CT-2012-002

COMPETITION TRIBUNAL

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.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- AND -

RELIANCE COMFORT LIMITED PARTNERSHIP

Respondent

- AND -

NATIONAL ENERGY CORPORATION

Intervenor

MEMORANDUM OF FACT AND LAW OF THE COMMISSIONER OF COMPETITION TO THE RESPONDENT'S MOTION FOR FURTHER PRODUCTIONS

DEPARTMENT OF JUSTICE CANADA
COMPETITION BUREAU LEGAL SERVICES
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau QC K1A 0C9

Jonathan Hood

Tel: (416) 954-5925
Fax: (416) 973-5131
Jonathan.hood@cb-bc.gc.ca

Counsel to the Commissioner of Competition

PART I OVERVIEW

1. This motion is about whether the Commissioner should spend years, not weeks, and significant resources reviewing audio files that are of only marginal probative value to this Application. This requirement would not be proportionate when weighed against the extensive production on all issues that the Respondent has received, including the issue of whether National Energy Corporation ("**National**") and other competitors have engaged in alleged misleading representations, and the significant discovery still to take place, including the production of the Commissioner's third party summary of information and the examination of the Commissioner's representative.

PART II FACTS

2. In this Application, the Commissioner applies for an order, among other relief, to stop Reliance from abusing its dominant position in the supply of natural gas and electric water heaters and related services to residential consumers in certain local markets in Ontario.

3. The Commissioner claims that Reliance abuses its dominant position by, among other actions, preventing customers from returning Reliance's water heaters and from switching to Reliance's competitors. As a result of Reliance's practice of anti-competitive acts, the Commissioner claims that Reliance has substantially prevented and lessened competition in the relevant markets.

4. The Statement of Grounds and Material Facts details the allegations related to Reliance's conduct. While some of the allegations are referred to below, they are not repeated here.

5. Pursuant to the order of the Tribunal dated 9 December 2013 amending a schedule dated 27 November 2013, the parties were ordered to deliver their affidavits of documents and productions by 28 March 2014.

6. On 28 March 2014, Reliance received from the Commissioner approximately 75,000 records that are relevant to this Application. Of these,

approximately 23,000 are records obtained from the Intervenor, National, including approximately 400 audio files, seized pursuant to the search warrants issued by the Honourable Justice Maranger and the supplemental search warrant issued by Justice Giovanna Toscano-Roccamo (the "**Search Warrants**").[1]

7. On the same day, National produced 69,625 of its own records, of which approximately 1,400 are audio files.[2] Pursuant to the order granting National leave to intervene in this Application, the Respondent will also obtain oral discovery of a National representative.

Evidence of the alleged misleading conduct of door-to-door water heater rental companies already produced in the Application

8. Reliance's own evidence is that National has produced over 2000 records relevant to complaints about National's alleged misleading conduct while National states it is approximately 17,000.[3] These records address a broad range of complaints from customers, including the alleged misleading conduct of door-to-door sales representatives. In addition, National has produced approximately 1,400 recorded telephone conversations with customers and prospective customers.[4] Reliance admits that approximately 10% of these (or about 140 audio files) involve customer complaints.[5]

9. The audio files already produced, as National's affiant explains, are from complaints that were escalated to National's Corporate and Consumer Relations Department. The uncontested evidence from National is that these are the audio files in its possession that are most probative to the issue of the alleged misleading conduct.[6]

10. Reliance has also received relevant National records from the Commissioner. The set of records received from the Commissioner is a smaller subset that is predominantly, if not entirely, duplicative of the records received from National

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[1] Affidavit of David Harding dated 28 March 2014, Reliance Motion Record, Tab 2, Exhibit G.
[2] Affidavit of Gord Potter dated 26 March 2014, Reliance Motion Record, Tab 2, Exhibit J.
[3] Supplemental Affidavit of Patrick Johnston affirmed 26 May 2014, Supplementary Motion Record of Reliance, Tab 2, para. 4 (the "**Supplementary Johnston Affidavit**"). Affidavit of Ash Rajendra sworn 22 May 2014, Responding Motion Record of the Intervenor, National Energy Corporation, Tab 1, para. 13. (the "**Rajendra Affidavit**").
[4] Rajendra Affidavit, para. 14.
[5] Affidavit of Patrick Johnston affirmed 9 May 2014, Tab 2, para. 18 (the "**Johnston Affidavit**").
[6] Rajendra Affidavit, paras. 14-15.

because all of National's records were not seized during execution of the Search Warrants.[7] Reliance has reviewed a sample of the approximately 400 National audio files produced by the Commissioner and again admits that approximately 10% of these relate to customer complaints.[8]

11. Consistent with Tribunal guidance, the Respondent will also receive a third party summary of information prior to discovery of the Commissioner's representative. The third party summary will contain information that informs the Respondent about the facts the Commissioner has gathered during his investigation. This summary contains information, including any information about the alleged misleading conduct of Reliance's competitors, both favourable and adverse to the Commissioner's case.

12. In addition to the significant number of records already received from National and the Commissioner, Reliance has in its possession a large number of records relevant to the alleged misleading conduct.

13. The affidavit of Patrick Johnston dated 9 May 2014, sworn in support of Reliance's motion, attaches as an exhibit a six resident complaint initiated against National, morEnergy Services Inc. ("**morEnergy**") and Ontario Consumers Home Services ("**OCHS**"), alleging that they were engaged in misleading door-to-door sales of residential water heater rental contracts.[9]

14. A Preliminary Submission filed by Reliance's counsel in support of the six resident complaint describes the alleged widespread misleading sales and marketing tactics. It attaches more than 100 examples of complaints against National and morEnergy. As the Preliminary Submission states, "the examples contained in this Preliminary Submission are merely a sampling of the reported incidents".[10]

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[7] Johnston Affidavit, para. 13.
[8] *Ibid.*
[9] Johnston Affidavit, Exhibit "A".
[10] Johnston Affidavit, Exhibit "B", p. 32, para. 13.

15. A mere sampling it was as Reliance has also produced approximately 8,000 records in its affidavit of documents under the category *Documents Relating to Misleading Marketing and Sales Tactics by Reliance's Competitors.*[11]

It would take the Commissioner years and significant resources to conduct a review of the audio files

16. Despite production of thousands of records by National, the Commissioner and Reliance related to the alleged misleading conduct, the Respondent seeks to have the Commissioner review all the audio files seized pursuant to the Search Warrants.

17. If the Commissioner was ordered to review the seized audio files he could not follow the same process as Reliance because of the terms of the Search Warrants. Pursuant to section 6.4 of the Search Warrants, electronic evidence must remain under the control of electronic evidence officers, or anyone under their direction (collectively "**Electronic Evidence Officers**"), until that evidence has been reviewed to ensure that privileged records and records not captured by the Search Warrants are not improperly distributed to anyone else.

18. Reliance filtered its call database and produced approximately 360,000 audio files that were in two queues where the vast majority of Removal Reference Numbers were issued. While Reliance produced all of these audio files because it believes the audio files are relevant, Reliance did not review each audio file. Instead it reviewed "at least a portion of approximately 70,000" recordings.[12] The Commissioner cannot simply assume that audio files are relevant; the Electronic Evidence 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.

19. Of course, the Commissioner cannot easily undertake the first step of applying the filtering mechanism to the National, morEnergy and OCHS audio files in the same way that Reliance did because the Commissioner does not have the same knowledge about how the audio files of National, morEnergy and OCHS are organized and kept. For example, until this motion, the Commissioner did not know that calls

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[11] Answers to undertakings from the cross examination of Patrick Johnston held 26 May 2014.
[12] Johnston Affidavit, para. 27.

National received went into one of two queues or that complaint calls would go to one of 50 employees.[13]

20. The second step in Reliance's review was to retain an external phonetic search software provider to assist in reviewing the subset of recordings for those relevant to the issues set out in the pleadings. This allowed Reliance to identify the approximately 70,000 sound recordings of which at least a portion, not all, was manually reviewed.

21. At this time, the Competition Bureau's Electronic Evidence Unit does not have software capable of conducting a phonetic search of sound recordings. The process to acquire and then deploy such a program could take up to a year. In addition to conducing a competitive government process to purchase such software, extensive research before and after the purchase is necessary in order to select the appropriate commercially available program, determine the program's effectiveness and, most importantly, determine the program's effects and interactions with the Forensic Software used by the Electronic Evidence Unit.[14]

22. To put in place and follow a process similar to that used by Reliance to review and produce audio files would not take the Commissioner fifteen weeks. Rather, it would take years and significant resources, all to review files that are of marginal probative value on an issue that Reliance has already obtained and will obtain significant discovery.

