

**THE COMPETITION TRIBUNAL**

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

**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:**

COMPETITION TRIBUNAL  
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT  
May 9, 2014  
CT-2012-002

Jos LaRose for / pour  
REGISTRAR / REGISTRAIRE

OTTAWA, ONT

# 90

**THE COMMISSIONER OF COMPETITION**

Applicant

- and -

**RELIANCE COMFORT LIMITED PARTNERSHIP**

Respondent

- and -

**NATIONAL ENERGY CORPORATION**

Intervenor

---

**MOTION RECORD**

---

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**MOTION RECORD INDEX**

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# TAB 1

**THE COMPETITION TRIBUNAL**

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**NOTICE OF MOTION**

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**TAKE NOTICE THAT** Reliance Comfort Limited Partnership will make a motion to the Competition Tribunal, at a date, time, location and in a manner to be determined by the Competition Tribunal.

**THE MOTION IS FOR THE FOLLOWING RELIEF:**

1. An Order requiring the Commissioner of Competition (the “**Commissioner**”) to conduct a reasonable review of the sound recordings seized from National, MorEnergy and OCHS in its possession, power, or control and produce those which are relevant:
2. Costs of this motion; and
3. Such further and other relief as to this Tribunal may seem just.

**THE GROUNDS OF THE MOTION ARE:**

1. A central issue in this proceeding is whether Reliance’s return policies, particularly its removal reference number (“**RRN**”), constitute an abuse of dominance within the meaning of the *Competition Act*.
2. Reliance has pleaded that its RRN policy is not abusive, but rather it is a reasonable and appropriate response to misleading marketing and sales practices by its competitors, including National, morEnergy and OCHS.
3. In early 2013, the Commissioner commenced a criminal and civil investigation into the deceptive marketing practices of National, morEnergy and OCHS, and in particular to determine whether they had engaged in offences under sections 52(1) or 74.01(1)(a) of the *Competition Act*.
4. On July 5, 2013, the Commissioner obtained five search warrants pursuant to sections 15 and 16 of the *Competition Act* to seize documents from National. Between July 8 and 12, 2013 the Commissioner seized over a terabyte of data from National. The data seized included large amounts of sound recordings. These sound recordings include recordings of consumers who phone into National to complain about National’s misleading sales and marketing practices.
5. Rule 1 of the Rules defines a “document” as including, *inter alia*, “any...sound recording...and any copy or portion of that material.”

6. Contrary to its obligation under Rule 60 of the Rules, the Commissioner has not conducted a reasonable review of the sound recordings in its possession to identify relevant call recordings.

7. By letter dated April 24, 2014, Reliance demanded that the Commissioner identify and produce relevant sound recordings in its possession.

8. By email dated April 29, 2014, the Commissioner responded to Reliance's demand, stating that the Commissioner did not intend to conduct a review of the sound recordings in his possession.

9. Sound recordings in the Commissioner's possession are relevant to several central issues in this proceeding, including but not limited to:

- (a) whether the circumstances of the marketplace provide a valid business justification for the implementation of Reliance's RRN policy;
- (b) the determination of whether Reliance's return policies and procedures constitute a practice of anti-competitive acts; and
- (c) the determination of whether Reliance's return policies and procedures substantially lessen and prevent competition.

10. It is neither appropriate nor proportional for the Commissioner to flatly refuse to undertake any review whatsoever of the sound recordings in its possession, particularly given that these sound recordings are likely probative to Reliance's defence.

11. Sections 8(1) and 8(2) of the *Competition Tribunal Act*.

12. Rules 1, 60, 61 and 62 of the *Competition Tribunal Rules*.

13. Rules 225, 227, 400 and 401 of the *Federal Court Rules*.

14. Such further and other grounds as counsel may advise and the Tribunal may permit.

**THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:**

1. The pleadings herein;
2. The Affidavit of Patrick Johnston, sworn on May 9, 2014; and
3. Such further and other materials as counsel may advise and the Tribunal may permit.

**DATED AT** Toronto, this 9th day of May, 2014.

**BORDEN LADNER GERVAIS LLP**

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Toronto, Ontario  
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Counsel for Reliance Home Comfort Limited  
Partnership

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**AND TO: DAVIES WARD PHILLIPS & VINEBERG LLP**  
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Counsel for National Energy Corporation

**AND TO: THE REGISTRAR**  
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Ottawa, Ontario K1P 5B4

**THE COMMISSIONER OF  
COMPETITION**  
Applicant

- and -

**RELIANCE COMFORT  
LIMITED PARTNERSHIP**  
Respondent

- and -

**NATIONAL ENERGY  
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Limited Partnership.**

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**NOTICE OF MOTION**

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Counsel for the Respondent,  
Reliance Comfort Limited Partnership

TOR01: 5587822: v2

# TAB 2

**THE COMPETITION TRIBUNAL**

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

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Intervenor

---

**AFFIDAVIT OF PATRICK JOHNSTON**

**(Affirmed May 9, 2014)**

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I, Patrick Johnston, of the City of Toronto, in the Province of Ontario, **AFFIRM AND SAY AS FOLLOWS:**

1. I am a paralegal with the firm Borden Ladner Gervais LLP (“**BLG**”), the lawyers acting for the Respondent, Reliance Comfort Limited Partnership (“**Reliance**”). I am involved in the assembly of the productions of Reliance in this matter. As such I have knowledge of the matters

to which I hereinafter depose. Where the information I have set out is based on knowledge I have acquired from others, I have identified the source of that information and believe that information to be true.

### **Six Person Complaint and Commissioner's Investigation**

2. On December 17, 2012, a Six Person Complaint under section 9 of the *Competition Act* (the "**Six Person Complaint**") was initiated against National Energy Corporation ("**National**") and Bancmor Credit Corporation, which operates as morEnergy ("**morEnergy**"). [REDACTED]

3. On January 30, 2013, preliminary submissions describing widespread misleading sales and marketing tactics by National and morEnergy were filed in furtherance of the Six Person Complaint (the "**Preliminary Submissions**"). [REDACTED]

4. The Commissioner subsequently commenced an investigation into National, morEnergy, and Ontario Consumers Home Services ("**OCHS**"). The Commissioner specifically investigated whether these companies had committed offences under subsections 52(1) (criminal false or misleading representations) and 74.01(1)(a) (civil misrepresentations to public) of the *Competition Act* (the "**Investigation**").

5. In furtherance of the Investigation, on July 5, 2013, the Commissioner obtained search warrants against five premises occupied by National, three premises occupied by OCHS, and one premise occupied by morEnergy. Copies of these search warrants are attached hereto as **Exhibit "C"**.

6. The Information of Dawn-Marie Jamieson sworn July 4, 2013 (the “**Information**”) filed in support of the Commissioner’s application for these search warrants describes the Investigation as at that time. The Information described the Commissioner’s findings at, *inter alia*, paragraphs 1.6 and 1.11:

1.6 The offence or reviewable conduct under investigation relates to [National, OCHS and morEnergy’s] solicitations, via door-to-door sales, to persons in Canada, specifically in Ontario and/or Quebec. These solicitations are for the supply of water heaters. **As this Information to Obtain (the “Information”) reveals, during the course of visits to consumers’ residences, representatives of [National, OCHS and morEnergy] allegedly make significant misrepresentations to convince consumers to sign long term water heater rental agreements, including misrepresentations relating to the nature of their visit, their identity, the ENERGY STAR initiative, alleged costs and energy savings and the terms and conditions of the water heater rental agreements**

...

1.11 I have reasonable grounds to believe and do believe that a criminal offence pursuant to subsection 52(1) and under Part VI of the *Competition Act* has been or is about to be committed [by National, OCHS and morEnergy], or that grounds exist for the making of an order under Part VII.1 of the *Competition Act* pursuant to paragraph 74.01(1)(a) regarding civilly reviewable conduct. **[Emphasis added]**

A copy of the Information is attached hereto as **Exhibit “D”**.

7. The Information further described the Commissioner’s Investigation in detail. The Information reveals at pages 44 to 47 that one of the Commissioner’s investigators posed as a prospective employee for National, and was trained to engage in misleading tactics which:

included but were not limited to, a lack of disclosure regarding the true purpose of the visit; the real cost savings of the water heater being promoted; the misuse of the ENERGY STAR initiative and other government incentives; the necessity of replacing the water heater; the unsubstantiated savings associated with the water heater; the nationality of National compared to their competitors and; the purported warranty associated with water heater.

8. The Information also revealed on pages 39, 40, 62 and 63 that the Commissioner's belief that National, morEnergy and OCHS had engaged in criminal and civil offences under the *Competition Act* was based on extensive interviews with 35 complainants out of thousands of recorded complaints to the Better Business Bureau, the Ministry of Consumer Services and other agencies, along with former employees of National.

9. On July 11, 2013, the Commissioner obtained a supplemental search warrant, a copy of which is attached hereto as **Exhibit "E"**.

10. Between July 8, 2013 and July 12, 2013, the Commissioner executed on all but one of the search warrants obtained against National, OCHS and morEnergy. Attached hereto as **Exhibit "F"** is a copy of the Affidavit of Dawn-Marie Jamieson sworn July 17, 2013.

**The Commissioner's Affidavit of Documents**

11. On March 28, 2014, the Commissioner delivered an affidavit of documents affirmed by David Harding. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

[REDACTED]



14. By letter dated April 24, 2014, counsel for Reliance demanded the Commissioner to, among other things, disclose and produce all relevant sound recordings seized from National. Attached hereto as **Exhibit "H"** is a copy of Reliance's letter of April 24, 2014.

15. By email dated April 29, 2014, counsel for the Commissioner responded to the letter sent by counsel for Reliance on April 24, 2014. Commissioner's counsel refused to conduct even an "initial review" of the sound recordings which it had obtained from National, despite having obtained these approximately nine months beforehand in July, 2013. A copy of the Commissioner's email of April 29, 2014 is attached hereto as **Exhibit "I"**.

16. As of the date of this affidavit, the Commissioner has not produced the requested sound recordings.

**National's Affidavit of Documents**

17. On March 28, 2014, National delivered an affidavit of documents sworn by Gord Potter on March 26, 2014. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

█ [REDACTED]

█ [REDACTED]

█ [REDACTED]

19. By letter dated April 28, 2014, counsel for Reliance formally requested that National identify, disclose and produce all relevant sound recordings in its possession. A copy of this letter is attached hereto as **Exhibit “P”**.

20. By letter dated May 8, 2014, counsel for National responded. While admitting that National had a large database of sound recordings, National refused to review and make productions from same. A copy of National’s responding letter of May 8, 2014 is attached hereto as **Exhibit “Q”**.

█ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Reliance’s Review of its Sound Recordings**

23. Reliance maintains a large database of recordings of all customer calls to its call centres (the “**Reliance Call Database**”). The Reliance Call Database is organized by the date of the sound recording and the applicable telephone agent. The Reliance Call Database is also organized by call queue. When a customer dials into Reliance’s call system, they may select various numeric options depending on the reason they are calling. This results in their call being directed to a particular queue. As such, calls for the servicing of tanks go into one queue, calls for new customers go into another queue, calls for general inquiries go into yet another queue, and so on.

24. Reliance's Call Database contains millions of recordings. However, several filters were applied to reduce this to a manageable number. In particular, Reliance created a subset of recordings that could potentially be relevant by (a) filtering out recordings that were less than 30 seconds long or over 25 minutes long; and then (b) including only those calls that (i) were created between January 1, 2010 and December 31, 2012 and (ii) belonged to one of the two relevant queues where the vast majority of RRN numbers were issued (which were identified in consultation in Reliance employees). As a result, a manageable subset of approximately 360,000 recordings was developed for further review (the "**Recordings Subset**").


[REDACTED]

26. In or about December, 2013, Reliance retained an external phonetic search software provider to assist in reviewing the Recordings Subset for sound recordings relevant to the issues set out in the pleadings, in order to meet Reliance's obligation to produce all relevant documents (including sound recordings) in its possession, power or control.

27. Through the use of the phonetic search software on the Recordings Subset, keyword search terms were used to identify those sound recordings within the Recordings Subset which were reasonably likely to be relevant to this proceeding ("**Review Subset**"). Altogether, the Review Subset included approximately 360,000 sound recordings. Of these, BLG reviewed at least a portion of approximately 70,000 recordings.

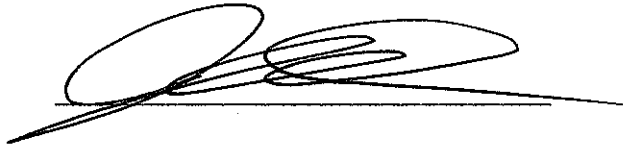
28. A large number of sound recordings could be reviewed in a relatively short time since reviewers were not required to listen to entire call recordings. Rather, the phonetic search software allowed reviewers to skip to the portion(s) of calls where a key word appeared. As a result, reviewers could often move on to the next recording within seconds in the event the software had picked up a false positive, or an audio segment that was clearly irrelevant.

AFFIRMED BEFORE ME at the City )  
of Toronto, in the Province of Ontario )  
this 9th day of May, 2014 )  
)  
)  
)  
)  
)

  
\_\_\_\_\_  
A Commissioner, etc. )  
JONATHAN ASSELSTINE

  
\_\_\_\_\_  
Patrick Johnston

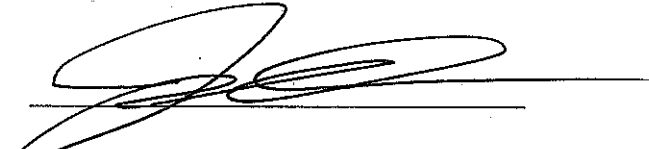
This is **Exhibit "A"** mentioned and referred  
to in the Affidavit of Patrick Johnston  
affirmed before me on May 9, 2014

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

A Commissioner for Taking Affidavits

**[CONFIDENTIAL]**

This is **Exhibit "B"** mentioned and referred  
to in the Affidavit of Patrick Johnston  
affirmed before me on May 9, 2014

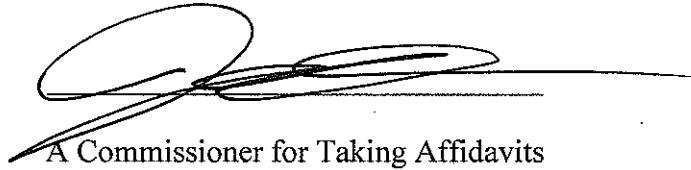


A Commissioner for Taking Affidavits



**[CONFIDENTIAL]**

This is **Exhibit "C"** mentioned and referred  
to in the Affidavit of Patrick Johnston  
affirmed before me on May 9, 2014

A handwritten signature in black ink, consisting of a large, stylized initial 'P' followed by several horizontal strokes and a long horizontal line extending to the right.

A Commissioner for Taking Affidavits

CANADA  
Province of Ontario

Court File No.: 13-13104

*Competition Act*,  
Sections 15 and 16

**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

**AND IN THE MATTER OF** an *ex parte* application, pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to prohibit access to and disclosure of this all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

---

**WARRANT TO ENTER, SEARCH AND COPY OR SEIZE FOR EXAMINATION OR  
COPYING CERTAIN RECORDS OR OTHER THINGS PURSUANT TO SECTIONS 15  
AND 16 OF THE *COMPETITION ACT***

25 Sheppard Avenue West, Suite 1700,  
North York, Ontario, M2N 6S8

---

**UPON** the application of Dawn-Marie Jamieson, an authorized representative of the Commissioner of Competition (the "Commissioner"), appointed under the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "*Competition Act*");

**AND UPON** reading the Information on oath of Dawn-Marie Jamieson;

**AND UPON** being satisfied that the requirements of sections 15 and 16 of the *Competition Act* have been met;

**IT IS ORDERED** that this search warrant (the "warrant") be issued authorizing the Commissioner and the persons named herein or authorized by this warrant to enter the premises described in this warrant, search for records and other things described in this warrant, and copy or seize them for examination and copying.

**1. The following persons are authorized to enter the premises described in paragraph 3 of this warrant, search for any records or other things described in paragraph 5 of this warrant and copy them or seize them for examination or copying, in accordance with this search warrant:**

**1. Les personnes suivantes sont autorisées à pénétrer dans les locaux décrits au paragraphe 3 du présent mandat, à y perquisitionner en vue d'obtenir des documents ou autres choses décrits au paragraphe 5 du présent mandat et à en prendre copie ou à les emporter pour en faire l'examen ou en prendre des copies, conformément au présent mandat de perquisition:**

**1.1 Authorized representatives of the Commissioner:**

Dawn-Marie Jamieson, Alain Garneau, Magalie Plouffe, Tom Steen, Tagreed Boules, Kelly Goetz, Ian Roger, Kristen Pihney, Colette Morin-Wade, Melanie Crossman, Melissa Melanson, Lynne Charpentier, Adam Zimmerman, Melanie Larouche, Robert Guilbeault, Kim Chorkowy, Stéphanie Grassi, Travis Todhunter, Anthony Nield, Bryan Cowell, Danielle Dubois, Rob Levine, Elizabeth Eves, Laura Grievson, Yanick Poulin, Robert Guilbeault, François Goulet, Véronique Brosseau, Arthur Carson, Daniel Robitaille

and other authorized representatives of the Commissioner and any person under the direction of the authorized representatives of the Commissioner that can facilitate access to the premises or to open anything that cannot be opened during the course of the search, should such access be denied or impeded;

**1.2 Authorized representatives of the Commissioner trained in electronic search procedures ["electronic evidence officers"]:**

Duncan Monkhouse, Mario Mainville, Matthew Kyrytow, Cliff Smith, Eric Daoust, Sébastien Guy, Marcel Thérien

and, in order to assist the aforementioned officers, any person who, under the direction of these officers, can facilitate the electronic search of computer systems, data storage devices and media; and

1.3 Any peace officer of the province of Ontario in order to assist the authorized representatives of the Commissioner.

**2. The offence or reviewable conduct with respect to which this search warrant is issued are the following:**

**2. L'infraction ou la conduite susceptible d'examen pour laquelle le présent mandat de perquisition est délivré sont:**

2.1 that National Home Services ("**National**") and other persons known and unknown, during the period commencing on or about July 2008 and continuing to the present, inclusively, the exact dates being unknown, did and continue to knowingly or recklessly make materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to subsection 52(1) of the *Competition Act*, thereby committing an offence under Part VI, namely subsection 52(5) of the *Competition Act*; or

2.2 that National and other persons known and unknown, during the period commencing on or about July 2008, and continuing to the present, inclusively, the exact dates being unknown, did make, and continue to make, materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to paragraph 74.01(1)(a) of the *Competition Act*, thereby establishing grounds for the making of an order under Part VII.1, namely section 74.1 of the *Competition Act*.

**3. The premises to be searched is:**

**3. Les locaux à être perquisitionnés sont les suivants:**

25 Sheppard Avenue West, Suite 1700, North York, Ontario, M2N 6S8

including all storage, record keeping and disposal areas located in and about this premises under the control of the occupant(s) of the premises including the Parties under investigation.

#### 4. Definitions:

#### 4. Définitions:

4.1 The following definitions apply to this search warrant:

- (a) "**alleged offence or reviewable conduct under investigation**" means the business, sales and marketing practices of the Parties under investigation (which itself is a defined term – see below), as described at paragraph 2, which are being investigated under subsection 52(1) and paragraph 74.01(1)(a) of the *Competition Act*;
- (b) "**computer password**" has the meaning set out in subsection 342.1(2) of the *Criminal Code* R.S.C., 1985, c. C-46 (as amended) (the "*Criminal Code*");
- (c) "**computer program**" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;
- (d) "**computer service**" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;
- (e) "**computer system**" has the meaning provided by section 16 of the *Competition Act* and, as set out in subsection 342.1(2) of the *Criminal Code*;
- (f) "**data**" has the meaning provided by section 16 of the *Competition Act*, as set out in subsection subsection 342.1(2) of the *Criminal Code*;
- (g) "**Parties under investigation**" means National Home Services (National Energy Corporation, a subsidiary of Just Energy Group Inc.), doing business as National Home Services and Services aux foyers du Québec ("**National**"), morEnergy Services Inc. (Bancmor Credit Corporation and morEnergy Services Inc.), doing business as morEnergy ("**morEnergy**") and Ontario Consumers Home Services Inc. ("**OCHS**"), and includes any business name associated with National, morEnergy and OCHS including, but not limited to, its predecessors, successors, parents, subsidiaries, divisions, partners, contractors, sub-contractors, employees, directors, administrators, corporate officers, agents, representatives and affiliates engaged in business in Canada, and other persons, known or unknown, implicated, directly or indirectly, in the commission of the alleged offence, or engaging in the reviewable conduct described at paragraph 2;

- (h) **"products"** has the meaning provided by section 2 of the *Competition Act*, which includes an article and a service and in this investigation refers to water heaters;
- (i) **"record"** has the meaning provided by section 2 of the *Competition Act* and includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record (including computer data and electro-magnetic recordings in tape or disc form for use in computers or other devices for storing information), and any other documentary material, including software, regardless of physical form or characteristics, and any copy or portion thereof;
- (j) **"relevant time period"** means the period during which it is believed that an alleged offence under subsection 52(1) or reviewable conduct under paragraph 74.01(1)(a) of the *Competition Act* occurred, and includes the period from July 2008 to the present, the exact dates being unknown;
- (k) **"representatives of the Parties under investigation"** means all individuals working for, or on behalf of, the Parties under investigation including, but not limited to, predecessors, successors, parents, subsidiaries, divisions, partners, contractors, sub-contractors, employees, directors, administrators, corporate officers, agents, representatives and affiliates engaged in business in Canada, and other persons, known or unknown, implicated, directly or indirectly, in the commission of the alleged offence or engaging in the reviewable conduct described at paragraph 2; and
- (l) **"water heater"** has the meaning of an appliance consisting of a gas or electric heating unit in which water is heated and stored.

**5. The records and other things to be searched are the following:**

**5. Les documents et autres choses visés par la perquisition sont les suivants:**

- 5.1 The records or other things to be searched for are all records, whenever created, which relate directly or indirectly to, and which will afford evidence of, the commission of the offence or the engaging of reviewable conduct described at paragraph 2. Specifically these are:

### **Corporate Structure**

- (a) All records or other things relating to the ownership, corporate structure, control and management of the Parties under investigation; and any other records or other things relating to the ownership or management and roles, duties, tasks, remuneration and responsibilities of the representatives of the Parties under investigation;

### **Identities**

- (b) All records or other things that, directly or indirectly, identify the individual or commercial names used to carry out the alleged offence or reviewable conduct, or that affiliate such individual or commercial names with legal entities or individuals;
- (c) All records or other things relating to aliases, user names, email addresses, email aliases or user IDs (user identities) used by the Parties under investigation and the representatives of the Parties under investigation involved in the alleged offence or reviewable conduct;
- (d) All records or other things related to the policies of the Parties under investigation for recruiting, training and managing of any past and current representatives of the Parties under investigation, including job postings, application forms, employee pay, commissions, and dismissal records; and
- (e) For any representatives of the Parties under investigation, up to five (5) original business records or other things that contain examples of the handwriting of such person.

### **Revenue, Finances and Compensation**

- (f) All records or other things relating, directly or indirectly, to the revenues generated from water heater rentals and sales by the Parties under investigation and representatives of the Parties under investigation, including historical, actual and forecast data, with respect to the alleged offence or reviewable conduct. These records or other things include but are not limited to: financial statements, annual reports, banking records, budget forecasts, credit and debit transactions, deposits, withdrawals, transfers, cheques, wire transfers, accounts receivable and payable records, currency, returns and any other accounting information;
- (g) All records or other things relating, directly or indirectly, to the management and distribution of the monies gained or revenue generated by the promotion, sale and rental of water heaters by the Parties under investigation and representatives of the Parties under investigation; and



- (h) All records, aliases, user names, or other identifiers or other things relating, directly or indirectly, to the identity, role and compensation of the representatives of the Parties under investigation.

**Operations**

- (i) All records or other things relating, directly or indirectly, to the corporate structure of the Parties under investigation and the ownership or control of these entities and any other records relating to the ownership or management and roles, duties, tasks, remuneration and responsibilities of the representatives of the Parties under investigation, including but not limited to guidelines, hiring policies and training manuals;
- (j) All records or other things relating, directly or indirectly, to the rental, lease, or ownership by the Parties under investigation of office space and/or office equipment including, but not limited to: computer systems, electronic storage devices, telephones, facsimile machines, office services (including Internet and telecommunication services), websites and email addresses as they relate to the alleged offence or reviewable conduct;
- (k) All records or other things relating, directly or indirectly, to the advertisement, sale, promotion, preparation, planning, development, delivery, payment, supply and removal of rental water heaters with respect to the alleged offence or reviewable conduct, including planning and development of sales tactics. These records or other things include, but are not limited to: agreements, contracts, publications, directives, correspondence, pictures, authorizations, memoranda, audio-recordings, door-to-door sales scripts, verification call scripts, efficacy/efficiency testing and notes;
- (l) All records related to certification, license, authorization, including all correspondence with authorities and agencies in relation to the activities or the products promoted;
- (m) All records or other things relating, directly or indirectly, to contracts, including but not limited to: scripts, application forms, customer acknowledgments, installation forms, pamphlets and any other records related to the promotion and supply of water heaters; and
- (n) All records or other things relating, directly or indirectly, to information on the application and use of the ENERGY STAR logos.

### Customers

- (o) All records or other things relating, directly or indirectly, to the customers or potential customers who were or might reasonably have been contacted by, made contact with or conducted business with the representatives of the Parties under investigation, including but not limited to contracts, pamphlets, and promotional materials;
- (p) All records or other things relating to customers who have contracts with the Parties under investigation, including names, addresses, and amounts incurred;
- (q) All records or other things relating to materials that were provided to customers who entered into contracts with the Parties under investigation;
- (r) All records or other things relating, directly or indirectly, to the customer service provided by the Parties under investigation, including but not limited to complaints, customer comments, refund requests, scripts, policies, and any other customer communications; and
- (s) All records or other things relating, directly or indirectly, to correspondence between the Parties under investigation and other agencies including, but not limited to, the BBB and the Ontario Ministry of Consumer Services with respect to conduct relating to the alleged offence or reviewable conduct.

### Other

- (t) Other things, specifically office equipment related to or used in the commission of the alleged offence or reviewable conduct that may be used as evidence including: computer systems, electronic storage devices, telephone switch boxes, telecommunications equipment, electronic surveillance and audio/visual recording devices and tapes, facsimile machines and facsimile memory;
- (u) Other things, specifically computer passwords, computer programs, computer services, computer systems, software, data storage devices, and associated documentation including operating instructions, manuals and service records that will assist in retrieving, copying, reading, printing, deciphering or acquiring the substance or meaning of any data seized, or accessed, together with all passwords, login codes, encryption keys or other security devices relating to these things;

- (v) Other things, specifically all records or other things described at paragraph 5 of this warrant, contained therein, or available to any computer system on the premises to be searched;
- (w) All records or other things relating to the use and application of the ENERGY STAR initiative;
- (x) Other things used by representatives of the Parties under investigation during the alleged offence or reviewable conduct including but are not limited to garments, uniforms, identification badges, clipboards, and contracts; and
- (y) All records or other things that could be used as similar fact evidence.

**6. Operation of Computer Systems:**

**6. Usage des ordinateurs:**

To search data contained in or available to any computer system for records described in paragraph 5 of this warrant:

- 6.1 This warrant authorizes the electronic evidence officers listed in paragraph 1.2 of this warrant to use or cause to be used any computer system on the premises to search any data contained in or available to the computer system; to reproduce the record or cause it to be reproduced from the data in the form of a printout or other intelligible output, and to seize the printout or other output for examination or copying.
- 6.2 The electronic evidence officers authorized to execute this warrant are authorized to do the following, to assist with accessing, searching, examining, copying, and seizing data found on computer systems, data storage devices or media:
  - a. Use forensic practices and procedures for acquiring electronic evidence, while attempting to minimize the impact on business functions;
  - b. Use or cause to be used, and/or seize, any computer system, data storage device, media, computer programs or associated documentation, including operating instructions, manuals and service records present on the premises;
  - c. Use or cause to be used, any computer system, data storage device, media or computer program brought onto the premises by the persons authorized to execute the warrant;

- d. Require any person who is in possession or control of the premises, including, where applicable, a computer system administrator or other custodian of information of a computer system on the premises, to permit any person named in the warrant to use or cause to be used any computer system or part of it on the premises by making accessible all data contained in any computer system, computer program, data storage device or media for the purposes of searching or seizing such data;
- e. Seize or produce an image of data from which they are unable to acquire the substance or meaning at the premises, for further off-site examination; and
- f. Employ, retain, direct or engage other persons to assist in the search of the named premises including the services of computer consultants or diagnosticians, which persons would, in the presence of persons authorized in the warrant, attend at the premises and perform such tasks as may assist the persons authorized in the warrant to carry out their functions authorized by the warrant.

6.3 The following practices and procedures may be used as circumstances dictate:

- (a) Search the computer system, data storage device or media and print or cause to be printed a copy of the records on-site;
- (b) Search the computer system, data storage device or media and reproduce an electronic copy of the records on-site;
- (c) Search the computer system, data storage device or media and produce an image of data to search and reproduce records off-site; or
- (d) Seize the computer system, data storage device or media and remove it/them from the premises, to search data and reproduce records off-site.

6.4 Some of these practices and procedures, specifically the steps described above in paragraphs 6.3(c) and 6.3(d) of this warrant, may result in the seizure of data containing records that are not described in paragraph 5 of this warrant. Electronic evidence officers and anyone under their direction will take steps to ensure that such data, with the exception of data that falls within the provisions of section 489 of the *Criminal Code*, will not be

accessible to anyone else.

The following procedures will be followed in order to identify and search data from which records described in paragraph 5 of this warrant can be reproduced, and to minimize access to data that contain records that are not described in paragraph 5 of this warrant:

- a. Where an image is produced as provided for in paragraph 6.3(c) of this warrant:
  - i. a true copy and a working copy of the seized image will be made in addition to any copy that may be provided to the party from whom it was seized;
  - ii. the seized image and the true copy will be sealed to protect the integrity of the data;
  - iii. the working copy will be examined by electronic evidence officers and anyone under their direction and records described in paragraph 5 of this warrant will be reproduced;
  - iv. access to the working copy will thereafter remain under the control of electronic evidence officers;
  - v. any further searching of data from the working copy, by electronic evidence officers and anyone under their direction, will be confined to data from which records described in paragraph 5 of this warrant can be reproduced, or as required within proceedings that may arise from the search or investigation;
  - vi. in order to minimize the examination of data containing records that are not described in paragraph 5 of this warrant, the persons examining the working copy will use forensic and electronic discovery practices and procedures to identify and search data from which records described in that paragraph can be reproduced; and
  - vii. electronic evidence officers and anyone under their direction will keep confidential all data found within the working copy containing records that are not described in paragraph 5 of this warrant, with the exception of things that fall within the provisions of section 489 of the *Criminal Code*.

- b. A similar process will be followed where a person authorized to execute the warrant, other than an electronic evidence officer, considers it necessary to seize a computer system, data storage device or media from the premises, as described in paragraph 6.3(d) of this warrant. In such a case,
  - i. the computer system, data storage device or media will be transferred to an electronic evidence officer, who may produce an image or extract data in order to produce records described in paragraph 5 of this warrant; and
  - ii. further handling will be as described above.

**7. Duration of this search warrant:**

**7. La durée de validité du présent mandat:**

- 7.1 The search warrants be valid from the 8th day of July, 2013, up to and including the 19th day of July, 2013, or, if issued after the 8th day of July, 2013, for such identical period of time, commencing from the date of issuance of the within sought warrant. It is not the intention of the authorized representatives of the Commissioner to actively conduct the search of the premises during this entire period, however, this period of validity is necessary to ensure that the authorized representatives of the Commissioner have a sufficient amount of time to search, copy, examine and seize a potentially large volume of records or other things.
- 7.2 Authorization be given to the authorized representatives of the Commissioner and Peace Officers to remain on the premises 24 hours per day in order to maintain security over the records or other things to be searched for and the items seized that may be placed in sealed containers and left on the premises each night, and, in order to allow for the completion of a search process involving a computer system commenced prior to 9:00 p.m. It is not the intention of the authorized representatives of the Commissioner to actively conduct the search of the premises 24 hours per day. The search will be actively conducted within the time period of 6 a.m. to 9 p.m. as specified in subsection 15(3) of the *Competition Act*, with allowance made for the completion of a search process involving a computer system or the capture of data, commenced prior to 9:00 p.m., and which, based on the length of the process, will extend after 9:00 p.m. in order to successfully complete or where the discontinuance of the search process of capture of data may result in loss of records or other things to be seized.

**8. This search warrant further authorizes:**

**8. De plus, le présent mandat autorise:**

- 8.1 The persons authorized to execute the warrant may enter the premises, leave them and return to them from time to time during the period of validity of the warrant for the purpose of executing it;
- 8.2 The persons authorized to execute the warrant may be accompanied by a Peace Officer and/or locksmith for the purpose of using such force as necessary or to provide any assistance to facilitate access to the premises, should access to the premises be refused;
- 8.3 One or more authorized representatives of the Commissioner shall be allowed to videotape the events of the search at the premises described at paragraph 3 in order to create a visual record of the manner in which the search was conducted, and to photograph or videotape records or other things to be seized. Such visual recordings can assist in the resolution of any allegation based on the conduct of the search, should such an allegation arise, and can provide a means of capturing records or other relevant information from the premises described at paragraph 3 that cannot readily be physically seized, e.g. writings on a large white board, layout of space, etc.;
- 8.4 The warrant authorizes the persons described at paragraph 1 to search anything found on the premises including personal belongings for which they have reason to believe may contain records or other things to be searched for. Personal belongings include, but are not limited to, briefcases, bags, purses, knapsacks, wallets, electronic devices such as: mobile computers, mobile phones, removable storage media, devices containing electronic data, PDA's (personal digital assistant's), pagers, telephones, and other devices; and
- 8.5 The persons authorized to execute the warrant be authorized to temporarily remove from the search premises any pre-selected record or other thing identified to be searched at the end of any day of searching for the purposes of preserving its integrity, or to prevent the loss or destruction of the said record or other thing. These records or other things will remain sealed and will be kept in the custody of the authorized person executing the warrant during this period of temporary removal. These records or other things will be returned to the premises on the day when the authorized person next returns to the searched premises.

**SOLICITOR-CLIENT PRIVILEGE**

**SECRET PROFESSIONNEL DE  
L'AVOCAT**

**9. It is further ordered that:**

**9. De plus, il est ordonné que:**

- 9.1 When a claim is made that a record about to be examined, copied or seized is subject to solicitor-client privilege, or when an authorized representative of the Commissioner has reason to believe that a record may be subject to solicitor-client privilege the record shall be placed in a package, suitably sealed and placed in the custody of the persons named pursuant to section 19 of the *Competition Act*.
- 9.2 Should a law office be located at the premise to be searched, the law office will not be searched until providing a reasonable opportunity to the respective lawyer to claim privilege over the records located in the office. Until such a reasonable opportunity presents itself, the law office and all records in the office may be sealed so as to preserve any evidence. If the situation should arise where there are no reasonable alternatives but to search the law office without the respective lawyer present, another search warrant will be sought at that time.

**DATED at the City of Ottawa, Province of Ontario, this \_\_\_\_ day of July, 2013.**

\_\_\_\_\_  
Justice of the Ontario Superior Court of Justice  
(East Region)



**Court File No.:**

**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

**AND IN THE MATTER OF** an *ex parte* application, pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to prohibit access to and disclosure of this all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

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**WARRANT TO ENTER, SEARCH AND COPY OR  
SEIZE FOR EXAMINATION OR COPYING  
CERTAIN RECORDS OR OTHER THINGS  
PURSUANT TO SECTIONS 15 AND 16 OF THE  
COMPETITION ACT**

**25 Sheppard Avenue West, Suite 1700,  
North York, Ontario, M2N 6S8**

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**Josephine A.L. Palumbo  
Senior Litigation Counsel  
Department of Justice  
Competition Bureau Legal Services  
50 Victoria Street,  
Gatineau, QC  
K1A 0C9**

**Tel: 819-953-3902  
Fax: 819-953-9267**

**Counsel to the Commissioner of Competition**

CANADA  
Province of Ontario

Court File No.: 13-13104

*Competition Act*,  
Sections 15 and 16

**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

**AND IN THE MATTER OF** an *ex parte* application, pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to prohibit access to and disclosure of this all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

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**WARRANT TO ENTER, SEARCH AND COPY OR SEIZE FOR EXAMINATION OR  
COPYING CERTAIN RECORDS OR OTHER THINGS PURSUANT TO SECTIONS 15  
AND 16 OF THE *COMPETITION ACT***

100 King Street West, Suite 2630,  
Toronto, ON M5X 1E1

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**UPON** the application of Dawn-Marie Jamieson, an authorized representative of the Commissioner of Competition (the "Commissioner"), appointed under the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "*Competition Act*");

**AND UPON** reading the Information on oath of Dawn-Marie Jamieson;

**AND UPON** being satisfied that the requirements of sections 15 and 16 of the *Competition Act* have been met;

**IT IS ORDERED** that this search warrant (the "warrant") be issued authorizing the Commissioner and the persons named herein or authorized by this warrant to enter the premises described in this warrant, search for records and other things described in this warrant, and copy or seize them for examination and copying.

**1. The following persons are authorized to enter the premises described in paragraph 3 of this warrant, search for any records or other things described in paragraph 5 of this warrant and copy them or seize them for examination or copying, in accordance with this search warrant:**

**1. Les personnes suivantes sont autorisées à pénétrer dans les locaux décrits au paragraphe 3 du présent mandat, à y perquisitionner en vue d'obtenir des documents ou autres choses décrits au paragraphe 5 du présent mandat et à en prendre copie ou à les emporter pour en faire l'examen ou en prendre des copies, conformément au présent mandat de perquisition:**

**1.1 Authorized representatives of the Commissioner:**

Dawn-Marie Jamieson, Alain Garneau, Magalie Plouffe, Tom Steen, Tagreed Boules, Kelly Goetz, Ian Roger, Kristen Pihney, Colette Morin-Wade, Melanie Crossman, Melissa Melanson, Lynne Charpentier, Adam Zimmerman, Melanie Larouche, Robert Guilbeault, Kim Chorkowy, Stéphanie Grassi, Travis Todhunter, Anthony Nield, Bryan Cowell, Danielle Dubois, Rob Levine, Elizabeth Eves, Laura Grievson, Yanick Poulin, Robert Guilbeault, François Goulet, Véronique Brosseau, Arthur Carson, Daniel Robitaille

and other authorized representatives of the Commissioner and any person under the direction of the authorized representatives of the Commissioner that can facilitate access to the premises or to open anything that cannot be opened during the course of the search, should such access be denied or impeded;

**1.2 Authorized representatives of the Commissioner trained in electronic search procedures ["electronic evidence officers"]:**

Duncan Monkhouse, Mario Mainville, Matthew Kyrytow, Cliff Smith, Eric Daoust, Sébastien Guy, Marcel Thérien

and, in order to assist the aforementioned officers, any person who, under the direction of these officers, can facilitate the electronic search of computer systems, data storage devices and media; and

1.3 Any peace officer of the province of Ontario in order to assist the authorized representatives of the Commissioner.

**2. The offence or reviewable conduct with respect to which this search warrant is issued are the following:**

**2. L'infraction ou la conduite susceptible d'examen pour laquelle le présent mandat de perquisition est délivré sont:**

2.1 that National Home Services ("**National**") and other persons known and unknown, during the period commencing on or about July 2008 and continuing to the present, inclusively, the exact dates being unknown, did and continue to knowingly or recklessly make materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to subsection 52(1) of the *Competition Act*, thereby committing an offence under Part VI, namely subsection 52(5) of the *Competition Act*; or

2.2 that National and other persons known and unknown, during the period commencing on or about July 2008, and continuing to the present, inclusively, the exact dates being unknown, did make, and continue to make, materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to paragraph 74.01(1)(a) of the *Competition Act*, thereby establishing grounds for the making of an order under Part VII.1, namely section 74.1 of the *Competition Act*.

**3. The premises to be searched is:**

**3. Les locaux à être perquisitionnés sont les suivants:**

100 King Street West, Suite 2630, Toronto, ON M5X 1E1

including all storage, record keeping and disposal areas located in and about this premises under the control of the occupant(s) of the premises including the Parties under investigation.

#### 4. Definitions:

#### 4. Définitions:

- 4.1 The following definitions apply to this search warrant:
- (a) "**alleged offence or reviewable conduct under investigation**" means the business, sales and marketing practices of the Parties under investigation (which itself is a defined term – see below), as described at paragraph 2, which are being investigated under subsection 52(1) and paragraph 74.01(1)(a) of the *Competition Act*;
  - (b) "**computer password**" has the meaning set out in subsection 342.1(2) of the *Criminal Code* R.S.C., 1985, c. C-46 (as amended) (the "*Criminal Code*");
  - (c) "**computer program**" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;
  - (d) "**computer service**" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;
  - (e) "**computer system**" has the meaning provided by section 16 of the *Competition Act* and, as set out in subsection 342.1(2) of the *Criminal Code*;
  - (f) "**data**" has the meaning provided by section 16 of the *Competition Act*, as set out in subsection subsection 342.1(2) of the *Criminal Code*;
  - (g) "**Parties under investigation**" means National Home Services (National Energy Corporation, a subsidiary of Just Energy Group Inc.), doing business as National Home Services and Services aux foyers du Québec ("**National**"), morEnergy Services Inc. (Bancmor Credit Corporation and morEnergy Services Inc.), doing business as morEnergy ("**morEnergy**") and Ontario Consumers Home Services Inc. ("**OCHS**"), and includes any business name associated with National, morEnergy and OCHS including, but not limited to, its predecessors, successors, parents, subsidiaries, divisions, partners, contractors, sub-contractors, employees, directors, administrators, corporate officers, agents, representatives and affiliates engaged in business in Canada, and other persons, known or unknown, implicated, directly or indirectly, in the commission of the alleged offence, or engaging in the reviewable conduct described at paragraph 2;

- (h) **"products"** has the meaning provided by section 2 of the *Competition Act*, which includes an article and a service and in this investigation refers to water heaters;
- (i) **"record"** has the meaning provided by section 2 of the *Competition Act* and includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record (including computer data and electro-magnetic recordings in tape or disc form for use in computers or other devices for storing information), and any other documentary material, including software, regardless of physical form or characteristics, and any copy or portion thereof;
- (j) **"relevant time period"** means the period during which it is believed that an alleged offence under subsection 52(1) or reviewable conduct under paragraph 74.01(1)(a) of the *Competition Act* occurred, and includes the period from July 2008 to the present, the exact dates being unknown;
- (k) **"representatives of the Parties under investigation"** means all individuals working for, or on behalf of, the Parties under investigation including, but not limited to, predecessors, successors, parents, subsidiaries, divisions, partners, contractors, sub-contractors, employees, directors, administrators, corporate officers, agents, representatives and affiliates engaged in business in Canada, and other persons, known or unknown, implicated, directly or indirectly, in the commission of the alleged offence or engaging in the reviewable conduct described at paragraph 2; and
- (l) **"water heater"** has the meaning of an appliance consisting of a gas or electric heating unit in which water is heated and stored.

**5. The records and other things to be searched are the following:**

**5. Les documents et autres choses visés par la perquisition sont les suivants:**

- 5.1 The records or other things to be searched for are all records, whenever created, which relate directly or indirectly to, and which will afford evidence of, the commission of the offence or the engaging of reviewable conduct described at paragraph 2. Specifically these are:

### **Corporate Structure**

- (a) All records or other things relating to the ownership, corporate structure, control and management of the Parties under investigation; and any other records or other things relating to the ownership or management and roles, duties, tasks, remuneration and responsibilities of the representatives of the Parties under investigation;

### **Identities**

- (b) All records or other things that, directly or indirectly, identify the individual or commercial names used to carry out the alleged offence or reviewable conduct, or that affiliate such individual or commercial names with legal entities or individuals;
- (c) All records or other things relating to aliases, user names, email addresses, email aliases or user IDs (user identities) used by the Parties under investigation and the representatives of the Parties under investigation involved in the alleged offence or reviewable conduct;
- (d) All records or other things related to the policies of the Parties under investigation for recruiting, training and managing of any past and current representatives of the Parties under investigation, including job postings, application forms, employee pay, commissions, and dismissal records; and
- (e) For any representatives of the Parties under investigation, up to five (5) original business records or other things that contain examples of the handwriting of such person.

### **Revenue, Finances and Compensation**

- (f) All records or other things relating, directly or indirectly, to the revenues generated from water heater rentals and sales by the Parties under investigation and representatives of the Parties under investigation, including historical, actual and forecast data, with respect to the alleged offence or reviewable conduct. These records or other things include but are not limited to: financial statements, annual reports, banking records, budget forecasts, credit and debit transactions, deposits, withdrawals, transfers, cheques, wire transfers, accounts receivable and payable records, currency, returns and any other accounting information;
- (g) All records or other things relating, directly or indirectly, to the management and distribution of the monies gained or revenue generated by the promotion, sale and rental of water heaters by the Parties under investigation and representatives of the Parties under investigation; and

- (h) All records, aliases, user names, or other identifiers or other things relating, directly or indirectly, to the identity, role and compensation of the representatives of the Parties under investigation.

### Operations

- (i) All records or other things relating, directly or indirectly, to the corporate structure of the Parties under investigation and the ownership or control of these entities and any other records relating to the ownership or management and roles, duties, tasks, remuneration and responsibilities of the representatives of the Parties under investigation, including but not limited to guidelines, hiring policies and training manuals;
- (j) All records or other things relating, directly or indirectly, to the rental, lease, or ownership by the Parties under investigation of office space and/or office equipment including, but not limited to: computer systems, electronic storage devices, telephones, facsimile machines, office services (including Internet and telecommunication services), websites and email addresses as they relate to the alleged offence or reviewable conduct;
- (k) All records or other things relating, directly or indirectly, to the advertisement, sale, promotion, preparation, planning, development, delivery, payment, supply and removal of rental water heaters with respect to the alleged offence or reviewable conduct, including planning and development of sales tactics. These records or other things include, but are not limited to: agreements, contracts, publications, directives, correspondence, pictures, authorizations, memoranda, audio-recordings, door-to-door sales scripts, verification call scripts, efficacy/efficiency testing and notes;
- (l) All records related to certification, license, authorization, including all correspondence with authorities and agencies in relation to the activities or the products promoted;
- (m) All records or other things relating, directly or indirectly, to contracts, including but not limited to: scripts, application forms, customer acknowledgments, installation forms, pamphlets and any other records related to the promotion and supply of water heaters; and
- (n) All records or other things relating, directly or indirectly, to information on the application and use of the ENERGY STAR logos.



