, this 13th day of June, 2014.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Donald J. Rennie

APPEARANCES:

For the applicant:

The Commissioner of Competition

Jonathan Hood

For the respondent:

Reliance Comfort Limited Partnership

Brendan Wong
Denes A. Rothschild

For the intervener:

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