PART III ISSUE IN DISPUTE

23. Applying the principle of proportionality, the issue to be determined in this motion is whether the Commissioner should be compelled to spend significant time and resources reviewing audio files that are of marginal probative value to this Application.

PART IV SUBMISSIONS

24. The importance of applying the principle of proportionality to litigation has been affirmed by courts at all levels. As the Supreme Court of Canada has said:

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[13] Answers to undertakings from the cross examination of Ash Rajendra held 28 May 2014.
[14] Affidavit of Jeffrey S. Chamberlain sworn 23 May 2014, Response of the Commissioner of Competition to the Respondent's Motion for Further Productions, Tab 2, para. 6 ("**Chamberlain Affidavit**").

> A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible – proportionate, timely, and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.[15]

25. The principle of proportionality is also captured in subsection 9(2) of the *Competition Tribunal Act,*[16] which states that all proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

26. This is consistent with the direction given by this Tribunal on 17 December 2013:

> To conclude, the Tribunal reminds counsel that while relevancy is a broad term, it is informed by the principles of proportionality. Some documents, while tangentially relevant on some theory or construct of the case, are of absolutely no probative value in the resolution of the ultimate issues before the Tribunal. Additionally, even if one document is relevant, it does not necessarily follow that several hundred documents to the same effect are also relevant.[17]

27. Applying the principle of proportionality to this motion, the Commissioner should not be required to spend years and significant resources reviewing audio files for information that is of marginal probative value to this Application.

The issue of the alleged misleading conduct of competitors is not important to the Application

28. Contrary to Reliance's submissions, the Commissioner's Application is simple. The allegation is that Reliance has abused its dominant position by engaging in a practice of anticompetitive acts, namely its exclusionary water heater return policies and procedures, which have caused a substantial lessening and prevention of competition. As demonstrated by the Statement of Grounds and Material Facts, the Commissioner's application is straight forward. It does not involve a novel interpretation of section 79 of the *Competition Act.*

29. The audio files are relevant only to whether Reliance has a valid business justification for engaging in its exclusionary conduct. However, the Commissioner's

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[15] *Hryniak v. Mauldin,* 2014 SCC 7, para. 28. (**Tab 1**)
[16] R.S.C. 1985, c. 19 (2nd Supp.), as am. (**Tab 2**)
[17] Direction by Rennie J. dated 17 December 2013. (**Tab 3**)

position is that the alleged misleading conduct of others can never be a legitimate business justification. In arguing that Reliance's conduct is 'procompetitive' and 'efficiency' enhancing, Reliance ignores the clear statement from the Federal Court of Appeal in *Canada Pipe* that:

> **improved consumer welfare on its own is insufficient to establish a valid business justification** for the purposes of paragraph 79(1)(b). A valid business justification must provide a credible efficiency or pro-competitive explanation, **unrelated to an anticompetitive purpose.**[18] [emphasis added]

30. As the Commissioner's position is that the alleged misleading conduct of others can never be a legitimate business justification, whether the alleged misleading conduct is occurring is not important to this Application. In fact, the Commissioner continues to have reason to believe that the alleged misleading conduct has and (in some instances) continues to occur within the provinces of Ontario and Quebec as stated in the Information to Obtain of Dawn-Marie Jamieson.[19]

31. Reliance's insistence that this is an important issue also stems from its apparent belief that it is litigating this Application against National. There are several references throughout its factum to the fact that National has strongly denied the alleged misleading conduct in 'the parallel' civil litigation, the pleadings for which Reliance has filed in support of this motion. While this might be an important issue in Reliance's litigation with National, it is not an important issue in the Application commenced by the Commissioner.

Reliance does not need additional audio files to prove the allegedly misleading conduct of its competitors

32. Even if the alleged misleading conduct is important to the Application, which is denied, Reliance has received significant discovery on this issue and also has its own evidence.

33. Reliance admits that National has already provided hundreds of sound recordings that are probative to the issue of the alleged misleading conduct. The Commissioner also accepts that a further review of the audio files would likely result in additional examples of customers calling Reliance's competitors to complain. However,

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[18] *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233, para. 90. (**Tab 4**)
[19] Johnston Affidavit, Exhibit "D".

it does not follow that the Tribunal will benefit from receiving additional examples, even if it is thousands, when it already has hundreds that could be submitted by Reliance into evidence.

34. The alleged misleading conduct by competitors is not just proved by customer phone calls alone, but also through internal emails, notes of meetings, and other non-audio records. Aside from the audio files, Reliance has received and will continue to receive production of the relevant documents and disclosure of the information on the issue of the alleged misleading conduct in the Commissioner's possession through the third party summary.

35. Reliance does not even need the records it has received on discovery or the information it will receive in the Commissioner's third party summary to prove that National has engaged in the allegedly misleading conduct. It is clear from the Preliminary Submissions made in support of the six resident complaint that Reliance has a trove of its own evidence, presumably contained in the approximately 8,000 records relevant to this issue listed in its own affidavit of documents, that Reliance will file at the hearing.

36. On the issue of the alleged misleading conduct, thousands of records have already been produced. Only a fraction of these records, likely the most probative audio files already produced, will actually be introduced into evidence at the hearing.

The audio files are of marginal probative value

37. The audio files are of marginal probative value and are ***only*** relevant to assessing the alleged misleading conduct of door-to-door water heater sales companies.

38. The Respondent has reviewed a sample of the 1,400 audio files produced by National. The Respondent admits that three of the categories of audio files, namely (a) verification calls, (b) cold calls, and (c) a mixture of U.S. based calls, hang ups, call backs, and wrong numbers, are not customer complaints and suggests that such records are not relevant to this Application.

39. The marginal probative value of the audio files is also demonstrated by the absence of a similar motion by Direct Energy Marketing Limited ("**Direct Energy**") to compel the Commissioner or National to review the audio files seized pursuant to the Search Warrants in the proceedings against Direct Energy. The application against Direct Energy was filed the same day as the application against Reliance and contains similar allegations. National has been granted leave to intervene in that application on the same terms. Direct Energy received the same productions from both the Commissioner and National.

An order requiring the Commissioner to review the audio files will unnecessarily delay this Application and is unnecessarily burdensome

40. Contrary to Reliance's submissions, an order to review the audio files, even if it is just a sampling of the audio files, will significantly delay the Application. As described above, the Commissioner cannot simply produce a filtered sample as Reliance has done due to the provisions of the Search Warrants. The Commissioner must manually review every minute of every audio file seized pursuant to the Search Warrants before it can even be reviewed for relevance.

41. When the Commissioner did filter the audio files to those that were more than 2 minutes and less than 15 minutes, a time filter that is even more restrictive than the time filter applied by Reliance, the audio files would still take over 8 years for one Competition Law Officer to review.[20]

42. In addition to the filters though, the reasonable search that Reliance would have the Commissioner conduct requires acquiring phonetic search software, a process that will take up to a year. This is in addition to the time it would take to review any filtered subset of the audio files.

43. Requiring the Commissioner to devote significant additional resources to this review is unduly burdensome. The Commissioner has already devoted and will continue to devote significant resources to this Application. However, the Commissioner does not have unlimited funds. As he recently stated, "we in the public sector are

[20] Chamberlain Affidavit, para. 5.

operating in a culture of austerity – one in which we are continually expected to do more with less."[21]

44. Through the productions already received, the third party summary of information, and discovery of National and the Commissioner's representatives, the Respondent will obtain significant discovery on all issues in dispute. In these circumstances, applying the principle of proportionality, it is clear that Reliance's request for production of additional audio files would only serve to significantly delay this proceeding and add considerable cost to the parties to produce information that is of marginal probative value to the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED AT GATINEAU, QUEBEC, this 30th day of May, 2014.