### **Customers**

- (o) All records or other things relating, directly or indirectly, to the customers or potential customers who were or might reasonably have been contacted by, made contact with or conducted business with the representatives of the Parties under investigation, including but not limited to contracts, pamphlets, and promotional materials;
- (p) All records or other things relating to customers who have contracts with the Parties under investigation, including names, addresses, and amounts incurred;
- (q) All records or other things relating to materials that were provided to customers who entered into contracts with the Parties under investigation;
- (r) All records or other things relating, directly or indirectly, to the customer service provided by the Parties under investigation, including but not limited to complaints, customer comments, refund requests, scripts, policies, and any other customer communications; and
- (s) All records or other things relating, directly or indirectly, to correspondence between the Parties under investigation and other agencies including, but not limited to, the BBB and the Ontario Ministry of Consumer Services with respect to conduct relating to the alleged offence or reviewable conduct.

### **Other**

- (t) Other things, specifically office equipment related to or used in the commission of the alleged offence or reviewable conduct that may be used as evidence including: computer systems, electronic storage devices, telephone switch boxes, telecommunications equipment, electronic surveillance and audio/visual recording devices and tapes, facsimile machines and facsimile memory;
- (u) Other things, specifically computer passwords, computer programs, computer services, computer systems, software, data storage devices, and associated documentation including operating instructions, manuals and service records that will assist in retrieving, copying, reading, printing, deciphering or acquiring the substance or meaning of any data seized, or accessed, together with all passwords, login codes, encryption keys or other security devices relating to these things;

- (v) Other things, specifically all records or other things described at paragraph 5 of this warrant, contained therein, or available to any computer system on the premises to be searched;
- (w) All records or other things relating to the use and application of the ENERGY STAR initiative;
- (x) Other things used by representatives of the Parties under investigation during the alleged offence or reviewable conduct including but are not limited to garments, uniforms, identification badges, clipboards, and contracts; and
- (y) All records or other things that could be used as similar fact evidence.

**6. Operation of Computer Systems:**

**6. Usage des ordinateurs:**

To search data contained in or available to any computer system for records described in paragraph 5 of this warrant:

- 6.1 This warrant authorizes the electronic evidence officers listed in paragraph 1.2 of this warrant to use or cause to be used any computer system on the premises to search any data contained in or available to the computer system; to reproduce the record or cause it to be reproduced from the data in the form of a printout or other intelligible output, and to seize the printout or other output for examination or copying.
- 6.2 The electronic evidence officers authorized to execute this warrant are authorized to do the following, to assist with accessing, searching, examining, copying, and seizing data found on computer systems, data storage devices or media:
  - a. Use forensic practices and procedures for acquiring electronic evidence, while attempting to minimize the impact on business functions;
  - b. Use or cause to be used, and/or seize, any computer system, data storage device, media, computer programs or associated documentation, including operating instructions, manuals and service records present on the premises;
  - c. Use or cause to be used, any computer system, data storage device, media or computer program brought onto the premises by the persons authorized to execute the warrant;

- d. Require any person who is in possession or control of the premises, including, where applicable, a computer system administrator or other custodian of information of a computer system on the premises, to permit any person named in the warrant to use or cause to be used any computer system or part of it on the premises by making accessible all data contained in any computer system, computer program, data storage device or media for the purposes of searching or seizing such data;
- e. Seize or produce an image of data from which they are unable to acquire the substance or meaning at the premises, for further off-site examination; and
- f. Employ, retain, direct or engage other persons to assist in the search of the named premises including the services of computer consultants or diagnosticians, which persons would, in the presence of persons authorized in the warrant, attend at the premises and perform such tasks as may assist the persons authorized in the warrant to carry out their functions authorized by the warrant.

6.3 The following practices and procedures may be used as circumstances dictate:

- (a) Search the computer system, data storage device or media and print or cause to be printed a copy of the records on-site;
- (b) Search the computer system, data storage device or media and reproduce an electronic copy of the records on-site;
- (c) Search the computer system, data storage device or media and produce an image of data to search and reproduce records off-site; or
- (d) Seize the computer system, data storage device or media and remove it/them from the premises, to search data and reproduce records off-site.

6.4 Some of these practices and procedures, specifically the steps described above in paragraphs 6.3(c) and 6.3(d) of this warrant, may result in the seizure of data containing records that are not described in paragraph 5 of this warrant. Electronic evidence officers and anyone under their direction will take steps to ensure that such data, with the exception of data that falls within the provisions of section 489 of the *Criminal Code*, will not be

accessible to anyone else.

The following procedures will be followed in order to identify and search data from which records described in paragraph 5 of this warrant can be reproduced, and to minimize access to data that contain records that are not described in paragraph 5 of this warrant:

- a. Where an image is produced as provided for in paragraph 6.3(c) of this warrant:
  - i. a true copy and a working copy of the seized image will be made in addition to any copy that may be provided to the party from whom it was seized;
  - ii. the seized image and the true copy will be sealed to protect the integrity of the data;
  - iii. the working copy will be examined by electronic evidence officers and anyone under their direction and records described in paragraph 5 of this warrant will be reproduced;
  - iv. access to the working copy will thereafter remain under the control of electronic evidence officers;
  - v. any further searching of data from the working copy, by electronic evidence officers and anyone under their direction, will be confined to data from which records described in paragraph 5 of this warrant can be reproduced, or as required within proceedings that may arise from the search or investigation;
  - vi. in order to minimize the examination of data containing records that are not described in paragraph 5 of this warrant, the persons examining the working copy will use forensic and electronic discovery practices and procedures to identify and search data from which records described in that paragraph can be reproduced; and
  - vii. electronic evidence officers and anyone under their direction will keep confidential all data found within the working copy containing records that are not described in paragraph 5 of this warrant, with the exception of things that fall within the provisions of section 489 of the *Criminal Code*.

- b. A similar process will be followed where a person authorized to execute the warrant, other than an electronic evidence officer, considers it necessary to seize a computer system, data storage device or media from the premises, as described in paragraph 6.3(d) of this warrant. In such a case,
  - i. the computer system, data storage device or media will be transferred to an electronic evidence officer, who may produce an image or extract data in order to produce records described in paragraph 5 of this warrant; and
  - ii. further handling will be as described above.

**7. Duration of this search warrant:**

**7. La durée de validité du présent mandat:**

- 7.1 The search warrants be valid from the 8th day of July, 2013, up to and including the 19th day of July, 2013, or, if issued after the 8th day of July, 2013, for such identical period of time, commencing from the date of issuance of the within sought warrant. It is not the intention of the authorized representatives of the Commissioner to actively conduct the search of the premises during this entire period, however, this period of validity is necessary to ensure that the authorized representatives of the Commissioner have a sufficient amount of time to search, copy, examine and seize a potentially large volume of records or other things.
- 7.2 Authorization be given to the authorized representatives of the Commissioner and Peace Officers to remain on the premises 24 hours per day in order to maintain security over the records or other things to be searched for and the items seized that may be placed in sealed containers and left on the premises each night, and, in order to allow for the completion of a search process involving a computer system commenced prior to 9:00 p.m. It is not the intention of the authorized representatives of the Commissioner to actively conduct the search of the premises 24 hours per day. The search will be actively conducted within the time period of 6 a.m. to 9 p.m. as specified in subsection 15(3) of the *Competition Act*, with allowance made for the completion of a search process involving a computer system or the capture of data, commenced prior to 9:00 p.m., and which, based on the length of the process, will extend after 9:00 p.m. in order to successfully complete or where the discontinuance of the search process of capture of data may result in loss of records or other things to be seized.

**8. This search warrant further authorizes:**

**8. De plus, le présent mandat autorise:**

- 8.1 The persons authorized to execute the warrant may enter the premises, leave them and return to them from time to time during the period of validity of the warrant for the purpose of executing it;
- 8.2 The persons authorized to execute the warrant may be accompanied by a Peace Officer and/or locksmith for the purpose of using such force as necessary or to provide any assistance to facilitate access to the premises, should access to the premises be refused;
- 8.3 One or more authorized representatives of the Commissioner shall be allowed to videotape the events of the search at the premises described at paragraph 3 in order to create a visual record of the manner in which the search was conducted, and to photograph or videotape records or other things to be seized. Such visual recordings can assist in the resolution of any allegation based on the conduct of the search, should such an allegation arise, and can provide a means of capturing records or other relevant information from the premises described at paragraph 3 that cannot readily be physically seized, e.g. writings on a large white board, layout of space, etc.;
- 8.4 The warrant authorizes the persons described at paragraph 1 to search anything found on the premises including personal belongings for which they have reason to believe may contain records or other things to be searched for. Personal belongings include, but are not limited to, briefcases, bags, purses, knapsacks, wallets, electronic devices such as: mobile computers, mobile phones, removable storage media, devices containing electronic data, PDA's (personal digital assistant's), pagers, telephones, and other devices; and
- 8.5 The persons authorized to execute the warrant be authorized to temporarily remove from the search premises any pre-selected record or other thing identified to be searched at the end of any day of searching for the purposes of preserving its integrity, or to prevent the loss or destruction of the said record or other thing. These records or other things will remain sealed and will be kept in the custody of the authorized person executing the warrant during this period of temporary removal. These records or other things will be returned to the premises on the day when the authorized person next returns to the searched premises.

**SOLICITOR-CLIENT PRIVILEGE**

**SECRET PROFESSIONNEL DE  
L'AVOCAT**

**9. It is further ordered that:**

**9. De plus, il est ordonné que:**

- 9.1 When a claim is made that a record about to be examined, copied or seized is subject to solicitor-client privilege, or when an authorized representative of the Commissioner has reason to believe that a record may be subject to solicitor-client privilege the record shall be placed in a package, suitably sealed and placed in the custody of the persons named pursuant to section 19 of the *Competition Act*.
- 9.2 Should a law office be located at the premise to be searched, the law office will not be searched until providing a reasonable opportunity to the respective lawyer to claim privilege over the records located in the office. Until such a reasonable opportunity presents itself, the law office and all records in the office may be sealed so as to preserve any evidence. If the situation should arise where there are no reasonable alternatives but to search the law office without the respective lawyer present, another search warrant will be sought at that time.

**DATED at the City of Ottawa, Province of Ontario, this \_\_\_\_ day of July, 2013.**

\_\_\_\_\_  
Justice of the Ontario Superior Court of Justice  
(East Region)

Court File No.:

**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

**AND IN THE MATTER OF** an *ex parte* application, pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to prohibit access to and disclosure of this all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

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**WARRANT TO ENTER, SEARCH AND COPY OR  
SEIZE FOR EXAMINATION OR COPYING  
CERTAIN RECORDS OR OTHER THINGS  
PURSUANT TO SECTIONS 15 AND 16 OF THE  
COMPETITION ACT**

100 King Street West, Suite 2630,  
Toronto, ON M5X 1E1

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**Josephine A.L. Palumbo**  
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Department of Justice  
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50 Victoria Street,  
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Tel: 819-953-3902  
Fax: 819-953-9267

**Counsel to the Commissioner of Competition**



CANADA  
Province of Ontario

Court File No.: 13-13184

*Competition Act*,  
Sections 15 and 16

**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

**AND IN THE MATTER OF** an *ex parte* application, pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to prohibit access to and disclosure of this all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

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**WARRANT TO ENTER, SEARCH AND COPY OR SEIZE FOR EXAMINATION OR  
COPYING CERTAIN RECORDS OR OTHER THINGS PURSUANT TO SECTIONS 15  
AND 16 OF THE COMPETITION ACT**

300 The East Mall, Suite 200,  
Toronto, ON M9B 6B7

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**UPON** the application of Dawn-Marie Jamieson, an authorized representative of the Commissioner of Competition (the "Commissioner"), appointed under the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "*Competition Act*");

**AND UPON** reading the Information on oath of Dawn-Marie Jamieson;

**AND UPON** being satisfied that the requirements of sections 15 and 16 of the *Competition Act* have been met;

**IT IS ORDERED** that this search warrant (the "warrant") be issued authorizing the Commissioner and the persons named herein or authorized by this warrant to enter the premises described in this warrant, search for records and other things described in this warrant, and copy or seize them for examination and copying.

**1. The following persons are authorized to enter the premises described in paragraph 3 of this warrant, search for any records or other things described in paragraph 5 of this warrant and copy them or seize them for examination or copying, in accordance with this search warrant:**

**1. Les personnes suivantes sont autorisées à pénétrer dans les locaux décrits au paragraphe 3 du présent mandat, à y perquisitionner en vue d'obtenir des documents ou autres choses décrits au paragraphe 5 du présent mandat et à en prendre copie ou à les emporter pour en faire l'examen ou en prendre des copies, conformément au présent mandat de perquisition:**

**1.1 Authorized representatives of the Commissioner:**

Dawn-Marie Jamieson, Alain Garneau, Magalie Plouffe, Tom Steen, Tagreed Boules, Kelly Goetz, Ian Roger, Kristen Pihney, Colette Morin-Wade, Melanie Crossman, Melissa Melanson, Lynne Charpentier, Adam Zimmerman, Melanie Larouche, Robert Guilbeault, Kim Chorkowy, Stéphanie Grassi, Travis Todhunter, Anthony Nield, Bryan Cowell, Danielle Dubois, Rob Levine, Elizabeth Eves, Laura Grievson, Yanick Poulin, Robert Guilbeault, François Goulet, Véronique Brosseau, Arthur Carson, Daniel Robitaille

and other authorized representatives of the Commissioner and any person under the direction of the authorized representatives of the Commissioner that can facilitate access to the premises or to open anything that cannot be opened during the course of the search, should such access be denied or impeded;

**1.2 Authorized representatives of the Commissioner trained in electronic search procedures ["electronic evidence officers"]:**

Duncan Monkhouse, Mario Mainville, Matthew Kyrytow, Cliff Smith, Eric Daoust, Sébastien Guy, Marcel Thérien

and, in order to assist the aforementioned officers, any person who, under the direction of these officers, can facilitate the electronic search of computer systems, data storage devices and media; and

1.3 Any peace officer of the province of Ontario in order to assist the authorized representatives of the Commissioner.

**2. The offence or reviewable conduct with respect to which this search warrant is issued are the following:**

**2. L'infraction ou la conduite susceptible d'examen pour laquelle le présent mandat de perquisition est délivré sont:**

2.1 that morEnergy Services Inc. ("morEnergy") and other persons known and unknown, during the period commencing on or about May 2009, and continuing until at least February 2013, inclusively, the exact dates being unknown, did knowingly or recklessly make materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to subsection 52(1) of the *Competition Act*, thereby committing an offence under Part VI, namely subsection 52(5) of the *Competition Act*; or

2.2 that morEnergy and other persons known and unknown, during the period commencing on or about May 2009, and continuing until at least February 2013, inclusively, the exact dates being unknown, did make materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to paragraph 74.01(1)(a) of the *Competition Act*, thereby establishing grounds for the making of an order under Part VII.1, namely section 74.1 of the *Competition Act*.

**3. The premises to be searched is:**

**3. Les locaux à être perquisitionnés sont les suivants:**

300 The East Mall, Suite 200, Toronto, ON M9B 6B7

including all storage, record keeping and disposal areas located in and about this premises under the control of the occupant(s) of the premises including the Parties under investigation.

#### 4. Definitions:

#### 4. Définitions:

4.1 The following definitions apply to this search warrant:

- (a) "**alleged offence or reviewable conduct under investigation**" means the business, sales and marketing practices of the Parties under investigation (which itself is a defined term – see below), as described at paragraph 2, which are being investigated under subsection 52(1) and paragraph 74.01(1)(a) of the *Competition Act*;
- (b) "**computer password**" has the meaning set out in subsection 342.1(2) of the *Criminal Code* R.S.C., 1985, c. C-46 (as amended) (the "*Criminal Code*");
- (c) "**computer program**" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;
- (d) "**computer service**" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;
- (e) "**computer system**" has the meaning provided by section 16 of the *Competition Act* and, as set out in subsection 342.1(2) of the *Criminal Code*;
- (f) "**data**" has the meaning provided by section 16 of the *Competition Act*, as set out in subsection subsection 342.1(2) of the *Criminal Code*;
- (g) "**Parties under investigation**" means National Home Services (National Energy Corporation, a subsidiary of Just Energy Group Inc.), doing business as National Home Services and Services aux foyers du Québec ("**National**"), morEnergy Services Inc. (Bancmor Credit Corporation and morEnergy Services Inc.), doing business as morEnergy ("**morEnergy**") and Ontario Consumers Home Services Inc. ("**OCHS**"), and includes any business name associated with National, morEnergy and OCHS including, but not limited to, its predecessors, successors, parents, subsidiaries, divisions, partners, contractors, sub-contractors, employees, directors, administrators, corporate officers, agents, representatives and affiliates engaged in business in Canada, and other persons, known or unknown, implicated, directly or indirectly, in the commission of the alleged offence, or engaging in the reviewable conduct described at paragraph 2;

- (h) **"products"** has the meaning provided by section 2 of the *Competition Act*, which includes an article and a service and in this investigation refers to water heaters;
- (i) **"record"** has the meaning provided by section 2 of the *Competition Act* and includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record (including computer data and electro-magnetic recordings in tape or disc form for use in computers or other devices for storing information), and any other documentary material, including software, regardless of physical form or characteristics, and any copy or portion thereof;
- (j) **"relevant time period"** means the period during which it is believed that an alleged offence under subsection 52(1) or reviewable conduct under paragraph 74.01(1)(a) of the *Competition Act* occurred, and includes the period from May 2009 to the present, the exact dates being unknown;
- (k) **"representatives of the Parties under investigation"** means all individuals working for, or on behalf of, the Parties under investigation including, but not limited to, predecessors, successors, parents, subsidiaries, divisions, partners, contractors, sub-contractors, employees, directors, administrators, corporate officers, agents, representatives and affiliates engaged in business in Canada, and other persons, known or unknown, implicated, directly or indirectly, in the commission of the alleged offence or engaging in the reviewable conduct described at paragraph 2; and
- (l) **"water heater"** has the meaning of an appliance consisting of a gas or electric heating unit in which water is heated and stored.

**5. The records and other things to be searched are the following:**

**5. Les documents et autres choses visés par la perquisition sont les suivants:**

- 5.1 The records or other things to be searched for are all records, whenever created, which relate directly or indirectly to, and which will afford evidence of, the commission of the offence or the engaging of reviewable conduct described at paragraph 2. Specifically these are:

### **Corporate Structure**

- (a) All records or other things relating to the ownership, corporate structure, control and management of the Parties under investigation; and any other records or other things relating to the ownership or management and roles, duties, tasks, remuneration and responsibilities of the representatives of the Parties under investigation;

### **Identities**

- (b) All records or other things that, directly or indirectly, identify the individual or commercial names used to carry out the alleged offence or reviewable conduct, or that affiliate such individual or commercial names with legal entities or individuals;
- (c) All records or other things relating to aliases, user names, email addresses, email aliases or user IDs (user identities) used by the Parties under investigation and the representatives of the Parties under investigation involved in the alleged offence or reviewable conduct;
- (d) All records or other things related to the policies of the Parties under investigation for recruiting, training and managing of any past and current representatives of the Parties under investigation, including job postings, application forms, employee pay, commissions, and dismissal records; and
- (e) For any representatives of the Parties under investigation, up to five (5) original business records or other things that contain examples of the handwriting of such person.

### **Revenue, Finances and Compensation**

- (f) All records or other things relating, directly or indirectly, to the revenues generated from water heater rentals and sales by the Parties under investigation and representatives of the Parties under investigation, including historical, actual and forecast data, with respect to the alleged offence or reviewable conduct. These records or other things include but are not limited to: financial statements, annual reports, banking records, budget forecasts, credit and debit transactions, deposits, withdrawals, transfers, cheques, wire transfers, accounts receivable and payable records, currency, returns and any other accounting information;
- (g) All records or other things relating, directly or indirectly, to the management and distribution of the monies gained or revenue generated by the promotion, sale and rental of water heaters by the Parties under investigation and representatives of the Parties under investigation; and

- (h) All records, aliases, user names, or other identifiers or other things relating, directly or indirectly, to the identity, role and compensation of the representatives of the Parties under investigation.

**Operations**

- (i) All records or other things relating, directly or indirectly, to the corporate structure of the Parties under investigation and the ownership or control of these entities and any other records relating to the ownership or management and roles, duties, tasks, remuneration and responsibilities of the representatives of the Parties under investigation, including but not limited to guidelines, hiring policies and training manuals;
- (j) All records or other things relating, directly or indirectly, to the rental, lease, or ownership by the Parties under investigation of office space and/or office equipment including, but not limited to: computer systems, electronic storage devices, telephones, facsimile machines, office services (including Internet and telecommunication services), websites and email addresses as they relate to the alleged offence or reviewable conduct;
- (k) All records or other things relating, directly or indirectly, to the advertisement, sale, promotion, preparation, planning, development, delivery, payment, supply and removal of rental water heaters with respect to the alleged offence or reviewable conduct, including planning and development of sales tactics. These records or other things include, but are not limited to: agreements, contracts, publications, directives, correspondence, pictures, authorizations, memoranda, audio-recordings, door-to-door sales scripts, verification call scripts, efficacy/efficiency testing and notes;
- (l) All records related to certification, license, authorization, including all correspondence with authorities and agencies in relation to the activities or the products promoted;
- (m) All records or other things relating, directly or indirectly, to contracts, including but not limited to: scripts, application forms, customer acknowledgments, installation forms, pamphlets and any other records related to the promotion and supply of water heaters; and
- (n) All records or other things relating, directly or indirectly, to information on the application and use of the ENERGY STAR logos.

### Customers

- (o) All records or other things relating, directly or indirectly, to the customers or potential customers who were or might reasonably have been contacted by, made contact with or conducted business with the representatives of the Parties under investigation, including but not limited to contracts, pamphlets, and promotional materials;
- (p) All records or other things relating to customers who have contracts with the Parties under investigation, including names, addresses, and amounts incurred;
- (q) All records or other things relating to materials that were provided to customers who entered into contracts with the Parties under investigation;
- (r) All records or other things relating, directly or indirectly, to the customer service provided by the Parties under investigation, including but not limited to complaints, customer comments, refund requests, scripts, policies, and any other customer communications; and
- (s) All records or other things relating, directly or indirectly, to correspondence between the Parties under investigation and other agencies including, but not limited to, the BBB and the Ontario Ministry of Consumer Services with respect to conduct relating to the alleged offence or reviewable conduct.

### Other

- (t) Other things, specifically office equipment related to or used in the commission of the alleged offence or reviewable conduct that may be used as evidence including: computer systems, electronic storage devices, telephone switch boxes, telecommunications equipment, electronic surveillance and audio/visual recording devices and tapes, facsimile machines and facsimile memory;
- (u) Other things, specifically computer passwords, computer programs, computer services, computer systems, software, data storage devices, and associated documentation including operating instructions, manuals and service records that will assist in retrieving, copying, reading, printing, deciphering or acquiring the substance or meaning of any data seized, or accessed, together with all passwords, login codes, encryption keys or other security devices relating to these things;



- (v) Other things, specifically all records or other things described at paragraph 5 of this warrant, contained therein, or available to any computer system on the premises to be searched;
- (w) All records or other things relating to the use and application of the ENERGY STAR initiative;
- (x) Other things used by representatives of the Parties under investigation during the alleged offence or reviewable conduct including but are not limited to garments, uniforms, identification badges, clipboards, and contracts; and
- (y) All records or other things that could be used as similar fact evidence.

**6. Operation of Computer Systems:**

**6. Usage des ordinateurs:**

To search data contained in or available to any computer system for records described in paragraph 5 of this warrant:

- 6.1 This warrant authorizes the electronic evidence officers listed in paragraph 1.2 of this warrant to use or cause to be used any computer system on the premises to search any data contained in or available to the computer system; to reproduce the record or cause it to be reproduced from the data in the form of a printout or other intelligible output, and to seize the printout or other output for examination or copying.
- 6.2 The electronic evidence officers authorized to execute this warrant are authorized to do the following, to assist with accessing, searching, examining, copying, and seizing data found on computer systems, data storage devices or media:
  - a. Use forensic practices and procedures for acquiring electronic evidence, while attempting to minimize the impact on business functions;
  - b. Use or cause to be used, and/or seize, any computer system, data storage device, media, computer programs or associated documentation, including operating instructions, manuals and service records present on the premises;
  - c. Use or cause to be used, any computer system, data storage device, media or computer program brought onto the premises by the persons authorized to execute the warrant;

- d. Require any person who is in possession or control of the premises, including, where applicable, a computer system administrator or other custodian of information of a computer system on the premises, to permit any person named in the warrant to use or cause to be used any computer system or part of it on the premises by making accessible all data contained in any computer system, computer program, data storage device or media for the purposes of searching or seizing such data;
- e. Seize or produce an image of data from which they are unable to acquire the substance or meaning at the premises, for further off-site examination; and
- f. Employ, retain, direct or engage other persons to assist in the search of the named premises including the services of computer consultants or diagnosticians, which persons would, in the presence of persons authorized in the warrant, attend at the premises and perform such tasks as may assist the persons authorized in the warrant to carry out their functions authorized by the warrant.

6.3 The following practices and procedures may be used as circumstances dictate:

- (a) Search the computer system, data storage device or media and print or cause to be printed a copy of the records on-site;
- (b) Search the computer system, data storage device or media and reproduce an electronic copy of the records on-site;
- (c) Search the computer system, data storage device or media and produce an image of data to search and reproduce records off-site;  
or
- (d) Seize the computer system, data storage device or media and remove it/them from the premises, to search data and reproduce records off-site.

6.4 Some of these practices and procedures, specifically the steps described above in paragraphs 6.3(c) and 6.3(d) of this warrant, may result in the seizure of data containing records that are not described in paragraph 5 of this warrant. Electronic evidence officers and anyone under their direction will take steps to ensure that such data, with the exception of data that falls within the provisions of section 489 of the *Criminal Code*, will not be

accessible to anyone else.

The following procedures will be followed in order to identify and search data from which records described in paragraph 5 of this warrant can be reproduced, and to minimize access to data that contain records that are not described in paragraph 5 of this warrant:

- a. Where an image is produced as provided for in paragraph 6.3(c) of this warrant:
  - i. a true copy and a working copy of the seized image will be made in addition to any copy that may be provided to the party from whom it was seized;
  - ii. the seized image and the true copy will be sealed to protect the integrity of the data;
  - iii. the working copy will be examined by electronic evidence officers and anyone under their direction and records described in paragraph 5 of this warrant will be reproduced;
  - iv. access to the working copy will thereafter remain under the control of electronic evidence officers;
  - v. any further searching of data from the working copy, by electronic evidence officers and anyone under their direction, will be confined to data from which records described in paragraph 5 of this warrant can be reproduced, or as required within proceedings that may arise from the search or investigation;
  - vi. in order to minimize the examination of data containing records that are not described in paragraph 5 of this warrant, the persons examining the working copy will use forensic and electronic discovery practices and procedures to identify and search data from which records described in that paragraph can be reproduced; and
  - vii. electronic evidence officers and anyone under their direction will keep confidential all data found within the working copy containing records that are not described in paragraph 5 of this warrant, with the exception of things that fall within the provisions of section 489 of the *Criminal Code*.

- b. A similar process will be followed where a person authorized to execute the warrant, other than an electronic evidence officer, considers it necessary to seize a computer system, data storage device or media from the premises, as described in paragraph 6.3(d) of this warrant. In such a case,
  - i. the computer system, data storage device or media will be transferred to an electronic evidence officer, who may produce an image or extract data in order to produce records described in paragraph 5 of this warrant; and
  - ii. further handling will be as described above.

**7. Duration of this search warrant:**

**7. La durée de validité du présent mandat:**

- 7.1 The search warrants be valid from the 8th day of July, 2013, up to and including the 19th day of July, 2013, or, if issued after the 8th day of July, 2013, for such identical period of time, commencing from the date of issuance of the within sought warrant. It is not the intention of the authorized representatives of the Commissioner to actively conduct the search of the premises during this entire period, however, this period of validity is necessary to ensure that the authorized representatives of the Commissioner have a sufficient amount of time to search, copy, examine and seize a potentially large volume of records or other things.
- 7.2 Authorization be given to the authorized representatives of the Commissioner and Peace Officers to remain on the premises 24 hours per day in order to maintain security over the records or other things to be searched for and the items seized that may be placed in sealed containers and left on the premises each night, and, in order to allow for the completion of a search process involving a computer system commenced prior to 9:00 p.m. It is not the intention of the authorized representatives of the Commissioner to actively conduct the search of the premises 24 hours per day. The search will be actively conducted within the time period of 6 a.m. to 9 p.m. as specified in subsection 15(3) of the *Competition Act*, with allowance made for the completion of a search process involving a computer system or the capture of data, commenced prior to 9:00 p.m., and which, based on the length of the process, will extend after 9:00 p.m. in order to successfully complete or where the discontinuance of the search process of capture of data may result in loss of records or other things to be seized.

**8. This search warrant further authorizes:**

**8. De plus, le présent mandat autorise:**

- 8.1 The persons authorized to execute the warrant may enter the premises, leave them and return to them from time to time during the period of validity of the warrant for the purpose of executing it;
- 8.2 The persons authorized to execute the warrant may be accompanied by a Peace Officer and/or locksmith for the purpose of using such force as necessary or to provide any assistance to facilitate access to the premises, should access to the premises be refused;
- 8.3 One or more authorized representatives of the Commissioner shall be allowed to videotape the events of the search at the premises described at paragraph 3 in order to create a visual record of the manner in which the search was conducted, and to photograph or videotape records or other things to be seized. Such visual recordings can assist in the resolution of any allegation based on the conduct of the search, should such an allegation arise, and can provide a means of capturing records or other relevant information from the premises described at paragraph 3 that cannot readily be physically seized, e.g. writings on a large white board, layout of space, etc.;
- 8.4 The warrant authorizes the persons described at paragraph 1 to search anything found on the premises including personal belongings for which they have reason to believe may contain records or other things to be searched for. Personal belongings include, but are not limited to, briefcases, bags, purses, knapsacks, wallets, electronic devices such as: mobile computers, mobile phones, removable storage media, devices containing electronic data, PDA's (personal digital assistant's), pagers, telephones, and other devices; and
- 8.5 The persons authorized to execute the warrant be authorized to temporarily remove from the search premises any pre-selected record or other thing identified to be searched at the end of any day of searching for the purposes of preserving its integrity, or to prevent the loss or destruction of the said record or other thing. These records or other things will remain sealed and will be kept in the custody of the authorized person executing the warrant during this period of temporary removal. These records or other things will be returned to the premises on the day when the authorized person next returns to the searched premises.

**SOLICITOR-CLIENT PRIVILEGE**

**SECRET PROFESSIONNEL DE  
L'AVOCAT**

**9. It is further ordered that:**

**9. De plus, il est ordonné que:**

- 9.1 When a claim is made that a record about to be examined, copied or seized is subject to solicitor-client privilege, or when an authorized representative of the Commissioner has reason to believe that a record may be subject to solicitor-client privilege the record shall be placed in a package, suitably sealed and placed in the custody of the persons named pursuant to section 19 of the *Competition Act*.
- 9.2 Should a law office be located at the premise to be searched, the law office will not be searched until providing a reasonable opportunity to the respective lawyer to claim privilege over the records located in the office. Until such a reasonable opportunity presents itself, the law office and all records in the office may be sealed so as to preserve any evidence. If the situation should arise where there are no reasonable alternatives but to search the law office without the respective lawyer present, another search warrant will be sought at that time.

**DATED at the City of Ottawa, Province of Ontario, this \_\_\_\_ day of July, 2013.**

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Justice of the Ontario Superior Court of Justice  
(East Region)

Court File No.:

**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

**AND IN THE MATTER OF** an *ex parte* application, pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to prohibit access to and disclosure of this all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

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**WARRANT TO ENTER, SEARCH AND COPY OR  
SEIZE FOR EXAMINATION OR COPYING  
CERTAIN RECORDS OR OTHER THINGS  
PURSUANT TO SECTIONS 15 AND 16 OF THE  
COMPETITION ACT**

300 The East Mall, Suite 200,  
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**Counsel to the Commissioner of Competition**

CANADA  
Province of Ontario

Court File No.: 13-13164

*Competition Act*,  
Sections 15 and 16

**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

**AND IN THE MATTER OF** an *ex parte* application, pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to prohibit access to and disclosure of this all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

---

**WARRANT TO ENTER, SEARCH AND COPY OR SEIZE FOR EXAMINATION OR  
COPYING CERTAIN RECORDS OR OTHER THINGS PURSUANT TO SECTIONS 15  
AND 16 OF THE *COMPETITION ACT***

619 Yonge Street, 2<sup>nd</sup> floor,  
Toronto, Ontario, M4Y 1K9

---

**UPON** the application of Dawn-Marie Jamieson, an authorized representative of the Commissioner of Competition (the "Commissioner"), appointed under the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "*Competition Act*");

**AND UPON** reading the Information on oath of Dawn-Marie Jamieson;

**AND UPON** being satisfied that the requirements of sections 15 and 16 of the *Competition Act* have been met;



**IT IS ORDERED** that this search warrant (the "warrant") be issued authorizing the Commissioner and the persons named herein or authorized by this warrant to enter the premises described in this warrant, search for records and other things described in this warrant, and copy or seize them for examination and copying.

**1. The following persons are authorized to enter the premises described in paragraph 3 of this warrant, search for any records or other things described in paragraph 5 of this warrant and copy them or seize them for examination or copying, in accordance with this search warrant:**

**1. Les personnes suivantes sont autorisées à pénétrer dans les locaux décrits au paragraphe 3 du présent mandat, à y perquisitionner en vue d'obtenir des documents ou autres choses décrits au paragraphe 5 du présent mandat et à en prendre copie ou à les emporter pour en faire l'examen ou en prendre des copies, conformément au présent mandat de perquisition:**

**1.1 Authorized representatives of the Commissioner:**

Dawn-Marie Jamieson, Alain Garneau, Magalie Plouffe, Tom Steen, Tagreed Boules, Kelly Goetz, Ian Roger, Kristen Pihney, Colette Morin-Wade, Melanie Crossman, Melissa Melanson, Lynne Charpentier, Adam Zimmerman, Melanie Larouche, Robert Guilbeault, Kim Chorkowy, Stéphanie Grassi, Travis Todhunter, Anthony Nield, Bryan Cowell, Danielle Dubois, Rob Levine, Elizabeth Eves, Laura Grievson, Yanick Poulin, Robert Guilbeault, François Goulet, Véronique Brosseau, Arthur Carson, Daniel Robitaille

and other authorized representatives of the Commissioner and any person under the direction of the authorized representatives of the Commissioner that can facilitate access to the premises or to open anything that cannot be opened during the course of the search, should such access be denied or impeded;

**1.2 Authorized representatives of the Commissioner trained in electronic search procedures ["electronic evidence officers"]:**

Duncan Monkhouse, Mario Mainville, Matthew Kyrytow, Cliff Smith, Eric Daoust, Sébastien Guy, Marcel Thérien

and, in order to assist the aforementioned officers, any person who, under the direction of these officers, can facilitate the electronic search of computer systems, data storage devices and media; and

1.3 Any peace officer of the province of Ontario in order to assist the authorized representatives of the Commissioner.

**2. The offence or reviewable conduct with respect to which this search warrant is issued are the following:**

**2. L'infraction ou la conduite susceptible d'examen pour laquelle le présent mandat de perquisition est délivré sont:**

2.1 that Ontario Consumers Home Services ("OCHS") and other persons, known and unknown, during the period commencing on or about May 2011, and continuing until at least January 2013, inclusively, the exact dates being unknown, in the province of Ontario, did knowingly or recklessly make materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to subsection 52(1) of the *Competition Act*, thereby committing an offence under Part VI, namely subsection 52(5) of the *Competition Act*; or

2.2 that OCHS and other persons known and unknown, during the period commencing on or about May 2011, and continuing until at least January 2013, the exact dates being unknown, in the province of Ontario, did make materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heater contrary to paragraph 74.01(1)(a) of the *Competition Act*, thereby establishing grounds for the making of an order under Part VII.1, namely section 74.1 of the *Competition Act*

**3. The premises to be searched is:**

**3. Les locaux à être perquisitionnés sont les suivants:**

619 Yonge Street, 2<sup>nd</sup> floor, Toronto, Ontario, M4Y 1K9

including all storage, record keeping and disposal areas located in and about this premises under the control of the occupant(s) of the premises including the Parties under investigation.

#### 4. Definitions:

#### 4. Définitions:

4.1 The following definitions apply to this search warrant:

- (a) "**alleged offence or reviewable conduct under investigation**" means the business, sales and marketing practices of the Parties under investigation (which itself is a defined term – see below), as described at paragraph 2, which are being investigated under subsection 52(1) and paragraph 74.01(1)(a) of the *Competition Act*;
- (b) "**computer password**" has the meaning set out in subsection 342.1(2) of the *Criminal Code* R.S.C., 1985, c. C-46 (as amended) (the "*Criminal Code*");
- (c) "**computer program**" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;
- (d) "**computer service**" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;
- (e) "**computer system**" has the meaning provided by section 16 of the *Competition Act* and, as set out in subsection 342.1(2) of the *Criminal Code*;
- (f) "**data**" has the meaning provided by section 16 of the *Competition Act*, as set out in subsection subsection 342.1(2) of the *Criminal Code*;
- (g) "**Parties under investigation**" means National Home Services (National Energy Corporation, a subsidiary of Just Energy Group Inc.), doing business as National Home Services and Services aux foyers du Québec ("**National**"), morEnergy Services Inc. (Bancmor Credit Corporation and morEnergy Services Inc.), doing business as morEnergy ("**morEnergy**") and Ontario Consumers Home Services Inc. ("**OCHS**"), and includes any business name associated with National, morEnergy and OCHS including, but not limited to, its predecessors, successors, parents, subsidiaries, divisions, partners, contractors, sub-contractors, employees, directors, administrators, corporate officers, agents, representatives and affiliates engaged in business in Canada, and other persons, known or unknown, implicated, directly or indirectly, in the commission of the alleged offence, or engaging in the reviewable conduct described at paragraph 2;

- (h) **"products"** has the meaning provided by section 2 of the *Competition Act*, which includes an article and a service and in this investigation refers to water heaters;
- (i) **"record"** has the meaning provided by section 2 of the *Competition Act* and includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record (including computer data and electro-magnetic recordings in tape or disc form for use in computers or other devices for storing information), and any other documentary material, including software, regardless of physical form or characteristics, and any copy or portion thereof;
- (j) **"relevant time period"** means the period during which it is believed that an alleged offence under subsection 52(1) or reviewable conduct under paragraph 74.01(1)(a) of the *Competition Act* occurred, and includes the period from May 2011 to the present, the exact dates being unknown;
- (k) **"representatives of the Parties under investigation"** means all individuals working for, or on behalf of, the Parties under investigation including, but not limited to, predecessors, successors, parents, subsidiaries, divisions, partners, contractors, sub-contractors, employees, directors, administrators, corporate officers, agents, representatives and affiliates engaged in business in Canada, and other persons, known or unknown, implicated, directly or indirectly, in the commission of the alleged offence or engaging in the reviewable conduct described at paragraph 2; and
- (l) **"water heater"** has the meaning of an appliance consisting of a gas or electric heating unit in which water is heated and stored.

**5. The records and other things to be searched are the following:**

**5. Les documents et autres choses visés par la perquisition sont les suivants:**

- 5.1 The records or other things to be searched for are all records, whenever created, which relate directly or indirectly to, and which will afford evidence of, the commission of the offence or the engaging of reviewable conduct described at paragraph 2. Specifically these are:

### **Corporate Structure**

- (a) All records or other things relating to the ownership, corporate structure, control and management of the Parties under investigation; and any other records or other things relating to the ownership or management and roles, duties, tasks, remuneration and responsibilities of the representatives of the Parties under investigation;

### **Identities**

- (b) All records or other things that, directly or indirectly, identify the individual or commercial names used to carry out the alleged offence or reviewable conduct, or that affiliate such individual or commercial names with legal entities or individuals;
- (c) All records or other things relating to aliases, user names, email addresses, email aliases or user IDs (user identities) used by the Parties under investigation and the representatives of the Parties under investigation involved in the alleged offence or reviewable conduct;
- (d) All records or other things related to the policies of the Parties under investigation for recruiting, training and managing of any past and current representatives of the Parties under investigation, including job postings, application forms, employee pay, commissions, and dismissal records; and
- (e) For any representatives of the Parties under investigation, up to five (5) original business records or other things that contain examples of the handwriting of such person.

### **Revenue, Finances and Compensation**

- (f) All records or other things relating, directly or indirectly, to the revenues generated from water heater rentals and sales by the Parties under investigation and representatives of the Parties under investigation, including historical, actual and forecast data, with respect to the alleged offence or reviewable conduct. These records or other things include but are not limited to: financial statements, annual reports, banking records, budget forecasts, credit and debit transactions, deposits, withdrawals, transfers, cheques, wire transfers, accounts receivable and payable records, currency, returns and any other accounting information;
- (g) All records or other things relating, directly or indirectly, to the management and distribution of the monies gained or revenue generated by the promotion, sale and rental of water heaters by the Parties under investigation and representatives of the Parties under investigation; and

- (h) All records, aliases, user names, or other identifiers or other things relating, directly or indirectly, to the identity, role and compensation of the representatives of the Parties under investigation.

### Operations

- (i) All records or other things relating, directly or indirectly, to the corporate structure of the Parties under investigation and the ownership or control of these entities and any other records relating to the ownership or management and roles, duties, tasks, remuneration and responsibilities of the representatives of the Parties under investigation, including but not limited to guidelines, hiring policies and training manuals;
- (j) All records or other things relating, directly or indirectly, to the rental, lease, or ownership by the Parties under investigation of office space and/or office equipment including, but not limited to: computer systems, electronic storage devices, telephones, facsimile machines, office services (including Internet and telecommunication services), websites and email addresses as they relate to the alleged offence or reviewable conduct;
- (k) All records or other things relating, directly or indirectly, to the advertisement, sale, promotion, preparation, planning, development, delivery, payment, supply and removal of rental water heaters with respect to the alleged offence or reviewable conduct, including planning and development of sales tactics. These records or other things include, but are not limited to: agreements, contracts, publications, directives, correspondence, pictures, authorizations, memoranda, audio-recordings, door-to-door sales scripts, verification call scripts, efficacy/efficiency testing and notes;
- (l) All records related to certification, license, authorization, including all correspondence with authorities and agencies in relation to the activities or the products promoted;
- (m) All records or other things relating, directly or indirectly, to contracts, including but not limited to: scripts, application forms, customer acknowledgments, installation forms, pamphlets and any other records related to the promotion and supply of water heaters; and
- (n) All records or other things relating, directly or indirectly, to information on the application and use of the ENERGY STAR logos.

### Customers

- (o) All records or other things relating, directly or indirectly, to the customers or potential customers who were or might reasonably have been contacted by, made contact with or conducted business with the representatives of the Parties under investigation, including but not limited to contracts, pamphlets, and promotional materials;
- (p) All records or other things relating to customers who have contracts with the Parties under investigation, including names, addresses, and amounts incurred;
- (q) All records or other things relating to materials that were provided to customers who entered into contracts with the Parties under investigation;
- (r) All records or other things relating, directly or indirectly, to the customer service provided by the Parties under investigation, including but not limited to complaints, customer comments, refund requests, scripts, policies, and any other customer communications; and
- (s) All records or other things relating, directly or indirectly, to correspondence between the Parties under investigation and other agencies including, but not limited to, the BBB and the Ontario Ministry of Consumer Services with respect to conduct relating to the alleged offence or reviewable conduct.

### Other

- (t) Other things, specifically office equipment related to or used in the commission of the alleged offence or reviewable conduct that may be used as evidence including: computer systems, electronic storage devices, telephone switch boxes, telecommunications equipment, electronic surveillance and audio/visual recording devices and tapes, facsimile machines and facsimile memory;
- (u) Other things, specifically computer passwords, computer programs, computer services, computer systems, software, data storage devices, and associated documentation including operating instructions, manuals and service records that will assist in retrieving, copying, reading, printing, deciphering or acquiring the substance or meaning of any data seized, or accessed, together with all passwords, login codes, encryption keys or other security devices relating to these things;

- (v) Other things, specifically all records or other things described at paragraph 5 of this warrant, contained therein, or available to any computer system on the premises to be searched;
- (w) All records or other things relating to the use and application of the ENERGY STAR initiative;
- (x) Other things used by representatives of the Parties under investigation during the alleged offence or reviewable conduct including but are not limited to garments, uniforms, identification badges, clipboards, and contracts; and
- (y) All records or other things that could be used as similar fact evidence.

**6. Operation of Computer Systems:**

**6. Usage des ordinateurs:**

To search data contained in or available to any computer system for records described in paragraph 5 of this warrant:

- 6.1 This warrant authorizes the electronic evidence officers listed in paragraph 1.2 of this warrant to use or cause to be used any computer system on the premises to search any data contained in or available to the computer system; to reproduce the record or cause it to be reproduced from the data in the form of a printout or other intelligible output, and to seize the printout or other output for examination or copying.
- 6.2 The electronic evidence officers authorized to execute this warrant are authorized to do the following, to assist with accessing, searching, examining, copying, and seizing data found on computer systems, data storage devices or media:
  - a. Use forensic practices and procedures for acquiring electronic evidence, while attempting to minimize the impact on business functions;
  - b. Use or cause to be used, and/or seize, any computer system, data storage device, media, computer programs or associated documentation, including operating instructions, manuals and service records present on the premises;
  - c. Use or cause to be used, any computer system, data storage device, media or computer program brought onto the premises by the persons authorized to execute the warrant;



- d. Require any person who is in possession or control of the premises, including, where applicable, a computer system administrator or other custodian of information of a computer system on the premises, to permit any person named in the warrant to use or cause to be used any computer system or part of it on the premises by making accessible all data contained in any computer system, computer program, data storage device or media for the purposes of searching or seizing such data;
- e. Seize or produce an image of data from which they are unable to acquire the substance or meaning at the premises, for further off-site examination; and
- f. Employ, retain, direct or engage other persons to assist in the search of the named premises including the services of computer consultants or diagnosticians, which persons would, in the presence of persons authorized in the warrant, attend at the premises and perform such tasks as may assist the persons authorized in the warrant to carry out their functions authorized by the warrant.

6.3 The following practices and procedures may be used as circumstances dictate:

- (a) Search the computer system, data storage device or media and print or cause to be printed a copy of the records on-site;
- (b) Search the computer system, data storage device or media and reproduce an electronic copy of the records on-site;
- (c) Search the computer system, data storage device or media and produce an image of data to search and reproduce records off-site;  
or
- (d) Seize the computer system, data storage device or media and remove it/them from the premises, to search data and reproduce records off-site.

6.4 Some of these practices and procedures, specifically the steps described above in paragraphs 6.3(c) and 6.3(d) of this warrant, may result in the seizure of data containing records that are not described in paragraph 5 of this warrant. Electronic evidence officers and anyone under their direction will take steps to ensure that such data, with the exception of data that falls within the provisions of section 489 of the *Criminal Code*, will not be

accessible to anyone else.

The following procedures will be followed in order to identify and search data from which records described in paragraph 5 of this warrant can be reproduced, and to minimize access to data that contain records that are not described in paragraph 5 of this warrant:

- a. Where an image is produced as provided for in paragraph 6.3(c) of this warrant:
  - i. a true copy and a working copy of the seized image will be made in addition to any copy that may be provided to the party from whom it was seized;
  - ii. the seized image and the true copy will be sealed to protect the integrity of the data;
  - iii. the working copy will be examined by electronic evidence officers and anyone under their direction and records described in paragraph 5 of this warrant will be reproduced;
  - iv. access to the working copy will thereafter remain under the control of electronic evidence officers;
  - v. any further searching of data from the working copy, by electronic evidence officers and anyone under their direction, will be confined to data from which records described in paragraph 5 of this warrant can be reproduced, or as required within proceedings that may arise from the search or investigation;
  - vi. in order to minimize the examination of data containing records that are not described in paragraph 5 of this warrant, the persons examining the working copy will use forensic and electronic discovery practices and procedures to identify and search data from which records described in that paragraph can be reproduced; and
  - vii. electronic evidence officers and anyone under their direction will keep confidential all data found within the working copy containing records that are not described in paragraph 5 of this warrant, with the exception of things that fall within the provisions of section 489 of the *Criminal Code*.

- b. A similar process will be followed where a person authorized to execute the warrant, other than an electronic evidence officer, considers it necessary to seize a computer system, data storage device or media from the premises, as described in paragraph 6.3(d) of this warrant. In such a case,
  - i. the computer system, data storage device or media will be transferred to an electronic evidence officer, who may produce an image or extract data in order to produce records described in paragraph 5 of this warrant; and
  - ii. further handling will be as described above.

**7. Duration of this search warrant:**

**7. La durée de validité du présent mandat:**

- 7.1 The search warrants be valid from the 8th day of July, 2013, up to and including the 19th day of July, 2013, or, if issued after the 8th day of July, 2013, for such identical period of time, commencing from the date of issuance of the within sought warrant. It is not the intention of the authorized representatives of the Commissioner to actively conduct the search of the premises during this entire period, however, this period of validity is necessary to ensure that the authorized representatives of the Commissioner have a sufficient amount of time to search, copy, examine and seize a potentially large volume of records or other things.
- 7.2 Authorization be given to the authorized representatives of the Commissioner and Peace Officers to remain on the premises 24 hours per day in order to maintain security over the records or other things to be searched for and the items seized that may be placed in sealed containers and left on the premises each night, and, in order to allow for the completion of a search process involving a computer system commenced prior to 9:00 p.m. It is not the intention of the authorized representatives of the Commissioner to actively conduct the search of the premises 24 hours per day. The search will be actively conducted within the time period of 6 a.m. to 9 p.m. as specified in subsection 15(3) of the *Competition Act*, with allowance made for the completion of a search process involving a computer system or the capture of data, commenced prior to 9:00 p.m., and which, based on the length of the process, will extend after 9:00 p.m. in order to successfully complete or where the discontinuance of the search process of capture of data may result in loss of records or other things to be seized.

**8. This search warrant further authorizes:**

**8. De plus, le présent mandat autorise:**

- 8.1 The persons authorized to execute the warrant may enter the premises, leave them and return to them from time to time during the period of validity of the warrant for the purpose of executing it;
- 8.2 The persons authorized to execute the warrant may be accompanied by a Peace Officer and/or locksmith for the purpose of using such force as necessary or to provide any assistance to facilitate access to the premises, should access to the premises be refused;
- 8.3 One or more authorized representatives of the Commissioner shall be allowed to videotape the events of the search at the premises described at paragraph 3 in order to create a visual record of the manner in which the search was conducted, and to photograph or videotape records or other things to be seized. Such visual recordings can assist in the resolution of any allegation based on the conduct of the search, should such an allegation arise, and can provide a means of capturing records or other relevant information from the premises described at paragraph 3 that cannot readily be physically seized, e.g. writings on a large white board, layout of space, etc.;
- 8.4 The warrant authorizes the persons described at paragraph 1 to search anything found on the premises including personal belongings for which they have reason to believe may contain records or other things to be searched for. Personal belongings include, but are not limited to, briefcases, bags, purses, knapsacks, wallets, electronic devices such as: mobile computers, mobile phones, removable storage media, devices containing electronic data, PDA's (personal digital assistant's), pagers, telephones, and other devices; and
- 8.5 The persons authorized to execute the warrant be authorized to temporarily remove from the search premises any pre-selected record or other thing identified to be searched at the end of any day of searching for the purposes of preserving its integrity, or to prevent the loss or destruction of the said record or other thing. These records or other things will remain sealed and will be kept in the custody of the authorized person executing the warrant during this period of temporary removal. These records or other things will be returned to the premises on the day when the authorized person next returns to the searched premises.

**SOLICITOR-CLIENT PRIVILEGE**

**SECRET PROFESSIONNEL DE  
L'AVOCAT**

**9. It is further ordered that:**

**9. De plus, il est ordonné que:**

- 9.1 When a claim is made that a record about to be examined, copied or seized is subject to solicitor-client privilege, or when an authorized representative of the Commissioner has reason to believe that a record may be subject to solicitor-client privilege the record shall be placed in a package, suitably sealed and placed in the custody of the persons named pursuant to section 19 of the *Competition Act*.
- 9.2 Should a law office be located at the premise to be searched, the law office will not be searched until providing a reasonable opportunity to the respective lawyer to claim privilege over the records located in the office. Until such a reasonable opportunity presents itself, the law office and all records in the office may be sealed so as to preserve any evidence. If the situation should arise where there are no reasonable alternatives but to search the law office without the respective lawyer present, another search warrant will be sought at that time.

**DATED at the City of Ottawa, Province of Ontario, this \_\_\_\_ day of July, 2013.**

\_\_\_\_\_  
Justice of the Ontario Superior Court of Justice  
(East Region)

Court File No.:

**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

**AND IN THE MATTER OF** an *ex parte* application, pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to prohibit access to and disclosure of this all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

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**WARRANT TO ENTER, SEARCH AND COPY OR  
SEIZE FOR EXAMINATION OR COPYING  
CERTAIN RECORDS OR OTHER THINGS  
PURSUANT TO SECTIONS 15 AND 16 OF THE  
COMPETITION ACT**

619 Yonge Street, 2<sup>nd</sup> floor,  
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**Josephine A.L. Palumbo**  
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**Counsel to the Commissioner of Competition**

CANADA  
Province of Ontario

Court File No.: 13-13104

*Competition Act*,  
Sections 15 and 16

**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

**AND IN THE MATTER OF** an *ex parte* application, pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to prohibit access to and disclosure of this all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

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**WARRANT TO ENTER, SEARCH AND COPY OR SEIZE FOR EXAMINATION OR  
COPYING CERTAIN RECORDS OR OTHER THINGS PURSUANT TO SECTIONS 15  
AND 16 OF THE *COMPETITION ACT***

1280 Finch Ave West,  
North York, Ontario, M3K 3J2

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**UPON** the application of Dawn-Marie Jamieson, an authorized representative of the Commissioner of Competition (the "Commissioner"), appointed under the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "*Competition Act*");

**AND UPON** reading the Information on oath of Dawn-Marie Jamieson;

**AND UPON** being satisfied that the requirements of sections 15 and 16 of the *Competition Act* have been met;

**IT IS ORDERED** that this search warrant (the "warrant") be issued authorizing the Commissioner and the persons named herein or authorized by this warrant to enter the premises described in this warrant, search for records and other things described in this warrant, and copy or seize them for examination and copying.

**1. The following persons are authorized to enter the premises described in paragraph 3 of this warrant, search for any records or other things described in paragraph 5 of this warrant and copy them or seize them for examination or copying, in accordance with this search warrant:**

**1. Les personnes suivantes sont autorisées à pénétrer dans les locaux décrits au paragraphe 3 du présent mandat, à y perquisitionner en vue d'obtenir des documents ou autres choses décrits au paragraphe 5 du présent mandat et à en prendre copie ou à les emporter pour en faire l'examen ou en prendre des copies, conformément au présent mandat de perquisition:**

**1.1 Authorized representatives of the Commissioner:**

Dawn-Marie Jamieson, Alain Garneau, Magalie Plouffe, Tom Steen, Tagreed Boules, Kelly Goetz, Ian Roger, Kristen Pihney, Colette Morin-Wade, Melanie Crossman, Melissa Melanson, Lynne Charpentier, Adam Zimmerman, Melanie Larouche, Robert Guilbeault, Kim Chorkowy, Stéphanie Grassi, Travis Todhunter, Anthony Nield, Bryan Cowell, Danielle Dubois, Rob Levine, Elizabeth Eves, Laura Grievson, Yanick Poulin, Robert Guilbeault, François Goulet, Véronique Brosseau, Arthur Carson, Daniel Robitaille

and other authorized representatives of the Commissioner and any person under the direction of the authorized representatives of the Commissioner that can facilitate access to the premises or to open anything that cannot be opened during the course of the search, should such access be denied or impeded;

**1.2 Authorized representatives of the Commissioner trained in electronic search procedures ["electronic evidence officers"]:**

Duncan Monkhouse, Mario Mainville, Matthew Kyrytow, Cliff Smith, Eric Daoust, Sébastien Guy, Marcel Thérien

and, in order to assist the aforementioned officers, any person who, under the direction of these officers, can facilitate the electronic search of computer systems, data storage devices and media; and



1.3 Any peace officer of the province of Ontario in order to assist the authorized representatives of the Commissioner.

**2. The offence or reviewable conduct with respect to which this search warrant is issued are the following:**

**2. L'infraction ou la conduite susceptible d'examen pour laquelle le présent mandat de perquisition est délivré sont:**

2.1 that Ontario Consumers Home Services ("OCHS") and other persons, known and unknown, during the period commencing on or about May 2011, and continuing until at least January 2013, inclusively, the exact dates being unknown, in the province of Ontario, did knowingly or recklessly make materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to subsection 52(1) of the *Competition Act*, thereby committing an offence under Part VI, namely subsection 52(5) of the *Competition Act*; or

2.2 that OCHS and other persons known and unknown, during the period commencing on or about May 2011, and continuing until at least January 2013, the exact dates being unknown, in the province of Ontario, did make materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heater contrary to paragraph 74.01(1)(a) of the *Competition Act*, thereby establishing grounds for the making of an order under Part VII.1, namely section 74.1 of the *Competition Act*

**3. The premises to be searched is:**

**3. Les locaux à être perquisitionnés sont les suivants:**

1280 Finch Ave West, North York, Ontario, M3K 3J2

including all storage, record keeping and disposal areas located in and about this premises under the control of the occupant(s) of the premises including the Parties under investigation.

#### 4. Definitions:

#### 4. Définitions:

4.1 The following definitions apply to this search warrant:

- (a) "**alleged offence or reviewable conduct under investigation**" means the business, sales and marketing practices of the Parties under investigation (which itself is a defined term – see below), as described at paragraph 2, which are being investigated under subsection 52(1) and paragraph 74.01(1)(a) of the *Competition Act*;
- (b) "**computer password**" has the meaning set out in subsection 342.1(2) of the *Criminal Code* R.S.C., 1985, c. C-46 (as amended) (the "*Criminal Code*");
- (c) "**computer program**" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;
- (d) "**computer service**" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;
- (e) "**computer system**" has the meaning provided by section 16 of the *Competition Act* and, as set out in subsection 342.1(2) of the *Criminal Code*;
- (f) "**data**" has the meaning provided by section 16 of the *Competition Act*, as set out in subsection subsection 342.1(2) of the *Criminal Code*;
- (g) "**Parties under Investigation**" means National Home Services (National Energy Corporation, a subsidiary of Just Energy Group Inc.), doing business as National Home Services and Services aux foyers du Québec ("**National**"), morEnergy Services Inc. (Bancmor Credit Corporation and morEnergy Services Inc.), doing business as morEnergy ("**morEnergy**") and Ontario Consumers Home Services Inc. ("**OCHS**"), and includes any business name associated with National, morEnergy and OCHS including, but not limited to, its predecessors, successors, parents, subsidiaries, divisions, partners, contractors, sub-contractors, employees, directors, administrators, corporate officers, agents, representatives and affiliates engaged in business in Canada, and other persons, known or unknown, implicated, directly or indirectly, in the commission of the alleged offence, or engaging in the reviewable conduct described at paragraph 2;

- (h) **"products"** has the meaning provided by section 2 of the *Competition Act*, which includes an article and a service and in this investigation refers to water heaters;
- (i) **"record"** has the meaning provided by section 2 of the *Competition Act* and includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record (including computer data and electro-magnetic recordings in tape or disc form for use in computers or other devices for storing information), and any other documentary material, including software, regardless of physical form or characteristics, and any copy or portion thereof;
- (j) **"relevant time period"** means the period during which it is believed that an alleged offence under subsection 52(1) or reviewable conduct under paragraph 74.01(1)(a) of the *Competition Act* occurred, and includes the period from May 2011 to the present, the exact dates being unknown;
- (k) **"representatives of the Parties under investigation"** means all individuals working for, or on behalf of, the Parties under investigation including, but not limited to, predecessors, successors, parents, subsidiaries, divisions, partners, contractors, sub-contractors, employees, directors, administrators, corporate officers, agents, representatives and affiliates engaged in business in Canada, and other persons, known or unknown, implicated, directly or indirectly, in the commission of the alleged offence or engaging in the reviewable conduct described at paragraph 2; and
- (l) **"water heater"** has the meaning of an appliance consisting of a gas or electric heating unit in which water is heated and stored.

**5. The records and other things to be searched are the following:**

**5. Les documents et autres choses visés par la perquisition sont les suivants:**

- 5.1 The records or other things to be searched for are all records, whenever created, which relate directly or indirectly to, and which will afford evidence of, the commission of the offence or the engaging of reviewable conduct described at paragraph 2. Specifically these are:

### **Corporate Structure**

- (a) All records or other things relating to the ownership, corporate structure, control and management of the Parties under investigation; and any other records or other things relating to the ownership or management and roles, duties, tasks, remuneration and responsibilities of the representatives of the Parties under investigation;

### **Identities**

- (b) All records or other things that, directly or indirectly, identify the individual or commercial names used to carry out the alleged offence or reviewable conduct, or that affiliate such individual or commercial names with legal entities or individuals;
- (c) All records or other things relating to aliases, user names, email addresses, email aliases or user IDs (user identities) used by the Parties under investigation and the representatives of the Parties under investigation involved in the alleged offence or reviewable conduct;
- (d) All records or other things related to the policies of the Parties under investigation for recruiting, training and managing of any past and current representatives of the Parties under investigation, including job postings, application forms, employee pay, commissions, and dismissal records; and
- (e) For any representatives of the Parties under investigation, up to five (5) original business records or other things that contain examples of the handwriting of such person.

### **Revenue, Finances and Compensation**

- (f) All records or other things relating, directly or indirectly, to the revenues generated from water heater rentals and sales by the Parties under investigation and representatives of the Parties under investigation, including historical, actual and forecast data, with respect to the alleged offence or reviewable conduct. These records or other things include but are not limited to: financial statements, annual reports, banking records, budget forecasts, credit and debit transactions, deposits, withdrawals, transfers, cheques, wire transfers, accounts receivable and payable records, currency, returns and any other accounting information;
- (g) All records or other things relating, directly or indirectly, to the management and distribution of the monies gained or revenue generated by the promotion, sale and rental of water heaters by the Parties under investigation and representatives of the Parties under investigation; and

- (h) All records, aliases, user names, or other identifiers or other things relating, directly or indirectly, to the identity, role and compensation of the representatives of the Parties under investigation.

**Operations**

- (i) All records or other things relating, directly or indirectly, to the corporate structure of the Parties under investigation and the ownership or control of these entities and any other records relating to the ownership or management and roles, duties, tasks, remuneration and responsibilities of the representatives of the Parties under investigation, including but not limited to guidelines, hiring policies and training manuals;
- (j) All records or other things relating, directly or indirectly, to the rental, lease, or ownership by the Parties under investigation of office space and/or office equipment including, but not limited to: computer systems, electronic storage devices, telephones, facsimile machines, office services (including Internet and telecommunication services), websites and email addresses as they relate to the alleged offence or reviewable conduct;
- (k) All records or other things relating, directly or indirectly, to the advertisement, sale, promotion, preparation, planning, development, delivery, payment, supply and removal of rental water heaters with respect to the alleged offence or reviewable conduct, including planning and development of sales tactics. These records or other things include, but are not limited to: agreements, contracts, publications, directives, correspondence, pictures, authorizations, memoranda, audio-recordings, door-to-door sales scripts, verification call scripts, efficacy/efficiency testing and notes;
- (l) All records related to certification, license, authorization, including all correspondence with authorities and agencies in relation to the activities or the products promoted;
- (m) All records or other things relating, directly or indirectly, to contracts, including but not limited to: scripts, application forms, customer acknowledgments, installation forms, pamphlets and any other records related to the promotion and supply of water heaters; and
- (n) All records or other things relating, directly or indirectly, to information on the application and use of the ENERGY STAR logos.

### Customers

- (o) All records or other things relating, directly or indirectly, to the customers or potential customers who were or might reasonably have been contacted by, made contact with or conducted business with the representatives of the Parties under investigation, including but not limited to contracts, pamphlets, and promotional materials;
- (p) All records or other things relating to customers who have contracts with the Parties under investigation, including names, addresses, and amounts incurred;
- (q) All records or other things relating to materials that were provided to customers who entered into contracts with the Parties under investigation;
- (r) All records or other things relating, directly or indirectly, to the customer service provided by the Parties under investigation, including but not limited to complaints, customer comments, refund requests, scripts, policies, and any other customer communications; and
- (s) All records or other things relating, directly or indirectly, to correspondence between the Parties under investigation and other agencies including, but not limited to, the BBB and the Ontario Ministry of Consumer Services with respect to conduct relating to the alleged offence or reviewable conduct.

### Other

- (t) Other things, specifically office equipment related to or used in the commission of the alleged offence or reviewable conduct that may be used as evidence including: computer systems, electronic storage devices, telephone switch boxes, telecommunications equipment, electronic surveillance and audio/visual recording devices and tapes, facsimile machines and facsimile memory;
- (u) Other things, specifically computer passwords, computer programs, computer services, computer systems, software, data storage devices, and associated documentation including operating instructions, manuals and service records that will assist in retrieving, copying, reading, printing, deciphering or acquiring the substance or meaning of any data seized, or accessed, together with all passwords, login codes, encryption keys or other security devices relating to these things;

- (v) Other things, specifically all records or other things described at paragraph 5 of this warrant, contained therein, or available to any computer system on the premises to be searched;
- (w) All records or other things relating to the use and application of the ENERGY STAR initiative;
- (x) Other things used by representatives of the Parties under investigation during the alleged offence or reviewable conduct including but are not limited to garments, uniforms, identification badges, clipboards, and contracts; and
- (y) All records or other things that could be used as similar fact evidence.

**6. Operation of Computer Systems:**

**6. Usage des ordinateurs:**

To search data contained in or available to any computer system for records described in paragraph 5 of this warrant:

- 6.1 This warrant authorizes the electronic evidence officers listed in paragraph 1.2 of this warrant to use or cause to be used any computer system on the premises to search any data contained in or available to the computer system; to reproduce the record or cause it to be reproduced from the data in the form of a printout or other intelligible output, and to seize the printout or other output for examination or copying.
- 6.2 The electronic evidence officers authorized to execute this warrant are authorized to do the following, to assist with accessing, searching, examining, copying, and seizing data found on computer systems, data storage devices or media:
  - a. Use forensic practices and procedures for acquiring electronic evidence, while attempting to minimize the impact on business functions;
  - b. Use or cause to be used, and/or seize, any computer system, data storage device, media, computer programs or associated documentation, including operating instructions, manuals and service records present on the premises;
  - c. Use or cause to be used, any computer system, data storage device, media or computer program brought onto the premises by the persons authorized to execute the warrant;

- d. Require any person who is in possession or control of the premises, including, where applicable, a computer system administrator or other custodian of information of a computer system on the premises, to permit any person named in the warrant to use or cause to be used any computer system or part of it on the premises by making accessible all data contained in any computer system, computer program, data storage device or media for the purposes of searching or seizing such data;
- e. Seize or produce an image of data from which they are unable to acquire the substance or meaning at the premises, for further off-site examination; and
- f. Employ, retain, direct or engage other persons to assist in the search of the named premises including the services of computer consultants or diagnosticians, which persons would, in the presence of persons authorized in the warrant, attend at the premises and perform such tasks as may assist the persons authorized in the warrant to carry out their functions authorized by the warrant.

6.3 The following practices and procedures may be used as circumstances dictate:

- (a) Search the computer system, data storage device or media and print or cause to be printed a copy of the records on-site;
- (b) Search the computer system, data storage device or media and reproduce an electronic copy of the records on-site;
- (c) Search the computer system, data storage device or media and produce an image of data to search and reproduce records off-site; or
- (d) Seize the computer system, data storage device or media and remove it/them from the premises, to search data and reproduce records off-site.

6.4 Some of these practices and procedures, specifically the steps described above in paragraphs 6.3(c) and 6.3(d) of this warrant, may result in the seizure of data containing records that are not described in paragraph 5 of this warrant. Electronic evidence officers and anyone under their direction will take steps to ensure that such data, with the exception of data that falls within the provisions of section 489 of the *Criminal Code*, will not be



accessible to anyone else.

The following procedures will be followed in order to identify and search data from which records described in paragraph 5 of this warrant can be reproduced, and to minimize access to data that contain records that are not described in paragraph 5 of this warrant:

- a. Where an image is produced as provided for in paragraph 6.3(c) of this warrant:
  - i. a true copy and a working copy of the seized image will be made in addition to any copy that may be provided to the party from whom it was seized;
  - ii. the seized image and the true copy will be sealed to protect the integrity of the data;
  - iii. the working copy will be examined by electronic evidence officers and anyone under their direction and records described in paragraph 5 of this warrant will be reproduced;
  - iv. access to the working copy will thereafter remain under the control of electronic evidence officers;
  - v. any further searching of data from the working copy, by electronic evidence officers and anyone under their direction, will be confined to data from which records described in paragraph 5 of this warrant can be reproduced, or as required within proceedings that may arise from the search or investigation;
  - vi. in order to minimize the examination of data containing records that are not described in paragraph 5 of this warrant, the persons examining the working copy will use forensic and electronic discovery practices and procedures to identify and search data from which records described in that paragraph can be reproduced; and
  - vii. electronic evidence officers and anyone under their direction will keep confidential all data found within the working copy containing records that are not described in paragraph 5 of this warrant, with the exception of things that fall within the provisions of section 489 of the *Criminal Code*.

- b. A similar process will be followed where a person authorized to execute the warrant, other than an electronic evidence officer, considers it necessary to seize a computer system, data storage device or media from the premises, as described in paragraph 6.3(d) of this warrant. In such a case,
  - i. the computer system, data storage device or media will be transferred to an electronic evidence officer, who may produce an image or extract data in order to produce records described in paragraph 5 of this warrant; and
  - ii. further handling will be as described above.

**7. Duration of this search warrant:**

**7. La durée de validité du présent mandat:**

- 7.1 The search warrants be valid from the 8th day of July, 2013, up to and including the 19th day of July, 2013, or, if issued after the 8th day of July, 2013, for such identical period of time, commencing from the date of issuance of the within sought warrant. It is not the intention of the authorized representatives of the Commissioner to actively conduct the search of the premises during this entire period, however, this period of validity is necessary to ensure that the authorized representatives of the Commissioner have a sufficient amount of time to search, copy, examine and seize a potentially large volume of records or other things.
- 7.2 Authorization be given to the authorized representatives of the Commissioner and Peace Officers to remain on the premises 24 hours per day in order to maintain security over the records or other things to be searched for and the items seized that may be placed in sealed containers and left on the premises each night, and, in order to allow for the completion of a search process involving a computer system commenced prior to 9:00 p.m. It is not the intention of the authorized representatives of the Commissioner to actively conduct the search of the premises 24 hours per day. The search will be actively conducted within the time period of 6 a.m. to 9 p.m. as specified in subsection 15(3) of the *Competition Act*, with allowance made for the completion of a search process involving a computer system or the capture of data, commenced prior to 9:00 p.m., and which, based on the length of the process, will extend after 9:00 p.m. in order to successfully complete or where the discontinuance of the search process of capture of data may result in loss of records or other things to be seized.

**8. This search warrant further authorizes:**

**8. De plus, le présent mandat autorise:**

- 8.1 The persons authorized to execute the warrant may enter the premises, leave them and return to them from time to time during the period of validity of the warrant for the purpose of executing it;
- 8.2 The persons authorized to execute the warrant may be accompanied by a Peace Officer and/or locksmith for the purpose of using such force as necessary or to provide any assistance to facilitate access to the premises, should access to the premises be refused;
- 8.3 One or more authorized representatives of the Commissioner shall be allowed to videotape the events of the search at the premises described at paragraph 3 in order to create a visual record of the manner in which the search was conducted, and to photograph or videotape records or other things to be seized. Such visual recordings can assist in the resolution of any allegation based on the conduct of the search, should such an allegation arise, and can provide a means of capturing records or other relevant information from the premises described at paragraph 3 that cannot readily be physically seized, e.g. writings on a large white board, layout of space, etc.;
- 8.4 The warrant authorizes the persons described at paragraph 1 to search anything found on the premises including personal belongings for which they have reason to believe may contain records or other things to be searched for. Personal belongings include, but are not limited to, briefcases, bags, purses, knapsacks, wallets, electronic devices such as: mobile computers, mobile phones, removable storage media, devices containing electronic data, PDA's (personal digital assistant's), pagers, telephones, and other devices; and
- 8.5 The persons authorized to execute the warrant be authorized to temporarily remove from the search premises any pre-selected record or other thing identified to be searched at the end of any day of searching for the purposes of preserving its integrity, or to prevent the loss or destruction of the said record or other thing. These records or other things will remain sealed and will be kept in the custody of the authorized person executing the warrant during this period of temporary removal. These records or other things will be returned to the premises on the day when the authorized person next returns to the searched premises.

**SOLICITOR-CLIENT PRIVILEGE**

**SECRET PROFESSIONNEL DE  
L'AVOCAT**

**9. It is further ordered that:**

**9. De plus, il est ordonné que:**

- 9.1 When a claim is made that a record about to be examined, copied or seized is subject to solicitor-client privilege, or when an authorized representative of the Commissioner has reason to believe that a record may be subject to solicitor-client privilege the record shall be placed in a package, suitably sealed and placed in the custody of the persons named pursuant to section 19 of the *Competition Act*.
- 9.2 Should a law office be located at the premise to be searched, the law office will not be searched until providing a reasonable opportunity to the respective lawyer to claim privilege over the records located in the office. Until such a reasonable opportunity presents itself, the law office and all records in the office may be sealed so as to preserve any evidence. If the situation should arise where there are no reasonable alternatives but to search the law office without the respective lawyer present, another search warrant will be sought at that time.

**DATED at the City of Ottawa, Province of Ontario, this \_\_\_\_ day of July, 2013.**

\_\_\_\_\_  
Justice of the Ontario Superior Court of Justice  
(East Region)

**Court File No.:**

**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

**AND IN THE MATTER OF** an *ex parte* application, pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to prohibit access to and disclosure of this all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

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**WARRANT TO ENTER, SEARCH AND COPY OR  
SEIZE FOR EXAMINATION OR COPYING  
CERTAIN RECORDS OR OTHER THINGS  
PURSUANT TO SECTIONS 15 AND 16 OF THE  
COMPETITION ACT**

1280 Finch Ave West,  
North York, Ontario, M3K 3J2

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**Counsel to the Commissioner of Competition**

**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

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**WARRANT TO ENTER, SEARCH AND COPY OR SEIZE FOR EXAMINATION OR  
COPYING CERTAIN RECORDS OR OTHER THINGS PURSUANT TO SECTIONS 15  
AND 16 OF THE *COMPETITION ACT***

2225 Sheppard Ave East, Suite 1501,  
North York, Ontario, M2J 5C2

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**UPON** the application of Dawn-Marie Jamieson, an authorized representative of the Commissioner of Competition (the "Commissioner"), appointed under the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "*Competition Act*");

**AND UPON** reading the Information on oath of Dawn-Marie Jamieson;

**AND UPON** being satisfied that the requirements of sections 15 and 16 of the *Competition Act* have been met;

**IT IS ORDERED** that this search warrant (the "warrant") be issued authorizing the Commissioner and the persons named herein or authorized by this warrant to enter the premises described in this warrant, search for records and other things described in this warrant, and copy or seize them for examination and copying.

**1. The following persons are authorized to enter the premises described in paragraph 3 of this warrant, search for any records or other things described in paragraph 5 of this warrant and copy them or seize them for examination or copying, in accordance with this search warrant:**

**1. Les personnes suivantes sont autorisées à pénétrer dans les locaux décrits au paragraphe 3 du présent mandat, à y perquisitionner en vue d'obtenir des documents ou autres choses décrits au paragraphe 5 du présent mandat et à en prendre copie ou à les emporter pour en faire l'examen ou en prendre des copies, conformément au présent mandat de perquisition:**

**1.1 Authorized representatives of the Commissioner:**

Dawn-Marie Jamieson, Alain Garneau, Magalie Plouffe, Tom Steen, Tagreed Boules, Kelly Goetz, Ian Roger, Kristen Pihney, Colette Morin-Wade, Melanie Crossman, Melissa Melanson, Lynne Charpentier, Adam Zimmerman, Melanie Larouche, Robert Guilbeault, Kim Chorkowy, Stéphanie Grassi, Travis Todhunter, Anthony Nield, Bryan Cowell, Danielle Dubois, Rob Levine, Elizabeth Eves, Laura Grievson, Yanick Poulin, Robert Guilbeault, François Goulet, Véronique Brosseau, Arthur Carson, Daniel Robitaille

and other authorized representatives of the Commissioner and any person under the direction of the authorized representatives of the Commissioner that can facilitate access to the premises or to open anything that cannot be opened during the course of the search, should such access be denied or impeded;

**1.2 Authorized representatives of the Commissioner trained in electronic search procedures ["electronic evidence officers"]:**

Duncan Monkhouse, Mario Mainville, Matthew Kyrytow, Cliff Smith, Eric Daoust, Sébastien Guy, Marcel Thérien

and, in order to assist the aforementioned officers, any person who, under the direction of these officers, can facilitate the electronic search of computer systems, data storage devices and media; and

1.3 Any peace officer of the province of Ontario in order to assist the authorized representatives of the Commissioner.

**2. The offence or reviewable conduct with respect to which this search warrant is issued are the following:**

**2. L'infraction ou la conduite susceptible d'examen pour laquelle le présent mandat de perquisition est délivré sont:**

2.1 that Ontario Consumers Home Services ("OCHS") and other persons, known and unknown, during the period commencing on or about May 2011, and continuing until at least January 2013, inclusively, the exact dates being unknown, in the province of Ontario, did knowingly or recklessly make materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to subsection 52(1) of the *Competition Act*, thereby committing an offence under Part VI, namely subsection 52(5) of the *Competition Act*; or

2.2 that OCHS and other persons known and unknown, during the period commencing on or about May 2011, and continuing until at least January 2013, the exact dates being unknown, in the province of Ontario, did make materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heater contrary to paragraph 74.01(1)(a) of the *Competition Act*, thereby establishing grounds for the making of an order under Part VII.1, namely section 74.1 of the *Competition Act*

**3. The premises to be searched is:**

**3. Les locaux à être perquisitionnés sont les suivants:**

2225 Sheppard Ave East, Suite 1501, North York, Ontario, M2J 5C2

including all storage, record keeping and disposal areas located in and about this premises under the control of the occupant(s) of the premises including the Parties under investigation.



#### 4. Definitions:

#### 4. Définitions:

4.1 The following definitions apply to this search warrant:

- (a) "**alleged offence or reviewable conduct under investigation**" means the business, sales and marketing practices of the Parties under investigation (which itself is a defined term – see below), as described at paragraph 2, which are being investigated under subsection 52(1) and paragraph 74.01(1)(a) of the *Competition Act*;
- (b) "**computer password**" has the meaning set out in subsection 342.1(2) of the *Criminal Code* R.S.C., 1985, c. C-46 (as amended) (the "*Criminal Code*");
- (c) "**computer program**" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;
- (d) "**computer service**" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;
- (e) "**computer system**" has the meaning provided by section 16 of the *Competition Act* and, as set out in subsection 342.1(2) of the *Criminal Code*;
- (f) "**data**" has the meaning provided by section 16 of the *Competition Act*, as set out in subsection subsection 342.1(2) of the *Criminal Code*;
- (g) "**Parties under investigation**" means National Home Services (National Energy Corporation, a subsidiary of Just Energy Group Inc.), doing business as National Home Services and Services aux foyers du Québec ("**National**"), morEnergy Services Inc. (Bancmor Credit Corporation and morEnergy Services Inc.), doing business as morEnergy ("**morEnergy**") and Ontario Consumers Home Services Inc. ("**OCHS**"), and includes any business name associated with National, morEnergy and OCHS including, but not limited to, its predecessors, successors, parents, subsidiaries, divisions, partners, contractors, sub-contractors, employees, directors, administrators, corporate officers, agents, representatives and affiliates engaged in business in Canada, and other persons, known or unknown, implicated, directly or indirectly, in the commission of the alleged offence, or engaging in the reviewable conduct described at paragraph 2;

- (h) "**products**" has the meaning provided by section 2 of the *Competition Act*, which includes an article and a service and in this investigation refers to water heaters;
- (i) "**record**" has the meaning provided by section 2 of the *Competition Act* and includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record (including computer data and electro-magnetic recordings in tape or disc form for use in computers or other devices for storing information), and any other documentary material, including software, regardless of physical form or characteristics, and any copy or portion thereof;
- (j) "**relevant time period**" means the period during which it is believed that an alleged offence under subsection 52(1) or reviewable conduct under paragraph 74.01(1)(a) of the *Competition Act* occurred, and includes the period from May 2011 to the present, the exact dates being unknown;
- (k) "**representatives of the Parties under investigation**" means all individuals working for, or on behalf of, the Parties under investigation including, but not limited to, predecessors, successors, parents, subsidiaries, divisions, partners, contractors, sub-contractors, employees, directors, administrators, corporate officers, agents, representatives and affiliates engaged in business in Canada, and other persons, known or unknown, implicated, directly or indirectly, in the commission of the alleged offence or engaging in the reviewable conduct described at paragraph 2; and
- (l) "**water heater**" has the meaning of an appliance consisting of a gas or electric heating unit in which water is heated and stored.

**5. The records and other things to be searched are the following:**

**5. Les documents et autres choses visés par la perquisition sont les suivants:**

- 5.1 The records or other things to be searched for are all records, whenever created, which relate directly or indirectly to, and which will afford evidence of, the commission of the offence or the engaging of reviewable conduct described at paragraph 2. Specifically these are:

### **Corporate Structure**

- (a) All records or other things relating to the ownership, corporate structure, control and management of the Parties under investigation; and any other records or other things relating to the ownership or management and roles, duties, tasks, remuneration and responsibilities of the representatives of the Parties under investigation;

### **Identities**

- (b) All records or other things that, directly or indirectly, identify the individual or commercial names used to carry out the alleged offence or reviewable conduct, or that affiliate such individual or commercial names with legal entities or individuals;
- (c) All records or other things relating to aliases, user names, email addresses, email aliases or user IDs (user identities) used by the Parties under investigation and the representatives of the Parties under investigation involved in the alleged offence or reviewable conduct;
- (d) All records or other things related to the policies of the Parties under investigation for recruiting, training and managing of any past and current representatives of the Parties under investigation, including job postings, application forms, employee pay, commissions, and dismissal records; and
- (e) For any representatives of the Parties under investigation, up to five (5) original business records or other things that contain examples of the handwriting of such person.

### **Revenue, Finances and Compensation**

- (f) All records or other things relating, directly or indirectly, to the revenues generated from water heater rentals and sales by the Parties under investigation and representatives of the Parties under investigation, including historical, actual and forecast data, with respect to the alleged offence or reviewable conduct. These records or other things include but are not limited to: financial statements, annual reports, banking records, budget forecasts, credit and debit transactions, deposits, withdrawals, transfers, cheques, wire transfers, accounts receivable and payable records, currency, returns and any other accounting information;
- (g) All records or other things relating, directly or indirectly, to the management and distribution of the monies gained or revenue generated by the promotion, sale and rental of water heaters by the Parties under investigation and representatives of the Parties under investigation; and

- (h) All records, aliases, user names, or other identifiers or other things relating, directly or indirectly, to the identity, role and compensation of the representatives of the Parties under investigation.

### Operations

- (i) All records or other things relating, directly or indirectly, to the corporate structure of the Parties under investigation and the ownership or control of these entities and any other records relating to the ownership or management and roles, duties, tasks, remuneration and responsibilities of the representatives of the Parties under investigation, including but not limited to guidelines, hiring policies and training manuals;
- (j) All records or other things relating, directly or indirectly, to the rental, lease, or ownership by the Parties under investigation of office space and/or office equipment including, but not limited to: computer systems, electronic storage devices, telephones, facsimile machines, office services (including Internet and telecommunication services), websites and email addresses as they relate to the alleged offence or reviewable conduct;
- (k) All records or other things relating, directly or indirectly, to the advertisement, sale, promotion, preparation, planning, development, delivery, payment, supply and removal of rental water heaters with respect to the alleged offence or reviewable conduct, including planning and development of sales tactics. These records or other things include, but are not limited to: agreements, contracts, publications, directives, correspondence, pictures, authorizations, memoranda, audio-recordings, door-to-door sales scripts, verification call scripts, efficacy/efficiency testing and notes;
- (l) All records related to certification, license, authorization, including all correspondence with authorities and agencies in relation to the activities or the products promoted;
- (m) All records or other things relating, directly or indirectly, to contracts, including but not limited to: scripts, application forms, customer acknowledgments, installation forms, pamphlets and any other records related to the promotion and supply of water heaters; and
- (n) All records or other things relating, directly or indirectly, to information on the application and use of the ENERGY STAR logos.

### Customers

- (o) All records or other things relating, directly or indirectly, to the customers or potential customers who were or might reasonably have been contacted by, made contact with or conducted business with the representatives of the Parties under investigation, including but not limited to contracts, pamphlets, and promotional materials;
- (p) All records or other things relating to customers who have contracts with the Parties under investigation, including names, addresses, and amounts incurred;
- (q) All records or other things relating to materials that were provided to customers who entered into contracts with the Parties under investigation;
- (r) All records or other things relating, directly or indirectly, to the customer service provided by the Parties under investigation, including but not limited to complaints, customer comments, refund requests, scripts, policies, and any other customer communications; and
- (s) All records or other things relating, directly or indirectly, to correspondence between the Parties under investigation and other agencies including, but not limited to, the BBB and the Ontario Ministry of Consumer Services with respect to conduct relating to the alleged offence or reviewable conduct.

### Other

- (t) Other things, specifically office equipment related to or used in the commission of the alleged offence or reviewable conduct that may be used as evidence including: computer systems, electronic storage devices, telephone switch boxes, telecommunications equipment, electronic surveillance and audio/visual recording devices and tapes, facsimile machines and facsimile memory;
- (u) Other things, specifically computer passwords, computer programs, computer services, computer systems, software, data storage devices, and associated documentation including operating instructions, manuals and service records that will assist in retrieving, copying, reading, printing, deciphering or acquiring the substance or meaning of any data seized, or accessed, together with all passwords, login codes, encryption keys or other security devices relating to these things;

- (v) Other things, specifically all records or other things described at paragraph 5 of this warrant, contained therein, or available to any computer system on the premises to be searched;
- (w) All records or other things relating to the use and application of the ENERGY STAR initiative;
- (x) Other things used by representatives of the Parties under investigation during the alleged offence or reviewable conduct including but are not limited to garments, uniforms, identification badges, clipboards, and contracts; and
- (y) All records or other things that could be used as similar fact evidence.

**6. Operation of Computer Systems:**

**6. Usage des ordinateurs:**

To search data contained in or available to any computer system for records described in paragraph 5 of this warrant:

6.1 This warrant authorizes the electronic evidence officers listed in paragraph 1.2 of this warrant to use or cause to be used any computer system on the premises to search any data contained in or available to the computer system; to reproduce the record or cause it to be reproduced from the data in the form of a printout or other intelligible output, and to seize the printout or other output for examination or copying.

6.2 The electronic evidence officers authorized to execute this warrant are authorized to do the following, to assist with accessing, searching, examining, copying, and seizing data found on computer systems, data storage devices or media:

- a. Use forensic practices and procedures for acquiring electronic evidence, while attempting to minimize the impact on business functions;
- b. Use or cause to be used, and/or seize, any computer system, data storage device, media, computer programs or associated documentation, including operating instructions, manuals and service records present on the premises;
- c. Use or cause to be used, any computer system, data storage device, media or computer program brought onto the premises by the persons authorized to execute the warrant;

- d. Require any person who is in possession or control of the premises, including, where applicable, a computer system administrator or other custodian of information of a computer system on the premises, to permit any person named in the warrant to use or cause to be used any computer system or part of it on the premises by making accessible all data contained in any computer system, computer program, data storage device or media for the purposes of searching or seizing such data;
- e. Seize or produce an image of data from which they are unable to acquire the substance or meaning at the premises, for further off-site examination; and
- f. Employ, retain, direct or engage other persons to assist in the search of the named premises including the services of computer consultants or diagnosticians, which persons would, in the presence of persons authorized in the warrant, attend at the premises and perform such tasks as may assist the persons authorized in the warrant to carry out their functions authorized by the warrant.

6.3 The following practices and procedures may be used as circumstances dictate:

- (a) Search the computer system, data storage device or media and print or cause to be printed a copy of the records on-site;
- (b) Search the computer system, data storage device or media and reproduce an electronic copy of the records on-site;
- (c) Search the computer system, data storage device or media and produce an image of data to search and reproduce records off-site;  
or
- (d) Seize the computer system, data storage device or media and remove it/them from the premises, to search data and reproduce records off-site.

6.4 Some of these practices and procedures, specifically the steps described above in paragraphs 6.3(c) and 6.3(d) of this warrant, may result in the seizure of data containing records that are not described in paragraph 5 of this warrant. Electronic evidence officers and anyone under their direction will take steps to ensure that such data, with the exception of data that falls within the provisions of section 489 of the *Criminal Code*, will not be

accessible to anyone else.

The following procedures will be followed in order to identify and search data from which records described in paragraph 5 of this warrant can be reproduced, and to minimize access to data that contain records that are not described in paragraph 5 of this warrant:

- a. Where an image is produced as provided for in paragraph 6.3(c) of this warrant:
  - i. a true copy and a working copy of the seized image will be made in addition to any copy that may be provided to the party from whom it was seized;
  - ii. the seized image and the true copy will be sealed to protect the integrity of the data;
  - iii. the working copy will be examined by electronic evidence officers and anyone under their direction and records described in paragraph 5 of this warrant will be reproduced;
  - iv. access to the working copy will thereafter remain under the control of electronic evidence officers;
  - v. any further searching of data from the working copy, by electronic evidence officers and anyone under their direction, will be confined to data from which records described in paragraph 5 of this warrant can be reproduced, or as required within proceedings that may arise from the search or investigation;
  - vi. in order to minimize the examination of data containing records that are not described in paragraph 5 of this warrant, the persons examining the working copy will use forensic and electronic discovery practices and procedures to identify and search data from which records described in that paragraph can be reproduced; and
  - vii. electronic evidence officers and anyone under their direction will keep confidential all data found within the working copy containing records that are not described in paragraph 5 of this warrant, with the exception of things that fall within the provisions of section 489 of the *Criminal Code*.



- b. A similar process will be followed where a person authorized to execute the warrant, other than an electronic evidence officer, considers it necessary to seize a computer system, data storage device or media from the premises, as described in paragraph 6.3(d) of this warrant. In such a case,
  - i. the computer system, data storage device or media will be transferred to an electronic evidence officer, who may produce an image or extract data in order to produce records described in paragraph 5 of this warrant; and
  - ii. further handling will be as described above.

**7. Duration of this search warrant:**

**7. La durée de validité du présent mandat:**

- 7.1 The search warrants be valid from the 8th day of July, 2013, up to and including the 19th day of July, 2013, or, if issued after the 8th day of July, 2013, for such identical period of time, commencing from the date of issuance of the within sought warrant. It is not the intention of the authorized representatives of the Commissioner to actively conduct the search of the premises during this entire period, however, this period of validity is necessary to ensure that the authorized representatives of the Commissioner have a sufficient amount of time to search, copy, examine and seize a potentially large volume of records or other things.
- 7.2 Authorization be given to the authorized representatives of the Commissioner and Peace Officers to remain on the premises 24 hours per day in order to maintain security over the records or other things to be searched for and the items seized that may be placed in sealed containers and left on the premises each night, and, in order to allow for the completion of a search process involving a computer system commenced prior to 9:00 p.m. It is not the intention of the authorized representatives of the Commissioner to actively conduct the search of the premises 24 hours per day. The search will be actively conducted within the time period of 6 a.m. to 9 p.m. as specified in subsection 15(3) of the *Competition Act*, with allowance made for the completion of a search process involving a computer system or the capture of data, commenced prior to 9:00 p.m., and which, based on the length of the process, will extend after 9:00 p.m. in order to successfully complete or where the discontinuance of the search process of capture of data may result in loss of records or other things to be seized.

**8. This search warrant further authorizes:**

**8. De plus, le présent mandat autorise:**

- 8.1 The persons authorized to execute the warrant may enter the premises, leave them and return to them from time to time during the period of validity of the warrant for the purpose of executing it;
- 8.2 The persons authorized to execute the warrant may be accompanied by a Peace Officer and/or locksmith for the purpose of using such force as necessary or to provide any assistance to facilitate access to the premises, should access to the premises be refused;
- 8.3 One or more authorized representatives of the Commissioner shall be allowed to videotape the events of the search at the premises described at paragraph 3 in order to create a visual record of the manner in which the search was conducted, and to photograph or videotape records or other things to be seized. Such visual recordings can assist in the resolution of any allegation based on the conduct of the search, should such an allegation arise, and can provide a means of capturing records or other relevant information from the premises described at paragraph 3 that cannot readily be physically seized, e.g. writings on a large white board, layout of space, etc.;
- 8.4 The warrant authorizes the persons described at paragraph 1 to search anything found on the premises including personal belongings for which they have reason to believe may contain records or other things to be searched for. Personal belongings include, but are not limited to, briefcases, bags, purses, knapsacks, wallets, electronic devices such as: mobile computers, mobile phones, removable storage media, devices containing electronic data, PDA's (personal digital assistant's), pagers, telephones, and other devices; and
- 8.5 The persons authorized to execute the warrant be authorized to temporarily remove from the search premises any pre-selected record or other thing identified to be searched at the end of any day of searching for the purposes of preserving its integrity, or to prevent the loss or destruction of the said record or other thing. These records or other things will remain sealed and will be kept in the custody of the authorized person executing the warrant during this period of temporary removal. These records or other things will be returned to the premises on the day when the authorized person next returns to the searched premises.