SIGNED BY:

Jonathan Hood

Jonathan Hood

Counsel to the Commissioner of Competition

[21] Written Remarks of John Pecman, Commissioner of Competition, prepared for the 2014 Competition Law Spring Forum. (**Tab 5**)

TO: **Reliance Comfort Limited Partnership**

BORDEN LADNER GERVAIS LLP
Barristers and Solicitors
Scotia Plaza, 40 King Street West
Toronto, Ontario M5H 3Y4
Robert S. Russell
Tel: (416) 367-6256/Fax: (416) 361-7060

Brendan Wong
Tel: (416) 367-6256/Fax: (416) 361-7060

AND TO: **National Energy Corporation**

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto, Ontario
M5V 3J7

Adam Fanaki
Tel: (416) 863-5564
Fax: (416) 863-0871

Tab	Authorities
1.	*Hryniak v. Mauldin*, 2014 SCC 7
2.	*Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), as am, subsection 9(2)
3.	Direction by Rennie J. dated 17 December 2013
4.	*Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233
5.	Written Remarks of John Pecman, Commissioner of Competition, prepared for the 2014 Competition Law Spring Forum

TAB 1

SUPREME COURT OF CANADA

CITATION: Hryniak *v.* Mauldin, 2014 SCC 7

DATE: 20140123
DOCKET: 34641

BETWEEN:

Robert Hryniak
Appellant
and
Fred Mauldin, Dan Myers, Robert Blomberg, Theodore Landkammer, Lloyd Chelli, Stephen Yee, Marvin Cleair, Carolyn Cleair, Richard Hanna, Douglas Laird, Charles Ivans, Lyn White and Athena Smith
Respondents
- and -
Ontario Trial Lawyers Association and Canadian Bar Association
Interveners

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT: (paras. 1 to 96)
Karakatsanis J. (McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell and Wagner JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

Robert Hryniak *Appellant*

v.

Fred Mauldin, Dan Myers, Robert Blomberg, Theodore Landkammer, Lloyd Chelli, Stephen Yee, Marvin Cleair, Carolyn Cleair, Richard Hanna, Douglas Laird, Charles Ivans, Lyn White and Athena Smith *Respondents*

and

Ontario Trial Lawyers Association and Canadian Bar Association *Interveners*

Indexed as: Hryniak *v.* Mauldin

2014 SCC 7

File No.: 34641.

2013: March 26; 2014: January 23.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Civil Procedure — Summary Judgment — Investors bringing action in civil fraud and subsequently bringing a motion for summary judgment — Motion judge granting summary judgment — Purpose of summary judgment motions — Access to Justice — Proportionality — Interpretation of recent amendments to Ontario Rules of Civil Procedure — Trial management orders — Standard of review for summary judgment motions — Whether motion judge erred in granting summary judgment — Rules of Civil Procedure, R.R.O. 1990, Reg. 194, Rule 20.

In June 2001, two representatives of a group of American investors met with H and others to discuss an investment opportunity. The group wired US$1.2 million, which was pooled with other funds and transferred to H's company, Tropos. A few months later, Tropos forwarded more than US$10 million to an offshore bank and the money disappeared. The investors brought an action for civil fraud against H and others and subsequently brought a motion for summary judgment. The motion judge used his powers under Rule 20.04(2.1) of the *Ontario Rules of Civil Procedure* (amended in 2010) to weigh the evidence, evaluate credibility, and draw inferences. He concluded that a trial was not required against H. Despite concluding that this case was not an appropriate candidate for summary judgment, the Court of Appeal was satisfied that the record supported the finding that H had committed the tort of civil fraud against the investors, and therefore dismissed H's appeal.

Held: The appeal should be dismissed.

Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised. However, undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

A shift in culture is required. The proportionality principle is now reflected in many of the provinces' rules and can act as a touchstone for access to civil justice. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure. Summary judgment motions provide an opportunity to simplify pre-trial procedures and move the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. Summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

Rule 20 was amended in 2010 to improve access to justice. These reforms embody the evolution of summary judgment rules from highly restricted tools used to weed out clearly unmeritorious claims or defences to their current status as a legitimate alternative means for adjudicating and resolving legal disputes. They offer significant new tools to judges, which allow them to adjudicate more cases through summary judgment motions and attenuate the risks when such motions do not resolve the entire case. The new powers in rules 20.04(2.1) and (2.2) expand the

number of cases in which there will be no genuine issue requiring a trial by permitting motion judges to weigh evidence, evaluate credibility and draw reasonable inferences.

Summary judgment motions must be granted whenever there is no genuine issue requiring a trial. There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when 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 proportionate, more expeditious and less expensive means to achieve a just result.

The new fact-finding powers granted to motion judges in Rule 20.04 may be employed on a motion for summary judgment unless it is in the interest of justice for them to be exercised only at trial. When the use of the new powers would enable a judge to fairly and justly adjudicate a claim, it will generally not be against the interest of justice to do so. The power to hear oral evidence should be employed when it allows the judge to reach a fair and just adjudication on the merits and it is the proportionate course of action. While this is more likely to be the case when the oral evidence required is limited, there will be cases where extensive oral evidence can be heard. Where a party seeks to lead oral evidence, it should be prepared to demonstrate why such evidence would assist the motion judge and to provide a description of the proposed evidence so that the judge will have a basis for setting the scope of the oral evidence.

On a motion for summary judgment under Rule 20.04, the judge should first determine if there is a genuine issue requiring trial based only on the evidence before her, *without* using the new fact-finding powers. There will be no genuine issue requiring a trial if the summary judgment process provides her with the evidence required to fairly and justly adjudicate the dispute and is a timely, affordable and proportionate procedure, under rule 20.04(2)(a). If there appears to be a genuine issue requiring a trial, she should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole.

Failed, or even partially successful, summary judgment motions add to costs and delay. This risk can be attenuated by a judge who makes use of the trial management powers provided in Rule 20.05 and the court's inherent jurisdiction. These powers allow the judge to use the insight she gained from hearing the summary judgment motion to craft a trial procedure that will resolve the dispute in a way that is sensitive to the complexity and importance of the issue, the amount involved in the case, and the effort expended on the failed motion. Where a motion judge dismisses a motion for summary judgment, in the absence of compelling reasons to the contrary, she should also seize herself of the matter as the trial judge.

Absent an error of law, the exercise of powers under the new summary judgment rule attracts deference. When the motion judge exercises her new fact-finding powers under Rule 20.04(2.1) and determines whether there is a genuine issue requiring a trial, this is a question of mixed fact and law which should not be overturned, absent palpable and overriding error. Similarly, the determination of whether it is in the interest of justice for the motion judge to exercise the new fact-finding powers provided by Rule 20.04(2.1) is also a question of mixed fact and law which attracts deference.

The motion judge did not err in granting summary judgment in the present case. The tort of civil fraud has four elements, which must be proven on a balance of probabilities: (1) a false representation by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether knowledge or recklessness); (3) the false representation caused the plaintiff to act; (4) the plaintiff's actions resulted in a loss. In granting summary judgment to the group against H, the motion judge did not explicitly address the correct test for civil fraud but his findings are sufficient to make out the cause of action. The motion judge found no credible evidence to support H's claim that he was a legitimate trader, and the outcome was therefore clear, so the motion judge concluded there was no issue requiring a trial. It was neither against the interest of justice for the motion judge to use his fact-finding powers nor was his discretionary decision to do so tainted with error.

Cases Cited

Referred to: *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Medicine Shoppe Canada Inc. v. Devchand*, 2012 ABQB 375, 541 A.R. 312; *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, 297 N.S.R. (2d) 371; *Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311; *Bal Global Finance Canada Corp. v. Aliments Breton (Canada) inc.*, 2010 QCCS 325 (CanLII); *Vaughan v. Warner Communications, Inc.* (1986), 56 O.R. (2d) 242; *Canada (Attorney General) v. Lameman*, 2008 SCC 14, [2008] 1 S.C.R. 372; *Aguonie v. Galion Solid Waste Material Inc.* (1998), 38 O.R. (3d) 161; *Dawson v. Rexcraft Storage and Warehouse Inc.* (1998), 164 D.L.R. (4th) 257; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

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Code of Civil Procedure, R.S.Q., c. C-25, arts. 4.2, 54.1 *et seq.*, 165(4).

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APPEAL from a judgment of the Ontario Court of Appeal (Winkler C.J.O. and Laskin, Sharpe, Armstrong and Rouleau JJ.A.), 2011 ONCA 764, 108 O.R. (3d) 1, 286 O.A.C. 3, 97 C.C.E.L. (3d) 25, 14 C.P.C. (7th) 242, 13 R.P.R. (5th) 167, 93 B.L.R. (4th) 1, 344 D.L.R. (4th) 193, 10 C.L.R. (4th) 17, [2011] O.J. No. 5431 (QL), 2011 CarswellOnt 13515 (*sub nom. Combined Air Mechanical Services Inc. v. Flesch*), affirming a decision of Grace J., 2010 ONSC 5490, [2010] O.J. No. 4661 (QL), 2010 CarswellOnt 8325. Appeal dismissed.

Sarit E. Batner, *Brandon Kain* and *Moya J. Graham*, for the appellant.

Javad Heydary, *Jeffrey D. Landmann*, *David K. Alderson*, *Michelle Jackson* and *Jonathan A. Odumeru*, for the respondents.