**SOLICITOR-CLIENT PRIVILEGE**

**SECRET PROFESSIONNEL DE  
L'AVOCAT**

**9. It is further ordered that:**

**9. De plus, il est ordonné que:**

- 9.1 When a claim is made that a record about to be examined, copied or seized is subject to solicitor-client privilege, or when an authorized representative of the Commissioner has reason to believe that a record may be subject to solicitor-client privilege the record shall be placed in a package, suitably sealed and placed in the custody of the persons named pursuant to section 19 of the *Competition Act*.
- 9.2 Should a law office be located at the premise to be searched, the law office will not be searched until providing a reasonable opportunity to the respective lawyer to claim privilege over the records located in the office. Until such a reasonable opportunity presents itself, the law office and all records in the office may be sealed so as to preserve any evidence. If the situation should arise where there are no reasonable alternatives but to search the law office without the respective lawyer present, another search warrant will be sought at that time.

**DATED at the City of Ottawa, Province of Ontario, this \_\_\_\_ day of July, 2013.**

\_\_\_\_\_  
Justice of the Ontario Superior Court of Justice  
(East Region)

**Court File No.:**

**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

**AND IN THE MATTER OF** an *ex parte* application, pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to prohibit access to and disclosure of this all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

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**WARRANT TO ENTER, SEARCH AND COPY OR  
SEIZE FOR EXAMINATION OR COPYING  
CERTAIN RECORDS OR OTHER THINGS  
PURSUANT TO SECTIONS 15 AND 16 OF THE  
COMPETITION ACT**

**2225 Sheppard Ave East, Suite 1501,  
North York, Ontario, M2J 5C2**

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**Josephine A.L. Palumbo  
Senior Litigation Counsel  
Department of Justice  
Competition Bureau Legal Services  
50 Victoria Street,  
Gatineau, QC  
K1A 0C9**

**Tel: 819-953-3902  
Fax: 819-953-9267**

**Counsel to the Commissioner of Competition**

**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

**AND IN THE MATTER OF** an *ex parte* application, pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to prohibit access to and disclosure of this all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

---

**WARRANT TO ENTER, SEARCH AND COPY OR SEIZE FOR EXAMINATION OR  
COPYING CERTAIN RECORDS OR OTHER THINGS PURSUANT TO SECTIONS 15  
AND 16 OF THE *COMPETITION ACT***

5160 Boulevard Décarie, Suite 430,  
Montréal, Québec, H3X 2H9

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**UPON** the application of Dawn-Marie Jamieson, an authorized representative of the Commissioner of Competition (the "Commissioner"), appointed under the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "*Competition Act*");

**AND UPON** reading the information on oath of Dawn-Marie Jamieson;

**AND UPON** being satisfied that the requirements of sections 15 and 16 of the *Competition Act* have been met;

**IT IS ORDERED** that this search warrant (the "warrant") be issued authorizing the Commissioner and the persons named herein or authorized by this warrant to enter the premises described in this warrant, search for records and other things described in this warrant, and copy or seize them for examination and copying.

**1. The following persons are authorized to enter the premises described in paragraph 3 of this warrant, search for any records or other things described in paragraph 5 of this warrant and copy them or seize them for examination or copying, in accordance with this search warrant:**

**1. Les personnes suivantes sont autorisées à pénétrer dans les locaux décrits au paragraphe 3 du présent mandat, à y perquisitionner en vue d'obtenir des documents ou autres choses décrits au paragraphe 5 du présent mandat et à en prendre copie ou à les emporter pour en faire l'examen ou en prendre des copies, conformément au présent mandat de perquisition:**

**1.1 Authorized representatives of the Commissioner:**

Dawn-Marie Jamieson, Alain Garneau, Magalie Plouffe, Tom Steen, Tagreed Boules, Kelly Goetz, Ian Roger, Kristen Pihney, Colette Morin-Wade, Melanie Crossman, Melissa Melanson, Lynne Charpentier, Adam Zimmerman, Melanie Larouche, Robert Guilbeault, Kim Chorkowy, Stéphanie Grassi, Travis Todhunter, Anthony Nield, Bryan Cowell, Danielle Dubois, Rob Levine, Elizabeth Eves, Laura Grievson, Yanick Poulin, Robert Guilbeault, François Goulet, Véronique Brosseau, Arthur Carson, Daniel Robitaille

and other authorized representatives of the Commissioner and any person under the direction of the authorized representatives of the Commissioner that can facilitate access to the premises or to open anything that cannot be opened during the course of the search, should such access be denied or impeded;

**1.2 Authorized representatives of the Commissioner trained in electronic search procedures ["electronic evidence officers"]:**

Duncan Monkhouse, Mario Mainville, Matthew Kyrytow, Cliff Smith, Eric Daoust, Sébastien Guy, Marcel Thérien

and, in order to assist the aforementioned officers, any person who, under the direction of these officers, can facilitate the electronic search of computer systems, data storage devices and media; and

1.3 Any peace officer of the province of Québec in order to assist the authorized representatives of the Commissioner.

**2. The offence or reviewable conduct with respect to which this search warrant is issued are the following:**

**2. L'infraction ou la conduite susceptible d'examen pour laquelle le présent mandat de perquisition est délivré sont:**

2.1 that National Home Services and Services aux foyers du Québec ("**National**") and other persons known and unknown, during the period commencing on or about July 2008 and continuing to the present, inclusively, the exact dates being unknown, did and continue to knowingly or recklessly make materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to subsection 52(1) of the *Competition Act*, thereby committing an offence under Part VI, namely subsection 52(5) of the *Competition Act*; or

2.2 that National and other persons known and unknown, during the period commencing on or about July 2008, and continuing to the present, inclusively, the exact dates being unknown, did make, and continue to make, materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to paragraph 74.01 (1)(a) of the *Competition Act*, thereby establishing grounds for the making of an order under Part VII.1, namely section 74.1 of the *Competition Act*.

**3. The premises to be searched is:**

**3. Les locaux à être perquisitionnés sont les suivants:**

5160 Boulevard Décarie, Suite 430, Montréal, Québec, H3X 2H9

including all storage, record keeping and disposal areas located in and about this premises under the control of the occupant(s) of the premises including the Parties under investigation.

#### 4. Definitions:

#### 4. Définitions:

4.1 The following definitions apply to this search warrant:

- (a) "**alleged offence or reviewable conduct under investigation**" means the business, sales and marketing practices of the Parties under investigation (which itself is a defined term – see below), as described at paragraph 2, which are being investigated under subsection 52(1) and paragraph 74.01(1)(a) of the *Competition Act*;
- (b) "**computer password**" has the meaning set out in subsection 342.1(2) of the *Criminal Code* R.S.C., 1985, c. C-46 (as amended) (the "*Criminal Code*");
- (c) "**computer program**" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;
- (d) "**computer service**" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;
- (e) "**computer system**" has the meaning provided by section 16 of the *Competition Act* and, as set out in subsection 342.1(2) of the *Criminal Code*;
- (f) "**data**" has the meaning provided by section 16 of the *Competition Act*, as set out in subsection subsection 342.1(2) of the *Criminal Code*;
- (g) "**Parties under investigation**" means National Home Services (National Energy Corporation, a subsidiary of Just Energy Group Inc.), doing business as National Home Services and Services aux foyers du Québec ("**National**"), morEnergy Services Inc. (Bancmor Credit Corporation and morEnergy Services Inc.), doing business as morEnergy ("**morEnergy**") and Ontario Consumers Home Services Inc. ("**OCHS**"), and includes any business name associated with National, morEnergy and OCHS including, but not limited to, its predecessors, successors, parents, subsidiaries, divisions, partners, contractors, sub-contractors, employees, directors, administrators, corporate officers, agents, representatives and affiliates engaged in business in Canada, and other persons, known or unknown, implicated, directly or indirectly, in the commission of the alleged offence, or engaging in the reviewable conduct described at paragraph 2;
- (h) "**products**" has the meaning provided by section 2 of the *Competition Act*, which includes an article and a service and in this investigation refers to water heaters;



- (i) **"record"** has the meaning provided by section 2 of the *Competition Act* and includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record (including computer data and electro-magnetic recordings in tape or disc form for use in computers or other devices for storing information), and any other documentary material, including software, regardless of physical form or characteristics, and any copy or portion thereof;
- (j) **"relevant time period"** means the period during which it is believed that an alleged offence under subsection 52(1) or reviewable conduct under paragraph 74.01(1)(a) of the *Competition Act* occurred, and includes the period from July 2008 to the present, the exact dates being unknown;
- (k) **"representatives of the Parties under investigation"** means all individuals working for, or on behalf of, the Parties under investigation including, but not limited to, predecessors, successors, parents, subsidiaries, divisions, partners, contractors, sub-contractors, employees, directors, administrators, corporate officers, agents, representatives and affiliates engaged in business in Canada, and other persons, known or unknown, implicated, directly or indirectly, in the commission of the alleged offence or engaging in the reviewable conduct described at paragraph 2; and
- (l) **"water heater"** has the meaning of an appliance consisting of a gas or electric heating unit in which water is heated and stored.

**5. The records and other things to be searched are the following:**

**5. Les documents et autres choses visés par la perquisition sont les suivants:**

- 5.1 The records or other things to be searched for are all records, whenever created, which relate directly or indirectly to, and which will afford evidence of, the commission of the offence or the engaging of reviewable conduct described at paragraph 2. Specifically these are:

**Corporate Structure**

- (a) All records or other things relating to the ownership, corporate structure, control and management of the Parties under investigation; and any other records or other things relating to the ownership or management and roles, duties, tasks, remuneration and responsibilities of the representatives of the Parties under investigation;

**Identities**

- (b) All records or other things that, directly or indirectly, identify the individual or commercial names used to carry out the alleged offence or reviewable conduct, or that affiliate such individual or commercial names with legal entities or individuals;
- (c) All records or other things relating to aliases, user names, email addresses, email aliases or user IDs (user identities) used by the Parties under investigation and the representatives of the Parties under investigation involved in the alleged offence or reviewable conduct;
- (d) All records or other things related to the policies of the Parties under investigation for recruiting, training and managing of any past and current representatives of the Parties under investigation, including job postings, application forms, employee pay, commissions, and dismissal records; and
- (e) For any representatives of the Parties under investigation, up to five (5) original business records or other things that contain examples of the handwriting of such person.

**Revenue, Finances and Compensation**

- (f) All records or other things relating, directly or indirectly, to the revenues generated from water heater rentals and sales by the Parties under investigation and representatives of the Parties under investigation, including historical, actual and forecast data, with respect to the alleged offence or reviewable conduct. These records or other things include but are not limited to: financial statements, annual reports, banking records, budget forecasts, credit and debit transactions, deposits, withdrawals, transfers, cheques, wire transfers, accounts receivable and payable records, currency, returns and any other accounting information;
- (g) All records or other things relating, directly or indirectly, to the management and distribution of the monies gained or revenue generated by the promotion, sale and rental of water heaters by the Parties under investigation and representatives of the Parties under investigation; and

- (h) All records, aliases, user names, or other identifiers or other things relating, directly or indirectly, to the identity, role and compensation of the representatives of the Parties under investigation.

**Operations**

- (i) All records or other things relating, directly or indirectly, to the corporate structure of the Parties under investigation and the ownership or control of these entities and any other records relating to the ownership or management and roles, duties, tasks, remuneration and responsibilities of the representatives of the Parties under investigation, including but not limited to guidelines, hiring policies and training manuals;
- (j) All records or other things relating, directly or indirectly, to the rental, lease, or ownership by the Parties under investigation of office space and/or office equipment including, but not limited to: computer systems, electronic storage devices, telephones, facsimile machines, office services (including Internet and telecommunication services), websites and email addresses as they relate to the alleged offence or reviewable conduct;
- (k) All records or other things relating, directly or indirectly, to the advertisement, sale, promotion, preparation, planning, development, delivery, payment, supply and removal of rental water heaters with respect to the alleged offence or reviewable conduct, including planning and development of sales tactics. These records or other things include, but are not limited to: agreements, contracts, publications, directives, correspondence, pictures, authorizations, memoranda, audio-recordings, door-to-door sales scripts, verification call scripts, efficacy/efficiency testing and notes;
- (l) All records related to certification, license, authorization, including all correspondence with authorities and agencies in relation to the activities or the products promoted;
- (m) All records or other things relating, directly or indirectly, to contracts, including but not limited to: scripts, application forms, customer acknowledgments, installation forms, pamphlets and any other records related to the promotion and supply of water heaters; and
- (n) All records or other things relating, directly or indirectly, to information on the application and use of the ENERGY STAR logos.

### Customers

- (o) All records or other things relating, directly or indirectly, to the customers or potential customers who were or might reasonably have been contacted by, made contact with or conducted business with the representatives of the Parties under investigation, including but not limited to contracts, pamphlets, and promotional materials;
- (p) All records or other things relating to customers who have contracts with the Parties under investigation, including names, addresses, and amounts incurred;
- (q) All records or other things relating to materials that were provided to customers who entered into contracts with the Parties under investigation;
- (r) All records or other things relating, directly or indirectly, to the customer service provided by the Parties under investigation, including but not limited to complaints, customer comments, refund requests, scripts, policies, and any other customer communications; and
- (s) All records or other things relating, directly or indirectly, to correspondence between the Parties under investigation and other agencies including, but not limited to, the BBB and the Ontario Ministry of Consumer Services with respect to conduct relating to the alleged offence or reviewable conduct.

### Other

- (t) Other things, specifically office equipment related to or used in the commission of the alleged offence or reviewable conduct that may be used as evidence including: computer systems, electronic storage devices, telephone switch boxes, telecommunications equipment, electronic surveillance and audio/visual recording devices and tapes, facsimile machines and facsimile memory;
- (u) Other things, specifically computer passwords, computer programs, computer services, computer systems, software, data storage devices, and associated documentation including operating instructions, manuals and service records that will assist in retrieving, copying, reading, printing, deciphering or acquiring the substance or meaning of any data seized, or accessed, together with all passwords, login codes, encryption keys or other security devices relating to these things;
- (v) Other things, specifically all records or other things described at paragraph 5 of this warrant, contained therein, or available to any computer system on the premises to be searched;

- (w) All records or other things relating to the use and application of the ENERGY STAR initiative;
- (x) Other things used by representatives of the Parties under investigation during the alleged offence or reviewable conduct including but are not limited to garments, uniforms, identification badges, clipboards, and contracts; and
- (y) All records or other things that could be used as similar fact evidence.

**6. Operation of Computer Systems:**

**6. Usage des ordinateurs:**

To search data contained in or available to any computer system for records described in paragraph 5 of this warrant:

- 6.1 This warrant authorizes the electronic evidence officers listed in paragraph 1.2 of this warrant to use or cause to be used any computer system on the premises to search any data contained in or available to the computer system; to reproduce the record or cause it to be reproduced from the data in the form of a printout or other intelligible output, and to seize the printout or other output for examination or copying.
- 6.2 The electronic evidence officers authorized to execute this warrant are authorized to do the following, to assist with accessing, searching, examining, copying, and seizing data found on computer systems, data storage devices or media:
  - a. Use forensic practices and procedures for acquiring electronic evidence, while attempting to minimize the impact on business functions;
  - b. Use or cause to be used, and/or seize, any computer system, data storage device, media, computer programs or associated documentation, including operating instructions, manuals and service records present on the premises;
  - c. Use or cause to be used, any computer system, data storage device, media or computer program brought onto the premises by the persons authorized to execute the warrant;
  - d. Require any person who is in possession or control of the premises, including, where applicable, a computer system

administrator or other custodian of information of a computer system on the premises, to permit any person named in the warrant to use or cause to be used any computer system or part of it on the premises by making accessible all data contained in any computer system, computer program, data storage device or media for the purposes of searching or seizing such data;

- e. Seize or produce an image of data from which they are unable to acquire the substance or meaning at the premises, for further off-site examination; and
- f. Employ, retain, direct or engage other persons to assist in the search of the named premises including the services of computer consultants or diagnosticians, which persons would, in the presence of persons authorized in the warrant, attend at the premises and perform such tasks as may assist the persons authorized in the warrant to carry out their functions authorized by the warrant.

6.3 The following practices and procedures may be used as circumstances dictate:

- (a) Search the computer system, data storage device or media and print or cause to be printed a copy of the records on-site;
- (b) Search the computer system, data storage device or media and reproduce an electronic copy of the records on-site;
- (c) Search the computer system, data storage device or media and produce an image of data to search and reproduce records off-site; or
- (d) Seize the computer system, data storage device or media and remove it/them from the premises, to search data and reproduce records off-site.

6.4 Some of these practices and procedures, specifically the steps described above in paragraphs 6.3(c) and 6.3(d) of this warrant, may result in the seizure of data containing records that are not described in paragraph 5 of this warrant. Electronic evidence officers and anyone under their direction will take steps to ensure that such data, with the exception of data that falls within the provisions of section 489 of the *Criminal Code*, will not be accessible to anyone else.

The following procedures will be followed in order to identify and search

data from which records described in paragraph 5 of this warrant can be reproduced, and to minimize access to data that contain records that are not described in paragraph 5 of this warrant:

- a. Where an image is produced as provided for in paragraph 6.3(c) of this warrant:
  - i. a true copy and a working copy of the seized image will be made in addition to any copy that may be provided to the party from whom it was seized;
  - ii. the seized image and the true copy will be sealed to protect the integrity of the data;
  - iii. the working copy will be examined by electronic evidence officers and anyone under their direction and records described in paragraph 5 of this warrant will be reproduced;
  - iv. access to the working copy will thereafter remain under the control of electronic evidence officers;
  - v. any further searching of data from the working copy, by electronic evidence officers and anyone under their direction, will be confined to data from which records described in paragraph 5 of this warrant can be reproduced, or as required within proceedings that may arise from the search or investigation;
  - vi. in order to minimize the examination of data containing records that are not described in paragraph 5 of this warrant, the persons examining the working copy will use forensic and electronic discovery practices and procedures to identify and search data from which records described in that paragraph can be reproduced; and
  - vii. electronic evidence officers and anyone under their direction will keep confidential all data found within the working copy containing records that are not described in paragraph 5 of this warrant, with the exception of things that fall within the provisions of section 489 of the *Criminal Code*.
- b. A similar process will be followed where a person authorized to execute the warrant, other than an electronic evidence officer, considers it necessary to seize a computer system, data storage

device or media from the premises, as described in paragraph 6.3(d) of this warrant. In such a case,

- i. the computer system, data storage device or media will be transferred to an electronic evidence officer, who may produce an image or extract data in order to produce records described in paragraph 5 of this warrant; and
- ii. further handling will be as described above.

**7. Duration of this search warrant:**

**7. La durée de validité du présent mandat:**

- 7.1 The search warrants be valid from the 8th day of July, 2013, up to and including the 19th day of July, 2013, or, if issued after the 8th day of July, 2013, for such identical period of time, commencing from the date of issuance of the within sought warrant. It is not the intention of the authorized representatives of the Commissioner to actively conduct the search of the premises during this entire period, however, this period of validity is necessary to ensure that the authorized representatives of the Commissioner have a sufficient amount of time to search, copy, examine and seize a potentially large volume of records or other things.
- 7.2 Authorization be given to the authorized representatives of the Commissioner and Peace Officers to remain on the premises 24 hours per day in order to maintain security over the records or other things to be searched for and the items seized that may be placed in sealed containers and left on the premises each night, and, in order to allow for the completion of a search process involving a computer system commenced prior to 9:00 p.m. It is not the intention of the authorized representatives of the Commissioner to actively conduct the search of the premises 24 hours per day. The search will be actively conducted within the time period of 6 a.m. to 9 p.m. as specified in subsection 15(3) of the *Competition Act*, with allowance made for the completion of a search process involving a computer system or the capture of data, commenced prior to 9:00 p.m., and which, based on the length of the process, will extend after 9:00 p.m. in order to successfully complete or where the discontinuance of the search process of capture of data may result in loss of records or other things to be seized.



**8. This search warrant further authorizes:**

**8. De plus, le présent mandat autorise:**

- 8.1 The persons authorized to execute the warrant may enter the premises, leave them and return to them from time to time during the period of validity of the warrant for the purpose of executing it;
- 8.2 The persons authorized to execute the warrant may be accompanied by a Peace Officer and/or locksmith for the purpose of using such force as necessary or to provide any assistance to facilitate access to the premises, should access to the premises be refused;
- 8.3 One or more authorized representatives of the Commissioner shall be allowed to videotape the events of the search at the premises described at paragraph 3 in order to create a visual record of the manner in which the search was conducted, and to photograph or videotape records or other things to be seized. Such visual recordings can assist in the resolution of any allegation based on the conduct of the search, should such an allegation arise, and can provide a means of capturing records or other relevant information from the premises described at paragraph 3 that cannot readily be physically seized, e.g. writings on a large white board, layout of space, etc.;
- 8.4 The warrant authorizes the persons described at paragraph 1 to search anything found on the premises including personal belongings for which they have reason to believe may contain records or other things to be searched for. Personal belongings include, but are not limited to, briefcases, bags, purses, knapsacks, wallets, electronic devices such as: mobile computers, mobile phones, removable storage media, devices containing electronic data, PDA's (personal digital assistant's), pagers, telephones, and other devices; and
- 8.5 The persons authorized to execute the warrant be authorized to temporarily remove from the search premises any pre-selected record or other thing identified to be searched at the end of any day of searching for the purposes of preserving its integrity, or to prevent the loss or destruction of the said record or other thing. These records or other things will remain sealed and will be kept in the custody of the authorized person executing the warrant during this period of temporary removal. These records or other things will be returned to the premises on the day when the authorized person next returns to the searched premises.

**SOLICITOR-CLIENT PRIVILEGE**

**SECRET PROFESSIONNEL DE L'AVOCAT**

9. It is further ordered that:

9. De plus, il est ordonné que:

- 9.1 When a claim is made that a record about to be examined, copied or seized is subject to solicitor-client privilege, or when an authorized representative of the Commissioner has reason to believe that a record may be subject to solicitor-client privilege the record shall be placed in a package, suitably sealed and placed in the custody of the persons named pursuant to section 19 of the *Competition Act*.
- 9.2 Should a law office be located at the premise to be searched, the law office will not be searched until providing a reasonable opportunity to the respective lawyer to claim privilege over the records located in the office. Until such a reasonable opportunity presents itself, the law office and all records in the office may be sealed so as to preserve any evidence. If the situation should arise where there are no reasonable alternatives but to search the law office without the respective lawyer present, another search warrant will be sought at that time.

DATED at the City of Ottawa, Province of Ontario, this \_\_\_\_ day of July, 2013.

\_\_\_\_\_  
Justice of the Ontario Superior Court of Justice  
(East Region)

Court File No.:

**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

**AND IN THE MATTER OF** an *ex parte* application, pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to prohibit access to and disclosure of this all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

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**WARRANT TO ENTER, SEARCH AND COPY OR  
SEIZE FOR EXAMINATION OR COPYING  
CERTAIN RECORDS OR OTHER THINGS  
PURSUANT TO SECTIONS 15 AND 16 OF THE  
COMPETITION ACT**

5160 Boulevard Décarie, Suite 430,  
Montréal, Québec, H3X 2H9

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**Josephine A.L. Palumbo**  
**Senior Litigation Counsel**  
Department of Justice  
Competition Bureau Legal Services  
50 Victoria Street,  
Gatineau, QC  
K1A 0C9

Tel: 819-953-3902  
Fax: 819-953-9267

**Counsel to the Commissioner of Competition**

ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)

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

AND IN THE MATTER OF an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

AND IN THE MATTER OF an *ex parte* application, pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to prohibit access to and disclosure of this all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

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WARRANT TO ENTER, SEARCH AND COPY OR SEIZE FOR EXAMINATION OR  
COPYING CERTAIN RECORDS OR OTHER THINGS PURSUANT TO SECTIONS 15  
AND 16 OF THE *COMPETITION ACT*

5160 Boulevard Décarie, Suite 450,  
Montréal, Québec, H3X 2H9

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UPON the application of Dawn-Marie Jamieson, an authorized representative of the Commissioner of Competition (the "Commissioner"), appointed under the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "*Competition Act*");

AND UPON reading the Information on oath of Dawn-Marie Jamieson;

AND UPON being satisfied that the requirements of sections 15 and 16 of the *Competition Act* have been met;

**IT IS ORDERED** that this search warrant (the "warrant") be issued authorizing the Commissioner and the persons named herein or authorized by this warrant to enter the premises described in this warrant, search for records and other things described in this warrant, and copy or seize them for examination and copying.

**1. The following persons are authorized to enter the premises described in paragraph 3 of this warrant, search for any records or other things described in paragraph 5 of this warrant and copy them or seize them for examination or copying, in accordance with this search warrant:**

**1. Les personnes suivantes sont autorisées à pénétrer dans les locaux décrits au paragraphe 3 du présent mandat, à y perquisitionner en vue d'obtenir des documents ou autres choses décrits au paragraphe 5 du présent mandat et à en prendre copie ou à les emporter pour en faire l'examen ou en prendre des copies, conformément au présent mandat de perquisition:**

**1.1 Authorized representatives of the Commissioner:**

Dawn-Marie Jamieson, Alain Garneau, Magalie Plouffe, Tom Steen, Tagreed Boules, Kelly Goetz, Ian Roger, Kristen Pihney, Colette Morin-Wade, Melanie Crossman, Melissa Melanson, Lynne Charpentier, Adam Zimmerman, Melanie Larouche, Robert Guilbeault, Kim Chorkowy, Stéphanie Grassi, Travis Todhunter, Anthony Nield, Bryan Cowell, Danielle Dubois, Rob Levine, Elizabeth Eves, Laura Grievson, Yanick Poulin, Robert Guilbeault, François Goulet, Véronique Brosseau, Arthur Carson, Daniel Robitaille

and other authorized representatives of the Commissioner and any person under the direction of the authorized representatives of the Commissioner that can facilitate access to the premises or to open anything that cannot be opened during the course of the search, should such access be denied or impeded;

**1.2 Authorized representatives of the Commissioner trained in electronic search procedures ["electronic evidence officers"]:**

Duncan Monkhouse, Mario Mainville, Matthew Kyrytow, Cliff Smith, Eric Daoust, Sébastien Guy, Marcel Thérien

and, in order to assist the aforementioned officers, any person who, under the direction of these officers, can facilitate the electronic search of computer systems, data storage devices and media; and

1.3 Any peace officer of the province of Québec in order to assist the authorized representatives of the Commissioner.

**2. The offence or reviewable conduct with respect to which this search warrant is issued are the following:**

**2. L'infraction ou la conduite susceptible d'examen pour laquelle le présent mandat de perquisition est délivré sont:**

2.1 that National Home Services and Services aux foyers du Québec ("**National**") and other persons known and unknown, during the period commencing on or about July 2008 and continuing to the present, inclusively, the exact dates being unknown, did and continue to knowingly or recklessly make materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to subsection 52(1) of the *Competition Act*, thereby committing an offence under Part VI, namely subsection 52(5) of the *Competition Act*; or

2.2 that National and other persons known and unknown, during the period commencing on or about July 2008, and continuing to the present, inclusively, the exact dates being unknown, did make, and continue to make, materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to paragraph 74.01(1)(a) of the *Competition Act*, thereby establishing grounds for the making of an order under Part VII.1, namely section 74.1 of the *Competition Act*.

**3. The premises to be searched is:**

**3. Les locaux à être perquisitionnés sont les suivants:**

5160 Boulevard Décarie, Suite 450, Montréal, Québec, H3X 2H9

including all storage, record keeping and disposal areas located in and about this premises under the control of the occupant(s) of the premises including the Parties under investigation.

#### 4. Definitions:

#### 4. Définitions:

- 4.1 The following definitions apply to this search warrant:
- (a) "**alleged offence or reviewable conduct under investigation**" means the business, sales and marketing practices of the Parties under investigation (which itself is a defined term – see below), as described at paragraph 2, which are being investigated under subsection 52(1) and paragraph 74.01(1)(a) of the *Competition Act*;
  - (b) "**computer password**" has the meaning set out in subsection 342.1(2) of the *Criminal Code* R.S.C., 1985, c. C-46 (as amended) (the "*Criminal Code*");
  - (c) "**computer program**" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;
  - (d) "**computer service**" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;
  - (e) "**computer system**" has the meaning provided by section 16 of the *Competition Act* and, as set out in subsection 342.1(2) of the *Criminal Code*;
  - (f) "**data**" has the meaning provided by section 16 of the *Competition Act*, as set out in subsection subsection 342.1(2) of the *Criminal Code*;
  - (g) "**Parties under investigation**" means National Home Services (National Energy Corporation, a subsidiary of Just Energy Group Inc.), doing business as National Home Services and Services aux foyers du Québec ("**National**"), morEnergy Services Inc. (Bancmor Credit Corporation and morEnergy Services Inc.), doing business as morEnergy ("**morEnergy**") and Ontario Consumers Home Services Inc. ("**OCHS**"), and includes any business name associated with National, morEnergy and OCHS including, but not limited to, its predecessors, successors, parents, subsidiaries, divisions, partners, contractors, sub-contractors, employees, directors, administrators, corporate officers, agents, representatives and affiliates engaged in business in Canada, and other persons, known or unknown, implicated, directly or indirectly, in the commission of the alleged offence, or engaging in the reviewable conduct described at paragraph 2;
  - (h) "**products**" has the meaning provided by section 2 of the *Competition Act*, which includes an article and a service and in this investigation refers to water heaters;

- (i) "**record**" has the meaning provided by section 2 of the *Competition Act* and includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record (including computer data and electro-magnetic recordings in tape or disc form for use in computers or other devices for storing information), and any other documentary material, including software, regardless of physical form or characteristics, and any copy or portion thereof;
- (j) "**relevant time period**" means the period during which it is believed that an alleged offence under subsection 52(1) or reviewable conduct under paragraph 74.01(1)(a) of the *Competition Act* occurred, and includes the period from July 2008 to the present, the exact dates being unknown;
- (k) "**representatives of the Parties under investigation**" means all individuals working for, or on behalf of, the Parties under investigation including, but not limited to, predecessors, successors, parents, subsidiaries, divisions, partners, contractors, sub-contractors, employees, directors, administrators, corporate officers, agents, representatives and affiliates engaged in business in Canada, and other persons, known or unknown, implicated, directly or indirectly, in the commission of the alleged offence or engaging in the reviewable conduct described at paragraph 2; and
- (l) "**water heater**" has the meaning of an appliance consisting of a gas or electric heating unit in which water is heated and stored.

**5. The records and other things to be searched are the following:**

**5. Les documents et autres choses visés par la perquisition sont les suivants:**

- 5.1 The records or other things to be searched for are all records, whenever created, which relate directly or indirectly to, and which will afford evidence of, the commission of the offence or the engaging of reviewable conduct described at paragraph 2. Specifically these are:

**Corporate Structure**



- (a) All records or other things relating to the ownership, corporate structure, control and management of the Parties under investigation; and any other records or other things relating to the ownership or management and roles, duties, tasks, remuneration and responsibilities of the representatives of the Parties under investigation;

**Identities**

- (b) All records or other things that, directly or indirectly, identify the individual or commercial names used to carry out the alleged offence or reviewable conduct, or that affiliate such individual or commercial names with legal entities or individuals;
- (c) All records or other things relating to aliases, user names, email addresses, email aliases or user IDs (user identities) used by the Parties under investigation and the representatives of the Parties under investigation involved in the alleged offence or reviewable conduct;
- (d) All records or other things related to the policies of the Parties under investigation for recruiting, training and managing of any past and current representatives of the Parties under investigation, including job postings, application forms, employee pay, commissions, and dismissal records; and
- (e) For any representatives of the Parties under investigation, up to five (5) original business records or other things that contain examples of the handwriting of such person.

**Revenue, Finances and Compensation**

- (f) All records or other things relating, directly or indirectly, to the revenues generated from water heater rentals and sales by the Parties under investigation and representatives of the Parties under investigation, including historical, actual and forecast data, with respect to the alleged offence or reviewable conduct. These records or other things include but are not limited to: financial statements, annual reports, banking records, budget forecasts, credit and debit transactions, deposits, withdrawals, transfers, cheques, wire transfers, accounts receivable and payable records, currency, returns and any other accounting information;
- (g) All records or other things relating, directly or indirectly, to the management and distribution of the monies gained or revenue generated by the promotion, sale and rental of water heaters by the Parties under investigation and representatives of the Parties under investigation; and

- (h) All records, aliases, user names, or other identifiers or other things relating, directly or indirectly, to the identity, role and compensation of the representatives of the Parties under investigation.

### Operations

- (i) All records or other things relating, directly or indirectly, to the corporate structure of the Parties under investigation and the ownership or control of these entities and any other records relating to the ownership or management and roles, duties, tasks, remuneration and responsibilities of the representatives of the Parties under investigation, including but not limited to guidelines, hiring policies and training manuals;
- (j) All records or other things relating, directly or indirectly, to the rental, lease, or ownership by the Parties under investigation of office space and/or office equipment including, but not limited to: computer systems, electronic storage devices, telephones, facsimile machines, office services (including Internet and telecommunication services), websites and email addresses as they relate to the alleged offence or reviewable conduct;
- (k) All records or other things relating, directly or indirectly, to the advertisement, sale, promotion, preparation, planning, development, delivery, payment, supply and removal of rental water heaters with respect to the alleged offence or reviewable conduct, including planning and development of sales tactics. These records or other things include, but are not limited to: agreements, contracts, publications, directives, correspondence, pictures, authorizations, memoranda, audio-recordings, door-to-door sales scripts, verification call scripts, efficacy/efficiency testing and notes;
- (l) All records related to certification, license, authorization, including all correspondence with authorities and agencies in relation to the activities or the products promoted;
- (m) All records or other things relating, directly or indirectly, to contracts, including but not limited to: scripts, application forms, customer acknowledgments, installation forms, pamphlets and any other records related to the promotion and supply of water heaters; and
- (n) All records or other things relating, directly or indirectly, to information on the application and use of the ENERGY STAR logos.

### Customers

- (o) All records or other things relating, directly or indirectly, to the customers or potential customers who were or might reasonably have been contacted by, made contact with or conducted business with the representatives of the Parties under investigation, including but not limited to contracts, pamphlets, and promotional materials;
- (p) All records or other things relating to customers who have contracts with the Parties under investigation, including names, addresses, and amounts incurred;
- (q) All records or other things relating to materials that were provided to customers who entered into contracts with the Parties under investigation;
- (r) All records or other things relating, directly or indirectly, to the customer service provided by the Parties under investigation, including but not limited to complaints, customer comments, refund requests, scripts, policies, and any other customer communications; and
- (s) All records or other things relating, directly or indirectly, to correspondence between the Parties under investigation and other agencies including, but not limited to, the BBB and the Ontario Ministry of Consumer Services with respect to conduct relating to the alleged offence or reviewable conduct.

### Other

- (t) Other things, specifically office equipment related to or used in the commission of the alleged offence or reviewable conduct that may be used as evidence including: computer systems, electronic storage devices, telephone switch boxes, telecommunications equipment, electronic surveillance and audio/visual recording devices and tapes, facsimile machines and facsimile memory;
- (u) Other things, specifically computer passwords, computer programs, computer services, computer systems, software, data storage devices, and associated documentation including operating instructions, manuals and service records that will assist in retrieving, copying, reading, printing, deciphering or acquiring the substance or meaning of any data seized, or accessed, together with all passwords, login codes, encryption keys or other security devices relating to these things;
- (v) Other things, specifically all records or other things described at paragraph 5 of this warrant, contained therein, or available to any computer system on the premises to be searched;

- (w) All records or other things relating to the use and application of the ENERGY STAR initiative;
- (x) Other things used by representatives of the Parties under investigation during the alleged offence or reviewable conduct including but are not limited to garments, uniforms, identification badges, clipboards, and contracts; and
- (y) All records or other things that could be used as similar fact evidence.

**6. Operation of Computer Systems:**

**6. Usage des ordinateurs:**

To search data contained in or available to any computer system for records described in paragraph 5 of this warrant:

- 6.1 This warrant authorizes the electronic evidence officers listed in paragraph 1.2 of this warrant to use or cause to be used any computer system on the premises to search any data contained in or available to the computer system; to reproduce the record or cause it to be reproduced from the data in the form of a printout or other intelligible output, and to seize the printout or other output for examination or copying.
- 6.2 The electronic evidence officers authorized to execute this warrant are authorized to do the following, to assist with accessing, searching, examining, copying, and seizing data found on computer systems, data storage devices or media:
  - a. Use forensic practices and procedures for acquiring electronic evidence, while attempting to minimize the impact on business functions;
  - b. Use or cause to be used, and/or seize, any computer system, data storage device, media, computer programs or associated documentation, including operating instructions, manuals and service records present on the premises;
  - c. Use or cause to be used, any computer system, data storage device, media or computer program brought onto the premises by the persons authorized to execute the warrant;
  - d. Require any person who is in possession or control of the premises, including, where applicable, a computer system

administrator or other custodian of information of a computer system on the premises, to permit any person named in the warrant to use or cause to be used any computer system or part of it on the premises by making accessible all data contained in any computer system, computer program, data storage device or media for the purposes of searching or seizing such data;

- e. Seize or produce an image of data from which they are unable to acquire the substance or meaning at the premises, for further off-site examination; and
- f. Employ, retain, direct or engage other persons to assist in the search of the named premises including the services of computer consultants or diagnosticians, which persons would, in the presence of persons authorized in the warrant, attend at the premises and perform such tasks as may assist the persons authorized in the warrant to carry out their functions authorized by the warrant.

6.3 The following practices and procedures may be used as circumstances dictate:

- (a) Search the computer system, data storage device or media and print or cause to be printed a copy of the records on-site;
- (b) Search the computer system, data storage device or media and reproduce an electronic copy of the records on-site;
- (c) Search the computer system, data storage device or media and produce an image of data to search and reproduce records off-site; or
- (d) Seize the computer system, data storage device or media and remove it/them from the premises, to search data and reproduce records off-site.

6.4 Some of these practices and procedures, specifically the steps described above in paragraphs 6.3(c) and 6.3(d) of this warrant, may result in the seizure of data containing records that are not described in paragraph 5 of this warrant. Electronic evidence officers and anyone under their direction will take steps to ensure that such data, with the exception of data that falls within the provisions of section 489 of the *Criminal Code*, will not be accessible to anyone else.

The following procedures will be followed in order to identify and search

data from which records described in paragraph 5 of this warrant can be reproduced, and to minimize access to data that contain records that are not described in paragraph 5 of this warrant:

- a. Where an image is produced as provided for in paragraph 6.3(c) of this warrant:
  - i. a true copy and a working copy of the seized image will be made in addition to any copy that may be provided to the party from whom it was seized;
  - ii. the seized image and the true copy will be sealed to protect the integrity of the data;
  - iii. the working copy will be examined by electronic evidence officers and anyone under their direction and records described in paragraph 5 of this warrant will be reproduced;
  - iv. access to the working copy will thereafter remain under the control of electronic evidence officers;
  - v. any further searching of data from the working copy, by electronic evidence officers and anyone under their direction, will be confined to data from which records described in paragraph 5 of this warrant can be reproduced, or as required within proceedings that may arise from the search or investigation;
  - vi. in order to minimize the examination of data containing records that are not described in paragraph 5 of this warrant, the persons examining the working copy will use forensic and electronic discovery practices and procedures to identify and search data from which records described in that paragraph can be reproduced; and
  - vii. electronic evidence officers and anyone under their direction will keep confidential all data found within the working copy containing records that are not described in paragraph 5 of this warrant, with the exception of things that fall within the provisions of section 489 of the *Criminal Code*.
- b. A similar process will be followed where a person authorized to execute the warrant, other than an electronic evidence officer, considers it necessary to seize a computer system, data storage

device or media from the premises, as described in paragraph 6.3(d) of this warrant. In such a case,

- i. the computer system, data storage device or media will be transferred to an electronic evidence officer, who may produce an image or extract data in order to produce records described in paragraph 5 of this warrant; and
- ii. further handling will be as described above.

**7. Duration of this search warrant:**

**7. La durée de validité du présent mandat:**

- 7.1 The search warrants be valid from the 8th day of July, 2013, up to and including the 19th day of July, 2013, or, if issued after the 8th day of July, 2013, for such identical period of time, commencing from the date of issuance of the within sought warrant. It is not the intention of the authorized representatives of the Commissioner to actively conduct the search of the premises during this entire period, however, this period of validity is necessary to ensure that the authorized representatives of the Commissioner have a sufficient amount of time to search, copy, examine and seize a potentially large volume of records or other things.
- 7.2 Authorization be given to the authorized representatives of the Commissioner and Peace Officers to remain on the premises 24 hours per day in order to maintain security over the records or other things to be searched for and the items seized that may be placed in sealed containers and left on the premises each night, and, in order to allow for the completion of a search process involving a computer system commenced prior to 9:00 p.m. It is not the intention of the authorized representatives of the Commissioner to actively conduct the search of the premises 24 hours per day. The search will be actively conducted within the time period of 6 a.m. to 9 p.m. as specified in subsection 15(3) of the *Competition Act*, with allowance made for the completion of a search process involving a computer system or the capture of data, commenced prior to 9:00 p.m., and which, based on the length of the process, will extend after 9:00 p.m. in order to successfully complete or where the discontinuance of the search process of capture of data may result in loss of records or other things to be seized.

**8. This search warrant further authorizes:**

**8. De plus, le présent mandat autorise:**

- 8.1 The persons authorized to execute the warrant may enter the premises, leave them and return to them from time to time during the period of validity of the warrant for the purpose of executing it;
- 8.2 The persons authorized to execute the warrant may be accompanied by a Peace Officer and/or locksmith for the purpose of using such force as necessary or to provide any assistance to facilitate access to the premises, should access to the premises be refused;
- 8.3 One or more authorized representatives of the Commissioner shall be allowed to videotape the events of the search at the premises described at paragraph 3 in order to create a visual record of the manner in which the search was conducted, and to photograph or videotape records or other things to be seized. Such visual recordings can assist in the resolution of any allegation based on the conduct of the search, should such an allegation arise, and can provide a means of capturing records or other relevant information from the premises described at paragraph 3 that cannot readily be physically seized, e.g. writings on a large white board, layout of space, etc.;
- 8.4 The warrant authorizes the persons described at paragraph 1 to search anything found on the premises including personal belongings for which they have reason to believe may contain records or other things to be searched for. Personal belongings include, but are not limited to, briefcases, bags, purses, knapsacks, wallets, electronic devices such as: mobile computers, mobile phones, removable storage media, devices containing electronic data, PDA's (personal digital assistant's), pagers, telephones, and other devices; and
- 8.5 The persons authorized to execute the warrant be authorized to temporarily remove from the search premises any pre-selected record or other thing identified to be searched at the end of any day of searching for the purposes of preserving its integrity, or to prevent the loss or destruction of the said record or other thing. These records or other things will remain sealed and will be kept in the custody of the authorized person executing the warrant during this period of temporary removal. These records or other things will be returned to the premises on the day when the authorized person next returns to the searched premises.

**SOLICITOR-CLIENT PRIVILEGE**

**SECRET PROFESSIONNEL DE  
L'AVOCAT**



9. It is further ordered that:

9. De plus, il est ordonné que:

- 9.1 When a claim is made that a record about to be examined, copied or seized is subject to solicitor-client privilege, or when an authorized representative of the Commissioner has reason to believe that a record may be subject to solicitor-client privilege the record shall be placed in a package, suitably sealed and placed in the custody of the persons named pursuant to section 19 of the *Competition Act*.
- 9.2 Should a law office be located at the premise to be searched, the law office will not be searched until providing a reasonable opportunity to the respective lawyer to claim privilege over the records located in the office. Until such a reasonable opportunity presents itself, the law office and all records in the office may be sealed so as to preserve any evidence. If the situation should arise where there are no reasonable alternatives but to search the law office without the respective lawyer present, another search warrant will be sought at that time.

DATED at the City of Ottawa, Province of Ontario, this \_\_\_\_ day of July, 2013.

\_\_\_\_\_  
Justice of the Ontario Superior Court of Justice  
(East Region)

Court File No.:

**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

**AND IN THE MATTER OF** an *ex parte* application, pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to prohibit access to and disclosure of this all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

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**WARRANT TO ENTER, SEARCH AND COPY OR  
SEIZE FOR EXAMINATION OR COPYING  
CERTAIN RECORDS OR OTHER THINGS  
PURSUANT TO SECTIONS 15 AND 16 OF THE  
COMPETITION ACT**

5160 Boulevard Décarie, Suite 450,  
Montréal, Québec, H3X 2H9

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**Josephine A.L. Palumbo**  
**Senior Litigation Counsel**  
Department of Justice  
Competition Bureau Legal Services  
50 Victoria Street,  
Gatineau, QC  
K1A 0C9

Tel: 819-953-3902  
Fax: 819-953-9267

**Counsel to the Commissioner of Competition**

**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

**AND IN THE MATTER OF** an *ex parte* application, pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to prohibit access to and disclosure of this all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

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**WARRANT TO ENTER, SEARCH AND COPY OR SEIZE FOR EXAMINATION OR  
COPYING CERTAIN RECORDS OR OTHER THINGS PURSUANT TO SECTIONS 15  
AND 16 OF THE COMPETITION ACT**

6345 Dixie Road, Suite 200 (including units 2 and 3),  
Mississauga, Ontario, L5T 2E6

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**UPON** the application of Dawn-Marie Jamieson, an authorized representative of the Commissioner of Competition (the "Commissioner"), appointed under the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "*Competition Act*");

**AND UPON** reading the Information on oath of Dawn-Marie Jamieson;

**AND UPON** being satisfied that the requirements of sections 15 and 16 of the *Competition Act* have been met;

**IT IS ORDERED** that this search warrant (the "warrant") be issued authorizing the Commissioner and the persons named herein or authorized by this warrant to enter the premises described in this warrant, search for records and other things described in this warrant, and copy or seize them for examination and copying.

**1. The following persons are authorized to enter the premises described in paragraph 3 of this warrant, search for any records or other things described in paragraph 5 of this warrant and copy them or seize them for examination or copying, in accordance with this search warrant:**

**1. Les personnes suivantes sont autorisées à pénétrer dans les locaux décrits au paragraphe 3 du présent mandat, à y perquisitionner en vue d'obtenir des documents ou autres choses décrits au paragraphe 5 du présent mandat et à en prendre copie ou à les emporter pour en faire l'examen ou en prendre des copies, conformément au présent mandat de perquisition:**

**1.1 Authorized representatives of the Commissioner:**

Dawn-Marie Jamieson, Alain Garneau, Magalie Plouffe, Tom Steen, Tagreed Boules, Kelly Goetz, Ian Roger, Kristen Pihney, Colette Morin-Wade, Melanie Crossman, Melissa Melanson, Lynne Charpentier, Adam Zimmerman, Melanie Larouche, Robert Guilbeault, Kim Chorkowy, Stéphanie Grassi, Travis Todhunter, Anthony Nield, Bryan Cowell, Danielle Dubois, Rob Levine, Elizabeth Eves, Laura Grievson, Yanick Poulin, Robert Guilbeault, François Goulet, Véronique Brosseau, Arthur Carson, Daniel Robitaille

and other authorized representatives of the Commissioner and any person under the direction of the authorized representatives of the Commissioner that can facilitate access to the premises or to open anything that cannot be opened during the course of the search, should such access be denied or impeded;

**1.2 Authorized representatives of the Commissioner trained in electronic search procedures ["electronic evidence officers"]:**

Duncan Monkhouse, Mario Mainville, Matthew Kyrytow, Cliff Smith, Eric Daoust, Sébastien Guy, Marcel Thérien

and, in order to assist the aforementioned officers, any person who, under the direction of these officers, can facilitate the electronic search of computer systems, data storage devices and media; and

1.3 Any peace officer of the province of Ontario in order to assist the authorized representatives of the Commissioner.

**2. The offence or reviewable conduct with respect to which this search warrant is issued are the following:**

**2. L'infraction ou la conduite susceptible d'examen pour laquelle le présent mandat de perquisition est délivré sont:**

2.1 that National Home Services ("**National**") and other persons known and unknown, during the period commencing on or about July 2008 and continuing to the present, inclusively, the exact dates being unknown, did and continue to knowingly or recklessly make materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to subsection 52(1) of the *Competition Act*, thereby committing an offence under Part VI, namely subsection 52(5) of the *Competition Act*; or

2.2 that National and other persons known and unknown, during the period commencing on or about July 2008, and continuing to the present, inclusively, the exact dates being unknown, did make, and continue to make, materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to paragraph 74.01(1)(a) of the *Competition Act*, thereby establishing grounds for the making of an order under Part VII.1, namely section 74.1 of the *Competition Act*.

**3. The premises to be searched is:**

**3. Les locaux à être perquisitionnés sont les suivants:**

6345 Dixie Road, Suite 200 (including units 2 and 3),  
Mississauga, Ontario, L5T 2E6

including all storage, record keeping and disposal areas located in and about this premises under the control of the occupant(s) of the premises including the Parties under investigation.

#### 4. Definitions:

#### 4. Définitions:

4.1 The following definitions apply to this search warrant:

- (a) "**alleged offence or reviewable conduct under investigation**" means the business, sales and marketing practices of the Parties under investigation (which itself is a defined term – see below), as described at paragraph 2, which are being investigated under subsection 52(1) and paragraph 74.01(1)(a) of the *Competition Act*;
- (b) "**computer password**" has the meaning set out in subsection 342.1(2) of the *Criminal Code* R.S.C., 1985, c. C-46 (as amended) (the "*Criminal Code*");
- (c) "**computer program**" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;
- (d) "**computer service**" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;
- (e) "**computer system**" has the meaning provided by section 16 of the *Competition Act* and, as set out in subsection 342.1(2) of the *Criminal Code*;
- (f) "**data**" has the meaning provided by section 16 of the *Competition Act*, as set out in subsection subsection 342.1(2) of the *Criminal Code*;
- (g) "**Parties under investigation**" means National Home Services (National Energy Corporation, a subsidiary of Just Energy Group Inc.), doing business as National Home Services and Services aux foyers du Québec ("**National**"), morEnergy Services Inc. (Bancmor Credit Corporation and morEnergy Services Inc.), doing business as morEnergy ("**morEnergy**") and Ontario Consumers Home Services Inc. ("**OCHS**"), and includes any business name associated with National, morEnergy and OCHS including, but not limited to, its predecessors, successors, parents, subsidiaries, divisions, partners, contractors, sub-contractors, employees, directors, administrators, corporate officers, agents, representatives and affiliates engaged in business in Canada, and other persons, known or unknown, implicated, directly or indirectly, in the commission of the alleged offence, or engaging in the reviewable conduct described at paragraph 2;

- (h) **"products"** has the meaning provided by section 2 of the *Competition Act*, which includes an article and a service and in this investigation refers to water heaters;
- (i) **"record"** has the meaning provided by section 2 of the *Competition Act* and includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record (including computer data and electro-magnetic recordings in tape or disc form for use in computers or other devices for storing information), and any other documentary material, including software, regardless of physical form or characteristics, and any copy or portion thereof;
- (j) **"relevant time period"** means the period during which it is believed that an alleged offence under subsection 52(1) or reviewable conduct under paragraph 74.01(1)(a) of the *Competition Act* occurred, and includes the period from July 2008 to the present, the exact dates being unknown;
- (k) **"representatives of the Parties under investigation"** means all individuals working for, or on behalf of, the Parties under investigation including, but not limited to, predecessors, successors, parents, subsidiaries, divisions, partners, contractors, sub-contractors, employees, directors, administrators, corporate officers, agents, representatives and affiliates engaged in business in Canada, and other persons, known or unknown, implicated, directly or indirectly, in the commission of the alleged offence or engaging in the reviewable conduct described at paragraph 2; and
- (l) **"water heater"** has the meaning of an appliance consisting of a gas or electric heating unit in which water is heated and stored.

**5. The records and other things to be searched are the following:**

**5. Les documents et autres choses visés par la perquisition sont les suivants:**

- 5.1 The records or other things to be searched for are all records, whenever created, which relate directly or indirectly to, and which will afford evidence of, the commission of the offence or the engaging of reviewable conduct described at paragraph 2. Specifically these are:

### **Corporate Structure**

- (a) All records or other things relating to the ownership, corporate structure, control and management of the Parties under investigation; and any other records or other things relating to the ownership or management and roles, duties, tasks, remuneration and responsibilities of the representatives of the Parties under investigation;

### **Identities**

- (b) All records or other things that, directly or indirectly, identify the individual or commercial names used to carry out the alleged offence or reviewable conduct, or that affiliate such individual or commercial names with legal entities or individuals;
- (c) All records or other things relating to aliases, user names, email addresses, email aliases or user IDs (user identities) used by the Parties under investigation and the representatives of the Parties under investigation involved in the alleged offence or reviewable conduct;
- (d) All records or other things related to the policies of the Parties under investigation for recruiting, training and managing of any past and current representatives of the Parties under investigation, including job postings, application forms, employee pay, commissions, and dismissal records; and
- (e) For any representatives of the Parties under investigation, up to five (5) original business records or other things that contain examples of the handwriting of such person.

### **Revenue, Finances and Compensation**

- (f) All records or other things relating, directly or indirectly, to the revenues generated from water heater rentals and sales by the Parties under investigation and representatives of the Parties under investigation, including historical, actual and forecast data, with respect to the alleged offence or reviewable conduct. These records or other things include but are not limited to: financial statements, annual reports, banking records, budget forecasts, credit and debit transactions, deposits, withdrawals, transfers, cheques, wire transfers, accounts receivable and payable records, currency, returns and any other accounting information;
- (g) All records or other things relating, directly or indirectly, to the management and distribution of the monies gained or revenue generated by the promotion, sale and rental of water heaters by the Parties under investigation and representatives of the Parties under investigation; and



- (h) All records, aliases, user names, or other identifiers or other things relating, directly or indirectly, to the identity, role and compensation of the representatives of the Parties under investigation.

**Operations**

- (i) All records or other things relating, directly or indirectly, to the corporate structure of the Parties under investigation and the ownership or control of these entities and any other records relating to the ownership or management and roles, duties, tasks, remuneration and responsibilities of the representatives of the Parties under investigation, including but not limited to guidelines, hiring policies and training manuals;
- (j) All records or other things relating, directly or indirectly, to the rental, lease, or ownership by the Parties under investigation of office space and/or office equipment including, but not limited to: computer systems, electronic storage devices, telephones, facsimile machines, office services (including Internet and telecommunication services), websites and email addresses as they relate to the alleged offence or reviewable conduct;
- (k) All records or other things relating, directly or indirectly, to the advertisement, sale, promotion, preparation, planning, development, delivery, payment, supply and removal of rental water heaters with respect to the alleged offence or reviewable conduct, including planning and development of sales tactics. These records or other things include, but are not limited to: agreements, contracts, publications, directives, correspondence, pictures, authorizations, memoranda, audio-recordings, door-to-door sales scripts, verification call scripts, efficacy/efficiency testing and notes;
- (l) All records related to certification, license, authorization, including all correspondence with authorities and agencies in relation to the activities or the products promoted;
- (m) All records or other things relating, directly or indirectly, to contracts, including but not limited to: scripts, application forms, customer acknowledgments, installation forms, pamphlets and any other records related to the promotion and supply of water heaters; and
- (n) All records or other things relating, directly or indirectly, to information on the application and use of the ENERGY STAR logos.

### Customers

- (o) All records or other things relating, directly or indirectly, to the customers or potential customers who were or might reasonably have been contacted by, made contact with or conducted business with the representatives of the Parties under investigation, including but not limited to contracts, pamphlets, and promotional materials;
- (p) All records or other things relating to customers who have contracts with the Parties under investigation, including names, addresses, and amounts incurred;
- (q) All records or other things relating to materials that were provided to customers who entered into contracts with the Parties under investigation;
- (r) All records or other things relating, directly or indirectly, to the customer service provided by the Parties under investigation, including but not limited to complaints, customer comments, refund requests, scripts, policies, and any other customer communications; and
- (s) All records or other things relating, directly or indirectly, to correspondence between the Parties under investigation and other agencies including, but not limited to, the BBB and the Ontario Ministry of Consumer Services with respect to conduct relating to the alleged offence or reviewable conduct.

### Other

- (t) Other things, specifically office equipment related to or used in the commission of the alleged offence or reviewable conduct that may be used as evidence including: computer systems, electronic storage devices, telephone switch boxes, telecommunications equipment, electronic surveillance and audio/visual recording devices and tapes, facsimile machines and facsimile memory;
- (u) Other things, specifically computer passwords, computer programs, computer services, computer systems, software, data storage devices, and associated documentation including operating instructions, manuals and service records that will assist in retrieving, copying, reading, printing, deciphering or acquiring the substance or meaning of any data seized, or accessed, together with all passwords, login codes, encryption keys or other security devices relating to these things;

- (v) Other things, specifically all records or other things described at paragraph 5 of this warrant, contained therein, or available to any computer system on the premises to be searched;
- (w) All records or other things relating to the use and application of the ENERGY STAR initiative;
- (x) Other things used by representatives of the Parties under investigation during the alleged offence or reviewable conduct including but are not limited to garments, uniforms, identification badges, clipboards, and contracts; and
- (y) All records or other things that could be used as similar fact evidence.

**6. Operation of Computer Systems:**

**6. Usage des ordinateurs:**

To search data contained in or available to any computer system for records described in paragraph 5 of this warrant:

- 6.1 This warrant authorizes the electronic evidence officers listed in paragraph 1.2 of this warrant to use or cause to be used any computer system on the premises to search any data contained in or available to the computer system; to reproduce the record or cause it to be reproduced from the data in the form of a printout or other intelligible output, and to seize the printout or other output for examination or copying.
- 6.2 The electronic evidence officers authorized to execute this warrant are authorized to do the following, to assist with accessing, searching, examining, copying, and seizing data found on computer systems, data storage devices or media:
  - a. Use forensic practices and procedures for acquiring electronic evidence, while attempting to minimize the impact on business functions;
  - b. Use or cause to be used, and/or seize, any computer system, data storage device, media, computer programs or associated documentation, including operating instructions, manuals and service records present on the premises;
  - c. Use or cause to be used, any computer system, data storage device, media or computer program brought onto the premises by the persons authorized to execute the warrant;

- d. Require any person who is in possession or control of the premises, including, where applicable, a computer system administrator or other custodian of information of a computer system on the premises, to permit any person named in the warrant to use or cause to be used any computer system or part of it on the premises by making accessible all data contained in any computer system, computer program, data storage device or media for the purposes of searching or seizing such data;
- e. Seize or produce an image of data from which they are unable to acquire the substance or meaning at the premises, for further off-site examination; and
- f. Employ, retain, direct or engage other persons to assist in the search of the named premises including the services of computer consultants or diagnosticians, which persons would, in the presence of persons authorized in the warrant, attend at the premises and perform such tasks as may assist the persons authorized in the warrant to carry out their functions authorized by the warrant.

6.3 The following practices and procedures may be used as circumstances dictate:

- (a) Search the computer system, data storage device or media and print or cause to be printed a copy of the records on-site;
- (b) Search the computer system, data storage device or media and reproduce an electronic copy of the records on-site;
- (c) Search the computer system, data storage device or media and produce an image of data to search and reproduce records off-site; or
- (d) Seize the computer system, data storage device or media and remove it/them from the premises, to search data and reproduce records off-site.

6.4 Some of these practices and procedures, specifically the steps described above in paragraphs 6.3(c) and 6.3(d) of this warrant, may result in the seizure of data containing records that are not described in paragraph 5 of this warrant. Electronic evidence officers and anyone under their direction will take steps to ensure that such data, with the exception of data that falls within the provisions of section 489 of the *Criminal Code*, will not be

accessible to anyone else.

The following procedures will be followed in order to identify and search data from which records described in paragraph 5 of this warrant can be reproduced, and to minimize access to data that contain records that are not described in paragraph 5 of this warrant:

- a. Where an image is produced as provided for in paragraph 6.3(c) of this warrant:
  - i. a true copy and a working copy of the seized image will be made in addition to any copy that may be provided to the party from whom it was seized;
  - ii. the seized image and the true copy will be sealed to protect the integrity of the data;
  - iii. the working copy will be examined by electronic evidence officers and anyone under their direction and records described in paragraph 5 of this warrant will be reproduced;
  - iv. access to the working copy will thereafter remain under the control of electronic evidence officers;
  - v. any further searching of data from the working copy, by electronic evidence officers and anyone under their direction, will be confined to data from which records described in paragraph 5 of this warrant can be reproduced, or as required within proceedings that may arise from the search or investigation;
  - vi. in order to minimize the examination of data containing records that are not described in paragraph 5 of this warrant, the persons examining the working copy will use forensic and electronic discovery practices and procedures to identify and search data from which records described in that paragraph can be reproduced; and
  - vii. electronic evidence officers and anyone under their direction will keep confidential all data found within the working copy containing records that are not described in paragraph 5 of this warrant, with the exception of things that fall within the provisions of section 489 of the *Criminal Code*.

- b. A similar process will be followed where a person authorized to execute the warrant, other than an electronic evidence officer, considers it necessary to seize a computer system, data storage device or media from the premises, as described in paragraph 6.3(d) of this warrant. In such a case,
  - i. the computer system, data storage device or media will be transferred to an electronic evidence officer, who may produce an image or extract data in order to produce records described in paragraph 5 of this warrant; and
  - ii. further handling will be as described above.

**7. Duration of this search warrant:**

**7. La durée de validité du présent mandat:**

- 7.1 The search warrants be valid from the 8th day of July, 2013, up to and including the 19th day of July, 2013, or, if issued after the 8th day of July, 2013, for such identical period of time, commencing from the date of issuance of the within sought warrant. It is not the intention of the authorized representatives of the Commissioner to actively conduct the search of the premises during this entire period, however, this period of validity is necessary to ensure that the authorized representatives of the Commissioner have a sufficient amount of time to search, copy, examine and seize a potentially large volume of records or other things.
- 7.2 Authorization be given to the authorized representatives of the Commissioner and Peace Officers to remain on the premises 24 hours per day in order to maintain security over the records or other things to be searched for and the items seized that may be placed in sealed containers and left on the premises each night, and, in order to allow for the completion of a search process involving a computer system commenced prior to 9:00 p.m. It is not the intention of the authorized representatives of the Commissioner to actively conduct the search of the premises 24 hours per day. The search will be actively conducted within the time period of 6 a.m. to 9 p.m. as specified in subsection 15(3) of the *Competition Act*, with allowance made for the completion of a search process involving a computer system or the capture of data, commenced prior to 9:00 p.m., and which, based on the length of the process, will extend after 9:00 p.m. in order to successfully complete or where the discontinuance of the search process of capture of data may result in loss of records or other things to be seized.

**8. This search warrant further authorizes:**

**8. De plus, le présent mandat autorise:**

- 8.1 The persons authorized to execute the warrant may enter the premises, leave them and return to them from time to time during the period of validity of the warrant for the purpose of executing it;
- 8.2 The persons authorized to execute the warrant may be accompanied by a Peace Officer and/or locksmith for the purpose of using such force as necessary or to provide any assistance to facilitate access to the premises, should access to the premises be refused;
- 8.3 One or more authorized representatives of the Commissioner shall be allowed to videotape the events of the search at the premises described at paragraph 3 in order to create a visual record of the manner in which the search was conducted, and to photograph or videotape records or other things to be seized. Such visual recordings can assist in the resolution of any allegation based on the conduct of the search, should such an allegation arise, and can provide a means of capturing records or other relevant information from the premises described at paragraph 3 that cannot readily be physically seized, e.g. writings on a large white board, layout of space, etc.;
- 8.4 The warrant authorizes the persons described at paragraph 1 to search anything found on the premises including personal belongings for which they have reason to believe may contain records or other things to be searched for. Personal belongings include, but are not limited to, briefcases, bags, purses, knapsacks, wallets, electronic devices such as: mobile computers, mobile phones, removable storage media, devices containing electronic data, PDA's (personal digital assistant's), pagers, telephones, and other devices; and
- 8.5 The persons authorized to execute the warrant be authorized to temporarily remove from the search premises any pre-selected record or other thing identified to be searched at the end of any day of searching for the purposes of preserving its integrity, or to prevent the loss or destruction of the said record or other thing. These records or other things will remain sealed and will be kept in the custody of the authorized person executing the warrant during this period of temporary removal. These records or other things will be returned to the premises on the day when the authorized person next returns to the searched premises.

**SOLICITOR-CLIENT PRIVILEGE**

**SECRET PROFESSIONNEL DE  
L'AVOCAT**

**9. It is further ordered that:**

**9. De plus, il est ordonné que:**

- 9.1 When a claim is made that a record about to be examined, copied or seized is subject to solicitor-client privilege, or when an authorized representative of the Commissioner has reason to believe that a record may be subject to solicitor-client privilege the record shall be placed in a package, suitably sealed and placed in the custody of the persons named pursuant to section 19 of the *Competition Act*.
- 9.2 Should a law office be located at the premise to be searched, the law office will not be searched until providing a reasonable opportunity to the respective lawyer to claim privilege over the records located in the office. Until such a reasonable opportunity presents itself, the law office and all records in the office may be sealed so as to preserve any evidence. If the situation should arise where there are no reasonable alternatives but to search the law office without the respective lawyer present, another search warrant will be sought at that time.

**DATED at the City of Ottawa, Province of Ontario, this \_\_\_\_ day of July, 2013.**

\_\_\_\_\_  
Justice of the Ontario Superior Court of Justice  
(East Region)



Court File No.:

ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)

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

AND IN THE MATTER OF an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

AND IN THE MATTER OF an *ex parte* application, pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to prohibit access to and disclosure of this all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

---

WARRANT TO ENTER, SEARCH AND COPY OR  
SEIZE FOR EXAMINATION OR COPYING  
CERTAIN RECORDS OR OTHER THINGS  
PURSUANT TO SECTIONS 15 AND 16 OF THE  
*COMPETITION ACT*

6345 Dixie Road, Suite 200 (including units 2 and  
3), Mississauga, Ontario, L5T 2E6

---

Josephine A.L. Palumbo  
Senior Litigation Counsel  
Department of Justice  
Competition Bureau Legal Services  
50 Victoria Street,  
Gatineau, QC  
K1A 0C9

Tei: 819-953-3902  
Fax: 819-953-9267

Counsel to the Commissioner of Competition

This is **Exhibit "D"** mentioned and referred  
to in the Affidavit of Patrick Johnston  
affirmed before me on May 9, 2014

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the bottom, positioned above a solid horizontal line.

A Commissioner for Taking Affidavits

CANADA  
Province of Ontario

Court File No.:

*Competition Act*,  
Sections 15 and 16

**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

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**INFORMATION OF DAWN-MARIE JAMIESON**  
sworn on July 4, 2013

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*DMA*

CANADA  
Province of Ontario

Court File No.:

*Competition Act*,  
Sections 15 and 16

**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

**AND IN THE MATTER OF** an *ex parte* application, pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to prohibit access to and disclosure of this all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

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**INFORMATION OF DAWN-MARIE JAMIESON  
sworn on July 4, 2013**

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## PART I

### INTRODUCTION

- 1 This is the Information of Dawn-Marie Jamieson (the "Affiant"), of the City of Ottawa, in the Province of Ontario, an authorized representative of the Commissioner of Competition (the "Commissioner") for the purpose of obtaining search warrants to enter premises, search for records or other things, and copy or seize them for examination or copying pursuant to sections 15 and 16 of the *Competition Act*, R.S.C. 1985, c. C-34, (as amended) (the "*Competition Act*").

I, DAWN-MARIE JAMIESON, MAKE OATH AND SAY AS FOLLOWS:

- 1.1 I am a Competition Law Officer with the Fair Business Practices Branch ("FBPB") of the Competition Bureau (the "Bureau"). I am an authorized representative of the Commissioner, appointed and designated to administer and enforce the *Competition Act*. I have been employed by the Bureau as a Competition Law Officer since November 2001, except for a six month period from December 2003 to June 2004, when I worked with Industry Canada. I hold a Bachelor's degree in Business Administration from the University of Prince Edward Island (2000).
- 1.2 I have participated in various inquiries initiated pursuant to the *Competition Act* as both a case team member and primary officer in matters involving conduct such as deceptive telemarketing and the making of materially false or misleading representations. As a Competition Law Officer, my duties regarding the enforcement of the *Competition Act* include conducting interviews, assessing complaints, examining deceptive marketing practices, gathering and analyzing evidence, and seeking judicial authorizations, such

as the present application. I have previously sworn affidavits in support of an application requiring the production of records by a third party pursuant to section 11 of the *Competition Act*, as well as affidavits in support of the issuance of warrants pursuant to sections 15 and 16 of the *Competition Act*. I have participated in numerous executions of search warrants with respect to Bureau matters and have testified in court in a criminal telemarketing case.

1.3 I have been actively involved in the investigation into certain marketing practices of National Home Services (National Energy Corporation, a subsidiary of Just Energy Group Inc., doing business as National Home Services and Services aux foyers du Québec) ("**National**"); morEnergy Services Inc. (Bancmor Credit Corporation and morEnergy Services Inc. doing business as morEnergy) ("**morEnergy**"); and Ontario Consumers Home Services Inc. ("**OCHS**") – all collectively known as the "**Parties under investigation**". All of these businesses are involved in the promotion of water heaters in the provinces of Ontario and/or Québec.

1.4 As the primary Competition Law Officer, on this matter, I have analyzed records, reviewed files, conducted interviews and supervised others who have assisted in the investigation regarding the business, sales and marketing practices of the Parties under investigation.



1.5 The Parties under investigation are alleged to have participated in the commission of an alleged offence or reviewable conduct contrary to the *Competition Act* from at least July, 2008 to the present, the exact dates being unknown. I have personal knowledge of the matters and facts hereinafter set out, except where specifically stated that such knowledge is based on the information or belief of others.

1.6 The offence or reviewable conduct under investigation relates to the Parties under investigation's solicitations, via door-to-door sales, to persons in Canada, specifically in Ontario and/or Québec. These solicitations are for the supply of water heaters. As this Information to Obtain (the "Information") reveals, during the course of visits to consumers' residences, representatives of the Parties under investigation allegedly make significant misrepresentations to convince consumers to sign long term water heater rental agreements, including misrepresentations relating to the nature of their visit, their identity, the ENERGY STAR initiative, alleged costs and energy savings and the terms and conditions of the water heater rental agreements.

1.7 In addition to my own actions, observations and personal knowledge, I rely on a number of sources for the information set out below. I have carefully considered the reliability of all of my sources of information and am satisfied that they are trustworthy. I have reasonable grounds to believe, and do believe, the information provided by each of these sources.

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1.8 The *Competition Act* provides two investigative regimes – criminal and civil – for addressing misleading representations and deceptive marketing practices. The present matter is currently being investigated under both regimes; namely subsection 52(1) and paragraph 74.01(1)(a) of the *Competition Act*. The elements of the criminal offence under subsection 52(1) of Part VI of the *Competition Act* and the reviewable conduct under paragraph 74.01(1)(a) of Part VII.1 of the *Competition Act* substantially mirror each other, except that the criminal offence requires proof of the additional *mens rea* element of “knowingly or recklessly”. Once proceedings have commenced pursuant to one regime, subsection 52(7) and section 74.16 of the *Competition Act* expressly prohibit duplicative proceedings from being initiated on the basis of the same or substantially the same facts. For the court's ease of reference, excerpts of the relevant provisions of the *Competition Act* are provided below:

ss.52(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect. [Emphasis added]

ss.74.01(1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,  
(a) makes a representation to the public that is false or misleading in a material respect [Emphasis added]

ss.52(7) No proceedings may be commenced under this section against a person against whom an order is sought under Part VII.1 on the basis of the same or substantially the same facts as would be alleged in proceedings under this section. [Emphasis added]

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s.74.16 No application may be made by the Commissioner for an order under this Part against a person where proceedings have been commenced under section 52 against that person on the basis of the same or substantially the same facts as would be alleged in proceedings under this Part. [Emphasis added]

1.9 The *Competition Act* also sets out the means to seek an *ex parte* application for a search warrant that applies to both the criminal and civil regimes under the *Competition Act*. For the court's ease of reference, an excerpt of the relevant provisions is provided below:

- ss.15(1) If, on the *ex parte* application of the Commissioner or his or her authorized representative, a judge of a superior or county court is satisfied by information on oath or solemn affirmation
- (a) that there are reasonable grounds to believe that
    - (i) a person has contravened an order made pursuant to section 32, 33 or 34, or Part VII.1 or VIII,
    - (ii) grounds exist for the making of an order under Part VII.1 or VIII, or
    - (iii) an offence under Part VI or VII has been or is about to be committed, and
  - (b) that there are reasonable grounds to believe that there is, on any premises, any record or other thing that will afford evidence with respect to the circumstances referred to in subparagraph (a)(i), (ii) or (iii), as the case may be,  
the judge may issue a warrant under his hand authorizing the Commissioner or any other person named in the warrant to
  - (c) enter the premises, subject to such conditions as may be specified in the warrant, and
  - (d) search the premises for any such record or other thing and copy it or seize it for examination or copying.  
[Emphasis added]

ss.16(1) A person who is authorized pursuant to subsection 15(1) to search premises for a record may use or cause to be used any computer system on the premises to search any data contained in or available to the computer system, may reproduce the record or cause it to be reproduced from the data in the form of printout or other intelligible output and may seize the printout or other output for examination or copying. [Emphasis added]

1.10 Section 15 of the *Competition Act* outlines the Commissioner's powers of search and seizure. Search warrants issued under section 15 allow the Commissioner to gather relevant information, inculpatory and exculpatory, pertaining to an investigation in relation to either a criminal or civil matter in Canada. In some cases, the serious and clandestine nature of the conduct in question, and the possibility that records could be altered, concealed or removed can make searching the best means of securing the required information. In addition, a search warrant allows the Commissioner to establish exactly where the records are located on a premise and who may have been in possession of them. The Commissioner's decision to seek a search warrant is assessed on a case-by-case basis with the specific fact situation of each case being examined on its own merits.

1.11 I have reasonable grounds to believe and do believe that a criminal offence pursuant to subsection 52(1) and under Part VI of the *Competition Act* has been or is about to be committed, or that grounds exist for the making of an order under Part VII.1 of the *Competition Act* pursuant to paragraph 74.01(1)(a) regarding civilly reviewable conduct .

1.12 I have reasonable grounds to believe and do believe that the records or other things to be searched for, as described at Part IV, are at the premises to be searched, as described at Part V, and will afford evidence respecting the alleged criminal offence or the civil reviewable conduct, as described at Part III of this Information.

## PART II DEFINITIONS

2 In this Information, the terms:

- (a) "***alleged offence or reviewable conduct under investigation***" means the business, sales and marketing practices of the Parties under investigation (which itself is a defined term – see below), as described at Part III of this Information, which are being investigated under subsection 52(1) and paragraph 74.01(1)(a) of the *Competition Act*;
- (b) "***computer password***" has the meaning set out in subsection 342.1(2) of the *Criminal Code* R.S.C., 1985, c. C-46 (as amended) (the "*Criminal Code*");
- (c) "***computer program***" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;

- (d) "**computer service**" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;
- (e) "**computer system**" has the meaning provided by section 16 of the *Competition Act* and, as set out in subsection 342.1(2) of the *Criminal Code*;
- (f) "**data**" has the meaning provided by section 16 of the *Competition Act*, as set out in subsection subsection 342.1(2) of the *Criminal Code*;
- (g) "**Parties under investigation**" means National Home Services (National Energy Corporation, a subsidiary of Just Energy Group Inc.), doing business as National Home Services and Services aux foyers du Québec ("**National**"), morEnergy Services Inc. (Bancmor Credit Corporation and morEnergy Services Inc.), doing business as morEnergy ("**morEnergy**") and Ontario Consumers Home Services Inc. ("**OCHS**") all of which is more fully described at section C of Part VI of this Information, and includes any business name associated with National, morEnergy and OCHS including, but not limited to, its predecessors, successors, parents, subsidiaries, divisions, partners, contractors, sub-contractors, employees, directors, administrators, corporate officers, agents, representatives and affiliates engaged in business in Canada, and other persons, known or unknown, implicated,

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directly or indirectly, in the commission of the alleged offence, or engaging in the reviewable conduct described at Part III;

- (h) "**products**" has the meaning provided by section 2 of the *Competition Act*, which includes an article and a service and in this investigation refers to water heaters;
- (i) "**record**" has the meaning provided by section 2 of the *Competition Act* and includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record (including computer data and electro-magnetic recordings in tape or disc form for use in computers or other devices for storing information), and any other documentary material, including software, regardless of physical form or characteristics, and any copy or portion thereof;
- (j) "**relevant time period**" means the period during which it is believed that an alleged offence under subsection 52(1) or reviewable conduct under paragraph 74.01(1)(a) of the *Competition Act* occurred, and includes the period from July 2008 to the present, the exact dates being unknown;

- (k) **"representatives of the Parties under investigation"** means all individuals working for, or on behalf of, the Parties under investigation including, but not limited to, predecessors, successors, parents, subsidiaries, divisions, partners, contractors, sub-contractors, employees, directors, administrators, corporate officers, agents, representatives and affiliates engaged in business in Canada, and other persons, known or unknown, implicated, directly or indirectly, in the commission of the alleged offence or engaging in the reviewable conduct described at Part III; and
- (l) **"water heater"** has the meaning of an appliance consisting of a gas or electric heating unit in which water is heated and stored.

### PART III

#### OFFENCE OR REVIEWABLE CONDUCT

**3 I have reasonable grounds to believe and do believe that the following alleged offence or that reviewable conduct under the *Competition Act* has been committed by the following named Parties under investigation:**

- 3.1(a) that National and other persons known and unknown, during the period commencing on or about July 2008 and continuing to the present, inclusively, the exact dates being unknown, did and continue to knowingly or recklessly make materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to subsection 52(1) of the *Competition Act*, thereby committing an offence under Part VI, namely subsection 52(5) of the *Competition Act*; or

(b) that National and other persons known and unknown, during the period commencing on or about July 2008, and continuing to the present, inclusively, the exact dates being unknown, did make, and continue to make, materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to paragraph 74.01(1)(a) of the *Competition Act*, thereby establishing grounds for the making of an order under Part VII.1, namely section 74.1 of the *Competition Act*.

3.2(a) that morEnergy and other persons known and unknown, during the period commencing on or about May 2009, and continuing until at least February 2013, inclusively, the exact dates being unknown, did knowingly or recklessly make materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to subsection 52(1) of the *Competition Act*, thereby committing an offence under Part VI, namely subsection 52(5) of the *Competition Act*; or

(b) that morEnergy and other persons known and unknown, during the period commencing on or about May 2009, and continuing until at least February 2013, inclusively, the exact dates being unknown, did make materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to paragraph 74.01(1)(a) of the *Competition Act*, thereby establishing grounds for the

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making of an order under Part VII.1, namely section 74.1 of the *Competition Act*.

3.3(a) that OCHS and other persons, known and unknown, during the period commencing on or about May 2011, and continuing until at least January 2013, inclusively, the exact dates being unknown, in the province of Ontario, did knowingly or recklessly make materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to subsection 52(1) of the *Competition Act*, thereby committing an offence under Part VI, namely subsection 52(5) of the *Competition Act*; or

(b) that OCHS and other persons known and unknown, during the period commencing on or about May 2011, and continuing until at least January 2013, the exact dates being unknown, in the province of Ontario, did make materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heater contrary to paragraph 74.01(1)(a) of the *Competition Act*, thereby establishing grounds for the making of an order under Part VII.1, namely section 74.1 of the *Competition Act*.

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- 3.4 The estimated timeframe of the alleged offence or reviewable conduct is based on the first complaint describing the conduct under investigation, which was received by the Better Business Bureau ("BBB") and the Competition Bureau's own Information Centre, all of which the Bureau presently has on file with respect to each of the Parties under investigation. Further details on these complaints are provided in Part VI paragraphs 6.28 to 6.32 of this Information.

#### PART IV

#### RECORDS OR OTHER THINGS TO BE SEARCHED FOR

- 4 I have reasonable grounds to believe and do believe that the following records or other things exist that will afford evidence of the alleged offence or reviewable conduct described above in Part III. I have reasonable grounds to believe and do believe that the following records or other things exist at the premises described at Part V and will afford evidence with respect to the alleged offence or reviewable conduct described at Part III, or will assist in retrieving, copying, reading, deciphering or acquiring the substance or meaning of any data contained therein.
- 4.1 Based on my experience as a Competition Law Officer in dealing with business records, and in consultation with Alain Garneau, Acting Assistant Deputy Commissioner and Tom Steen, Major Case Director, both assigned to this investigation, and based on the information disclosed hereafter, I believe that the records or other things to be searched for are the sorts of records that would have been created by, or would be in the possession of the Parties under investigation.

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4.2 I have reasonable grounds to believe, and do believe, that the following records or other things, whenever created, are linked, directly or indirectly, to the alleged offence or reviewable conduct of the representatives of the Parties under investigation and will afford evidence with respect to the alleged offence or reviewable conduct described at Part III:

**Corporate Structure**

- (a) All records or other things relating to the ownership, corporate structure, control and management of the Parties under investigation; and any other records or other things relating to the ownership or management and roles, duties, tasks, remuneration and responsibilities of the representatives of the Parties under investigation. These records or other things will afford evidence as to the identities of and the role executed by the representatives of the Parties under investigation as they relate to the alleged offence or reviewable conduct by the Parties under investigation.

**Identities**

- (b) All records or other things that, directly or indirectly, identify the individual or commercial names used to carry out the alleged offence or reviewable conduct, or that affiliate such individual or commercial names with legal entities or individuals. These records or other things will afford evidence as to the true identities of all persons implicated in the alleged offence or reviewable conduct.
  
- (c) All records or other things relating to aliases, user names, email addresses, email aliases or user IDs (user identities) used by the Parties under investigation and the representatives of the Parties under investigation involved in the alleged offence or reviewable conduct. These records or other things will afford evidence as to the identities of all persons implicated in the alleged offence or reviewable conduct.
  
- (d) All records or other things related to the policies of the Parties under investigation for recruiting, training and managing of any past and current representatives of the Parties under investigation, including job postings, application forms, employee pay, commissions, and dismissal records. These records or other things will afford evidence as to the identities of the all persons implicated in the alleged offence or reviewable conduct, and of the intent and the purpose of the activities

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under investigation as well as the benefits and compensation paid for their participation in the activities.

- (e) For any representatives of the Parties under investigation, up to five (5) original business records or other things that contain examples of the handwriting of such person. These records or other things will afford evidence as to the identity of the author of any unidentified handwriting appearing on records being seized.

**Revenue, Finances and Compensation**

- (f) All records or other things relating, directly or indirectly, to the revenues generated from water heater rentals and sales by the Parties under investigation and representatives of the Parties under investigation, including historical, actual and forecast data, with respect to the alleged offence or reviewable conduct. These records or other things include but are not limited to: financial statements, annual reports, banking records, budget forecasts, credit and debit transactions, deposits, withdrawals, transfers, cheques, wire transfers, accounts receivable and payable records, currency, returns and any other accounting information. These records or other things will afford evidence as to the monies collected from consumers by the Parties under investigation and the representatives of the Parties under investigation who received financial benefit from the alleged offence or reviewable conduct, the

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directing mind(s) of the Parties under investigation, and the alleged materiality of the representations in question.

- (g) All records or other things relating, directly or indirectly, to the management and distribution of the monies gained or revenue generated by the promotion, sale and rental of water heaters by the Parties under investigation and representatives of the Parties under investigation. These records of other things will afford evidence as to the directing minds of the Parties under investigation.
- (h) All records, aliases, user names, or other identifiers or other things relating, directly or indirectly, to the identity, role and compensation of the representatives of the Parties under investigation. These records or other things will afford evidence as to who received financial benefit from the alleged offence or reviewable conduct, the directing mind(s) of the Parties under investigation, and the materiality of the alleged false or misleading representations at issue.

**Operations**

- (i) All records or other things relating, directly or indirectly, to the corporate structure of the Parties under investigation and the ownership or control of these entities and any other records relating to the ownership or management and roles, duties, tasks, remuneration and responsibilities

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of the representatives of the Parties under investigation, including but not limited to guidelines, hiring policies and training manuals. These records or other things will afford evidence as to the identity and role and directions of the corporate entities, the identity of and the role exerted by, the representatives of the Parties under investigation.

(j) All records or other things relating, directly or indirectly, to the rental, lease, or ownership by the Parties under investigation of office space and/or office equipment including, but not limited to: computer systems, electronic storage devices, telephones, facsimile machines, office services (including Internet and telecommunication services), websites and email addresses as they relate to the alleged offence or reviewable conduct. These records or other things will afford evidence as to the identity and the role exerted by persons in the day-to-day operations of the Parties under investigation as they relate to the alleged offence or reviewable conduct.

(k) All records or other things relating, directly or indirectly, to the advertisement, sale, promotion, preparation, planning, development, delivery, payment, supply and removal of rental water heaters with respect to the alleged offence or reviewable conduct, including planning and development of sales tactics. These records or other things include, but are not limited to: agreements, contracts, publications, directives, correspondence, pictures, authorizations, memoranda,

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audio-recordings, door-to-door sales scripts, verification call scripts, efficacy/efficiency testing and notes. These records or other things will afford evidence as to the nature of the rental water heater promotions, the scope of the alleged offence or reviewable conduct, and evidence of the marketing strategies and sales tactics employed, including the accuracy of representations made to the public.

(l) All records related to certification, license, authorization, including all correspondence with authorities and agencies in relation to the activities or the products promoted. These records or other things will afford evidence of the compliance of marketing strategies with the legal requirements imposed by regulation and law, and will afford evidence of the accuracy of the representations made to the public.

(m) All records or other things relating, directly or indirectly, to contracts, including but not limited to: scripts, application forms, customer acknowledgments, installation forms, pamphlets and any other records related to the promotion and supply of water heaters. These records or other things will afford evidence of the alleged offence or the reviewable conduct.

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- (n) All records or other things relating, directly or indirectly, to information on the application and use of the ENERGY STAR logos. These records or other things will afford evidence of the alleged offence or the reviewable conduct.

**Customers**

- (o) All records or other things relating, directly or indirectly, to the customers or potential customers who were or might reasonably have been contacted by, made contact with or conducted business with the representatives of the Parties under investigation, including but not limited to contracts, pamphlets, and promotional materials. These records or other things will afford evidence as to the target market of the Parties under investigation, including to whom the representations were made or were likely to have been made, how complaints were handled and how consumers were targeted which will also afford evidence relevant to materiality of those representations.
- (p) All records or other things relating to customers who have contracts with the Parties under investigation, including names, addresses, and amounts incurred. These records or other things will afford evidence of the extent of the activities of the Parties under investigation.

- (q) All records or other things relating to materials that were provided to customers who entered into contracts with the Parties under investigation. These records or other things will afford evidence of what customers received.
- (r) All records or other things relating, directly or indirectly, to the customer service provided by the Parties under investigation, including but not limited to complaints, customer comments, refund requests, scripts, policies, and any other customer communications. These records or other things will afford evidence as to customer satisfaction, the extent to which customers or potential customers believed they were misled and the extent to which customers or potential customers advised the Parties under investigation that they believed they were misled, as well as, the general handling of complaints, cancellations and/or refund requests by the Parties under investigation. These records will also afford evidence as to the depth of knowledge held by the Parties under investigation regarding the activities of the representatives of the Parties under investigation.
- (s) All records or other things relating, directly or indirectly, to correspondence between the Parties under investigation and other agencies including, but not limited to, the BBB and the Ontario Ministry of Consumer Services with respect to conduct relating to the alleged offence or reviewable conduct. These records will also afford evidence

as to the depth of knowledge held by the Parties under investigation regarding the activities of the representatives of the Parties under investigation.

Other

- (t) Other things, specifically office equipment related to or used in the commission of the alleged offence or reviewable conduct that may be used as evidence including: computer systems, electronic storage devices, telephone switch boxes, telecommunications equipment, electronic surveillance and audio/visual recording devices and tapes, facsimile machines and facsimile memory. These other things will provide evidence of how, as well as the scope or means by which the alleged offence or reviewable conduct was carried out.
  
- (u) Other things, specifically computer passwords, computer programs, computer services, computer systems, software, data storage devices, and associated documentation including operating instructions, manuals and service records that will assist in retrieving, copying, reading, printing, deciphering or acquiring the substance or meaning of any data seized, or accessed, together with all passwords, login codes, encryption keys or other security devices relating to these things.

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- (v) Other things, specifically all records or other things described at Part IV of this Information, contained therein, or available to any computer system on the premises to be searched.
- (w) All records or other things relating to the use and application of the ENERGY STAR initiative.
- (x) Other things used by representatives of the Parties under investigation during the alleged offence or reviewable conduct including but are not limited to garments, uniforms, identification badges, clipboards, and contracts which will afford evidence as to the level of deception as well as the scope by which the alleged offence or reviewable conduct was carried out by the Parties under investigation.
- (y) All records or other things that could be used as similar fact evidence.

## PART V

### PREMISES TO BE SEARCHED

- 5 I have reasonable grounds to believe, and do believe, that the aforementioned records or other things to be searched for are located on the following premises, as described below: including all storage, record keeping and disposal areas located in and about this premises under the control of the occupant(s) of the premises including the Parties under investigation:

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- 5.1 National Home Services and Services aux foyers du Québec ("National"):
- (a) 25 Sheppard Avenue West, Suite 1700, North York, Ontario, M2N 6S8
  - (b) 6345 Dixie Road, Suite 200 (including units 2 and 3), Mississauga, Ontario, L5T 2E6
  - (c) 100 King Street West, Suite 2630, Toronto, Ontario, M5X 1E1
  - (d) 5160 Boulevard Décarie, Suite 430, Montréal, Québec, H3X 2H9
  - (e) 5160 Boulevard Décarie, Suite 450, Montréal, Québec, H3X 2H9
- 5.2 Ontario Consumer Home Services ("OCHS")
- (a) 2225 Sheppard Ave East, Suite 1501, North York, Ontario, M2J 5C2
  - (b) 619 Yonge Street, 2<sup>nd</sup> floor, Toronto, Ontario, M4Y 1K9
  - (c) 1280 Finch Ave West, North York, Ontario, M3K 3J2
- 5.3 morEnergy Services Inc. ("morEnergy")
- (a) 300 The East Mall, Suite 200, Toronto, Ontario, M9B 6B7

## PART VI

### REASONABLE GROUNDS

- 6 The following information constitutes the reasonable grounds for my belief in support of this information to obtain search warrants:

A) Overview of the Investigation

- 6.1 On January 10, 2013, the Commissioner commenced a formal inquiry pursuant to paragraph 10(1)(a) of the *Competition Act* regarding an alleged offence contrary to subsection 52(1) and reviewable conduct under paragraph 74.01(1)(a) of the *Competition Act* in relation to the marketing practices of two (2) of the Parties under investigation namely, National and morEnergy (the "Inquiry"). I have been actively involved in many of the investigative steps prior to and following the commencement of this Inquiry.

6.2 The Inquiry was initiated as a result of a six-resident application (“**six-resident application**”) under section 9 the *Competition Act*. Section 9 reads:

ss. 9(1) Any six persons resident in Canada who are not less than eighteen years of age and who are of the opinion that

- (a) a person has contravened an order made pursuant to section 32,33 or 34, or Part VII.1 or VIII,
- (b) grounds exist for the making of an order under Part VII.1 or VIII, or
- (c) an offence under Part VI or Part VII has been or is about to committed, may apply to the Commissioner for an inquiry into the matter. [Emphasis added]

6.3 The applicants to the six-resident application, all employees of Reliance Home Comfort (“**Reliance**”) (a competitor of the Parties under investigation), allege false or misleading representations made by National and morEnergy.

Reliance alleges that National and morEnergy are knowingly making materially false or misleading representations, both through door-to-door sales and the dissemination of promotional materials, for the purpose of promoting their services and business interests of residential water heaters in the Ontario residential markets.

6.4 On April 30, 2013, the Commissioner amended the above noted Inquiry to include OCHS as an additional Party under investigation.

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6.5 The activities under investigation relate to the business, sales and marketing practices in relation to water heaters, specifically those offered through door-to-door sales in Ontario and/or Québec by the Parties under investigation. The preliminary investigation, based on the information received from Reliance, indicated that the activities in question were limited to the province of Ontario. However, more recent and independent information obtained by the Bureau, during the course of the investigation, has led me to believe that National is also conducting the same activities in the province of Québec.

6.6 Consumers may rent a natural gas or electric water heater from a utility company, if available, or from a water heater rental provider. Consumers may also purchase natural gas and electric water heaters from retailers, such as home improvement centres and hardware stores, or from heating, ventilation and air conditioning contractors. Most consumers who rent or purchase a water heater also obtain related water heater services, including installation, repair, maintenance and disconnection. When a customer renting a water heater switches providers, the original rental water heater provider generally requires customers to return the water heater.