Allan Rouben and Ronald P. Bohm, for the intervener the Ontario Trial Lawyers Association.

Paul R. Sweeny and David Sterns, for the intervener the Canadian Bar Association.

and the interpretation of Rule 20 in particular. I will then address specific judicial tools for managing the risks of summary judgment motions.

[22] Finally, I will consider the appropriate standard of review and whether summary judgment should have been granted to the respondents.

IV. Analysis

A. *Access to Civil Justice: A Necessary Culture Shift*

[23] This appeal concerns the values and choices underlying our civil justice system, and the ability of ordinary Canadians to access that justice. Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.

[24] However, undue process and protracted trials, with unnecessary expense and delay, can *prevent* the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available,[1] ordinary Canadians cannot afford to access the adjudication of civil disputes.[2] The

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[1] For instance, state funding is available in the child welfare context under *G. (J.)* orders even where legal aid is not available (see *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, or for cases involving certain minority rights (see the Language Rights Support Program).

[2] In M. D. Agrast, J. C. Botero and A. Ponce, the 2011 *Rule of Law Index*, published by the World Justice Project, Canada ranked 9th among 12 European and North American countries in access to justice. Although Canada scored among the top ten countries in the world in four rule of law categories (limited government powers, order and security, open government, and effective criminal justice), its lowest scores were in access to civil justice. This ranking is "partially explained by

cost and delay associated with the traditional process means that, as counsel for the intervener the Advocates' Society (in *Bruno Appliance*) stated at the hearing of this appeal, the trial process denies ordinary people the opportunity to have adjudication. And while going to trial has long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative.

[25] Prompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great, people look for alternatives or simply give up on justice. Sometimes, they choose to represent themselves, often creating further problems due to their lack of familiarity with the law.

[26] In some circles, private arbitration is increasingly seen as an alternative to a slow judicial process. But private arbitration is not the solution since, without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined.

[27] There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for

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shortcomings in the affordability of legal advice and representation, and the lengthy duration of civil cases" (p. 23).

adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.

[28] This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

[29] There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

[30] The proportionality principle is now reflected in many of the provinces' rules and can act as a touchstone for access to civil justice.[3] For example, Ontario Rules 1.04(1) and 1.04(1.1) provide:

> **1.04** (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> **1.04** (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

[31] Even where proportionality is not specifically codified, applying rules of court that involve discretion "includes . . . an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation" (*Szeto v. Dwyer*, 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311, at para. 53).

[32] This culture shift requires judges to actively manage the legal process in line with the principle of proportionality. While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. While judges can and should play a role in controlling such risks, counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice.

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[3] This principle has been expressly codified in British Columbia, Ontario, and Quebec: *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rule 1-3(2); *Ontario Rules*, Rule 1.04(1.1); and *Code of Civil Procedure*, R.S.Q., c. C-25, art. 4.2. Aspects of Alberta's and Nova Scotia's rules of court have also been interpreted as reflecting proportionality: *Medicine Shoppe Canada Inc. v. Devchand*, 2012 ABQB 375, 541 A.R. 312, at para. 11; *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, 297 N.S.R. (2d) 371, at para. 12.

Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.

[33] A complex claim may involve an extensive record and a significant commitment of time and expense. However, proportionality is inevitably comparative; even slow and expensive procedures can be proportionate when they are the fastest and most efficient alternative. The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication.

B. *Summary Judgment Motions*

[34] The summary judgment motion is an important tool for enhancing access to justice because it can provide a cheaper, faster alternative to a full trial. With the exception of Quebec, all provinces feature a summary judgment mechanism in their respective rules of civil procedure.[4] Generally, summary judgment is available where there is no genuine issue for trial.

[35] Rule 20 is Ontario's summary judgment procedure, under which a party may move for summary judgment to grant or dismiss all or part of a claim. While, Ontario's Rule 20 in some ways goes further than other rules throughout the country, the values and principles underlying its interpretation are of general application.

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[4] Quebec has a procedural device for disposing of abusive claims summarily: see arts. 54.1 ff of the *Code of Civil Procedure*. While this procedural device is narrower on its face, it has been likened to summary judgment: see *Bal Global Finance Canada Corp. v. Aliments Breton (Canada) inc.*, 2010 QCCS 325 (CanLII). Moreover, s. 165(4) of the Code provides that the defendant may ask for an action to be dismissed if the suit is "unfounded in law".

TAB 2

Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.), as am, subsection 9(2)

9. (1) The Tribunal is a court of record and shall have an official seal which shall be judicially noticed.

Proceedings

(2) All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.

Interventions by persons affected

(3) Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the *Competition Act*, to make representations relevant to those proceedings in respect of any matter that affects that person.

Summary dispositions

(4) On a motion from a party to an application made under Part VII.1 or VIII of the *Competition Act*, a judicial member may hear and determine the application in a summary way, in accordance with any rules on summary dispositions.

Decision

(5) The judicial member may dismiss the application in whole or in part if the member finds that there is no genuine basis for it. The member may allow the application in whole or in part if satisfied that there is no genuine basis for the response to it.

TAB 3

Competition Tribunal Tribunal de la Concurrence

Date: December 17, 2013

Subject: **CT-2012-003** - Commissioner of Competition and Direct Energy Marketing Limited and National Energy Corporation

CT-2012-002 - Commissioner of Competition and Reliance Comfort Limited Partnership and National Energy Corporation

Direction by Rennie J. (Chairperson)

The Tribunal acknowledges receipt of correspondence, between December 11 and December 16, 2013, from counsel for the Commissioner and counsel for the Respondent Reliance and the Respondent Direct Energy and issues the following direction:

[1] The Respondents, through these communications, seek to put in issue the Commissioner's obligation to produce documents in its possession which it has obtained from a third party. This is not an issue. The Commissioner has an obligation to produce third party documents in his possession, and concedes as much. Having reviewed the correspondence, I have concluded that the Respondents have conflated the obligation to produce documents with the means or mechanisms by which the Commissioner proposes to discharge that obligation.

[2] In this case, the third party is National. National has been granted broad rights of intervention in these proceedings and is subject to independent discovery obligations. While National's discovery obligations are broad, they are not necessarily co-extensive with those of the Commissioner. There may be some documents which National

will not produce, but which are in the possession of the Commissioner. At this point, however, this is conjecture.

[3] All parties are under an obligation to produce an affidavit of documents under Rule 60. How that obligation is satisfied is up to counsel. As a practical matter, counsel may satisfy the requirements by use of an agent, a document management firm, paralegals, through the client, or through counsel or associates. At the end of the day, the adequacy of the affidavit stands or falls on the mechanisms used to ensure that all relevant documents are produced. In mega litigation, for example, software may be used to troll data bases and extract documents, in which case the adequacy of that software may be an issue. Ultimately, it is the adequacy of the process used to ensure that the discovery obligation is met. The Rules are not prescriptive as to how a party puts itself in a position to swear an affidavit, and the Tribunal will not preclude a party from using any particular means to support it as it prepares an affidavit for discovery, nor will it, at this stage, prescribe that a party use any particular search methodology. Should they use a legal agent or a third party, it is the mandate they give, together with the search and relevancy criteria, that is relevant. If a party thinks the affidavit of documents is, at the end of the day, deficient, it can challenge the affidavit.

[4] To conclude, the Tribunal reminds counsel that while relevancy is a broad term, it is informed by the principles of proportionality. Some documents, while tangentially relevant on some theory or construct of the case, are of absolutely no probative value in the resolution of the ultimate issues before the Tribunal. Additionally, even if one document is

relevant, it does not necessarily follow that several hundred documents to the same effect are also relevant.

[5] With respect to the purported 800,000 documents in the possession of both National and the Commissioner that are said to be relevant, counsel should consider reaching an agreement with respect to broad categories to determine whether they are in fact worthy of review or production. Ten thousand documents, each of which makes the same point, are of little assistance to the Tribunal, or the parties, when the matter comes to a hearing.

[6] Insofar as production of duplicates of documents are concerned, namely, where the same document is in the possession of both the Commissioner and National, the Tribunal would have regard to subsection 9(2) of *Competition Tribunal Act* (RSC, 1985, c 19).

Joseph (Jos) LaRose
Deputy Registrar / Registraire adjoint
Competition Tribunal / Tribunal de la concurrence
600-90 Sparks, Ottawa ON K1P 5B4
Tel.: 613-954-0857 Fax: 613-952-1123

TAB 4

A-106-05

2006 FCA 233

Commissioner of Competition (*Appellant*)

v.