#### **Misrepresentations in Door-to-Door Sales**

6.7 There are a number of ways in which consumers are allegedly misled by the Parties under Investigation and representatives of the Parties under investigation as fully described below. Firstly, consumers are allegedly misled and deceived as to the identity of the water heater representative at their door.

Complainants have indicated the representatives of the Parties under investigation have presented themselves in various ways, including but not limited to, leading them to believe they are: their current water heater supplier; representatives from a government agency; or that the actual company they represent took over for their current water heater supplier.

6.8 Secondly, the representatives use various tactics and misrepresentations in stating the reason for their visit in order to gain entry to the homeowners residence. According to witness statements obtained by the Bureau, the representatives of the Parties under investigation use tactics such as, but not limited to, indicating that: they are there to simply check the condition of the water heater; they need to inspect the water heater for the Energy Star logo; they need to inspect for safety issues or for upgrade eligibility; or that they are simply in the neighbourhood and all consumers are being upgraded.

6.9 Thirdly, once entry to the residence is granted, various tactics are then employed by representatives of the Parties under investigation to convince the homeowner to switch out their current water heater. At times an inspection of the current installed water heater is performed. The homeowner is then told the water heater must be replaced for various reasons including: safety issues, age of the water heater, a new one is more efficient, cost savings available, including offers such as two (2) month free rental, and offers for available government rebate programs. The homeowner is often asked to sign documents confirming the inspection and installation request for a new water

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heater – at no additional cost. In many instances, these documents are not explained to the homeowner as actually being long-term monthly water heaters rental agreements which include significant early termination fees and penalties.

6.10 Fourthly, once the homeowner has entered into the water heater rental agreements, (s)he then discovers that they are bound by the terms and conditions of the agreement including pricing and other terms and conditions that were not clearly explained to them by the representative of the Parties under investigation. Homeowners that have complained to the BBB have often indicated their extreme frustration in dealing with the Parties under investigation and their representatives in honouring the ten (10) day cooling off period provided under the *Ontario Consumer Protection Act*, (2002) S.O. 2002, C. 30 (Schedule A) ("**Ontario Consumer Protection Act**") as well as in attempting to exit the agreement which they felt they had been misled into signing from the beginning. Installation of the water heaters generally happens very quickly, at times on the same day as the visit by the representative of the Parties under investigation.

BBB

### **Energy Star Initiative**

6.11 The Bureau is also concerned with the alleged unauthorized and misuse of the ENERGY STAR initiative name and symbols both in verbal representations and in print materials. All of the Parties under investigation use or have used the ENERGY STAR logo printed directly on their water heater rental agreements, contrary to the ENERGY STAR initiative guidelines.

### **Other Enforcement and Legal Actions**

6.12 As mentioned in paragraphs 6.2 and 6.3, Reliance and its employees are the six-resident applicants in the Bureau's Inquiry. Reliance is a direct competitor to the Parties under investigation and is currently a named Party in a separate civil investigation by the Bureau. Specifically, on December 20, 2012, the Civil Matters Branch of the Bureau filed two applications pursuant to section 79, namely, the abuse of dominance provisions of the *Competition Act*. The Bureau is seeking orders prohibiting Reliance and Direct Energy Marketing Limited from engaging in further anti-competitive conduct contrary to the *Competition Act*. However, the investigation conducted by the Civil Matters Branch is independent from the investigation being conducted by the Fair Business Practices Branch within the Bureau.

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6.13 On December 17, 2012, National was served by Reliance with a Statement of Claim filed in the Ontario Superior Court of Justice (Court File No.: CV-12-470200). In this latter proceeding, Reliance is seeking damages in the amount of \$60 million dollars against National and declaratory and injunctive relief, based on allegations that National has engaged in unfair trade practices and misleading representations in its marketing and sale of water heaters.

6.14 On or about June 3, 2013, Reliance provided the Bureau with additional information regarding its six-resident application which included a copy of the Statement Claim and the Statement of Defence and Counterclaim in Court File No.: CV-12-470200. In its Statement of Defence and Counterclaim, National indicates at page 6 (paragraph 22) that it retained approximately 500 independent third party contractors who provide direct marketing services. National does not consider them to be their "employees" stating that no National employees engage in door-to-door sales.

6.15 On January 16, 2013, the Ontario Ministry of Consumer Services laid sixty-three (63) charges under the Ontario *Consumer Protection Act* against OCHS and its directors, Vassili Tatarinov, Margarita Tatarinova, Maria Pevzner and Vitali Godonooga. In these proceedings, consumers complained about door-to-door sales of water heaters rentals, air conditioning units, as well as furnace sales and allege that OCHS representatives led them to believe that: they represented the consumers' existing water heater service provider; they were taking over from another water heater service provider; they were performing

an inspection required by the government; or the consumers might be eligible for service upgrades. Consumers also allege that they were: subject to high-pressure sales tactics; promised improved products and services at cost savings; told there would be no change to their billing arrangements, and were wrongfully advised that there was no "right to cancel" their water heater rental agreement.

6.16 On January 25, 2013, the Ontario Ministry of Consumer Services also laid charges against morEnergy, John Dare and John Nassar under the Ontario *Consumer Protection Act* for unfair practices and unconscionable representations.

6.17 On April 11, 2013, the Ontario Ministry of Consumer Services announced it would introduce reforms to the Ontario *Consumer Protection Act* as part of its plan to strengthen consumer protection. If passed, Bill 55, *An Act to amend the Collection Agencies Act, the Consumer Protection Act, 2002 and the Real Estate and Business Brokers Act, 2002 and to make consequential amendments to other Acts, (2<sup>nd</sup> Sess., 40<sup>th</sup> Leg., Ontario, 2013) ("Bill 55")*, would impose new rules for dealing with door-to-door sales fairly, including:

- (a) Doubling the existing 10-day cooling-off period to 20-days for water heater rentals, providing consumers more time to consider their decision;

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- (b) Banning delivery and installation of water heaters during the new 20-day cooling-off period;
- (c) Creating rules requiring companies to confirm sales by making scripted and recorded telephone calls to the customer and that key contract terms are disclosed in clear, easy-to-understand language; and
- (d) Providing new consumer protections when the rules are not followed, such as requiring the supplier to pay all cancellation fees when the 20-day cooling-off period is not observed.

As of June 13, 2013, Bill 55 was in second reading, has not yet been referred to Standing Committee, and will not be further debated until the Ontario legislature reconvenes, at the earliest, in September 2013.

6.18 I am advised by Josephine Palumbo, Senior Counsel for the Commissioner, that Counsel for National, Mr. Adam Fanaki, Davies Ward Phillips & Vineberg LLP, contacted her inquiring on the status of the six-resident application by Reliance and offered to answer any questions regarding the allegations against National. Mr. Fanaki was advised that such discussions were premature at this time. The decision to seek an order under sections 15 and 16 of the *Competition Act* is based on a number of factors including: the very serious nature of the allegations being made against the Parties under investigation and corroborated by a number of independent sources; the Bureau's belief that information obtained directly from the Parties under

investigation may prove to be unreliable and the denial by National of any wrongdoing as set out in the Statement of Defence and Counterclaim noted in paragraphs 6.13 and 6.14 above, which is inconsistent with the independent information collected and received by the Bureau in its ongoing investigation. In the Statement of Defence and Counterclaim at page 16 (paragraph 49(c)), National indicates that they have retained approximately 500 independent third party contractors who provide direct marketing services to customers. They go on to say that the independent contractors are not "employees" of National and that no National employee engages in door-to-door sales. This information is contrary to the information received by the Bureau from former employees of National as further described in paragraphs 6.62(4)(a) and (b) of this Information. I am aware that National has been generally cooperative with the Bureau in the civil section 79 investigation.

**B) Investigative Sources**

6.19 I have reasonable grounds to believe and do believe that the information provided to me by each of my investigative sources. For ease of reference of the court, I provide basic information about my key investigative sources below.

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### Bureau Resources

- 6.20 **Gus Laforge** is an employee of the Royal Canadian Mounted Police ("RCMP"), who works as an Intelligence Analyst for the Canadian Anti-Fraud Centre ("CAFC"), an anti-fraud call centre located in North Bay, ON. The CAFC serves as Canada's central fraud data repository, as it collects information from complainants across Canada and disseminates related information to the appropriate enforcement agencies. The CAFC is jointly managed by the RCMP, the Ontario Provincial Police ("OPP"), and the Bureau. He has been with the CAFC since June, 1994, and is duty bound to be truthful.
- 6.21 **Alain Garneau** is an Acting Assistant Deputy Commissioner with the Fair Business Practices Branch in the National Capital Region office of the Bureau. He assisted me by conducting interviews of complainants and an ex-employee, by providing me with complaint information, and by providing strategic guidance. He has been with the Bureau since February 2001.
- 6.22 **Tom Steen** is a Major Case Director and Senior Policy Advisor - Mass Marketing Fraud with the Fair Business Practices Branch in the National Capital Region office of the Bureau. Mr. Steen has provided guidance in this investigation. He has been with the Bureau since 1992.

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- 6.23 **Gregory Pang** was a Competition Law Officer with the Fair Business Practices Branch in the National Capital Region office of the Bureau from August 2009 to May 2013 and was a member of my case team. Mr. Pang assisted me by conducting interviews of complainants and an ex-employee.
- 6.24 **Patrick Allaire** is a Competition Law Officer with the Fair Business Practices Branch in the Québec Regional office of the Bureau in Montréal. Mr. Allaire assisted me by conducting interviews of complainants and visual surveillance of the premises to be searched. He has been with the Bureau since 2012.
- 6.25 **André Soulière** is a Research Assistant with the Resource Centre of the Bureau in the National Capital Region office of the Bureau, who conducts research on behalf of Bureau investigators and employees. Mr. Soulière assisted me by accessing online databases, through which he could access official government records on incorporation and obtain information from commercial business services. He has been with the Bureau since September, 1998.
- 6.26 **Gabrièle Dennie-Filion** is a Research Officer with the Competition Bureau, who conducts research on behalf of Bureau investigators and staff. Ms. Dennie-Filion assisted me by accessing public records including corporate registries and property records, as well as several commercial online databases which provide reliable information relating to business entities and individuals. She has been with the Bureau since April, 2013.



6.27 **James (Jim) White** is a Senior Competition Law Officer with the Fair Business Practices Branch in the Ontario Regional office of the Bureau in Toronto. Mr. White assisted me by conducting visual surveillance of the premises to be searched. He has been employed with the Bureau since November, 2004 and was previously employed by the Toronto Police Service for 27 years.

**Complainants and Witnesses**

6.28 On January 11, 2013, I received, via email from Fiona Dunbar (Manager, Dispute Resolution & Information Services for the BBB of Mid-Western & Central Ontario), in response to a request for assistance, complaint data from the BBB on complaints relating to water heater rentals in Ontario. This complaint data indicates that, along with the original Parties under investigation by the Bureau, namely National and morEnergy, OCHS has also been the subject of a significant number of complaints alleging similar conduct in regards to water heater rental agreements promoted through door-to-door sales.

6.29 On January 31, 2013, Mr. Garneau provided me with complaint data he received from Mr. Laforge from the CAFC which are noted at paragraph 6.32 of this Information.

6.30 On or about January 11, 2013, I requested from Tomek Cygalski, an employee of the Bureau, to provide me with the complaints received from the Information Centre of the Bureau which are noted at paragraph 6.32 of this Information.

6.31 On May 14, 2013, I noted on the Ontario Ministry of Consumer Services' website (<http://www.sse.gov.on.ca/mcs/en/pages/default.aspx>) that "Water Heater Rental/Removal" is the number two (2) source of complaints received by the Ontario Ministry of Customer Services for 2012, having received more than 3,200 complaints.

6.32 As consumers sometimes complain to multiple organizations, there is always the possibility of a certain number of duplicate complaints. However, the following table is a general indication as to the volume of complaints received collectively against three of the Parties under investigation:

<b>Target</b>	<b>BBB Complaints</b>	<b>Bureau Complaints</b>	<b>CAFC Complaints</b>	<b>Total Complaints</b>
National	251	18	13	282
morEnergy	71	6	2	79
OCHS	80	2	2	84
<b>TOTAL</b>	<b>402</b>	<b>26</b>	<b>17</b>	<b>445</b>

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**Witness Interviews**

6.33 The following table provides basic information about the complainants that were interviewed by Bureau investigators over the telephone and/or in person:

Name	Company	Location	Interview Date	Officer
Diana Thompson	OCHS	Telephone	Jan 18, 2013	A. Garneau
Dallne Benatar	OCHS	North York	Jan 21, 2013	A. Garneau
Maurice Benatar	OCHS	North York	Jan 21, 2013	A. Garneau
Rob Powell	OCHS	Mississauga	Jan 21, 2013	A. Garneau
Madam Powell	OCHS	Mississauga	Jan 21, 2013	A. Garneau
Lucy Poscente	OCHS	Thornhill	Jan 22, 2013	A. Garneau
Michael Jenkyns	OCHS	Kanata	Jan 23, 2013	A. Garneau
Isabelle Guimont	OCHS	Ottawa	Jan 24, 2013	A. Garneau
Mia Poscente	OCHS	Thornhill	Jan 25, 2013	A. Garneau
Robert Wheeler	OCHS	St. Catherines	Jan 29, 2013	A. Garneau
Helen Simpson	OCHS	Etobicoke	Feb 6, 2013	A. Garneau
Jason Morrison	National	Telephone	Jan 21, 2013	A. Garneau
Andrew Maarschalk	National	Oakville	Feb 7, 2013	A. Garneau
James Lacey	National	London	Feb 12, 2013	A. Garneau
Louise Harvey	National	Ancaster	Feb 12, 2013	A. Garneau
Ms. Jocelyn Leblanc	National	Guelph	Feb 14, 2013	A. Garneau
Teresa Pak	National	Markham, ON	Feb 18-19, 2013	A. Garneau
Jeffrey Bosman	National	Clinton, ON	Feb 20, 2013	A. Garneau
Mary Peifer	National	North Bay, ON	Feb 21, 2013	A. Garneau
Shammi Singal	National	Mississauga, ON	Feb 22, 2013	A. Garneau
Dale Eldridge	National	Telephone	Mar 15, 2013	A. Garneau
Matthew Rivers-Moore	National	Kitchener, ON	Feb 4, 20, Mar 13, 2013	DM Jamieson/ G.Pang
Mathias Marchal Baptiste Barbe Éric Aussaint (Metro)	Service aux Foyers du QC	Montréal, QC	May 7, 2013 May 23, 2013	A. Garneau
Saul Goren	Service aux Foyers du QC	Laval, QC	May 30, June 20, 2013	A. Garneau
Rhona Goren	Service aux Foyers du QC	Laval, QC	May 30, June 20, 2013	A. Garneau

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Name	Company	Location	Interview Date	Officer
Stephanie Grassi	Service aux Foyers du QC	Gatineau, QC	Notes provided by Ms. Grassi, a Bureau officer, June 18, 2013	
Pierre Brisson	Service aux Foyers du QC	Gatineau, QC	June 6, 2013	A. Garneau
Nicholas Bester	NHS	Hamilton, ON	April 30, 2013	P. Allaire
Han Han	NHS	Kingston, ON	April 9, 2013	P. Allaire
Harsimranjeet Kaur	NHS	Brampton, ON	April 12, 2013	P. Allaire
Alice McNamee	NHS	London, ON	April 25, 2013	P. Allaire
Ronald Maertens	morEnergy	Thunder Bay, ON	March 19, 2013	DM Jamieson
Milena DeFigueiro	morEnergy	Brampton, ON	April 4, 2013	P. Allaire
Shayla Nelson	morEnergy	Drayton, ON	April 8, 2013	P. Allaire
Laura Martins	morEnergy	Toronto, ON	April 3, 2013	P. Allaire

6.34 At the time these complainants were interviewed, they were made aware that the information they provided was part of an ongoing investigation and could be used in future legal proceedings. The information provided by the complainants corroborated information independently obtained from the Bureau from the other sources. I therefore believe the information they provided to the Bureau to be reliable.

6.35 The time elapsed among complaints, the geographical distance among the complainants and the parallels among their respective stories reinforce their collective reliability.

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**Six-resident Application Pursuant to Section 9**

6.36 Reliance and its employees (six-resident application), have provided the Bureau with information received by their Customer Service Division with regards to complaints from current customers and their interaction with other water heater rental providers, including National and morEnergy. This information is consistent with the information obtained by the Bureau through its own independent investigation.

**Additional Complainant – Competitor**

6.37 On May 29, 2013, Mr. Garneau, Dalia Boulos (a student working with the Bureau) and I met with representatives of HydroSolution and their legal counsel, Madeleine Renaud, McCarthy Tetrault LLP in Montréal, Québec. The meeting was held as a result of HydroSolution contacting the Bureau with concerns over certain marketing practices of Services aux foyers du Québec (the corporate name used by National in Québec) and specifically, relating to the door-to-door promotion of water heater rental agreements. HydroSolution is a competitor to National in the province of Québec and indicated in this meeting that they have received over 300 client requests regarding the activities of Services aux foyers du Québec since late 2012. The information provided by HydroSolution, during the interview, is consistent with the information obtained by the Bureau through its ongoing investigation.

*ADW*

## Other Sources

### 6.38 Metro News – Montréal

- (a) On or about April 24, 2013, I became aware that Services aux Foyer du Québec was conducting business in Québec through an article published in the *Metro News (Montréal)*, a Canadian national daily newspaper (available in print and online), regarding the door-to-door solicitations of an Ontario based company now making its way into Québec with the same sales tactics and pitches that have resulted in hundreds of complaints in Ontario. The article goes on to say that the company is "Services aux foyers du Québec" and the author indicates his source to be a former employee who describes the operations of the business in much the same manner and detail as the complainants interviewed by the Bureau as part of this ongoing investigation. A copy of this article is attached to this Information as Exhibit "A".
- (b) On May 23, 2013, Mr. Garneau interviewed the journalist from *Metro News (Montréal)*, Mr. Mathias Marchal. Mr. Marchal confirmed the content of the article published on or about April 24, 2013, without revealing his source. He also provided Mr. Garneau with copies of documents given to him by his source which were obtained during a training session given by Services aux foyers du Québec. Mr. Garneau also spoke with Mr. Marchal's supervisor, Eric Aussant, who indicated

his belief in Mr. Marchal's reliability. Mr. Marchal's findings in his article are consistent with the information provided by the complainants interviewed as part of the Bureau's ongoing investigation and there does not appear to be any reason for doubting the reliability of the statements made by Mr. Marchal in the article.

#### **6.39 Journal de Montréal**

On May 26, 2013, *Le journal de Montréal*, a daily newspaper published in Montréal, Québec, published an article regarding alleged misrepresentations by Services aux foyers du Québec in their door-to-door promotions of water heater rentals. This information is consistent with the information obtained by the Bureau as part of this ongoing investigation. A copy of this article is attached to this Information as Exhibit "B".

#### **6.40 Mr. Garneau – National Interview and Training**

- (a) On June 8, 2013, Mr. Garneau, posing as a prospective employee, responded to an online advertisement for a job posting with Just Energy on the website [www.Kijiji.ca](http://www.Kijiji.ca). On June 17, 2013, Mr Garneau received a call from a certain "Marilyn" who invited him to an interview at 130 Slater Street, Suite 1100, Ottawa, Ontario to take place on June 18, 2013.

- (b) At this location, Mr. Garneau noted signage for both Just Energy and National. There were also numerous National and Services aux Foyers du Québec representatives that were going in and out of the premise. On June 18, 2013, Mr. Garneau was interviewed by "Kate" from Just Energy. He then participated in a training session for National on June 24, 2013.
- (c) The training session at the above noted address for National was specifically for door-to-door water heater sales. The main purpose of this training was to provide participants with information in regards to: 1) who National is; 2) the specifics of National's water heaters; 3) the commissions to be paid; and 4) the organizational structure of National. A copy of the training material provided to Mr. Garneau and his notations are attached to this Information as Exhibit "C".
- (d) On June 25, 2013, Mr. Garneau also attended a second half-day training session. Upon arrival, he was asked to sign an Independent Contractor Agreement, as well as two (2) forms attached to it: (1) a Disclosure Form that would authorize National to use his personal information; and (2) a Compliance Matrix Acknowledgment, which list the penalties and sanctions for failure to comply with ethical and professional expectations. The Independent Contractor Agreement appeared to release National from any liability from the actions of its representatives. The training began with a motivation session and was



followed by job shadowing (door-to-door sales exercise with representatives from National promoting water heater sales).

(e) Mr. Garneau also informs me of the following:

- The training manual was not up-to-date (2010) and did not mention anything with regards to the 10-day cooling off period;
- The trainer "Andy" encouraged new representatives to take advantage of the 90-day commission program, which allows new representatives to get an extra \$25 dollars, on top of the regular commission, for all new deals that have an installation date within five (5) days of the sale;
- The level of confusion created as to the identity and the purpose of the door-to-door visits he witnessed was consistent with the experiences reported by complainants and former employees interviewed by the Bureau;
- The misleading tactics used included, but were not limited to, a lack of disclosure regarding the true purpose of the visit; the real cost savings of the water heater being promoted; the misuse of the ENERGY STAR initiative and other government incentives; the necessity of replacing the water heater; the unsubstantiated savings associated with the water heater; the nationality of National compared to their competitors and; the purported warranty associated with the water heater; and

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- Aggressive sales tactics were used by National representatives, particularly with respect to more vulnerable consumers.

(f) Mr. Garneau also noted that, despite having sales representatives sign an Independent Contractor Agreement, National retains control over the schedule, number of hours worked, targeted markets, manner in which the door-to-door promotions are performed as well as company clothing to be worn by representatives of National and the equipment to be used.

### C) The Parties Under Investigation

6.41 It should be noted that the addresses obtained for the Parties under investigation, based on several sources, refer to the locations as Toronto, North York or Etobicoke. According to Canada Post ([www.canadapost.ca](http://www.canadapost.ca) – on June 13, 2013), the addresses as they appear in Part V are correct, including the premise located in Montréal.

#### 1. *National Home Services*

##### (a) Corporate Records

6.42 On May 13, 2013, Ms. Dennie-Fillion provided me with records from One Source<sup>1</sup> with the corporate information on Just Energy Group Inc. (“Just

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<sup>1</sup> OneSource.com is an online database of company, executive, and industry intelligence.

**Energy**). This data shows that Just Energy has several subsidiaries and branches, including National Energy Corporation and National Home Services. Corporate records from the Province of Ontario, Ministry of Government Services, indicate for National Energy Corporation the following information:

**Registered Office Address:**

100 King Street West, Suite 2630, Toronto, ON M5X 1E1

**Administrators:**

Jonah T. Davids, Vice President  
Ken Hartwick, Chief Executive Officer  
Mark L. Silver, President  
Beth Summers, Chief Financial Officer

6.43 On May 2, 2013, Mr. Allaire provided me with copies of corporate records for Services aux foyers du Québec obtained from the office of the Registraire des entreprises Québec. These records indicate the following information:

**National Energy Corporation**

2630-100 King Street, West, Toronto, ON M5X 1E1

**Administrators located at:**

6345 Dixie Road, Suite 200, Mississauga, ON, L5T 2E6 and 25  
Sheppard Avenue, West, Suite 1700, Toronto, ON M2N 6S6

**Address of principal location:**

430, 5160 boulevard Décarie, Montréal, QC, H3X 2H9

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**Other Names Used in Québec:**

National Home Services  
Services aux foyers du Québec

**(b) Publically Available Information**

6.44 On May 14, 2013, I visited Just Energy's website ([www.justenergy.com](http://www.justenergy.com)) which indicates Just Energy is a publicly traded company (NYSE:JE and TSX:JE).

The same day, I also visited National's website

([www.nationalhomeservices.ca](http://www.nationalhomeservices.ca)) and noted the following information:

25 Sheppard Avenue West, Suite 1700, Toronto, ON M2N 6S6

6.45 On May 14, 2013, I visited the website [www.servicesauxfoyersduquebec.ca](http://www.servicesauxfoyersduquebec.ca) and noted the following contact information:

5160 Boulevard Décarie, Bureau 430, Montréal, Québec , H3X 2H9

**(c) Business Operations**

6.46 On June 21, 2013, I visited the website [www.nationalhomeservices.ca](http://www.nationalhomeservices.ca) which noted the following on the "About US" tab:

"National Home Services (NHS) is the Home Services subsidiary of Just Energy, a publicly traded company (NYSE: JE and TSX: JE) with 1.8 million customers across Canada and the United States. Established in 2008 and specializing in the supply of energy efficient rental water heaters and HVAC equipment to both the existing and new home markets, NHS has grown

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rapidly and continues to build upon a base of over 230,000 rental customers. We strive for long-term customer satisfaction by supplying quality products at competitive rates with a quick, reliable service response. Our promise of a maximum 4 hour service response time is the best in the business. "

**2. MorEnergy**

**(a) Corporate Records**

6.47 On May 13, 2013, Ms. Dennie-Fillion provided me with corporate records from the Province of Ontario, Ministry of Government Services, for Bancmor Credit Corporation, doing business as morEnergy. Ms. Dennie-Fillion also indicated in her information that Bancmor Credit Corporation and morEnergy Services Inc. have the same corporate number in the Ontario Business Registry leading her to believe that their corporate records would be identical. The corporate records indicate the following information:

**Registered office address:**

300 The East Mall, Suite 200, Toronto, ON M9B 6B7

**Administrators:**

John Nasser, President  
John Dare, Director  
4263 Sherwood Towne Boulevard, Suite 200, Mississauga, ON, L4Z  
1Y5

**(b) Publically Available Information**

6.48 On May 14, 2013, I visited the website [www.moreenergy.ca](http://www.moreenergy.ca) which indicated the following information:

300 The East Mall, Suite 200, Etobicoke, ON, M9B 6B7

6.49 On May 14, 2013, I visited a Facebook page entitled "morEnergy" which indicated the following information:

300 The East Mall, Suite 200, Toronto, ON Heating Ventilation & Air Conditioning – Rental Company.

6.50 One of the last posts noted by "morEnergy" on December 20, 2012 was a link to the Competition Bureau's press release regarding the Bureau's filing of two applications with the Competition Tribunal, seeking orders prohibiting Direct Energy and Reliance from engaging in further anti-competitive conduct contrary to section 79 of the *Competition Act*.

6.51 On June 21, 2013, I visited the website [www.moreenergy.ca](http://www.moreenergy.ca) which is no longer accessible.

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**3. Ontario Consumers Home Services (OCHS)**

**(a) Corporate Records**

6.52 On May 13, 2013, Ms. Dennie-Filion provided me with corporate records from the Province of Ontario, Ministry of Government Services, for OCHS. The corporate records indicate the following information:

**Registered Officer Address:**

2225 Sheppard Ave. East, Suite 1501, Toronto, ON M2J 5C2

**Administrator:**

Vitalii Godonooga, President

6.53 I am informed by Mr. Pang that, on January 31, 2013, Mr. Soulière provided Mr. Pang with corporate records from the Province of Ontario, Ministry of Government Services, for OCHS. The corporate records indicate the following information:

**Registered Office Address:**

Vassili Tatarinov

22 Sunnyside Drive, Richmond Hill, ON L4C 0S5

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**Administrator:**

Vitalii Godonooga, President  
Vassili Tatarinov, Chief Executive Officer

**(b) Publically Available Sources**

6.54 On May 14, 2013, I found the following information under the "Contact Us" tab on OCHS's website ([www.ontarioconsumers.com](http://www.ontarioconsumers.com)):

2225 Sheppard Ave. East, Suite 1501 Toronto, ON M3J 5C2.

6.55 On May 14, 2013, using the "Wayback Machine" – a digital archive service that maintains content from the Internet enabling users to see archived versions of web pages across time – I was able to access a version of the same website dated September 5, 2012, which listed additional offices at:

1280 Finch Ave. W., Suite 414, Toronto, ON M3J 3K6  
619 Yonge St., Toronto, ON M4Y 1K9

6.56 Additional information corroborating the above addresses for OCHS has been obtained through the complaint data obtained from the BBB as well as through witness interviews conducted by fellow Competition Law Officers.

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(c) **Business Operations**

6.57 On June 21, 2013, I visited the OCHS website at [www.ontarioconsumers.com](http://www.ontarioconsumers.com) and noted the following information under the "About Us" tab:

"Ontario Consumers Home Services is a 100% Canadian owned and operated company. Our Management Team has a combined experience of 50 plus years which helps us serve thousands of our customers to the best of our ability. Our organization is one of the fastest growing Home Service providers in the industry. By offering a variety of Heating & Cooling options to our customers, we will ensure that your home is equipped with the best quality, High Efficiency products and that you and your family are comfortable during the hottest and coldest days of the season. When you call Ontario Consumers Home Services, expect that your needs will be met right away. We are available 24-7-365, and our reliable technicians are always prepared. At Ontario Consumers Home Services, we truly believe that our customers are our first priority."

4. ***Additional Relevant Information – National's Purchase of morEnergy***

6.58 The website, [www.justenergy.com](http://www.justenergy.com) offers a link to investor relations information, found on [www.justenergygroup.com](http://www.justenergygroup.com). This site includes additional information for the public and shareholders including financial reports. The 2013 Third Quarter Report to Shareholders (the "Shareholders' Report") indicates the following:

"During the three months ended December 31, 2012, NHS<sup>2</sup> completed the acquisition of the equipment and related customer contracts from morEnergy Services Inc. ("morEnergy") for approximately \$9.5 million. The acquisition was primarily financed through additional funding from

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<sup>2</sup> National Home Services

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Home Trust Company ("HTC"). Included in the acquisition were the equipment and customer contracts related to 26,000 water heaters and 1,000 air conditioner and furnace units with an average remaining life of seven years. "

6.59 This Shareholders' Report also indicates that, as of December 31, 2012, the installed customer base for National, including water heaters, furnaces and air conditioners, amounted to 222,000.

**D) Reasonable Grounds to Believe that an Offence has been Committed or Reviewable Conduct has been Engaged in**

6.60 I have reasonable grounds to believe and do believe that an offence has been committed contrary to subsection 52(1) or reviewable conduct under paragraph 74.01(1)(a) of the *Competition Act*. Specifically, I believe that materially false or misleading representations have been and are being made by representatives of the Parties under investigation through door-to-door sales. These activities involve door-to-door solicitations for water heaters in Ontario and/or Québec. These solicitations are often for contract offers for water heater rentals. As this Information reveals, these solicitations rely heavily on misrepresentations made by the door-to-door sales representatives. Generally speaking, the misrepresentations can be classified into the following four (4) categories: i) representations as to the identity of the door-to-door sales representative; ii) the nature of the visit; iii) representations as to why the homeowners' water heater must be replaced; and iv) representations as to the terms and conditions of the water heater rental

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agreements. Additionally, the Bureau has concerns over the alleged inappropriate and unauthorised use of the ENERGY STAR initiative.

6.61 As more fully described below, I base my belief on the following:

- a) witness and complainant interviews;
- b) analysis of the complaints and witness statements; and
- c) analysis of the elements of the alleged offence contrary to subsection 52(1) or reviewable conduct under paragraph 74.01(1)(a) of the *Competition Act*.

I believe the information in the complaints, declarations and interviews acquired by the Bureau to be accurate and reliable because:

- (a) the complaints are generally consistent with information obtained from independent complaints, declarations and interviews; and
- (b) the complainants interviewed were informed of the Bureau's ongoing investigation and were made aware that the information they provided could be used in subsequent legal proceedings.

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a) **Witness and Complainant Interviews**

6.62 Between January 2013 and June 2013, Mr. Garneau, Mr. Allaire, Mr. Pang and I conducted interviews of certain complainants and witnesses from Ontario and Québec. The complainants were selected from the hundreds of complaints received from the BBB, from the Bureau, the information provided by competitors of the Parties under investigation and publically sourced information which has been relayed to the Bureau for consideration. Below are some of the key points noted in some of the interviews conducted by the Bureau, particularly as they relate to the misrepresentatlons mentioned above in Part III:

6.62 (1) ***National and Services aux foyers du Québec***

(a) On February 7, 2013, Mr. Garneau interviewed Mr. Andrew Maarschalk (Oakville, ON, aged 57 years), a Director for a software company. Mr. Maarschalk's statement leads me to believe there were misrepresentations made by a representative of National in regards to the reason for their visit, the necessity of replacing his water heater and the alleged savings claims. According to Mr. Maarschalk, there were also representations made by the representative for National regarding his original service provider (Reliance) that were false (i.e.: that they are not Canadian and that their service was not good). After receiving additional information from his original service provider (Reliance), Mr. Maarschalk decided to switch back to Reliance. However, when he called National to cancel his contract, he was told that it was too late to request a cancellation, that he would be subject to fees of over \$1,000 dollars for cancellation and that he would be taken to court if he refused to pay. Notwithstanding, Mr. Maarschalk switched back to his original service provider and has not paid cancellation fees nor has he had any further dealings with National. He indicated he felt forced into an agreement that was not explained to him and that National never left him a copy of the terms and conditions of the water heater rental agreement until after installation. Mr. Maarschalk indicates he visited the BBB website and found that National's BBB rating showed that the business has a pattern

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of complaints concerning misleading sales practices, specifically in regards to complaints that allege that door-to-door sales persons are misleading consumers, providing false information and using high pressure tactics, which Mr. Maarschalk feels happened to him.

(b) On May 30 2013 and again on June 20, 2013, Mr. Garneau interviewed Mr. Saul Goren (Laval, QC). Mr. Goren's statement leads me to believe there were misrepresentations made by agents of Service aux foyers du Québec. In his statement, Mr. Goren indicated that, on February 27, 2013, two representatives from Service aux foyers du Québec attended his home. Mr. Goren states the representatives told him that his water heaters needed to be replaced. When asked about the reason for their visit, the representatives from Service aux foyers du Québec replied that Mr. Goren's supplier, HydroSolution, was phasing out that department and that they were in his area to examine their existing water heaters to ensure that everything was in good condition as well as to record the registration number or register the serial number of the water heaters. Mr. Goren stated that he was informed that his two (2) water heaters needed to be replaced due to their age and issues with discoloured water (which he was already aware). Mr. Goren was shown papers indicating that Service aux foyers du Québec's water heaters can help save energy and the representatives proceeded to explain their fees. The installation was done on the following day. After receiving a bill from HydroSolution, Mr. Goren spoke to representatives at HydroSolution who informed him that this was a scam – that HydroSolution was not phasing out. Mr. Goren had HydroSolution remove the two (2) Service aux foyers du Québec water heaters and reinstall two (2) new HydroSolution water heaters. When Mr. Goren called Service aux foyers du Québec asking them to pickup their water heaters he was told that if he wanted the water heaters removed, he would have to pay a fine totalling \$1,264.00 dollars (\$632 dollars each) as a cancellation fee. The water heaters were picked up on April 4, 2013. Mr. Goren indicated he was never told that Services aux Foyers du Québec was a competitor of HydroSolution and noted that he was under the impression that Service aux foyers du Québec was there to help as HyrdoSolution was phasing out. Mr. Goren affirmed that, if he had known that the information provided by Service aux foyers du Québec was false, he would have asked the two (2) sales representatives to leave his home. He stated that he signed the rental water heater agreement with Service aux foyers du Québec because he was told that HydroSolution was phasing out, that Service aux foyers du Québec was taking over their water heater rental operations, that his two (2) water heaters had discoloured water issues, and that they were coordinating the upgrades of rental water heaters in his area.

Mr. Goren was also interviewed for the news article that appeared in the Journal de Montréal describing this experience with Service aux foyers du Québec.

(c) On June 6, 2013, Mr. Garneau interviewed Mr. Pierre Brisson (Gatineau, QC). Mr. Brisson's statement leads me to believe that he was visited by representatives of Service aux foyers du Québec who misled him as to the nature of their visit. He indicated in his statement that the representative from Service aux foyers du Québec signed him up for a rental water heater agreement contrary to his request. After the representative left his home, Mr. Brisson read carefully the document left by the Service aux foyers du Québec representative and realized he had signed a long-term rental water heater agreement. He then tracked down the representative who was still in his neighbourhood, confronted him about the document and subsequently tore up the water heater rental agreement in front of the representative. Mr. Brisson was able to cancel the installation of the new rental water heater and stated he would never have let this man into his home had he known the true intention of his visit.

6.62(2) **MorEnergy**

(a) Between March 19 and April 4, 2013, on several occasions, I spoke to Mr. Ronald Maertens (Thunder Bay, ON, aged 73 years). Mr. Maertens' statement leads me to believe there were misrepresentations made by a representative of morEnergy in regards to their identity, the reason for their visit and the document they may have had Mr. Maertens sign. Mr. Maertens indicated a man came to his door and inferred he was with Reliance and said that if his water heater was more than five (5) years old, they could replace it. Mr. Maertens let him enter his home. There was nothing said about his old water heater and on the same day, his water heater was replaced. Mr. Maertens was asked to sign a document when the work was complete which he refused to do. He indicated that he may have signed something but he did not sign a contract. According to his statement, Mr. Maertens asked morEnergy to send a copy of the signed contract which arrived by mail around March 7, 2013, and appears to have his name handwritten on it, but spelled wrong in two places. Mr. Maertens believes he must have signed something with a carbon copy underneath it concealing information so that he was led to believe he was signing a "job complete form". Around March 7, 2013, Mr. Maertens sent a registered letter to morEnergy informing them he wished to cancel his contract and has yet to receive anything from them.

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(b) April 4, 2013, Mr. Allaire interviewed Milena DeFigueiredo (Brampton, ON). Ms. DeFigueiredo's statement leads me to believe there were misrepresentations made by a representative of morEnergy in regards to their identity and reason for their visit. Ms. DeFigueiredo stated that on June 2, 2011, a representative came to her home and said he was from Enbridge. He was wearing a hat with a sticker of Enbridge on it and a shirt that also had an Enbridge sticker. She was told by the representative that they were eligible, as a new customer, for a newer, more energy efficient water heater and that they would pay less money and save energy, at no additional charge. He had not seen their water heater at this point. The representative indicated that Enbridge does this for all their customers. Ms. DeFigueiredo affirmed that the door-to-door approach used by the salesman from morEnergy led her to believe that he was from Enbridge and that her water heater needed to be replaced by a more efficient one. Ms. DeFigueiredo indicates she believes the tactics used by morEnergy were misleading and that they used false representations as they gave the impression that: they were her current water heater service provider; she was due to change her water heater for a more efficient one; there would be no change on her monthly account, and the change was at no additional cost. Ms. DeFigueiredo stated that she was given the impression that the rental water heater agreement she signed was for the installation of a new water heater with no impact on the monthly charge and at no additional cost for the installation. It was never revealed to her that the real purpose of the document she signed was a ten (10) year rental water heater agreement. She was offered a buyout from morEnergy of over \$3,000 dollars and as of the date of her interview, morEnergy remained her water heater service provider.

6.62(3) ***Ontario Consumers Home Services***

(a) On January 29, 2013, Mr. Garneau interviewed Mr. Robert Wheeler (St. Catherine's, ON, aged 49 years). Mr. Wheeler's statement leads me to believe there were misrepresentations by an representative of OCHS with respect to: the reason for their visit to his home; the necessity of his water heater being replaced; the alleged cost savings and efficacy claims; and the non-disclosure of additional fees and the terms and conditions. Mr. Wheeler indicated in his statement that he was persuaded to switch because: there was no charge for the replacement; that OCHS would give him two (2) months free rental; the new water heater was better insulated; the new water heater would use less natural gas; and there would be no further safety issues. Mr. Wheeler noted that he believed he was misled into signing the water heater rental agreement with OCHS based on exaggerated savings, false efficiency and safety claims and non-disclosure of all fees, terms and conditions.

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(b) On January 22, 2013, Mr. Garneau interviewed Ms. Lucy Poscente (Thornhill, ON, aged 75 years). Lucy Poscente's statement leads me to believe there were misrepresentations made by representative of OCHS with respect to their identity, the reason for their visit at her home and the need for the replacement of her water heater. In fact, Lucy Poscente actually owned her water heater. Additionally, while at Lucy Poscente's home, the OCHS agent allegedly telephoned her gas provider, Enbridge, to confirm account details before passing the phone to her so that she could confirm her name and address. To date, Lucy Poscente continues to be billed each month for the OCHS water heater rental.

(c) On January 24, 2013, Mr. Garneau subsequently interviewed Mia Poscente (Lucy Poscente's daughter). Mia Poscente (Thornhill, ON, aged 47 years) is employed with the RCMP. She provided a signed statement indicating she now believes the phone call allegedly made to Enbridge was actually a call to OCHS as she has not been able to obtain a copy of this recorded call from Enbridge and that there was no such call logged at Enbridge offices. Mia Poscente indicated that her mother did not know, at the time, that she owned her water heater. She was eventually offered a buyout price of \$1,200 dollars for the unit, but she continues to rent the unit.

(d) On January 22, 2013, Mr. Garneau interviewed Mr. Michael Jenkyns (Kanata, ON, aged 70 years). Mr. Jenkyns is retired from the Federal Public Service where he occupied the position of Senior Officer (Regional Director) at the Canadian International Development Agency. Mr. Jenkyns' statement leads me to believe there were misrepresentations by a representative of the OCHS with respect to their identity, the reason for their visit and the necessity for the replacement of his water heater. Mr. Jenkyns indicated in his statements that the OCHS representative explained that he needed to check his water heater for possible safety issues. Based on these representations, Mr. Jenkyns signed a rental water heater agreement with OCHS. The following day he had his current supplier, Reliance, inspect the current equipment (i.e. the water heater and PVC piping) and confirmed that everything was fine. He then requested, in writing, cancellation of his rental water heater agreement with the OCHS as he was still within the ten (10) day termination period. Mr. Jenkyns affirmed that the door-to-door approach used by the OCHS representatives led him to believe that he had no choice but to let them enter his home. He believes the sales tactics used by OCHS are misleading because they do not reveal their real purpose, which is to sign up new customers into long-term rental water heater agreements, regardless of the eventual cost to the customer. Mr. Jenkyns also affirmed that he signed the rental water heater agreement with the OCHS because of the misrepresentations regarding Reliance,



particularly with respect to the alleged safety of the PVC piping on the water heater itself and the fact that the replacement was free.

#### 6.62(4) *National – Former Employees*

(a) Between February 4 and March 13, 2013, Mr. Pang and I conducted interviews with Mr. Matthew Rivers-Moore (Ottawa, ON, aged 24 years). Mr. Rivers-Moore indicated in his signed statement that he was employed by National in the spring of 2011 as a door-to-door sales person. His role was to sell residential water heaters to homeowners. The pay was based on commission revenue and he worked for two (2) or three (3) days including a training day. He indicated that he never made a sale and was never paid by National. His reason for leaving the position was that he was not interested in a sales job that required such a high level of manipulation.

Mr. Rivers-Moore indicated that, in his training, he was taught to say to the potential customer: "I'm a water tank representative", leaving it deliberately vague and then to say: "We need to check your hot water tank." According to Mr. Rivers-Moore, in doing this they were essentially posing as someone that was just there to check their water heater. They would have to say they were from National at some point, but sometimes only at the end of the interaction.

Mr. Rivers-Moore indicated that, if the potential customer let them in and played along, they would ask to look at their water heater to see if it could be replaced. They would look for the tags on the water heater indicating which rental water heater service provider it belonged to and look for signs of wear, water damage, rust or decay. They would say things like: "This tank is clearly old. Is it ok if we swap out your tank?" He indicated if there was wear on the water heater, they would use this as a point of leverage to replace the water heater. Mr. Rivers-Moore gave the example of a water heater that lasts fifteen (15) years but shows signs of wear at five (5) years. He indicated they genuinely looked for signs of wear. In addition to signs of wear, Mr. Rivers-Moore stated that they had fallback lines, such as, if they did not see the ENERGY STAR logo on the water heater they would point this out to the homeowner and bring it to their attention that they could save money if they had an ENERGY STAR water heater. He indicated they were briefed on some energy savings figures to use and lines to explain the efficiency.

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Mr. Rivers-Moore also indicated that there are certain water heaters that cannot be replaced, such as those from certain providers, or if the customer was already under service contract. They could not replace the water heater owned outright by the customer. National was willing to pay certain fees within a certain range to send the water heater back to the other service provider and then install a new water heater.

Mr. Rivers-Moore witnesses another representative closing a sale while shadow training. The person he shadowed called National on the spot to schedule the installation. During the training, Mr. Rivers-Moore was given a script of what to say during the door-to-door sales as well as the fallback lines. Mr. Rivers-Moore indicates that they were encouraged to handwrite copies of the script and to memorize them. He indicated that National wanted them to follow the script because it worked. During the interviews, Mr. Rivers-Moore was shown several National documents, some of which he was able to identify.

I believe the information provided by Mr. Rivers-Moore to be reliable as it is consistent with the information included in the *Metro News* (Montréal) and *Journal de Montréal* articles (as mentioned in paragraphs 6.38 and 6.39) as well as the information provided by complainants to the Bureau describing their experiences with other employees of National.

(b) On March 3, 2011, Mr. Jason Morrison contacted the Bureau by email indicating he attended orientation training with National in Windsor, Ontario. His original correspondence to the Bureau indicated that the supervisor he trained with said, "People are people. Once you tell them something, it'll stick in their heads. Just tell them you're here to change the hot water tank and they'll do it." Mr. Morrison also indicated in his email that part of the pitch is dressing up to look like official water heater installers to seem more credible. He also indicated that they are provided with "dummy" contracts that make it look like it is time for the individual to change their water heater. Mr. Morrison indicated that he had an example of a "dummy" rental water heater agreement in his possession. He also indicated that, during his training, he was told that Direct Energy was their parent company, but when going door-to-door they are to claim that it is a competitor. Mr. Morrison indicated he witnessed an older disabled lady "suckered" into the contract. He indicated that his supervisor, Mr. Arseneault, discussed how the trainees shouldn't feel bad about doing what they're doing. He also noted having witnessed Mr. Arseneault falsifying a work order.

On January 21, 2013, Mr. Garneau spoke to Mr. Morrison who confirmed the information he provided to the Bureau in his complaint and added that he attended a training session along with other participants. He received materials during the training and an additional component to the training included going door-to-door in two teams of two. Mr. Morrison quit after only a few houses when he witnessed his trainer/co-worker taking advantage of an elderly person. Mr. Garneau has not been able to reach Mr. Morrison since this last conversation. I believe the information provided by Mr. Morrison to be reliable as it is consistent with the information described earlier in other witness statements in describing their experience with other employees of National.