Canada Pipe Company Ltd./Tuyauteries Canada Ltée (*Respondent*)

INDEXED AS: CANADA (COMMISSIONER OF COMPETITION) v. CANADA PIPE CO. (F.C.A.)

Federal Court of Appeal, Desjardins, Létourneau and Pelletier JJ.A.—Ottawa, February 7, 9 and June 23, 2006.

Competition — Appeal from Competition Tribunal's decision dismissing application by Competition Commissioner for order prohibiting respondent from engaging in certain acts, practices — Respondent offering loyalty rebate program — Appellant arguing this program constituting practice of exclusive dealing (Competition Act, s. 77(2)), anti-competitive acts leading to abuse of dominant position (Act, s. 79(1)) — Appeal allowed — With respect to abuse of dominant position, Tribunal erring as to test applicable under s. 79(1)(c) — Tribunal conducted analysis from narrow, absolute perspective of whether program prevented entry, competition when should have addressed whether competitiveness substantially lessened in presence of program — Tribunal also wrong to say s. 79(1)(b) (engaging in anti-competitive acts) requiring causal link between impugned act and decrease in competition — S. 79(1)(b) concerning narrower focus of impugned act's effects on competitors — Valid business justification for impugned act not established — As to question of exclusive dealing, Tribunal adopting same approach as under s. 79(1) — As such, findings re: errors of law made under s. 79(1) also applying under s. 77(2).

This was an appeal from a decision of the Competition Tribunal dismissing an application by the Commissioner of Competition (Commissioner) under sections 77 and 79 of the *Competition Act* for an order prohibiting the respondent (Canada Pipe) from engaging in the practice of anti-competitive acts leading to an abuse of dominant position (section 79), and prohibiting the respondent from continuing to engage in the practice of exclusive dealing (section 77).

The conduct at issue was a loyalty rebate program offered by the respondent (the Stocking Distributor Program or SDP). Under this program, distributors of the respondent's cast iron drain, waste and vent (DWV) products obtained significant rebates and discounts in return for stocking only cast iron products produced by the respondent. The Commissioner argued that the SDP constituted both a practice of exclusive dealing with exclusionary effects and a practice of anti-competitive acts, and was likely to have the effect of substantially lessening competition in the markets for DWV products by impeding the entry and expansion of competitors.

In dismissing the Commissioner's application, the Tribunal found that the requisite elements for the order requested were not met. The SDP did not qualify as an "anti-competitive act" (paragraph 79(1)(*b*)), the SDP had not substantially lessened or prevented competition (paragraph 79(1)(*c*)), and finally, while the SDP could be characterized as a practice of exclusive dealing, there was insufficient evidence to establish that it had impeded entry into or expansion of firms in a market, that it was having any other exclusionary effect on the market, or that it had caused or was likely to cause a substantial lessening of competition (subsection 77(2)).

Held, the appeal should be allowed.

On the question of abuse of dominant position, the Tribunal erred in law with respect to the legal test applicable under paragraph 79(1)(*c*). Pararaph 79(1)(*c*) permits the Tribunal to make an order prohibiting a practice which it finds "has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market." In order to achieve the inquiry dictated by the statutory language of paragraph 79(1)(*c*), the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the

absence of the practice, and then determine whether the preventing or lessening of competition, if any, is "substantial". This comparison must be done with reference to actual effects in the past and present, as well as likely future effects. One correct approach (but not necessarily the only correct one) is for the Tribunal to ask itself the following question: Would the relevant markets—in the past, present or future—be substantially more competitive but for the impugned practice of anti-competitive acts (the "but for" test)? This legal test reflects the plain meaning of the statutory language of paragraph 79(1)(*c*) and corresponds to the Tribunal's analysis in its previous decisions with respect to this provision. In the case at bar, the Tribunal's analysis was conducted from the narrow, absolute perspective of whether the SDP prevented entry and whether competition subsisted in its presence, when it should have turned its mind to the question of whether, in each of the relevant markets, competitiveness was substantially lessened in the presence of the SDP, as compared to the likely state of competition in the absence of this practice.

The second issue with respect to the question of abuse of dominant position was whether the Tribunal erred in concluding that the SDP did not constitute an "anti-competitive act" as required by paragraph 79(1)(*b*) before a prohibition order may issue. An anti-competitive act is identified by reference to its purpose. This requisite purpose is an intended, exclusionary or disciplinary negative effect on a competitor. As such, the paragraph 79(1)(*b*) inquiry is focused upon the intended effects of the act on a competitor. Relevant factors to be considered and weighed to determine the purpose of the impugned conduct include the reasonably foreseeable or expected objective effects of the act, any business justification, and any evidence of subjective intent. The Tribunal misdirected itself as to the applicable legal test and considered irrelevant factors in making its paragraph 79(1)(*b*) determination. The Tribunal's erroneous interpretation played a significant role in its analysis of the SDP. As such, it committed a reversible error of law. Particularly, it erred in requiring a causal link between the impugned act and a decrease in competition. Paragraph 79(1)(*b*) simply concerns whether the act displays the requisite intended effect on competitors; it is not directly concerned with the state of competition in the market or the general causes thereof. The Tribunal thus conflated the legal test for paragraph 79(1)(*c*) (which concerns the broader state of competition) with that applicable for paragraph 79(1)(*b*) (which focuses on the impugned act's effects on competitors). The Tribunal was also wrong to suggest that "detriment to the consumer" is an independently relevant consideration for the purposes of that paragraph. Finally, there was no valid business justification in the case at bar. Such a justification is properly relevant only in so far as it is pertinent and probative in relation to the determination required by paragraph 79(1)(*b*), i.e. whether the purpose for which the act was performed was a predatory, exclusionary or disciplinary negative effect on a competitor. It is properly employed to counterbalance or neutralize other evidence of an anti-competitive purpose, prior to making a determination under paragraph 79(1)(*b*), and must provide a credible efficiency or pro-competitive explanation, unrelated to an anti-competitive purpose, for why the dominant firm engaged in the conduct alleged to be anti-competitive. Here the justification was that the SDP makes possible the high-volume sales necessary to enable the respondent to maintain a full line of products. The Tribunal's reasons did not establish the requisite efficiency-related link between the SDP and the respondent, and hence did not supply a legitimate explanation for the latter's choice to engage in the impugned conduct, unrelated to an anti-competitive purpose. Self-interest was the only justification for the SDP. The Tribunal thus erred in concluding that the respondent had established a valid business justification for the SDP.

On the question of exclusive dealing (Act, subsection 77(2)), the first issue was whether the Tribunal erred in its determination with respect to whether the SDP had the result that competition was or was likely to be lessened substantially. Because of the parallel structure and logic between the requisite statutory elements for exclusive dealing under subsection 77(2) and abuse of dominant position under subsection 79(1), the parties simply referred the Court to their arguments in the context of subsection 79(1). Although the two subsections contain some differences in wording, it was not necessary to consider these differences in the present instance. To the extent that the Tribunal erred in law in the context of paragraph 79(1)(*c*) in its interpretation of the test for substantial lessening of competition, the same errors of law applied with respect to subsection 77(2). The same could be said with respect to whether the Tribunal erred in its conclusion that the SDP was not likely to impede entry or expansion of a firm or a product in a market or have any other exclusionary effect in a market. The Tribunal's analysis of the evidence concerning barriers to entry and the effects of the SDP was conducted from the narrow perspective of prevention, and not the broader perspective implied by the word "impede", and as such constituted a reversible error.

statutes and regulations judicially
considered

Competition Act, R.S.C., 1985, c. C-34, ss. 1 (as am. by R.S.C., 1985 (2nd Supp.), c. 19, s. 19), 1.1 (as enacted *idem*), 77 (as am. *idem*, s. 45; S.C. 1999, c. 2, ss. 23, 37(*y*); c. 31, s. 52(F); 2002 c. 16, ss. 11.2, 11.3), 78 (as enacted by R.S.C., 1985 (2nd Supp.), c. 19, s. 45; S.C. 2000, c. 15, s. 13), 79 (as enacted by R.S.C., 1985 (2nd Supp.), c. 19, s. 45; S.C. 1990, c. 37, s. 31; 1999, c. 2, s. 37(*z*); 2002, c. 16, s. 11.4), 96 (as enacted by R.S.C., 1985 (2nd Supp.), c. 19, s. 45).

cases judicially considered

applied:

Canada (Director of Investigation and Research) v. NutraSweet Co. (1990), 32 C.P.R. (3d) 1 (Comp. Trib.); *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; (1997), 144 D.L.R. (4th) 1; 50 Admin. L.R. (2d) 199; 71 C.P.R. (3d) 417; 209 N.R. 20; *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2001] 3 F.C. 185; (2001), 199 D.L.R. (4th) 130; 11 C.P.R. (4th) 289; 269 N.R. 109; 2001 FCA 204; *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Comp. Trib.).

considered:

Canada (Commissioner of Competition) v. Canada Pipe Co., [2007] 2 F.C.R. 57; (2006), 268 D.L.R. (4th) 238; 49 C.P.R. (4th) 286; 350 N.R. 264; 2006 FCA 236; *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000); *Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd.* (1995), 64 C.P.R. (3d) 216 (Comp. Trib.); *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (Comp. Trib.).

referred to:

R. v. Proulx, [2000] 1 S.C.R. 61; 182 D.L.R. (4th) 1; [2000] 4 W.W.R. 21; 142 Man. R. (2d) 161; 140 C.C.C. (3d) 449; 30 C.R. (5th) 1; 49 M.V.R. (3d) 163; 249 N.R. 201; 2000 SCC 5; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; (1998), 36 O.R. (3d) 418; 154 D.L.R. (4th) 193; 50 C.B.R. (3d) 163; 33 C.C.E.L. (2d) 173; 221 N.R. 241; 106 O.A.C. 1; *Gravel and Lake Services Ltd. v. Bay Ocean Management Inc.* (2002), 298 N.R. 369; 2002 FCA 465; *SMX Shopping Centre Ltd. v. Canada*, [2004] 2 C.T.C. 48; 2004 DTC 6013; (2003), 314 N.R. 365; 2003 FCA 479; *Naguib v. Canada*, [2004] 2 C.T.C. 215; 2004 DTC 6082; (2004), 317 N.R. 88; 2004 FCA 40; *The SS "Tordenskjold" v. The SS "Euphemia"* (1908), 41 S.C.R. 154; *Perka et al. v. The Queen*, [1984] 2 S.C.R. 232; (1984), 13 D.L.R. (4th) 1; [1984] 6 W.W.R. 289; 28 B.C.L.R. (2d) 205; 14 C.C.C. (3d) 385; 42 C.R. (3d) 113; 55 N.R. 1; *R. v. Keegstra*, [1995] 2 S.C.R. 381; (1995), 169 A.R. 50; 124 D.L.R. (4th) 289; 29 Alta. L.R. (3d) 305; 98 C.C.C. (3d) 1; 39 C.R. (4th) 205; 29 C.R.R. (2d) 256; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559; (2002), 212 D.L.R. (4th) 1; [2002] 5 W.W.R. 1; 166 B.C.A.C. 1; 100 B.C.L.R. (3d) 1; 18 C.R.R. (4th) 289; 93 C.R.R. (2d) 189; 2002 SCC 42.

authors cited

Canada. House of Commons. *Minutes of Proceedings and Evidence of the Legislative Committee on Bill-C-91*, 1st Sess., 33rd Parl., 1986.

Competition Bureau. *Enforcement Guidelines on the Abuse of Dominance Provisions*. Industry Canada: Ottawa, 2001.

APPEAL from a decision of the Competition Tribunal ((2005), 40 C.P.R. (4th) 453 (Comp. Trib.)) dismissing the Commissioner of Competition's application for an order against the respondent under subsections 77(2) (exclusive dealing) and 79(1) (abuse of dominant position) of the *Competition Act*. Appeal allowed.

appearances:

Randall Hofley and *Leslie J. F. Milton* for appellant.

Kent E. Thomson, James W. E. Doris and *Charles E. Tingley* for respondent.

solicitors of record:

Johnston & Buchan LLP, Ottawa, and *Deputy Attorney General of Canada* for appellant.

Davies Ward Phillips & Vineberg LLP, Toronto, for respondent.

The following are the reasons for judgment rendered in English by

[1] DESJARDINS J.A.: This is an appeal from a decision of the Competition Tribunal (Tribunal), dated February 3, 2005, dismissing the application by the Commissioner of Competition (Commissioner or appellant) under sections 77 [as am. by R.S.C., 1985 (2nd Supp.), c. 19, s. 45; S.C. 1999, c. 2, ss. 23, 37(*y*); c. 31, s. 52(F); 2002, c. 16, ss. 11.2, 11.3] and 79 [as enacted by R.S.C., 1985 (2nd Supp.), c. 19, s. 45; S.C. 1990, c. 37, s. 31; 1999, c. 2, s. 37(*z*); 2002, c. 16, s. 11.4] of the *Competition Act* [R.S.C., 1985, c. C-34, s. 1 (as am. by R.S.C., 1985 (2nd supp.) c. 19, s. 19)] (reported as (2005), 40 C.P.R. (4th) 453) (Comp. Trib.). The Commissioner sought an order against Canada Pipe Company Ltd. (Canada Pipe or respondent), to prohibit the respondent from engaging in the practice of several purported anti-competitive acts leading to an abuse of dominant position under section 79, as well as to prohibit the respondent from continuing to engage in the practice of exclusive dealing under section 77. This case also involves a cross-appeal by Canada Pipe, which is dealt with in separate reasons [[2007] 2 F.C.R. 57 (F.C.A.)].

[2] This is the first time this Court has the opportunity to consider the tests for exclusive dealing and abuse of dominant position established respectively by sections 77 and 79 of the Act. Both of these provisions, generally speaking, authorize the Tribunal to make orders prohibiting a dominant firm from engaging in conduct that has had, is having or is likely to have the effect of substantially lessening competition. While the Act has been in force since 1986, and the Tribunal has elaborated its perspective on the requirements of sections 77 and 79 in several cases, these provisions have not to date been interpreted by any Canadian court.

[3] The conduct at issue in this case consists of a "loyalty rebate" program offered by the respondent and known as the Stocking Distributor Program (SDP). Under the SDP, distributors of the respondent's cast iron drain, waste and vent (DWV) products obtain significant rebates and discounts in return for stocking only cast iron products produced by the respondent. These distributors are free to stock other companies' DWV products which are not made of cast iron.

[4] According to the Commissioner, Canada Pipe is a dominant firm with respect to the product markets relevant in this case. Furthermore, the Commissioner asserts, the SDP constitutes both a practice of exclusive dealing with exclusionary effects and a practice of anti-competitive acts, and it is likely to have the effect of substantially lessening competition in the markets for DWV products by impeding the entry and expansion of competitors. The respondent contends, by contrast, that it exercises no market power in relation to the relevant product markets, when the latter are properly defined. Moreover, according to the respondent, the SDP is neither exclusionary nor anti-competitive, but rather is a voluntary, non-exclusive, incentive-based program which encourages competition between DWV distributors, is compatible with competition on the merits between suppliers and is supported by valid business justifications.

[5] The Tribunal dismissed the Commissioner's application, based upon the following findings. With respect to the alleged abuse of dominant position under section 79, the Tribunal held that: (i) there are three relevant product markets, and six geographic markets, and the respondent substantially controls all these markets; (ii) the SDP is a practice, but does not qualify as an "anti-competitive act"; and (iii) the Commissioner had not demonstrated that the SDP had substantially lessened or prevented competition. With respect to the allegation of exclusive dealing contrary to section 77, the Tribunal found that: (i) the SDP can be characterized as a practice of exclusive dealing; (ii) the respondent is a major supplier of the products in the relevant markets; and (iii) there was insufficient evidence to establish that the SDP had impeded entry or expansion of firms, or that it is having any other exclusionary effect on the market, or that it has caused or is likely to cause a substantial lessening of competition.

[6] The Commissioner appeals from the Tribunal's decision.

[7] Broadly stated, the appeal challenges two aspects of the Tribunal's conclusions: first, the finding with respect to substantial lessening of competition for the purposes of both sections 77 and 79, and second, the finding concerning exclusionary effects under section 77 or anti-competitive acts under section 79. The cross-appeal by Canada Pipe, which concerns the Tribunal's conclusions as to the definition of the relevant product markets and the issue of market power for the purpose of paragraph 79(1)(*a*), is discussed in separate reasons, as stated earlier.

[8] In order to facilitate the reading of these reasons, I include the following table of contents:

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I. FACTS

[9] The respondent is a Canadian company based in Hamilton, Ontario, which produces and sells through its Bibby Ste-Croix division (Bibby) cast iron drain, waste and vent products. DWV products are used in a wide variety of structures to carry waste and drain water, and to vent plumbing systems. There are three components to a cast iron DWV system: pipe, fittings and mechanical joint (MJ) couplings (collectively "DWV products").