#### 6.62 (5) *HydroSolution*

As indicated in paragraph 6.37, on May 29, 2013, Mr. Garneau, Ms. Boulos and I met with Yvon Chevalier, Director General for HydroSolution and his legal counsel, Ms. Madeleine Renaud, McCarthy Tétrault LLP in Montréal, Québec. The meeting was held as a result of HydroSolution contacting the Bureau with concerns over certain marketing practices of Services aux foyers du Québec and specifically relating to the door-to-door promotion of water heater rental agreements in Québec. HydroSolution is a competitor to National in the province of Québec. During this meeting, Mr. Chevalier indicated they first became aware of Services aux foyers du Québec in late 2012 and early 2013 when HydroSolution began receiving calls from their existing customers saying there were door-to-door sales people offering water heater rentals, specifically indicating that HydroSolution has gone out of business and that Services aux foyers du Québec was taking over. Five (5) to six (6) weeks later, HydroSolution began receiving their water heaters back from Services aux foyers du Québec in unusable condition. He indicated that they have received over 300 inquiries from their customers, and approximately 1,000 water heaters have been removed since January 2013. An additional 300 water heaters, or so are still unaccounted for.

The information provided by HydroSolution, in regards to their customers' experiences indicates misrepresentations with respect to the identity of the door-to-door representatives, and more often, misrepresentations indicating that HydroSolution has gone out of business. The door-to-door representatives also make claims as to efficiency and cost savings claims which HydroSolution believes to be significantly exaggerated.

The information and documents during the interview provided by HydroSolution in Québec are consistent with the complaints received in regards to National's conduct in Ontario.

**6.62(6) Energy Star Initiative – Natural Resources Canada**

On May 16, 2013, I participated in a meeting with Dianne Miller, Chief of ENERGY STAR in Canada with the Office of Energy Efficiency, Natural Resources of Canada in Ottawa, Ontario. Ms. Miller has provided a signed statement which I rely upon in this Information. She has advised me regarding the ENERGY STAR initiative and its guidelines and applicability. Specifically, Ms. Miller indicated that:

- (a) Products that receive an ENERGY STAR rating (and thus are permitted to include a promotional logo on their product and in associated marketing) are required to meet criteria specific to their product category;
- (b) Although National and OCHS are registered participants with the initiative, the use of the ENERGY STAR logo, as it appears on their rental water heater agreements, is an inappropriate use of this logo and Ms. Miller indicates that morEnergy is not a registered participant; and
- (c) The Graphic Block with the text "ENERGY STAR" below is the ENERGY STAR certification symbol and carries the meaning that the product has met or exceeded the qualification criteria for that specific product category. This symbol is the only one that

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can be used directly in association with a specific product in its advertisement and it cannot be used, or displayed, on a sales agreement in any manner whatsoever.

**b) Analysis of the Complaints and Witness Statements**

6.63 Based on the information obtained through the complaints and witness statements described at paragraph 6.62 above, I believe that parallels exist among the complainants' information. Though the geographical areas and the time frames of the complaints against each of the Parties under investigation vary, the complaints are consistent in a number of areas. I believe there is a pattern of misrepresentations in revealing the identity of the door-to-door representatives, the purpose of the alleged visits, the use of the ENERGY STAR initiative and the subsequent misrepresentations as to the reason(s) the water heater must be replaced.

6.64 I believe that the information from the complainants is credible and reliable, because to my knowledge, the complainants are independent and yet they share significant similarities in their experiences and testimonials.

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**c) Analysis of the Alleged Offence or Reviewable Conduct**

6.65 I outline the basic analysis for the elements of the criminal offence pursuant to subsection 52(1) and the civil reviewable conduct pursuant to paragraph 74.01(1)(a) of the *Competition Act* below.

**Person**

6.66 As described at paragraphs 6.42, 6.43, 6.47 and 6.52 above, I was provided with corporate information of National, morEnergy and OCHS. Based on this information, the Parties under investigation constitute persons under the *Competition Act*.

**Makes False or misleading representations**

6.67 By the general impression they convey and their literal meaning, I believe that the representations made by the representatives of the Parties under investigation in person through door-to-door sales pitches and through promotional materials are false or misleading. As described at paragraphs 6.62(4)(a) and (b) above, the complainants held mistaken beliefs based on representations made by the representatives of the Parties under investigation. As described at paragraphs 6.62(4)(a) and (b), interviews with two (2) former employees of National support the complainants' information about the representations being false or misleading.

**Materiality**

6.68 As described at paragraph 6.62 above, I believe that the representations are material to the complainants in that they made a choice to switch their water heaters from one service provider to another on the basis of these representations. Many of them signed costly, long-term water heater rental agreements based on these misrepresentations. Additionally, other factors that contributed to the materiality included the use of the ENERGY STAR logo and the fact that many of the complainants believed they were dealing with their current water heater service provider. Furthermore, the purpose of the door-to-door visit, namely the new contract offer, is minimized by suggesting the representatives were simply in the area checking installed water heaters for safety issues or other reasons. The fine print, terms and conditions in the water heater rental agreements, including any cancellation fees, were often either skipped or minimized by the representatives of the Parties under investigation.

**To the public**

6.69 As described at paragraph 6.62 above, complainants from various regions of Ontario and Québec were visited by representatives of the Parties under investigation.

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**For the purpose of promoting the supply or use of a product**

6.70 My review of the witness statements and complaints lead me to believe that the real purpose for the door-to-door visits is to sign customers into long-term water heaters rental agreements. In this regard, the Parties under investigation use a variety of tactics to enter customer's homes, generally without being forthcoming as to the true nature and purpose of their visit, and the true business they represent. However, the Parties under investigation do offer a legitimate service of water heater rentals.

**Knowingly or recklessly**

6.71 I believe that the Parties under investigation knew or ought to have known that the representations made by the representatives of the Parties under investigation in relation to the sale and promotion of water heaters were false or misleading, because:

- (a) The volume of complaints, made both directly to the Bureau and through other organizations such as the BBB, against the Parties under investigation, in itself is an indication of a consistent problem in the marketing practices used by the Parties under investigation and the representatives of the Parties under investigation such that they ought to have been aware;



- (b) Complainants have attempted to seek resolution, including rescinding their water heater rental agreements, directly with the Parties under investigation and through the BBB;
- (c) There has been and continues to be ongoing legal action regarding the marketing practices of the Parties under investigation in relation to the water heater rental agreements;
- (d) Reliance, the applicant in the six-resident application, has made their application to the Bureau public;
- (e) HydroSolution has corresponded with National in regards to their concerns over National's marketing activities, specifically in Québec; and
- (f) There has been and continues to be significant media coverage on the water heater rental market in both Ontario and Québec.

6.72 Based on the above information, I have reasonable grounds to believe that an offence contrary to subsection 52(1) has been committed or that reviewable conduct has been engaged in contrary to paragraph 74.01(1)(a) of the *Competition Act*:

*DWG*

**E) Reasonable Grounds to Believe that the Records or Other Things to be Searched for are at the Premises to be Searched**

6.73 I have reasonable grounds to believe and do believe that the records or other things to be searched for are at the premises listed at Part V of this Information to be searched named in. As more fully described below, I base my belief on the following:

- i) my experience as a Competition Law Officer; and
- ii) information from the investigation and visual surveillance.

i) **Experience**

6.74 Based on my experience in investigating matters under the *Competition Act* and in consultation with Mr. Garneau and Mr. Steen, and based on the information discussed herein, I believe that: the records or other things to be searched for are the kinds of records that exist in the process of engaging in the activities described above in Part III under investigation; that they will be found in the premises to be searched named in Part V of the Information; and that they will afford evidence with respect to the commission of the alleged offence or the engaging in the reviewable conduct set out in Part III of the Information.

*DWG*

ii) Information from the Investigation and Visual Surveillance

6.75 Mr. Garneau, Mr. Allaire and Mr. White conducted surveillance on the business premises of the Parties under investigation, specifically the business premises mentioned in Part V. As such, Mr. Garneau, Mr. Allaire and Mr. White have personal knowledge of certain matters and facts regarding this investigation. I incorporate, rely on, and truly believe the following information provided by them.

6.76 Using the information described in Part V, I provided Mr. Garneau and Mr. Allaire addresses for visual surveillance and verification. I was provided with notes from the surveillance and subsequent verification that took place, and I incorporate, rely on and truly believe the following information provided to me by them:

- (a) On March 20, 2013, Mr. Garneau attended 25 Sheppard Avenue West, North York, ON. Mr. Garneau indicated in his notes that in front of the security desk there is a billboard which lists National Home Services as being located in suite #1700. He proceeded to the 17<sup>th</sup> floor and noted that the entire floor is occupied by National Home Services with a reception, cubicles and offices as well as signage. Mr. Garneau did a second round of surveillance on May 13, 2013 which confirmed his initial findings. On June 27, 2013, Mr. White conducted an additional

*AWG*

round of surveillance which confirmed the initial findings of Mr. Garneau.

(b) On March 20, 2013, Mr. Garneau attended 2225 Sheppard Avenue East, North York, ON. Mr. Garneau noted that the building is marked as Direct Energy and that inside the building, next to the elevator was a billboard which indicated Ontario Consumer Home Services at Suite #1501. He proceeded to the 15<sup>th</sup> floor and noted an office for Ontario Consumer Home Services located directly in front of the elevators. The door was marked with signage indicating Ontario Consumer Home Services. Mr. Garneau did a second round of surveillance on May 13, 2013 which confirmed his initial findings. On June 27, 2013, Mr. White conducted an additional round of surveillance which confirmed the initial findings of Mr. Garneau.

(c) On March 21, 2013, Mr. Garneau attended 619 Yonge Street, Toronto, ON. Mr. Garneau indicated in his notes that there was nothing on the first floor and that he took the stairs to access the second floor where he noted a sign directing him to the left for Ontario Consumer Home Services. Down the left hall, he found a suite with signage for Ontario Consumer Home Services on the outside of the door. He noted the office door was open and he could see a receptionist, cubicles and chairs inside. Mr. Garneau did a second round of surveillance on May 14, 2013, which confirmed his initial findings. On June 27, 2013, Mr.

*AWG*

White conducted an additional round of surveillance which confirmed the initial findings of Mr. Garneau.

(d) On March 23, 2013, Mr. Garneau attended 6345 Dixie Road, Mississauga, ON. Mr. Garneau noted that in the lobby, next to the elevator, was a billboard listing Just Energy as the tenant in Suite #200. He was not able to access the second floor as it required a key card access. On May 13, 2013, Mr. Garneau did a second round of surveillance which confirmed his initial findings. He also noted during this visit that he was able to access two doors marked "Sales and Marketing Dept" by walking around outside, which led to a lobby with Just Energy posters. These were marked as Units 2 and 3. Inside, he noted the employees who were working. On June 27, 2013, Mr. White conducted an additional round of surveillance which confirmed the initial findings of Mr. Garneau. Mr. White was able to access the second floor via the elevator (with other people in the elevator) and noted a large sign for Just Energy on the second floor.

(e) On March 23, 2013, Mr. Garneau attended 300 The East Mall, Etobicoke, ON. Mr. Garneau was not able to access the premises. On May 13, 2013, Mr. Garneau did a second round of surveillance at which time he was able to access the second floor where he noted the presence of other businesses, including Teleperformance and Blue Power. The receptionist he spoke with indicated Blue Power and

*DMG*

morEnergy are one in the same. On June 27, 2013, Mr. White conducted an additional round of surveillance in which he noted that he did not find anything at this location that indicated a presence of morEnergy, only Teleperformance and Blue Power.

- (f) On May 13, 2013, Mr. Garneau attended 1280 Finch Avenue West, North York, ON. He noted the building directory in the lobby that confirmed Ontario Consumers Home Services at Suite 414. In his notes, he indicated that he proceeded to Suite 414 which was marked as Ontario Consumers Home Services Inc. On June 27, 2013, Mr. White conducted an additional round of surveillance which confirmed the initial findings of Mr. Garneau.
  
- (g) On May 1, 2013, Mr. Allaire attended 5160, Boulevard Décarie, Montréal, QC. In his notes, Mr. Allaire indicated that he proceeded to the fourth floor and noted Suite 430 as being identified as belonging to Juste Energie. Suite 450 was identified as belonging to Administration Bureau de Location, but Mr. Allaire spoke to the receptionist in this suite who confirmed the tenant to be Services aux foyers du Québec.
  
- (h) On May 23, 2013, Mr. Garneau attended 5160, Boulevard Décarie, Montréal, QC. In his notes, Mr. Garneau confirmed the finding of Mr. Allaire. At Suite 450, Mr. Garneau spoke with the receptionist and Ms. Iva Piperkovic, "Recruiter Regional", who provided her business card

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that indicated Services aux foyers du Québec and an email address for National. Ms. Piperkovik's business card indicates they are located at Suite 430; however, it was in Suite 450 that Mr. Garneau spoke with her and the receptionist. The sign in the lobby also confirms Services aux foyers du Québec and Juste Energie are located at Suites 430 and 450.

- (i) On June 28, 2013, Mr. Garneau, posing as a prospective job applicant, telephoned 438-899-9281 and spoke with the receptionist who confirmed that Services aux Foyers du Québec are located at 5160, Boulevard Décarie, Montréal, QC, Suite 450 and that they were still accepting applications for various job postings.
- (j) On March 21, 2013, Mr. Garneau and I attended 100 King Street West, Toronto, Ontario, Suite 2630, and noted Suite 2630 was identified as occupied Just Energy.

**F) Reasonable Grounds to Believe in the Necessity of Searching Computer Systems**

6.77 Based on my experience in investigating competition matters under the *Competition Act*, and in consultation with Mr. Garneau and Mr. Steen, and based on the information herein, I believe that, in the normal conduct of business, companies use computer systems for their day-to-day operations. I further believe that certain of the records to be searched for described above

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In this Information will be found in the form of data suitable for use in a computer system.

6.78 Forensic practices and procedures are used when conducting searches for data. The Bureau has electronic evidence officers trained to conduct searches of computer systems, data storage devices and media pursuant to sections 15 and 16 of the *Competition Act*.

6.79 Mario Mainville, an electronic evidence officer trained to examine and seize electronic evidence, informed me on May 6, 2013 that:

- i. Data is stored in a variety of different formats, some of which are not readily accessible without the specific software and/or hardware on which they were created;
- ii. Data may be recovered months or even years after it has been created, deleted, copied to a data storage device or media or viewed via the Internet;
- iii. Data may be stored on data storage devices. The devices may hold large volumes of data and are used in office environments as removable storage for data, such as digital cameras, USB (universal serial bus) devices (these could be disguised as, for

*DMG*



example, watches or pens), mobile phones, mobile computers, flash drives, smart cards, etc.;

- iv. Many operating systems and computer programs create temporary files containing records such as a history of websites visited, files printed or fax transmissions, in order to facilitate efficient operation of these operating systems and computer programs. This may result in the creation of data without user knowledge or intervention;
- v. Traces of transient, erased or deleted data persist on computer systems, data storage devices or some media until the space that was allocated to them is re-used; and
- vi. The use of hardware security devices, passwords, log-on codes and encryption keys is commonplace and can substantially impede or, in some cases, prevent the search and seizure of records or other things that are contained in a computer system, computer program, data storage device or media.

*AMG*

6.80 In this case, the Affiant requests authorization:

- i. to use or cause to be used any computer system on the premises to search any data contained in or available to the computer system; to reproduce the record or cause it to be reproduced from the data in the form of a printout or other intelligible output; and
- ii. to seize the printout or other output for examination or copying.

6.81 Mr. Mainville, has conducted searches of computer systems, data storage devices and media and in order to assist with accessing, searching, examining, copying and seizing data found on computer systems, data storage devices or media, authorization is being sought to:

- (a) Use forensic practices and procedures for acquiring electronic evidence, while attempting to minimize the impact on business functions;
- (b) Use or cause to be used, and/or seize, any computer system, data storage device, media, computer programs or associated documentation, including operating instructions, manuals and service records present on the premises;
- (c) Use or cause to be used, any computer system, data storage device, media or computer program brought onto the premises by the persons authorized to execute the search warrant;

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- (d) Require any person who is in possession or control of the premises, including, where applicable, a computer system administrator or other custodian of information of a computer system on the premises, to permit any person named in the search warrant to use or cause to be used any computer system or part of it on the premises by making accessible all data contained in any computer system, computer program, data storage device or media for the purposes of searching or seizing such data;
- (e) Seize or produce an image of data from which they are unable to acquire the substance or meaning at the premises, for further off-site examination; and
- (f) Employ, retain, direct or engage other persons to assist in the search of the named premises including the services of computer consultants or diagnosticians, which person would, in the presence of persons authorized in the search warrant, attend at the premises and perform such tasks as may assist the persons authorized in the search warrant to carry out their functions authorized by the search warrant.

*AMJ*

6.82 Mr. Mainville has informed me that the following practices and procedures may be used as circumstances dictate:

- (a) Search the computer system, data storage device or media and print or cause to be printed a copy of the records on-site;
- (b) Search the computer system, data storage device or media and reproduce an electronic copy of the records on-site;
- (c) Search the computer system, data storage device or media and produce an image of data to search and reproduce records off-site; or
- (d) Seize the computer system, data storage device or media and remove it/them from the premises, to search data and reproduce records off-site.

6.83 Some of these practices and procedures, specifically the steps described above in paragraph 6.82, at paragraphs (c) and (d) above, may result in the seizure of data containing records that are not described in Part IV. Electronic evidence officers and anyone under their direction will take steps to ensure that such data, with the exception of data that falls within the provisions of section 489 of the *Criminal Code*, will not be accessible to anyone else. The following procedures will be followed in order to identify and search data from which records described in Part IV can be reproduced, and to minimize access to data that contain records that are not described in Part IV:

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- (a) Where an image is produced as provided for in paragraph 6.82, at paragraph (c) above:
- i. a true copy and a working copy of the seized image will be made in addition to any copy that may be provided to the party from whom it was seized;
  - ii. the seized image and the true copy will be sealed to protect the integrity of the data;
  - iii. the working copy will be examined by electronic evidence officers and anyone under their direction and records described in Part IV will be reproduced;
  - iv. access to the working copy will thereafter remain under the control of electronic evidence officers;
  - v. any further searching of data from the working copy, by electronic evidence officers and anyone under their direction, will be confined to data from which records described in Part IV can be reproduced, or as required within proceedings that may arise from the search or investigation;

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- vi. in order to minimize the examination of data containing records that are not described in Part IV the persons examining the working copy will use forensic and electronic discovery practices and procedures to identify and search data from which records described in that paragraph can be reproduced; and
  - vii. electronic evidence officers and anyone under their direction will keep confidential all data found within the working copy containing records that are not described in Part IV, with the exception of things that fall within the provisions of section 489 of the *Criminal Code*.
- (b) A similar process will be followed where a person authorized to execute the warrant, other than an electronic evidence officer, considers it necessary to seize a computer system, data storage device or media from the premises as described in paragraph 6.82, at paragraph (d) above. In such a case:
- i. the computer system, data storage device or media will be transferred to an electronic evidence officer, who may produce an image or extract data in order to produce records described in Part IV; and
  - ii. further handling will be as described above.

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## PART VII

### COMPUTER SYSTEMS AUTHORIZATIONS

- 7.1 The Affiant requests authorization for the persons named in paragraph 8.1(b) below, who have been trained to search and seize data from computer systems, data storage devices and media, and persons under their direction, to do what has been described in the above paragraph.

## PART VIII

### AUTHORIZED PERSONS

- 8.1 **I, the Affiant therefore request that search warrants be issued authorizing the Commissioner and the following named persons to enter and search each of the premises described at Part V, and seize the records or other things described at Part IV in accordance with the search warrants herein requested:**

- (a) Authorized representatives of the Commissioner:

Dawn-Marie Jamieson, Alain Garneau, Magalie Plouffe, Tom Steen, Tagreed Boules, Kelly Goetz, Ian Roger, Kristen Pihney, Colette Morin-Wade, Melanie Crossman, Melissa Melanson, Lynne Charpentier, Adam Zimmerman, Melanie Larouche, Robert Guilbeault, Kim Chorkowy, Stéphanie Grassi, Travis Todhunter, Anthony Nield, Bryan Cowell, Danielle Dubois, Rob Levine, Elizabeth Eves, Laura Grievson, Yanick Poulin, Robert Guilbeault, François Goulet, Véronique Brosseau, Arthur Carson, Daniel Robitaille

and other authorized representatives of the Commissioner and any person under the direction of the authorized representatives of the

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Commissioner that can facilitate access to the premises or to open anything that cannot be opened during the course of the search, should such access be denied.

- (b) Authorized representatives of the Commissioner trained in electronic search procedures (electronic evidence officers):

Duncan Monkhouse, Mario Mainville, Matthew Kyrytow, Cliff Smith, Eric Daoust, Sébastien Guy, Marcel Thérien

and in order to assist the aforementioned officers, any person who, under the direction of these officers, can facilitate the electronic search of computer systems, data storage devices and media.

- (c) Any Peace Officer of the Provinces of Ontario and Québec, in order to assist the authorized representatives of the Commissioner in accessing the premises and in maintaining security over the records and other things and over the authorized representatives of the Commissioner.

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**PART IX**  
**DURATION OF WARRANT**

**9.1 The Affiant requests that:**

(1) The search warrants be valid from the 8th day of July, 2013, up to and including the 19th day of July, 2013, or, if issued after the 8th day of July, 2013, for such identical period of time, commencing from the date of issuance of the within sought warrant. It is not the intention of the authorized representatives of the Commissioner to actively conduct the search of the premises during this entire period, however, this period of validity is necessary to ensure that the authorized representatives of the Commissioner have a sufficient amount of time to search, copy, examine and seize a potentially large volume of records or other things.

(2) Authorization be given to the authorized representatives of the Commissioner and Peace Officers to remain on the premises 24 hours per day in order to maintain security over the records or other things to be searched for and the items seized that may be placed in sealed containers and left on the premises each night, and, in order to allow for the completion of a search process involving a computer system commenced prior to 9:00 p.m. It is not the intention of the authorized representatives of the Commissioner to actively conduct the search of the premises 24 hours per day. The search will be actively conducted within the time period of 6 a.m. to 9 p.m. as specified in

subsection 15(3) of the *Competition Act*, with allowance made for the completion of a search process involving a computer system or the capture of data, commenced prior to 9:00 p.m., and which, based on the length of the process, will extend after 9:00 p.m. in order to successfully complete or where the discontinuance of the search process of capture of data may result in loss of records or other things to be seized.

## PART X

### SEARCH AND ASSISTANCE

#### 10.1 The Affiant further requests that:

- (a) The persons authorized to execute the search warrants may enter the premises, leave them and return to them from time to time during the period of validity of the warrant for the purpose of executing it;
- (b) The persons authorized to execute the search warrants may be accompanied by a Peace Officer and/or locksmith for the purpose of using such force as necessary or to provide any assistance to facilitate access to the premises, should access to the premises be refused;
- (c) One or more authorized representatives of the Commissioner shall be allowed to videotape the events of the search at each of the premises described at Part V in order to create a visual record of the manner in

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which the search was conducted, and to photograph or videotape records or other things to be seized. Such visual recordings can assist in the resolution of any allegation based on the conduct of the search, should such an allegation arise, and can provide a means of capturing records or other relevant information from the premises described at Part V that cannot readily be physically seized, e.g. writings on a large white board, layout of space, etc.;

- (d) The search warrants authorize the persons described at paragraph 8.1 to search anything found on the premises including personal belongings for which they have reason to believe may contain records or other things to be searched for. Personal belongings include, but are not limited to, briefcases, bags, purses, knapsacks, wallets, electronic devices such as: mobile computers, mobile phones, removable storage media, devices containing electronic data, PDA's (personal digital assistant's), pagers, telephones, and other devices; and
  
- (e) The persons authorized to execute the search warrants be authorized to temporarily remove from the search premises any pre-selected record or other thing identified to be searched at the end of any day of searching for the purposes of preserving its integrity, or to prevent the loss or destruction of the said record or other thing. These records or other things will remain sealed and will be kept in the custody of the authorized person executing the search warrants during this period of

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temporary removal. These records or other things will be returned to the premises on the day when the authorized person next returns to the searched premises.

## PART XI

### SOLICITOR-CLIENT PRIVILEGE

**11.1 The following information constitutes the reasonable grounds to believe that a law office will, or will not be on, or part of, the premises to be searched:**

- (1) The Affiant affirms to the court that:
  - (a) only non-privileged records are being sought; and
  - (b) a reasonable opportunity to claim privilege over records subject to search and seizure will be afforded to those in control of the premises to be searched, prior to the commencement of the search.
  
- (2) On May 15, 2013, I instructed Veronika Andreeva (a student working with the Bureau) to search the website of the Law Society of Upper Canada for the addresses noted in Part V, specifically in looking for law offices at these locations. The following results were noted:

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**(a) National**

*25 Sheppard Avenue West, Suite 1700, North York, ON, M2N 6S8*

- **No lawyers listed**

*6345 Dixie Road, Suite 200, Mississauga, ON, L5T 2E6*

- **Eli David Cranley, Counsel, Just Energy**

- **Jonah Todd Davids, Vice-President & General Counsel, Just Energy**

- **Brahm Michael Nathans, Senior Counsel, Just Energy**

*5160 Boulevard Décarie, Suites 430 & 450, Montréal, QC, H3X 2H9*

- **No lawyers listed**

*100 King Street West, Suite 2630, Toronto, ON M5X 1E1*

- **Robert Arthur Donaldson**

**(b) OCHS**

*2225 Sheppard Ave East, Suite 1501, North York, ON, M2J 5C2*

- **No lawyers listed**

*619 Yonge Street, 2nd floor, Toronto, ON, M4Y 1K9*

- **No lawyers listed**

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280 Finch Ave West, North York, ON, M3K 3J2

- No lawyers listed

(c) morEnergy

300 East Mall, Suite 200, Etobicoke, ON, M9B 6B7

- John Dare, Director

As there were lawyers listed at the above mentioned addresses, a search of an in-house counsel's office may take place.

11.2 Should a law office be located at the premises to be searched, I do not intend to search the law office until providing a reasonable opportunity to the respective lawyer to claim privilege over the records located in the office. Until such a reasonable opportunity presents itself, I request that the law office and all records in the office be sealed so as to preserve any evidence. If the situation should arise where there are no reasonable alternatives but to search the law office without the respective lawyer present, another search warrant will be sought at that time.

11.3 If an authorized representative of the Commissioner authorized to execute the search warrants has reason to believe that a record may be subject to solicitor-client privilege, the record will be sealed whether or not a claim of solicitor-client privilege is made unless a person who appears to have

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authority for the premises to be searched determines at that time, after examining the record in question, that no privilege applies or waives any privilege over the record. The authorized representative of the Commissioner, when identifying a record as potentially being subject to solicitor-client privilege, makes only a preliminary assessment. He or she neither examines the record extensively nor decides whether the privilege applies.

11.4 Records which are sealed will be placed in the custody of one of the following parties, as authorized by subsection 19 (3) of the *Competition Act*:

- (a) the registrar, prothonotary or other like officer of a superior or county court in the province in which the record was ordered to be produced or in which it was found, or of the Federal Court;
- (b) a sheriff of the district or county in which the record was ordered to be produced or in which it was found; or
- (c) some person agreed upon between the Commissioner, or the authorized representative of the Commissioner, and the person who makes the claim of privilege.

11.5 I also request that the search warrants follow the process described below to address any unforeseen discovery of solicitor-client privileged records:

*MJ*

- i. When a claim is made that a record about to be examined, copied or seized is subject to solicitor-client privilege; or
- ii. When an authorized representative of the Commissioner has reason to believe that a record may be subject to solicitor-client privilege;

the record shall be placed in a package, suitably sealed and placed in the custody of the persons named pursuant to section 19 of the *Competition Act*.

## PART XII

### SEALING ORDER

#### 12. The Affiant further requests:

- 12.1 As the materials filed by the Commissioner with this Honourable Court describe the substance of the Commissioner's Inquiry pursuant to paragraph 10(1)(a) of the *Competition Act*, the confidentiality of the materials filed in this matter must be preserved in order to maintain the effectiveness of the Commissioner's on-going investigation into the present matters of possible civil or criminal misconduct.
- 12.2 The disclosure of this information to the public would compromise the continuing investigation as well as result in possible destruction of evidence. The information could be used for an improper purpose and these concerns

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outweigh the availability of the information on file to the public. Subsection 487.3(1) of the *Criminal Code* expressly prohibits access to and disclosure of information that would compromise the nature and extent of an ongoing investigation.

12.3 All inquiries made under the *Competition Act* must be conducted in private according to subsection 10(3) of the *Competition Act* and information gathered under the Act is subject to strict confidentiality under section 29 of the *Competition Act*.

12.4 It is the Commissioner's intention to commence execution of the search warrants as early as the morning of July 8th, 2013 and to complete the execution thereof on or before July 19th, 2013. Premature disclosure of the information in the investigation may lead to the destruction of records or other things thereby negatively affecting the search process and jeopardizing the ongoing investigation.

12.5 For this reason, I request that the Court File in this matter be sealed from the date of the issuance of the search warrants until such time as the Attorney General of Canada or counsel acting on his behalf may advise this Court or until such further Order of this Court.

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**PART XIII**  
**CONCLUSION**

13.1 **The Affiant requests that the search warrants be granted to search the premises described at Part V for the records or other things described at Part IV, and to copy them or seize them for examination or copying.**

13.2 Based on the foregoing, I have reasonable grounds to believe, and do believe that:

(a) the Parties under investigation and other persons, known and unknown, during the period commencing July, 2008 to the present, the exact dates being unknown, in the provinces of Ontario and Québec, knowingly or recklessly made, and continue to make, materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to subsection 52(1) of the *Competition Act*, thereby committing an offence under Part VI, namely subsection 52(5) of the *Competition Act*;

(b) the Parties under investigation and other persons, known and unknown, during the period commencing July, 2008 to the present, the exact dates being unknown, in the provinces of Ontario and Québec, made and continue to make, materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to paragraph 74.01(1)(a) of

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*Competition Act*, thereby establishing grounds for the making of an order under Part VII.1, namely section 74.1 of the *Competition Act*;

- (c) the things to be search for, described above in this Information:
  - i. do exist as set out in my Information; and
  - ii. will afford evidence with respect to the commission of the alleged offence or reviewable conduct as set out in Part III or my Information; and
  
- (d) the records or things to be searched for will be found on the premises to be searched described in Part V of this Information.

13.3 The Affiant requests that the search warrants be granted to search the premises described in Part V for the records or other things described in Part IV, and to copy them or seize them for examination or copying.

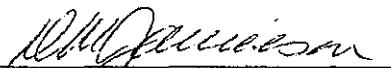
13.4 As revealed in this Information, I have reasonable grounds to believe and do believe that:

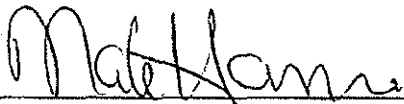
- (a) an offence has been committed or reviewable conduct has been engaged in contrary to the *Competition Act* by the Parties under investigation;

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- (b) the records or other things to be searched for are at the premises to be searched and will afford evidence respecting the commission of the - - - - - alleged offence or the engaging of the reviewable conduct; and
  
- (c) searching computer systems will be necessary.

SWORN BEFORE ME at the City of  
Gatineau, in the Province of Québec,  
this 4<sup>th</sup> day of July, 2013.

  
Dawn-Marie Jamieson (the Affiant)

  
\_\_\_\_\_

Commissioner of Oaths



*DMJ*

This is **Exhibit "E"** mentioned and referred  
to in the Affidavit of Patrick Johnston  
affirmed before me on May 9, 2014



A Commissioner for Taking Affidavits

CANADA  
Province of Ontario

Court File No.: 13-13104

*Competition Act*,  
Sections 15 and 16

**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

**AND IN THE MATTER OF** an *ex parte* application, pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to prohibit access to and disclosure of this all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

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**WARRANT TO ENTER, SEARCH AND COPY OR SEIZE FOR EXAMINATION OR  
COPYING CERTAIN RECORDS OR OTHER THINGS PURSUANT TO SECTIONS 15  
AND 16 OF THE *COMPETITION ACT***

**25 Sheppard Avenue West, Suite 1600,  
North York, Ontario, M2N 6S8  
(Supplemental)**

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**UPON** the application of William Bradley, an authorized representative of the Commissioner of Competition (the "Commissioner"), appointed under the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "*Competition Act*");

**AND UPON** reading the Information on oath of William Bradley;

**AND UPON** being satisfied that the requirements of sections 15 and 16 of the *Competition Act* have been met;

**IT IS ORDERED** that this search warrant (the "warrant") be issued authorizing the Commissioner and the persons named herein or authorized by this warrant to enter the premises described in this warrant, search for records and other things described in this warrant, and copy or seize them for examination and copying.

**1. The following persons are authorized to enter the premises described in paragraph 3 of this warrant, search for any records or other things described in paragraph 5 of this warrant and copy them or seize them for examination or copying, in accordance with this search warrant:**

**1. Les personnes suivantes sont autorisées à pénétrer dans les locaux décrits au paragraphe 3 du présent mandat, à y perquisitionner en vue d'obtenir des documents ou autres choses décrits au paragraphe 5 du présent mandat et à en prendre copie ou à les emporter pour en faire l'examen ou en prendre des copies, conformément au présent mandat de perquisition:**

**1.1 Authorized representatives of the Commissioner:**

Dawn-Marie Jamieson, Alain Garneau, Magalie Plouffe, Tom Steen, Tagreed Boules, Kelly Goetz, Ian Roger, Kristen Pinhey, Colette Morin-Wade, Melanie Crossman, Melissa Melanson, Lynne Charpentier, Adam Zimmerman, Melanie Larouche, Robert Guilbeault, Kim Chorkawy, Stéphanie Grassi, Travis Todhunter, Anthony Nield, Bryan Cowell, Danielle Dubois, Rob Levine, Elizabeth Eves, Laura Grievson, Yanick Poulin, Robert Guilbeault, François Goulet, Véronique Brosseau, Arthur Carson, Daniel Robitaille

and other authorized representatives of the Commissioner and any person under the direction of the authorized representatives of the Commissioner that can facilitate access to the premises or to open anything that cannot be opened during the course of the search, should such access be denied or impeded;

**1.2 Authorized representatives of the Commissioner trained in electronic search procedures ["electronic evidence officers"]:**

Duncan Monkhouse, Mario Mainville, Matthew Kyrutow, Cliff Smith, Eric Daoust, Sébastien Guy, Marcel Thérien

and, in order to assist the aforementioned officers, any person who, under the direction of these officers, can facilitate the electronic search of computer systems, data storage devices and media; and

1.3 Any peace officer of the province of Ontario in order to assist the authorized representatives of the Commissioner.

**2. The offence or reviewable conduct with respect to which this search warrant is issued are the following:**

**2. L'infraction ou la conduite susceptible d'examen pour laquelle le présent mandat de perquisition est délivré sont:**

2.1 that National Home Services ("National") and other persons known and unknown, during the period commencing on or about July 2008 and continuing to the present, inclusively, the exact dates being unknown, did and continue to knowingly or recklessly make materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to subsection 52(1) of the *Competition Act*, thereby committing an offence under Part VI, namely subsection 52(5) of the *Competition Act*; or

2.2 that National and other persons known and unknown, during the period commencing on or about July 2008, and continuing to the present, inclusively, the exact dates being unknown, did make, and continue to make, materially false or misleading representations to the public for the purpose of promoting, directly or indirectly, the supply or use of water heaters contrary to paragraph 74.01(1)(a) of the *Competition Act*, thereby establishing grounds for the making of an order under Part VII.1, namely section 74.1 of the *Competition Act*.

**3. The premises to be searched is:**

**3. Les locaux à être perquisitionnés sont les suivants:**

25 Sheppard Avenue West, Suite 1600, North York, Ontario, M2N 6S8

including all storage, record keeping and disposal areas located in and about this premises under the control of the occupant(s) of the premises including the Parties under investigation.



#### 4. Definitions:

#### 4. Définitions:

4.1 The following definitions apply to this search warrant:

- (a) "**alleged offence or reviewable conduct under investigation**" means the business, sales and marketing practices of the Parties under investigation (which itself is a defined term – see below), as described at paragraph 2, which are being investigated under subsection 52(1) and paragraph 74.01(1)(a) of the *Competition Act*;
- (b) "**computer password**" has the meaning set out in subsection 342.1(2) of the *Criminal Code* R.S.C., 1985, c. C-46 (as amended) (the "*Criminal Code*");
- (c) "**computer program**" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;
- (d) "**computer service**" has the meaning set out in subsection 342.1(2) of the *Criminal Code*;
- (e) "**computer system**" has the meaning provided by section 16 of the *Competition Act* and, as set out in subsection 342.1(2) of the *Criminal Code*;
- (f) "**data**" has the meaning provided by section 16 of the *Competition Act*, as set out in subsection subsection 342.1(2) of the *Criminal Code*;
- (g) "**Parties under investigation**" means National Home Services (National Energy Corporation, a subsidiary of Just Energy Group Inc.), doing business as National Home Services and Services aux foyers du Québec ("**National**"), morEnergy Services Inc. (Bancmor Credit Corporation and morEnergy Services Inc.), doing business as morEnergy ("**morEnergy**") and Ontario Consumers Home Services Inc. ("**OCHS**"), and includes any business name associated with National, morEnergy and OCHS including, but not limited to, its predecessors, successors, parents, subsidiaries, divisions, partners, contractors, sub-contractors, employees, directors, administrators, corporate officers, agents, representatives and affiliates engaged in business in Canada, and other persons, known or unknown, implicated, directly or indirectly, in the commission of the alleged offence, or engaging in the reviewable conduct described at paragraph 2;

- (h) "**products**" has the meaning provided by section 2 of the *Competition Act*, which includes an article and a service and in this investigation refers to water heaters;
- (i) "**record**" has the meaning provided by section 2 of the *Competition Act* and includes any correspondence, memorandum, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, microform, sound recording, videotape, machine readable record (including computer data and electro-magnetic recordings in tape or disc form for use in computers or other devices for storing information), and any other documentary material, including software, regardless of physical form or characteristics, and any copy or portion thereof;
- (j) "**relevant time period**" means the period during which it is believed that an alleged offence under subsection 52(1) or reviewable conduct under paragraph 74.01(1)(a) of the *Competition Act* occurred, and includes the period from July 2008 to the present, the exact dates being unknown;
- (k) "**representatives of the Parties under investigation**" means all individuals working for, or on behalf of, the Parties under investigation including, but not limited to, predecessors, successors, parents, subsidiaries, divisions, partners, contractors, sub-contractors, employees, directors, administrators, corporate officers, agents, representatives and affiliates engaged in business in Canada, and other persons, known or unknown, implicated, directly or indirectly, in the commission of the alleged offence or engaging in the reviewable conduct described at paragraph 2; and
- (l) "**water heater**" has the meaning of an appliance consisting of a gas or electric heating unit in which water is heated and stored.

**5. The records and other things to be searched are the following:**

**5. Les documents et autres choses visés par la perquisition sont les suivants:**

- 5.1 The records or other things to be searched for are all records, whenever created, which relate directly or indirectly to, and which will afford evidence of, the commission of the offence or the engaging of reviewable conduct described at paragraph 2. Specifically these are:

**Corporate Structure**

- (a) All records or other things relating to the ownership, corporate structure, control and management of the Parties under investigation; and any other records or other things relating to the ownership or management and roles, duties, tasks, remuneration and responsibilities of the representatives of the Parties under investigation;

**Identities**

- (b) All records or other things that, directly or indirectly, identify the individual or commercial names used to carry out the alleged offence or reviewable conduct, or that affiliate such individual or commercial names with legal entities or individuals;
- (c) All records or other things relating to aliases, user names, email addresses, email aliases or user IDs (user identities) used by the Parties under investigation and the representatives of the Parties under investigation involved in the alleged offence or reviewable conduct;
- (d) All records or other things related to the policies of the Parties under investigation for recruiting, training and managing of any past and current representatives of the Parties under investigation, including job postings, application forms, employee pay, commissions, and dismissal records; and
- (e) For any representatives of the Parties under investigation, up to five (5) original business records or other things that contain examples of the handwriting of such person.

**Revenue, Finances and Compensation**

- (f) All records or other things relating, directly or indirectly, to the revenues generated from water heater rentals and sales by the Parties under investigation and representatives of the Parties under investigation, including historical, actual and forecast data, with respect to the alleged offence or reviewable conduct. These records or other things include but are not limited to: financial statements, annual reports, banking records, budget forecasts, credit and debit transactions, deposits, withdrawals, transfers, cheques, wire transfers, accounts receivable and payable records, currency, returns and any other accounting information;
- (g) All records or other things relating, directly or indirectly, to the management and distribution of the monies gained or revenue generated by the promotion, sale and rental of water heaters by the Parties under investigation and representatives of the Parties under investigation; and

- (h) All records, aliases, user names, or other identifiers or other things relating, directly or indirectly, to the identity, role and compensation of the representatives of the Parties under investigation.

**Operations**

- (i) All records or other things relating, directly or indirectly, to the corporate structure of the Parties under investigation and the ownership or control of these entities and any other records relating to the ownership or management and roles, duties, tasks, remuneration and responsibilities of the representatives of the Parties under investigation, including but not limited to guidelines, hiring policies and training manuals;
- (j) All records or other things relating, directly or indirectly, to the rental, lease, or ownership by the Parties under investigation of office space and/or office equipment including, but not limited to: computer systems, electronic storage devices, telephones, facsimile machines, office services (including Internet and telecommunication services), websites and email addresses as they relate to the alleged offence or reviewable conduct;
- (k) All records or other things relating, directly or indirectly, to the advertisement, sale, promotion, preparation, planning, development, delivery, payment, supply and removal of rental water heaters with respect to the alleged offence or reviewable conduct, including planning and development of sales tactics. These records or other things include, but are not limited to: agreements, contracts, publications, directives, correspondence, pictures, authorizations, memoranda, audio-recordings, door-to-door sales scripts, verification call scripts, efficacy/efficiency testing and notes;
- (l) All records related to certification, license, authorization, including all correspondence with authorities and agencies in relation to the activities or the products promoted;
- (m) All records or other things relating, directly or indirectly, to contracts, including but not limited to: scripts, application forms, customer acknowledgments, installation forms, pamphlets and any other records related to the promotion and supply of water heaters; and
- (n) All records or other things relating, directly or indirectly, to information on the application and use of the ENERGY STAR logos.

### **Customers**

- (o) All records or other things relating, directly or indirectly, to the customers or potential customers who were or might reasonably have been contacted by, made contact with or conducted business with the representatives of the Parties under investigation, including but not limited to contracts, pamphlets, and promotional materials;
- (p) All records or other things relating to customers who have contracts with the Parties under investigation, including names, addresses, and amounts incurred;
- (q) All records or other things relating to materials that were provided to customers who entered into contracts with the Parties under investigation;
- (r) All records or other things relating, directly or indirectly, to the customer service provided by the Parties under investigation, including but not limited to complaints, customer comments, refund requests, scripts, policies, and any other customer communications; and
- (s) All records or other things relating, directly or indirectly, to correspondence between the Parties under investigation and other agencies including, but not limited to, the BBB and the Ontario Ministry of Consumer Services with respect to conduct relating to the alleged offence or reviewable conduct.

### **Other**

- (t) Other things, specifically office equipment related to or used in the commission of the alleged offence or reviewable conduct that may be used as evidence including: computer systems, electronic storage devices, telephone switch boxes, telecommunications equipment, electronic surveillance and audio/visual recording devices and tapes, facsimile machines and facsimile memory;
- (u) Other things, specifically computer passwords, computer programs, computer services, computer systems, software, data storage devices, and associated documentation including operating instructions, manuals and service records that will assist in retrieving, copying, reading, printing, deciphering or acquiring the substance or meaning of any data seized, or accessed, together with all passwords, login codes, encryption keys or other security devices relating to these things;

- (v) Other things, specifically all records or other things described at paragraph 5 of this warrant, contained therein, or available to any computer system on the premises to be searched;
- (w) All records or other things relating to the use and application of the ENERGY STAR initiative;
- (x) Other things used by representatives of the Parties under investigation during the alleged offence or reviewable conduct including but are not limited to garments, uniforms, identification badges, clipboards, and contracts; and
- (y) All records or other things that could be used as similar fact evidence.

**6. Operation of Computer Systems:**

**6. Usage des ordinateurs:**

To search data contained in or available to any computer system for records described in paragraph 5 of this warrant:

- 6.1 This warrant authorizes the electronic evidence officers listed in paragraph 1.2 of this warrant to use or cause to be used any computer system on the premises to search any data contained in or available to the computer system; to reproduce the record or cause it to be reproduced from the data in the form of a printout or other intelligible output, and to seize the printout or other output for examination or copying.
- 6.2 The electronic evidence officers authorized to execute this warrant are authorized to do the following, to assist with accessing, searching, examining, copying, and seizing data found on computer systems, data storage devices or media:
  - a. Use forensic practices and procedures for acquiring electronic evidence, while attempting to minimize the impact on business functions;
  - b. Use or cause to be used, and/or seize, any computer system, data storage device, media, computer programs or associated documentation, including operating instructions, manuals and service records present on the premises;
  - c. Use or cause to be used, any computer system, data storage device, media or computer program brought onto the premises by the persons authorized to execute the warrant;

- d. Require any person who is in possession or control of the premises, including, where applicable, a computer system administrator or other custodian of information of a computer system on the premises, to permit any person named in the warrant to use or cause to be used any computer system or part of it on the premises by making accessible all data contained in any computer system, computer program, data storage device or media for the purposes of searching or seizing such data;
- e. Seize or produce an image of data from which they are unable to acquire the substance or meaning at the premises, for further off-site examination; and
- f. Employ, retain, direct or engage other persons to assist in the search of the named premises including the services of computer consultants or diagnosticians, which persons would, in the presence of persons authorized in the warrant, attend at the premises and perform such tasks as may assist the persons authorized in the warrant to carry out their functions authorized by the warrant.

6.3 The following practices and procedures may be used as circumstances dictate:

- (a) Search the computer system, data storage device or media and print or cause to be printed a copy of the records on-site;
- (b) Search the computer system, data storage device or media and reproduce an electronic copy of the records on-site;
- (c) Search the computer system, data storage device or media and produce an image of data to search and reproduce records off-site;  
or
- (d) Seize the computer system, data storage device or media and remove it/them from the premises, to search data and reproduce records off-site.

6.4 Some of these practices and procedures, specifically the steps described above in paragraphs 6.3(c) and 6.3(d) of this warrant, may result in the seizure of data containing records that are not described in paragraph 5 of this warrant. Electronic evidence officers and anyone under their direction will take steps to ensure that such data, with the exception of data that falls within the provisions of section 489 of the *Criminal Code*, will not be

accessible to anyone else.