[10] There are currently two domestic manufacturers of cast iron DWV products: Bibby and Vandem Industries (Vandem). Bibby manufactures cast iron DWV pipe and fittings, and imports MJ couplings from its sister companies in the United States. Vandem, which was founded in 1997 (according to the Tribunal; the respondent claims it was 1999, but little turns on this fact) by two former officers of Bibby, manufactures DWV pipe and imports fittings and couplings. The only Canadian manufacturer of MJ couplings is Rollee Industrial Products (1987) Ltd., but it is not a major player. In addition, there are a limited number of other Canadian importers of cast iron DWV products, who generally import from the United States and the Far East (mainly China and India). Imports of cast iron DWV products for all of Canada, including imports by Bibby and Vandem, represented 5% of total sales in 2002. The respondent is the only company in Canada that manufactures and sells a full range of cast iron DWV products.

[11] Distributors buy DWV products from the suppliers (either manufacturers or importers), and in turn sell to the building, mechanical or plumbing contractors involved in construction or renovation projects. Distributors generally carry DWV pipe and fittings made of various materials; cast iron DWV products usually represent only a small proportion of their inventory and sales. In Canada, there are three major distributors, all with national presence: Wolseley Canada Inc., EMCO Ltd, and Crane Supply. There are also small distributors, some of whom are members of buying groups in order to improve their bargaining power and obtain volume discount advantages.

[12] Contractors buy DWV products from distributors for construction projects upon which they bid. The bidding process is highly competitive, and contractors will try to obtain the best price possible in order to make their bids attractive. Although contractors may have some leeway in deciding what material to use in construction they will generally buy the type of DWV product that has been specified by the architect or mechanical engineer.

[13] The SDP was introduced by Bibby in January 1998. In contrast to the volume-based rebate programs typical in the industry, the SDP is premised on exclusivity, not the volume of purchases. Under the SDP, distributors of Bibby's DWV products obtain quarterly and yearly rebates as well as significant point-of-purchase discounts, in return for stocking only Bibby-supplied cast-iron DWV products. These distributors are free to stock other companies' DWV products which are not made of cast iron, but must purchase all three cast iron DWV products exclusively from the respondent. There are no signed contracts for the SDP: distributors can join at any time, and receive the quarterly and yearly rebates for each completed calendar quarter or year. Distributors who choose not to participate in the SDP are permitted to purchase products from Bibby, albeit at higher prices. There are no restrictions on the resale of cast iron DWV products purchased by distributors who participate in the SDP.

[14] The SDP discounts consist of point-of-sale discounts (for example, 55% of list price for stocking distributors, compared to 94% for non-stocking distributors), as well as quarterly and annual rebates (in 2002, the quarterly rebates were 7, 15 and 9 percent on pipe, fittings and MJ couplings respectively, and the annual rebate was 4 percent for all products). The point-of-sale discount and the rebates vary from one region to another. Any

mandates an assessment of the substantiality of the practice's actual or likely effects on competition in the relevant market(s), a task that proceeds from the vantage point of the market as a whole and invites consideration of a wider range of effects of the practice in question. The approach adopted by the Tribunal in this case does not properly recognize or maintain these important conceptual distinctions between the statutory elements of paragraphs 79(1)(*b*) and 79(1)(*c*).

(3) The valid business justification and paragraph 79(1)(*b*)

[84] The Tribunal's conflation of the legal tests for paragraphs 79(1)(*b*) and 79(1)(*c*) is also apparent in its discussion of the business justification arguments proffered by the respondent. The Tribunal noted two business justifications suggested by the respondent: first, that the SDP's uniform rebate structure encourages competition, by creating a level playing field between small and large distributors; and second, that the SDP makes possible the high-volume sales necessary to enable Bibby to maintain a full line of products.

[85] The Tribunal rejected the first business justification proposed by the respondent, but was persuaded by the second. With respect to the first justification, the Tribunal concluded (at paragrah 209) that although the creation of equitable opportunities for small- and medium-sized enterprises to participate in the Canadian economy is an objective of the Act set out in section 1.1, this is not a relevant consideration for the purposes of section 79:

While the Tribunal acknowledges this to be an enunciated purpose of the Act, the Tribunal is of the view that this purpose is unrelated to the issue of abuse of dominance. Competition between distributors is not at issue. Rather, the case is about competition between Bibby and other suppliers of cast iron DWV products. The equitable characteristics of the SDP as it relates to distributors have little to do with whether Bibby is exercising its market power in a way that precludes competition between suppliers of the product. In consequence, this argument of business justification must fail.

[86] The Tribunal was persuaded, however, by the second business justification put forward by the respondent. It explained its reasoning as follows (at paragraphs 212 and 259):

High-volume sales are also important in a business which is volume-driven, as Mr. Leonard, General Manager of Bibby, explained. Bibby argues that it needs the sales to ensure efficiencies and to lower its cost of production; the Commissioner did not challenge this assertion. The rebate structure provided for in the SDP does encourage distributors to deal with Bibby for all three products if they choose Bibby to supply one of them and in consequence Bibby's sales are increased. As was stated in *Laidlaw*, the self-interest justification is not sufficient. However, in this case, the Tribunal accepts, based on Mr. Leonard's evidence, that high volumes allow Bibby to maintain in inventory smaller, less profitable but nevertheless important products. As a result, items that are used less often remain available in the market. This availability serves the interests of distributors and contractors, whether or not they belong to the SDP, and ultimately benefits the consumer.

. . .

The Respondent's business argument that Bibby needs to sell a certain volume in all three products to be able to maintain full production of all product lines is valid. There are certainly recognizable advantages in having a reliable source able to manufacture and supply a full line of cast iron pipe DWV products for the Canadian market.

[87] This analysis is problematic, as the Tribunal appears to have lost sight of the role of the valid business justification doctrine within paragraph 79(1)(*b*), and instead seems to grant it an independent role. A business justification for an impugned act is properly relevant only in so far as it is pertinent and probative in relation to the determination required by paragraph 79(1)(*b*), namely the determination as to whether the purpose for which the act was performed was a predatory, exclusionary or disciplinary negative effect on a competitor. As I explained above in the discussion of the intentionality aspect of the paragraph 79(1)(*b*) test, a valid business justification can, in appropriate circumstances, overcome the deemed intention arising from the actual or foreseeable negative effects of the conduct on competitors, by demonstrating that such anti-competitive effects are not in fact the overriding purpose of the conduct in question. In this way, a valid business justification essentially provides an alternative explanation as to why the impugned act was performed, which in the right circumstances might be sufficient to

counterbalance the evidence of negative effects on competitors or subjective intent in this vein.

[88] The valid business justification doctrine is not an absolute defence for paragraph 79(1)(*b*). Rather, a business justification is properly employed to counterbalance or neutralize other evidence of an anti- competitive purpose, prior to making a determination under 79(1)(*b*). As the Tribunal observed in *D & B*, a business justification proffered by a respondent must therefore be "weigh[ed]. . . in light of any anti- competitive effects to establish the overriding purpose" of the impugned act (at page 262, also quoted in *Tele-Direct*, at page 180). In *D & B*, the Tribunal properly emphasized this balancing exercise (at page 265):

Proof of the existence of a business motive for long-term contracts [the impugned conduct] that was unrelated to an anti-competitive purpose would undoubtedly be relevant to an evaluation of an allegation of anti-competitive acts. The mere proof of *some* legitimate business purpose would be, however, hardly sufficient to support a finding that there is no anti-competitive act. All known factors must be taken into account in assessing the nature and purpose of the acts alleged to be anti-competitive.

[89] In the case at bar, the Commissioner argued that the business justification accepted by the Tribunal is actually a self-interest argument based on selling more product, and therefore cannot qualify as a business justification for the purposes of paragraph 79(1)(*b*). The respondent countered that this was a mischaracterization of the Tribunal's reasons, as in its view the business justification actually accepted by the Tribunal related to the maintenance of a full product line and the consequent benefits for consumers: according to the respondent, "it is crystal clear from the Tribunal's reasons that the Tribunal accepted the SDP's business purpose on the basis of its benefits to customers and end consumers, rather than Canada Pipe" (respondent's memorandum of fact and law, at paragraph 83, emphasis in original).

[90] In my view, the respondent's interpretation of the Tribunal's reasons with respect to the second business justification is apt. However, this reasoning, which relies solely upon consumer welfare benefits to establish the business justification, is at the core of the Tribunal's error. Simply stated, improved consumer welfare is on its own insufficient to establish a valid business justification for the purposes of paragraph 79(1)(*b*). A valid business justification must provide a credible efficiency or pro-competitive explanation, unrelated to an anti-competitive purpose, for why the dominant firm engaged in the conduct alleged to be anti-competitive. The business justification must therefore be attributable to the respondent, for it is the latter's allegedly anti- competitive conduct which is sought to be explained.

[91] In the case at bar, the Tribunal's reasons do not establish the requisite efficiency-related link between the SDP and the respondent, and hence do not supply a legitimate explanation for the latter's choice to engage in the impugned conduct, unrelated to an anti- competitive purpose. Without such a link, self-interest remains as the only justification for the SDP which is attributable to the respondent for the purposes of paragraph 79(1)(*b*). The Tribunal thus erred in concluding, on the basis of the reasoning provided in its decision, that the respondent had established a valid business justification for the SDP. While this error may not ultimately have been determinative, in that a valid business justification is at most a factor to be balanced within the paragraph 79(1)(*b*) determination, it may well have played an important supporting role in the Tribunal's decision with respect to paragraph 79(1)(*b*).

(4) Conclusion with respect to paragraph 79(1)(*b*)

[92] In sum, the aspects of the Tribunal's decision discussed above admittedly represent short extracts of a long and complex analysis. However, the identified errors suggest a basic misapprehension and misapplication of the legal test for paragraph 79(1)(*b*), and a troubling conflation between paragraphs 79(1)(*b*) and (*c*). Thus, at the very least, the extracts highlighted above render suspect the Tribunal's analysis of the relevant factors in the context of paragraph 79(1)(*b*). I can only conclude that the matter should be returned to the Tribunal for a reconsideration of its paragraph 79(1)(*b*) determination in light of the correct legal test.

(C) For the purposes of subsection 77(2), did the Tribunal err in its determination with respect to whether the SDP has the result that competition is or is likely to be lessened substantially?

[93] As I described above at paragraph 21 of these reasons, there is a parallel structure and logic between the

TAB 5

Competition Bureau

Remarks by John Pecman, Commissioner of Competition

The Competition Bureau: Past, Present and Future

Written Remarks prepared for the 2014 Competition Law Spring Forum

Toronto, Ontario

May 21, 2014

(Check against delivery)

I. Introduction

Good afternoon and thank you for the opportunity to be here today. It is a pleasure to once again be providing the keynote address at the CBA Competition Law Spring Forum. As I have said before, this is an important event on the competition law calendar.

When I spoke at this forum last May, I did so as the Interim Commissioner. Much has happened since then, including my appointment as Commissioner for a five-year term. It is hard to believe that almost a year has passed since my appointment in June 2013 — due in no small part to the tremendous volume of work that you have brought to me and my staff.

All kidding aside, I am truly honoured to be serving as Commissioner, not only because I believe in the value of competition, but also because I now have the opportunity to make some important changes at the Competition Bureau (the **"Bureau"**). While these changes are at various stages, they all have one thing in common — they are intended to make the Bureau a more efficient, flexible and transparent law enforcement agency — one that is better equipped to ensure that Canadian businesses and consumers prosper in a competitive and innovative marketplace.

II. Compliance Promotion

Before I discuss these changes and other significant developments at the Bureau, I would like to do something a little different.

As you all know, I have spoken a lot about compliance over the last year — and that is no accident. Promoting compliance with the *Competition Act* (the **"Act"**)[1] and the other legislation we enforce[2] has been, and will continue to be, a priority for the Bureau. Going forward, we will work with our partners and utilize the full range of tools available to us to ensure maximum compliance with this legislation for the benefit of Canadians.

I am sure that you have heard enough about how shared compliance comes from the recognition that we all — the Bureau, the business community and the legal community — have a role to play in promoting compliance. I am also sure that some of you are getting sick of hearing me speak about it. So I am not going to speak about it today. Instead, I am going to show it to you.

You may be aware that we launched our first annual anti-cartel day on March 24, 2014, which was aimed at increasing awareness among businesses about how to avoid engaging in cartel activity, such as price-fixing and bid-rigging.[3] In conjunction with anti-cartel day, we released and provided links to a variety of publications and other documents on compliance and compliance-related subjects.[4] We also produced a short video on corporate compliance — which is the "show part" of what I was just referring to.[5]

I believe that this video illustrates the importance of complying with the Act in an innovative and easy to understand way, but I'll let you be the judge.

Promoting Corporate Compliance

Transcript

Video Length: 3 minute, 19 seconds

MPEG 4: (25.0 MB)

While I do not need to educate anyone in this room on the importance of compliance, I know that videos like this are a valuable resource for your clients and I hope that you will share this video with them.

By working together to promote compliance with the Act, we can accomplish more than we ever could alone in ensuring an efficient, competitive and open marketplace — for the benefit of consumers, businesses and the economy.

As I mentioned earlier, promoting compliance with the legislation we enforce is a priority for the Bureau. To ensure that we are doing this as effectively as possible, we have retained an expert to help us determine how best to promote compliance and ensure that we have the right incentives in place.

III. Realignment

Since I have been appointed Commissioner, I have spent much time thinking about ways to make the Bureau an even better law enforcement agency. I would like to spend a few minutes talking about one of the changes happening at the Bureau.

It will be no surprise to anyone in this room when I say that we in the public sector are operating in a culture of austerity — one in which we are continually expected to do more with less. At the same time, the demands on our organization and the expectations for delivering on our mandate have increased. When you see this trend continuing throughout government for a number of years, you very quickly

come to realize that it is, in fact, not a trend, but a new reality; and that if your organization wants to continue succeeding, you must adapt.

With that in mind, the Bureau has begun the process of what I like to call "realignment". This includes plans to restructure the Bureau to leverage its current resources and enhance collaboration, with the goal of increasing its impact in the economy. While there are many elements to realignment, the most visible change will involve combining our existing eight branches into four branches. The current thinking is as follows:

- The Fair Business Practices Branch (**"FBPB"**) and the Criminal Matters Branch (**"CMB"**) will be combined into a single branch.
- The Mergers Branch and the Civil Matters Branch will be combined into a single branch.
- The Economic Policy and Enforcement Branch (**"EP&E"**), the Legislative and International Affairs Branch (**"LIA"**) and the Public Affairs Branch will be combined into a single branch. This branch would be responsible for our advocacy efforts, inter-governmental affairs and corporate compliance, as well as economic and international support and external communications.
- The Compliance and Operations Branch would continue to operate as a separate branch. This branch would be responsible for, among other things, managing resources, overseeing the Bureau's electronic evidence and conversion unit, and managing the Bureau's Information Centre.

Realignment will not decrease the size of the Bureau or impact the nature of the work it does. Rather, realignment is about building a stronger, more flexible and more adaptive agency. It is focused on ensuring that the Bureau is responding to current realities and prepared for continued success in the future.

IV. Vision for The Bureau

I would like to turn now to my vision for the Bureau.

When we last met, I spoke about openness and transparency and how critical these are to the future success of the Bureau. In fact, if you look at governments, public sector institutions, publicly-funded organizations and private sector companies, they are all moving in one direction — toward greater openness. I believe that it is incumbent on the Bureau to heed this and to itself create a culture of greater openness.

What does this mean for the Bureau? Quite simply, it means increased dialogue with parties under investigation and more transparency in the work we do, while preserving our discretion and other enforcement interests; more competition advocacy; and more developed, diversified and coordinated relationships with our partners and stakeholders.

We are looking to create a more open culture and to work more closely with our external partners with a view to enabling us to be more effective in delivering on our mandate. As the old saying goes, we can accomplish infinitely more together than we ever will alone.

We are also going to place a renewed emphasis on making sure that we use all of our tools to encourage compliance with the legislation we enforce. In this regard, it goes without saying that vigorous enforcement is crucial to promoting compliance with the Act — enforcement is, after all, the Bureau's bread and butter. But other tools, such as advocacy, outreach, suasion and publications, are also important in promoting compliance. The tool used in a particular case will, of course, depend on the circumstances in question.

As I have said previously, we are currently in the process of updating and rebranding the *Conformity Continuum*[6] in order to provide greater transparency to our stakeholders. As with the current

CT-2012-002

COMPETITION TRIBUNAL

B E T W E E N:

COMMISSIONER OF COMPETITION

(Applicant)

-AND-

RELIANCE COMFORT LIMITED PARTNERSHIP
(Respondents)

-AND-

NATIONAL ENERGY CORPORATION

(Intervenor)

MEMORANDUM OF FACT AND LAW

DEPARTMENT OF JUSTICE CANADA
COMPETITION BUREAU LEGAL SERVICES
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau QC K1A 0C9

Jonathan Hood

Tel: 819.994.7714
Fax: 819.953.9267

Counsel to the Commissioner of Competition