The following procedures will be followed in order to identify and search data from which records described in paragraph 5 of this warrant can be reproduced, and to minimize access to data that contain records that are not described in paragraph 5 of this warrant:

- a. Where an image is produced as provided for in paragraph 6.3(c) of this warrant:
  - i. a true copy and a working copy of the seized image will be made in addition to any copy that may be provided to the party from whom it was seized;
  - ii. the seized image and the true copy will be sealed to protect the integrity of the data;
  - iii. the working copy will be examined by electronic evidence officers and anyone under their direction and records described in paragraph 5 of this warrant will be reproduced;
  - iv. access to the working copy will thereafter remain under the control of electronic evidence officers;
  - v. any further searching of data from the working copy, by electronic evidence officers and anyone under their direction, will be confined to data from which records described in paragraph 5 of this warrant can be reproduced, or as required within proceedings that may arise from the search or investigation;
  - vi. in order to minimize the examination of data containing records that are not described in paragraph 5 of this warrant, the persons examining the working copy will use forensic and electronic discovery practices and procedures to identify and search data from which records described in that paragraph can be reproduced; and
  - vii. electronic evidence officers and anyone under their direction will keep confidential all data found within the working copy containing records that are not described in paragraph 5 of this warrant, with the exception of things that fall within the provisions of section 489 of the *Criminal Code*.



- b. A similar process will be followed where a person authorized to execute the warrant, other than an electronic evidence officer, considers it necessary to seize a computer system, data storage device or media from the premises, as described in paragraph 6.3(d) of this warrant. In such a case,
  - i. the computer system, data storage device or media will be transferred to an electronic evidence officer, who may produce an image or extract data in order to produce records described in paragraph 5 of this warrant; and
  - ii. further handling will be as described above.

**7. Duration of this search warrant:**

**7. La durée de validité du présent mandat:**

- 7.1 The search warrants be valid from the 10th day of July, 2013, up to and including the 19th day of July, 2013, or, if issued after the 10th day of July, 2013, for such identical period of time, commencing from the date of issuance of the within sought warrant. It is not the intention of the authorized representatives of the Commissioner to actively conduct the search of the premises during this entire period, however, this period of validity is necessary to ensure that the authorized representatives of the Commissioner have a sufficient amount of time to search, copy, examine and seize a potentially large volume of records or other things.
- 7.2 Authorization be given to the authorized representatives of the Commissioner and peace officers to remain on the premises 24 hours per day in order to maintain security over the records or other things to be searched for and the items seized that may be placed in sealed containers and left on the premises each night, and, in order to allow for the completion of a search process involving a computer system commenced prior to 9:00 p.m. It is not the intention of the authorized representatives of the Commissioner to actively conduct the search of the premises 24 hours per day. The search will be actively conducted within the time period of 6 a.m. to 9 p.m. as specified in subsection 15(3) of the *Competition Act*, with allowance made for the completion of a search process involving a computer system or the capture of data, commenced prior to 9:00 p.m., and which, based on the length of the process, will extend after 9:00 p.m. in order to successfully complete or where the discontinuance of the search process of capture of data may result in loss of records or other things to be seized.

**8. This search warrant further authorizes:**

**8. De plus, le présent mandat autorise:**

- 8.1 The persons authorized to execute the warrant may enter the premises, leave them and return to them from time to time during the period of validity of the warrant for the purpose of executing it;
- 8.2 The persons authorized to execute the warrant may be accompanied by a peace officer and/or locksmith for the purpose of using such force as necessary or to provide any assistance to facilitate access to the premises, should access to the premises be refused;
- 8.3 One or more authorized representatives of the Commissioner shall be allowed to videotape the events of the search at the premises described at paragraph 3 in order to create a visual record of the manner in which the search was conducted, and to photograph or videotape records or other things to be seized. Such visual recordings can assist in the resolution of any allegation based on the conduct of the search, should such an allegation arise, and can provide a means of capturing records or other relevant information from the premises described at paragraph 3 that cannot readily be physically seized, e.g. writings on a large white board, layout of space, etc.;
- 8.4 The warrant authorizes the persons described at paragraph 1 to search anything found on the premises including personal belongings for which they have reason to believe may contain records or other things to be searched for. Personal belongings include, but are not limited to, briefcases, bags, purses, knapsacks, wallets, electronic devices such as: mobile computers, mobile phones, removable storage media, devices containing electronic data, PDA' s (personal digital assistant' s), pagers, telephones, and other devices; and
- 8.5 The persons authorized to execute the warrant be authorized to temporarily remove from the search premises any pre-selected record or other thing identified to be searched at the end of any day of searching for the purposes of preserving its integrity, or to prevent the loss or destruction of the said record or other thing. These records or other things will remain sealed and will be kept in the custody of the authorized person executing the warrant during this period of temporary removal. These records or other things will be returned to the premises on the day when the authorized person next returns to the searched premises.

**SOLICITOR-CLIENT PRIVILEGE**

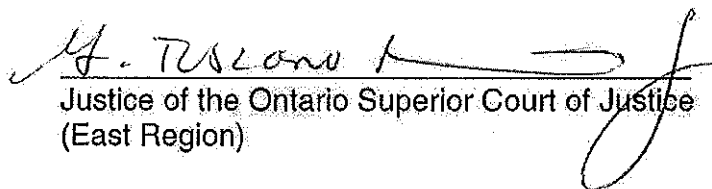
**SECRET PROFESSIONNEL DE  
L'AVOCAT**

**9. It is further ordered that:**

**9. De plus, il est ordonné que:**

- 9.1 When a claim is made that a record about to be examined, copied or seized is subject to solicitor-client privilege, or when an authorized representative of the Commissioner has reason to believe that a record may be subject to solicitor-client privilege the record shall be placed in a package, suitably sealed and placed in the custody of the persons named pursuant to section 19 of the *Competition Act*.
- 9.2 Should a law office be located at the premise to be searched, the law office will not be searched until providing a reasonable opportunity to the respective lawyer to claim privilege over the records located in the office. Until such a reasonable opportunity presents itself, the law office and all records in the office may be sealed so as to preserve any evidence. If the situation should arise where there are no reasonable alternatives but to search the law office without the respective lawyer present, another search warrant will be sought at that time.

DATED at the City of Ottawa, Province of Ontario, this 11<sup>th</sup> day of July, 2013.

  
Justice of the Ontario Superior Court of Justice  
(East Region)

**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

**AND IN THE MATTER OF** an *ex parte* application, pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to prohibit access to and disclosure of this all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

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**WARRANT TO ENTER, SEARCH AND COPY OR  
SEIZE FOR EXAMINATION OR COPYING  
CERTAIN RECORDS OR OTHER THINGS  
PURSUANT TO SECTIONS 15 AND 16 OF THE  
*COMPETITION ACT***

**25 Sheppard Avenue West, Suite 1600,  
North York, Ontario, M2N 6S8**

**(Supplemental)**

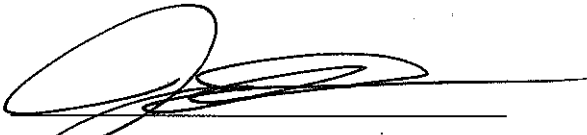
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**Josephine A.L. Palumbo  
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Department of Justice  
Competition Bureau Legal Services  
50 Victoria Street,  
Gatineau, QC  
K1A 0C9**

Tel: 819-953-3902  
Fax: 819-953-9267

**Counsel to the Commissioner of Competition**

This is **Exhibit "F"** mentioned and referred  
to in the Affidavit of Patrick Johnston  
affirmed before me on May 9, 2014



A Commissioner for Taking Affidavits

**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

**AND IN THE MATTER OF** an *ex parte* application, pursuant to subsection 487.3(4) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to terminate the sealing orders prohibiting access to and disclosure of all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

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**AFFIDAVIT OF DAWN-MARIE JAMIESON**

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I, Dawn-Marie Jamieson, of the City of Ottawa, in the province of Ontario **MAKE OATH AND SAY AS FOLLOWS:**

1. I am a Competition Law Officer with the Fair Business Practices Branch of the Competition Bureau and I am an authorized representative of the Commissioner of Competition (the "Commissioner" also referred to as the "Applicant") for the purpose of this application for an issuance of an Order terminating the sealing orders issued in Court File No. 13-13104 by the Hon. Justice R.L. Maranger on the 5<sup>th</sup> of July 2013 and the Hon. Justice G. Toscano-Roccamo on the 11<sup>th</sup> of July 2013 (collectively the "Sealing Orders") and filed in this matter in respect of applications for search warrants (including a supplemental warrant) to enter and search pursuant to sections 15 and 16 of the *Competition Act*, R.S.C. 1985, c. C-34 (as amended) (the "*Competition Act*") and Sealing Orders pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, (the "*Criminal Code*").

2. I was assigned on or about January 4<sup>th</sup>, 2013, to review certain alleged deceptive marketing practices of National Home Services (National Energy Corporation, a subsidiary of Just Energy Group Inc., doing business as National Home Services and Services aux foyers du Québec) ("**National**"); morEnergy Services Inc. (Bancmor Credit Corporation and morEnergy Services Inc. doing business as morEnergy) ("**morEnergy**"); and Ontario Consumers Home Services Inc. ("**OCHS**") – all collectively known as the "**Parties under investigation**". As such, I have personal knowledge of the matters deposed in this Affidavit. Where such knowledge is based on information and belief, and where so stated, I verily believe such information to be true.

A. **THE INQUIRY**

3. On January 10<sup>th</sup>, 2013, the Commissioner commenced a formal inquiry, which is ongoing and pursuant to paragraph 10(1)(a) of the *Competition Act* relating to an alleged offence contrary to subsection 52(1) and reviewable conduct pursuant to paragraph 74.01(1)(a) of the *Competition Act*, in relation to the marketing practices of National and morEnergy (the "**Inquiry**"). The Inquiry was initiated as a result of a six-resident application under section 9 the *Competition Act*.
4. On April 30, 2013, the Commissioner amended the above-noted Inquiry to include the OCHS as an additional party under investigation as set out in the Information to Obtain search warrants of Dawn-Marie Jamieson sworn on the 4<sup>th</sup> of July 2013 (the "**Jamieson Information**") and the Information to Obtain a supplemental search warrant of William Bradley sworn the 10<sup>th</sup> of July 2013 (the "**Bradley Information**"). I have been actively involved in many of the investigative steps prior to and following the commencement of this Inquiry. I was also present during the course of the searches at (2) two of the premises in Toronto, Ontario.

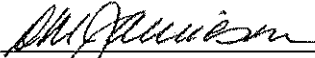
**B. SEALING ORDER**


5. The Applicant requested, at the time of filing of the materials in support of the search warrants (including the supplemental warrant), Sealing Orders in this matter such that the Jamieson Information and the Bradley Information, the accompanying Exhibits, and all other documents relating to and filed in support of the Applications for search warrants pursuant to sections 15 and 16 of the *Competition Act* in the above-noted matter be placed in a sealed packet and kept in the custody of the Court in the Office of the Clerk thereof in a safe, secure and private place to which the public has no access, so as to ensure the privacy and confidentiality of such contents.
6. The Applicant further requested that the material described in paragraph (5) above be treated confidentially, pursuant to subsection 487.3(1) of the *Criminal Code*, on the grounds that disclosure of documents relating to the Applications for the issuance of search warrants would compromise the nature and extent of an ongoing investigation.
7. The Applicant further requested that, pursuant to section 487.3 of the *Criminal Code*, the sealed packet not be delivered to any person except by order of the undersigned justice or competent judge pursuant to subsection 487.3(4) of the *Criminal Code* and that the Attorney General of Canada or counsel, acting on his behalf, may apply *ex parte* to a Justice of this Court to vary the terms of the Sealing Orders.
8. On July 5<sup>th</sup>, 2013, the Hon. Justice R.L. Maranger of this Court issued nine (9) Search Warrants and related Sealing Order as requested by the Applicant. Attached and marked as Exhibit "A" is a copy of the Sealing Order.
9. One of the Search Warrants issued by Justice R.L. Maranger for the premise at 100 King Street West, Suite 2630, Toronto, Ontario was not executed.



10. On July 11<sup>th</sup>, 2013, the Hon. Justice G. Toscano-Roccamo of this Court issued a supplemental Search Warrant and related Sealing Order as requested by the Applicant. Attached and marked as Exhibit "B" is a copy of the Sealing Order.
11. The searches were conducted in Toronto, Ontario and in Montreal, Quebec during the week of July 8<sup>th</sup>, 2013 to July 12<sup>th</sup>, 2013 (inclusive) including a supplemental search which was commenced on July 11<sup>th</sup>, 2013 and completed on July 12<sup>th</sup>, 2013 and are all now completed. Accordingly, the rationale for the request for confidentiality of the material in support of the Applications and the search process no longer exists.
12. I make this Affidavit in support of an application by the Applicant for the issuance of an Order terminating the Sealing Orders issued in Court File No. 13-13104 in respect of applications for search warrants (including a supplemental warrant) to enter and search pursuant to sections 15 and 16 of the *Competition Act* and Sealing Orders pursuant to subsection 487.3(1) of the *Criminal Code*.

Sworn before me at the City of  
Gatineau in the Province of Québec  
this 17 day of July, 2013.

  
\_\_\_\_\_  
**Dawn-Marie Jamieson**  
An authorized representative  
of the Commissioner of Competition

  
\_\_\_\_\_  
**A Commissioner of Oaths in  
and for Canada**





THIS IS EXHIBIT....."A".....TO THE  
AFFIDAVIT OF.....  
Dawn-Marie Jamieson  
SWORN BEFORE ME THIS.....17<sup>th</sup>.....DAY  
OF.....July.....2013.....  
Matthew  
COMMISSIONER FOR OATHS

Court File No.: 13-13104  
Competition Act,  
Sections 15 and 16

**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

AND IN THE MATTER OF an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

AND IN THE MATTER OF an *ex parte* application, pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to prohibit access to and disclosure of this all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

---

**SEALING ORDER**

---

**UPON** the *ex parte* application made this day by an authorized representative of the Commissioner of Competition for an order to seal and prohibit disclosure of the Information to Obtain search warrants sworn by Competition Law Officer, Dawn-Marie Jamieson, on July 4<sup>th</sup>, 2013, the accompanying Exhibits filed in support of the application, and all other documents relating to the application for search warrants pursuant to sections 15 and 16 of the *Competition Act* (the "Application");

**AND UPON** reading the Information to Obtain search warrants sworn by Competition Law Officer, Dawn-Marie Jamieson, on July 4<sup>th</sup>, 2013 in support of the application to seal and prohibit disclosure;

**AND UPON** reading the Exhibits of the Information to Obtain search warrants;

**AND UPON** being satisfied that the disclosure of documents relating to the Application would compromise the nature and extent of an ongoing investigation;

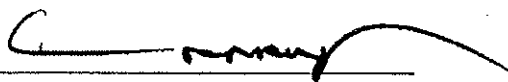
**AND UPON** being satisfied that it would be in the best interests of the administration of justice that the Information to Obtain search warrants, the accompanying Exhibits and all other documents relating to the Application be sealed and that disclosure be prohibited;

**IT IS ORDERED THAT**, pursuant to section 487.3 of the *Criminal Code*, the Information to Obtain search warrants sworn by Competition Law Officer, Dawn-Marie Jamieson, on July 4<sup>th</sup>, 2013, the accompanying Exhibits, and all other documents relating to and filed in support of the Application for search warrants pursuant to sections 15 and 16 of the *Competition Act* be placed in a sealed packet and kept in the custody of the Court in the Office of the Clerk thereof in a safe, secure and private place to which the public has no access, so as to ensure the privacy and confidentiality of such contents;

**AND IT IS FURTHER ORDERED THAT** the sealed packet is not to be delivered to any person except by order of the undersigned justice or competent judge pursuant to subsection 487.3(4) of the *Criminal Code*.

**AND IT IS FURTHER ORDERED THAT** the Attorney General of Canada or counsel acting on his behalf may apply *ex parte* to a Justice of this Court to vary the terms of this Order.

**DATED** at the City of Ottawa, Province of Ontario, this 5<sup>th</sup> day of July, 2013.

  
Justice R. C. McPherson  
Ontario Superior Court of Justice

This packet was sealed at 11 o'clock in the Fore  
noon, on the 5<sup>th</sup> day of July  
A.D.2013 by Justice Emery and the sealed packet was  
forthwith delivered into the custody of the said Court Clerk.



Clerk  
Ontario Superior Court of Justice

**PUBLIC OFFICER:** Dawn-Marie Jamieson

Court File No.:

**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 18 of the *Competition Act*;

**AND IN THE MATTER OF** an *ex parte* application, pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to prohibit access to and disclosure of this all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

---

**SEALING ORDER**

---

**Josephine A.L. Palumbo**  
**Senior Litigation Counsel**  
Department of Justice  
Competition Bureau Legal Services  
50 Victoria Street,  
Gatineau, QC  
K1A 0C9

Tel: 819-953-3902  
Fax: 819-953-9267

**Counsel to the Commissioner of Competition**



THIS IS EXHIBIT....."B".....TO THE  
 AFFIDAVIT OF.....  
 Dawn-Marie Jamieson  
 SWORN BEFORE ME THIS.....17<sup>th</sup>.....DAY  
 OF.....July.....20.....13.....  
 .....M. Malottian.....  
 COMMISSIONER FOR OATHS

CANADA  
 Province of Ontario

Court File No.:13-13104

Competition Act,  
 Sections 15 and 16

**ONTARIO SUPERIOR COURT OF JUSTICE  
 (EAST REGION)**

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

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

**AND IN THE MATTER OF** an *ex parte* application, pursuant to subsection 487.3(1) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to prohibit access to and disclosure of this all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

---

**SEALING ORDER**

---

**UPON** the *ex parte* application made this day by an authorized representative of the Commissioner of Competition for an order to seal and prohibit disclosure of the Information to Obtain a supplemental search warrant sworn by Competition Law Officer, William Bradley, on July 10<sup>th</sup>, 2013, the accompanying Exhibits filed in support of the application, and all other documents relating to the application for a supplemental search warrant pursuant to sections 15 and 16 of the *Competition Act* (the "Application");

**AND UPON** reading the Information to Obtain a supplemental search warrant sworn by Competition Law Officer, William Bradley, on July 10<sup>th</sup>, 2013 and the

accompanying Exhibits in support of the application to seal and prohibit disclosure;

**AND UPON** reading the Exhibits to the Information to Obtain a supplemental search warrants;

**AND UPON** being satisfied that the disclosure of documents relating to the Application would compromise the nature and extent of an ongoing investigation;

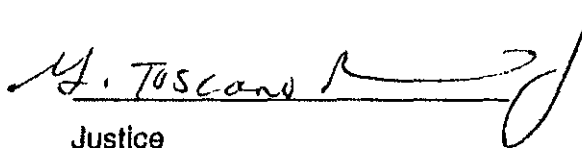
**AND UPON** being satisfied that it would be in the best interests of the administration of justice that the Information to Obtain a supplemental search warrant, the accompanying Exhibits and all other documents relating to the Application be sealed and that disclosure be prohibited;

**IT IS ORDERED THAT**, pursuant to section 487.3 of the *Criminal Code*, the Information to Obtain a supplemental search warrant sworn by Competition Law Officer, William Bradley, on July 10<sup>th</sup>, 2013, the accompanying Exhibits, and all other documents relating to and filed in support of the Application for a supplemental search warrant pursuant to sections 15 and 16 of the *Competition Act* be placed in a sealed packet and kept in the custody of the Court in the Office of the Clerk thereof in a safe, secure and private place to which the public has no access, so as to ensure the privacy and confidentiality of such contents;

**AND IT IS FURTHER ORDERED THAT** the sealed packet is not to be delivered to any person except by order of the undersigned justice or competent judge pursuant to subsection 487.3(4) of the *Criminal Code*.

**AND IT IS FURTHER ORDERED THAT** the Attorney General of Canada or counsel acting on his behalf may apply *ex parte* to a Justice of this Court to vary the terms of this Order.

**DATED** at the City of Ottawa, Province of Ontario, this 11<sup>th</sup> day of July, 2013.



Justice  
Ontario Superior Court of Justice

This packet was sealed at 12:34 o'clock in the \_\_\_\_\_  
a few noon, on the 11<sup>th</sup> day of July  
A.D.2013 by Justice Toscano Roccano and the sealed packet was  
forthwith delivered into the custody of the said Court Clerk.

  
Clerk  
Ontario Superior Court of Justice

**PUBLIC OFFICER:** William Bradley



**ONTARIO SUPERIOR COURT OF JUSTICE  
(EAST REGION)**

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

**AND IN THE MATTER OF an *ex parte* application  
by an authorized representative of the  
Commissioner of Competition for the issuance of  
search warrants to enter, search and copy or seize  
for examination or copying certain records or other  
things pursuant to sections 15 and 16 of the  
*Competition Act*;**

**AND IN THE MATTER OF an *ex parte* application,  
pursuant to subsection 487.3(1) of the *Criminal  
Code*, R.S.C., 1985, c. C-46, as amended, to  
prohibit access to and disclosure of this all  
documents related to and filed in support of the  
application for the issuance of search warrants  
under the *Competition Act*.**

---

**SEALING ORDER**

---

**Josephine A.L. Palumbo  
Senior Litigation Counsel  
Department of Justice  
Competition Bureau Legal Services  
50 Victoria Street,  
Gatineau, QC  
K1A 0C9**

**Tel: 819-953-3902  
Fax: 819-953-9267**

**Counsel to the Commissioner of Competition**

**ONTARIO SUPERIOR COURT OF  
JUSTICE  
(EAST REGION)**

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

**AND IN THE MATTER OF** an *ex parte* application by an authorized representative of the Commissioner of Competition for the issuance of search warrants to enter, search and copy or seize for examination or copying certain records or other things pursuant to sections 15 and 16 of the *Competition Act*;

**AND IN THE MATTER OF** an *ex parte* application, pursuant to subsection 487.3(4) of the *Criminal Code*, R.S.C., 1985, c. C-46, as amended, to terminate the sealing orders prohibiting access to and disclosure of all documents related to and filed in support of the application for the issuance of search warrants under the *Competition Act*.

---

**AFFIDAVIT OF DAWN-MARIE  
JAMIESON**

---

**Josephine A.L. Palumbo**  
**Senior Litigation Counsel**  
Department of Justice  
Competition Bureau Legal Services  
50 Victoria Street,  
Gatineau, QC  
K1A 0C9

Tel: 819-953-3902  
Fax: 819-953-9267

**Counsel to the Commissioner of  
Competition**


This is **Exhibit "G"** mentioned and referred  
to in the Affidavit of Patrick Johnston  
affirmed before me on May 9, 2014



A Commissioner for Taking Affidavits

**[CONFIDENTIAL]**

This is **Exhibit "H"** mentioned and referred  
to in the Affidavit of Patrick Johnston  
affirmed before me on May 9, 2014



A Commissioner for Taking Affidavits

Brendan Wong  
T (416) 367-6743  
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bwong@blg.com

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Scotia Plaza, 40 King St W  
Toronto, ON, Canada M5H 3Y4  
T 416.367.6000  
F 416.367.6749  
www.blg.com



April 24, 2014

**Delivered by Email**

Jonathan Hood  
Department of Justice Canada  
Competition Bureau, Legal Services  
151 Yonge Street, 3<sup>rd</sup> Floor  
Toronto, Ontario  
M5C 2W7

Dear Mr. Hood:

**RE: *The Commissioner of Competition v. Reliance Comfort Limited Partnership CT-2012-002 - Commissioner's Outstanding Documentary Disclosure and Productions***

We are in receipt of the affidavit of documents of the Commissioner of Competition ("Commissioner") affirmed by David Harding on March 28, 2014 (the "Affidavit"). The Affidavit indicates that the Commissioner has not produced a large amount of relevant documents.

In particular, the Affidavit indicates that in July 2013, the Commissioner executed on nine search warrants issued against National Energy Corporation ("National"), Ontario Consumers Home Services ("OCHS") and morEnergy Services Inc. ("morEnergy"). The Affidavit further indicates that the Commissioner "seized electronic and paper records that may be relevant to these proceedings" and that the documents are first reviewed by the Competition Bureau's electronic evidence officers ("Electronic Evidence Officers") prior to being released to Mr. Harding for further review for relevance and production.

Documents Seized from National

The Affidavit indicates that one terabyte of data has been seized from National, and that there are three groups of documents.

1. **Electronic Records Commonly Used in Business Applications (“National Business Documents”)**: The Affidavit states that most of these documents have been reviewed and produced, and that as at March 28, 2014, Mr. Harding “expect[s] to receive the last batch of records shortly, and those that are relevant will be produced in the coming weeks” on a bi-weekly basis.
2. **Electronic Database**: The Affidavit provides no detail as to what is contained in the “electronic database” and indicates that the Electronic Evidence Officers have completed their review of the database and that they will be released to Mr. Harding shortly (as at March 28, 2014) for review.
3. **Other Electronic Records**: The Affidavit provides no information whatsoever on what is contained in this broad category, aside from “audio files”. The Affidavit indicates that Mr. Harding will review these documents as they are released to him by the Electronic Evidence Officers and produce them on a bi-weekly basis.

The Affidavit indicates that the Commissioner will make bi-weekly production of the above categories of documents. However, to date the Commissioner has not issued a Supplementary Affidavit of Documents or made any further productions.

#### Documents seized from OCHS and morEnergy

The Affidavit states only that, with respect to the documents seized from morEnergy and OCHS, “[d]iscussions with both parties, through legal counsel, are ongoing regarding the release of these records to me.” The Affidavit provides no further details as to the nature of these documents or when they will be produced.

#### Commissioner’s Claims of Privilege

Schedule C of the Affidavit contains 217 pages of documents over which the Commissioner claims privilege. Schedule C lists numerous documents which were obtained from third parties and over which public interest privilege is claimed. No information regarding these documents is provided (aside from the fact that they were authored by a third party), and there is no way for Reliance to determine whether the Commissioner has properly asserted public interest privilege.

#### Demand

As you know, the Commissioner’s investigation of National, OCHS and morEnergy was commenced as a direct result of Six-Person Complaint made under s.9 of the *Competition Act* (the “Complaint”). The materials filed in support of the Complaint provided examples of wide-ranging misconduct by National and morEnergy in the marketplace, which was confirmed by the Commissioner’s initial investigations. This is illustrated by the Introduction to the Information of Dawn-Marie Jamieson sworn July 4, 2013 (the “Information”) which states at paragraphs 1.6 and 1.11:

1.6 The office or reviewable conduct under investigation relates to [National, OCHS and morEnergy's] solicitations, via door-to-door sales, to persons in Canada, specifically in Ontario and/or Quebec. These solicitations are for the supply of water heaters. As this Information to Obtain (the "Information") reveals, during the course of visits to consumers' residences, representatives of [National, OCHS and morEnergy] allegedly make significant misrepresentations to convince consumers to sign long term water heater rental agreements, including misrepresentations relating to the nature of their visit, their identity, the ENERGY STAR initiative, alleged costs and energy savings and the terms and conditions of the water heater rental agreements

...

1.11 I have reasonable grounds to believe and do believe that a criminal offence pursuant to subsection 52(1) and under Part VI of the *Competition Act* has been or is about to be committed [by National, OCHS and morEnergy], or that grounds exist for the making of an order under Part VII.1 of the *Competition Act* pursuant to paragraph 74.01(1)(a) regarding civilly reviewable conduct.

The misconduct of National, OCHS, morEnergy, and other competitors of Reliance is a key element of the business justification relied on by Reliance in this proceeding. It is therefore certain that a very large number of documents seized from National, OCHS and morEnergy will be relevant to this proceeding. Indeed, Mr. Harding acknowledges the relevance of such documents, and the Commissioner's possession thereof in his Affidavit.

In short, relevant documents were seized from National in July, 2013 - seven months after this proceeding against Reliance was commenced. They were in the Commissioner's possession when the timetable was settled last year. Nine months passed between their seizure and the March 28, 2014 production deadline in this proceeding. All of these documents clearly ought to have been reviewed and produced by the Commissioner on March 28, 2014. We therefore demand that the Commissioner immediately serve a complete affidavit of documents which includes:

1. The remaining relevant National Business Documents;
2. The relevant documents contained in National's "electronic database";
3. All relevant "other electronic records" seized from National including all relevant audio files;
4. All relevant documents seized from OCHS and morEnergy, including all relevant audio files;
5. Summaries of the documents obtained from third parties over which the Commissioner claims privilege.

If the Commissioner cannot produce these materials immediately, we trust that you will be advise of a firm date by which they will be provided and agree to jointly approach Justice Rennie on a case conference call at his earliest availability to request appropriate modifications to the timelines under the Amended Scheduling Order dated December 9, 2013.

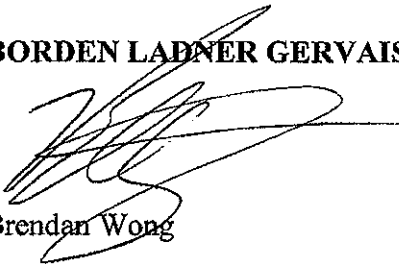
I add that we reserve Reliance's right to bring a motion to compel production despite the Commissioner's claims of public interest privilege as asserted in Mr. Harding's affidavit, and the



Commissioner's further productions. Given the Commissioner's failure to provide any details regarding the nature of these documents, Reliance is unable to determine whether to bring such a motion at this time.

Sincerely,

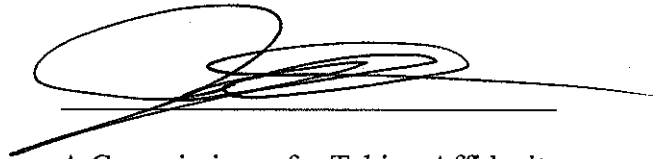
**BORDEN LADNER GERVAIS LLP**



Brendan Wong

cc. Don Houston, for Direct Energy  
Adam Fanaki, for National

This is **Exhibit "I"** mentioned and referred  
to in the Affidavit of Patrick Johnston  
affirmed before me on May 9, 2014

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right, positioned above a solid horizontal line.

A Commissioner for Taking Affidavits

## **Burgess, Marlee**

---

**From:** Jonathan.Hood@bc-cb.gc.ca  
**Sent:** April-29-14 10:02 AM  
**To:** Wong, Brendan  
**Cc:** AFanaki@dwpv.com; dhouston@mccarthy.ca; hrichards@mccarthy.ca; David.Harding@bc-cb.gc.ca  
**Subject:** Commissioner of Competition v. Reliance - Letter re Commissioner's Outstanding Disclosure and Productions

Dear Mr. Wong:

This is in response to your letter dated April 24, 2014.

### ***Commissioner's Claims of Privilege***

The information provided in Schedule C to the Commissioner's affidavit of documents is sufficient to allow the parties to assess the Commissioner's claims of public interest privilege. Schedule C was prepared in accordance with the guidance provided by the Competition Tribunal in TREB (*The Commissioner of Competition v. The Toronto Real Estate Board*, 2012 Comp. Trib 8). No more information is required from the Commissioner to assess these claims.

### ***Reliance's Demand***

The Commissioner disagrees with your client's position that the alleged misconduct (even if proved at the hearing) of National, OCHS, morEnergy, and other competitors is a legitimate business justification. In Mr. Harding's affidavit, he indicates only that the records seized from National, OCHS, and morEnergy are potentially relevant to this application. With respect to the 5 point demand:

1. Your client has received disclosure of all relevant National Business Documents. Mr. Harding understood that there was a third batch of National Business Documents when he swore his affidavit; however, these records were included in the productions your client received.
2. On April 24, 2014, National's electronic database was produced to your clients. The electronic database was not produce on April 11th (the bi-weekly production deadline) because they were not ready for production at that time.
3. The remaining electronic records from National constitute audio files. I understand that the initial review of these audio files so that they can be released from the Electronic Evidence Unit would take until next year to complete. Your client has had extensive production of National's records both from the Commissioner and from National itself. I understand from National's counsel that they have already produced 1,400 audio files related to customer complaints. The National audio files in the Bureau's possession are of marginal relevance to the issue of business justification. Given the principles of proportionality, it would not be fair to require the Commissioner to complete the review of those audio files before proceeding to the hearing.
4. I can advise that the relevant documents obtained from OCHS and morEnergy will be reviewed and any relevant information will be captured in the Commissioner's Third Party Summary of Information.

5. The Commissioner will deliver his Third Party Summary of Information two weeks before the examination of his representative in accordance with Tribunal guidance on this issue in TREB.

With the exception of National's databases which was produced last week and National's audio files, the parties will have received disclosure of the relevant records in accordance with the schedule. Consistent with Tribunal guidance in TREB, the parties will also receive a Third Party Summary of Information that summarizes relevant information protected by public interest privilege. Therefore, it is unnecessary for the scheduling order to be amended.

Regards,

Jonathan

**Jonathan Hood**

**Counsel - Avocat**

Tel: (416) 954-5925 | Fax: (416) 973-5131

[jonathan.hood@cb-bc.gc.ca](mailto:jonathan.hood@cb-bc.gc.ca)

Department of Justice - Ministère de la Justice

Services juridiques - Bureau de la concurrence

Competition Bureau - Legal Services

151 Yonge Street, 3rd Floor, Toronto, Ontario. M5C 2W7

Gouvernement du Canada | Government of Canada

[www.cb-bc.gc.ca](http://www.cb-bc.gc.ca)

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Bureau de la concurrence  
Canada

Competition Bureau  
Canada

Canada

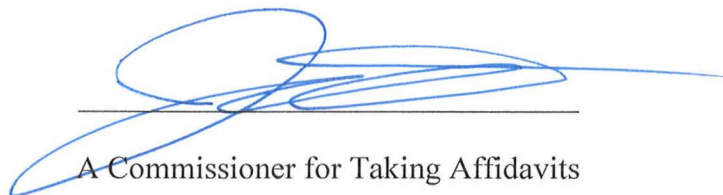
This is **Exhibit "J"** mentioned and referred  
to in the Affidavit of Patrick Johnston  
affirmed before me on May 9, 2014



A Commissioner for Taking Affidavits

**[CONFIDENTIAL]**

This is **Exhibit "K"** mentioned and referred  
to in the Affidavit of Patrick Johnston  
affirmed before me on May 9, 2014



A Commissioner for Taking Affidavits

**[CONFIDENTIAL]**




This is **Exhibit "L"** mentioned and referred  
to in the Affidavit of Patrick Johnston  
affirmed before me on May 9, 2014



A Commissioner for Taking Affidavits

**[CONFIDENTIAL]**

This is **Exhibit "M"** mentioned and referred  
to in the Affidavit of Patrick Johnston  
affirmed before me on May 9, 2014



---

A Commissioner for Taking Affidavits

**[CONFIDENTIAL]**

This is **Exhibit "N"** mentioned and referred  
to in the Affidavit of Patrick Johnston  
affirmed before me on May 9, 2014



A Commissioner for Taking Affidavits

**[CONFIDENTIAL]**

This is **Exhibit "O"** mentioned and referred  
to in the Affidavit of Patrick Johnston  
affirmed before me on May 9, 2014

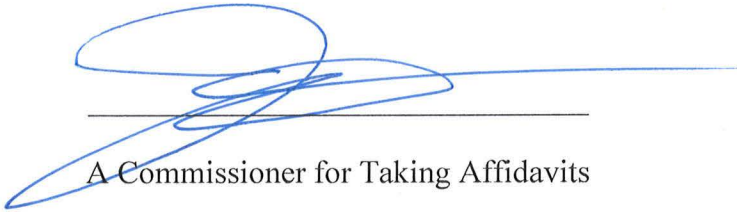


A Commissioner for Taking Affidavits

**[CONFIDENTIAL]**



This is **Exhibit "P"** mentioned and referred  
to in the Affidavit of Patrick Johnston  
affirmed before me on May 9, 2014



A Commissioner for Taking Affidavits

Brendan Wong  
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Borden Ladner Gervais LLP  
Scotia Plaza, 40 King St W  
Toronto, ON, Canada M5H 3Y4  
T 416.367.6000  
F 416.367.6749  
www.blg.com



April 28, 2014

**Delivered by Email**

Adam Fanaki  
Davies Ward Phillips & Vineberg LLP  
155 Wellington St West  
Toronto, Ontario  
M5V 3J7

Dear Mr. Fanaki:

**RE: *The Commissioner of Competition v. Reliance Comfort Limited Partnership CT-2012-002 – Outstanding Productions from National***

We are in receipt of the affidavit of documents (the “Affidavit”) of National Energy Corporation (“National”). It is evident from a review of the Affidavit that National has not reviewed its database of call recordings and produced audio files relevant to this proceeding, since the only audio files included in the Affidavit are those that are attached to emails or other documents.

Paragraph 6(b) of the Order Granting National Energy Corporation Leave to Intervene (“Order”) in this proceeding (2013 Comp. Trib. 17) requires National to produce an affidavit of all documents relevant to the topics set out in paragraph 5 of the Order (“National Energy Topics”). Pursuant to section 60(2) of the *Competition Tribunal Rules* (“Rules”), National’s affidavit of documents must include a list of relevant documents that are or were in its possession, power or control. Section 1 of the Rules clearly defines “document” as including, *inter alia*, “any...sound recording...and any copy or portion of that material.”

As you know, the conduct of National’s door knockers, as well as the impact of Reliance’s Removal Reference Number policy, are central issues in this proceeding. Recordings of customer comments and complaints are evidently very probative evidence in relation to these and other issues.

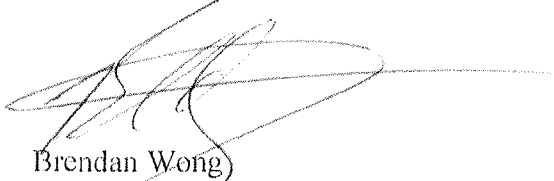
The Commissioner’s affidavit of documents served in this proceeding states that as part of its separate investigation into certain of National’s marketing practices under sections 52(1) and 74.01(1)(a) of the *Competition Act*, the Commissioner has executed search warrants against National and seized, among other things, copies of electronic audio files which may be relevant to this proceeding.

As such, National clearly has in its possession large amounts of relevant audio files, which it has not produced. Conversely, Reliance has undertaken an extensive review of its database of audio recordings and produced approximately 21,000 audio files organized by issue.

National's failure to make any effort to review its audio recording database and produce relevant audio files is a clear deficiency. We request that you confirm that National will review its audio database and produce the relevant recordings, and provide a date by which such production will be made.

Sincerely,

**BORDEN LADNER GERVAIS LLP**



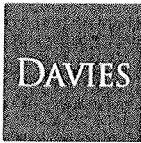
Brendan Wong

cc. Jonathan Hood, Counsel for the Commissioner  
Don Houston, Counsel for Direct Energy

This is **Exhibit "Q"** mentioned and referred  
to in the Affidavit of Patrick Johnston  
affirmed before me on May 9, 2014



A Commissioner for Taking Affidavits



155 Wellington Street West  
Toronto ON M5V 3J7  
dwpv.com

May 8, 2014

Adam Fanaki  
T 416 863 5564  
afanaki@dwpv.com

File No. 239468

**BY EMAIL**

Brendan Wong  
Borden Ladner Gervais LLP  
Scotia Plaza  
40 King Street West  
Suite 4100  
Toronto, ON M5H 3Y4

Dear Mr. Wong:

**Re: *Commissioner of Competition v. Reliance Comfort Limited Partnership*  
*CT-2012-002***

We are writing in response to your letter dated April 28, 2014, regarding alleged deficiencies in the affidavit of documents of National Energy Corporation.

Your position that National's affidavit of documents is deficient because of "National's failure to make any effort to review its audio recording database" is plainly without merit. Contrary to the statement in your letter, National has produced over 1,400 audio recordings as part of its total production of approximately 70,000 records. In preparing its affidavit of documents, National took reasonable and proportionate steps to ensure that potentially relevant audio recordings were produced.

Your letter does not provide any basis to support the contention that additional audio recordings are necessary or relevant to National's intervention in this proceeding. While your letter states that National's audio files are relevant to the "central issue" in this proceeding of National's door-to-door marketing practices, the fact is that National is an intervenor in this proceeding and its conduct is far from the "central issue". Rather, the central issue in this proceeding is Reliance's anti-competitive conduct, including its decision to implement the Removal Reference Number ("RRN") process and other exclusionary tank return policies. In this regard, it is telling that Reliance requires production of additional records – beyond its own records and the 70,000 records of National – to attempt to establish an adequate business justification in an effort to somehow offset the obvious anti-competitive effects of its own conduct.

In any event, your client's blanket request for more audio recordings – beyond the over 1,400 audio files that were already produced by National – is not proportionate in the circumstances.

DAVIES WARD PHILLIPS & VINEBERG LLP

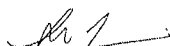
Pursuant to the principle of proportionality, the Tribunal will consider whether the time and expense associated with producing a document is justified in light of the relevance of the information. In this regard, subsection 9(2) of the *Competition Tribunal Act* requires that proceedings before the Tribunal "shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit." Consistent with these principles, Mr. Justice Rennie recognized that when preparing our respective document productions in this proceeding, the parties should be guided by the principle of proportionality.<sup>1</sup>

National currently has more than 20,000,000 megabytes of audio recordings in storage, representing an aggregate length of over 5.5 million minutes of recordings. Such calls relate to, among other things, routine customer inquiries, requests for repairs and operations in unrelated parts of the business of National or its affiliates over an extended period of time. Significantly, and unlike with email and other electronic documents, National does not have the means to conduct keyword or other searches of the audio recordings. As such, it would take a person engaged full-time approximately 44 years to complete a review of these audio recordings to determine if any of them are possibly relevant and not captured by the 1,400 audio recordings already produced. Even a large team of reviewers would require years to properly review and categorize such a large volume of data.

In the circumstances, it is clear that Reliance's request for production of additional audio files amounts to a fishing expedition that would only serve to significantly delay this proceeding and add considerably to the costs of all parties. Accordingly, National has no current plan to conduct any additional reviews of its audio recordings databases.

Please do not hesitate to contact me should you have any questions.

Yours very truly,



Adam Fanaki

cc: Jonathan Hood  
Counsel to Commissioner of Competition

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<sup>1</sup> *Commissioner of Competition v. Reliance Comfort Limited Partnership*, 2013 Comp. Trib. 18 at para. 8.

**THE COMMISSIONER OF  
COMPETITION**  
Applicant

- and -

**RELIANCE COMFORT  
LIMITED PARTNERSHIP**  
Respondent

- and -

**NATIONAL ENERGY  
CORPORATION**  
Intervenor

---

**THE COMPETITION TRIBUNAL**

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

**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.**

---

**AFFIDAVIT OF PATRICK JOHNSTON**

---

**BORDEN LADNER GERVAIS LLP**  
Barristers and Solicitors  
Scotia Plaza, 40 King Street West  
Toronto, Ontario M5H 3Y4

**Robert S. Russell / Brendan Y.B. Wong /  
Denes Rothschild / Zirjan Derwa**  
Tel: (416) 367-6256  
Fax: (416) 361-7060

Counsel for the Respondent,  
Reliance Comfort Limited Partnership

TOR01: 5587807: v3

# TAB 3



COMPETITION TRIBUNAL  
TRIBUNAL DE LA CONCURRENCE

FILED / PRODUIT

CT-2012-002  
December 20, 2012

Jos LaRose for / pour  
REGISTRAR / REGISTRAIRE

OTTAWA, ONT

# 1

CT-2012- 002

**THE COMPETITION TRIBUNAL**

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


**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:**

I hereby certify this to be a true copy of the original document/  
Je certifie par la présente que ceci est une copie conforme au document original

Dated this / Fait ce 20<sup>th</sup> of December 2012

  
For Registrar, Competition Tribunal /  
Pour Registraire, Tribunal de la concurrence

**THE COMMISSIONER OF COMPETITION**

Applicant

**AND**

**RELIANCE COMFORT LIMITED PARTNERSHIP**

Respondent

---

**NOTICE OF APPLICATION**

---

**TAKE NOTICE** that the Applicant will make an application to the Competition Tribunal (the "**Tribunal**") pursuant to section 79 of the *Competition Act* (the "**Act**") for an Order pursuant to subsections 79(1), 79(2), and 79(3.1) of the Act, prohibiting the Respondent from abusing its dominant position by imposing exclusionary water heater return policies and procedures; directing the

Respondent to take certain other actions necessary to overcome the effects of its practice of anti-competitive acts; and directing the Respondent to pay an administrative monetary penalty and costs. The particulars of the Order sought by the Applicant are set out in paragraphs 55 and 56.

**AND TAKE NOTICE** that the timing and place of hearing of this matter shall be fixed in accordance with the practice of the Tribunal.

**AND TAKE NOTICE** that the Applicant has attached hereto as Schedule "A" a concise statement of the economic theory of the case.

**AND TAKE FURTHER NOTICE** that the Applicant will rely on the following Statement of Grounds and Material Facts in support of this application and on such further or other material as counsel may advise and the Tribunal may permit.

## STATEMENT OF GROUNDS AND MATERIAL FACTS

### I. OVERVIEW OF GROUNDS

1. The Commissioner of Competition (the "**Commissioner**") alleges that Reliance Comfort Limited Partnership, which conducts business under various names ("**Reliance**"), has abused and continues to abuse 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 (the "**Relevant Market**", as described more fully at paragraphs 29-32 below).
2. Reliance substantially or completely controls the Relevant Market. Since at least 2009, Reliance has preserved and enhanced its market power in the Relevant Market by implementing water heater return policies and procedures that impose significant costs on competitors and prevent customers from switching to those competitors. Reliance's water heater return policies and procedures constitute a practice of anti-competitive acts, the purpose and effect of which is to exclude competitors in the Relevant Market. Furthermore, Reliance imposed these water heater return policies and procedures knowing that they would have a negative exclusionary effect on competitors.
3. Reliance's practice of anti-competitive acts has had and is having the effect of preventing and lessening competition substantially. But for Reliance's exclusionary water heater return policies and procedures, competitors would likely enter or expand in the Relevant Market and consumers would likely benefit from substantially greater competition.
4. The Commissioner therefore seeks an Order from the Tribunal: (i) prohibiting Reliance from directly or indirectly implementing exclusionary

water heater return policies and procedures; (ii) directing Reliance to take certain other actions necessary to overcome the effects of its practice of anti-competitive acts; (iii) directing Reliance to pay an administrative monetary penalty of \$10,000,000; (iv) directing Reliance to pay the costs of this proceeding; and (v) such other relief as the Tribunal considers appropriate.

## **II. MATERIAL FACTS**

### **A. THE PARTIES**

5. The Commissioner is appointed under section 7 of the Act and is charged with the administration and enforcement of the Act.
6. Reliance is a privately-held limited partnership, wholly owned by Alinda Capital Partners LLC, that rents natural gas and electric water heaters and provides related services to consumers in Ontario.

### **B. INDUSTRY BACKGROUND**

#### **(i) Residential Use of Water Heaters in Ontario**

7. In Ontario, most residential consumers rent water heaters.
8. A significant majority of water heaters in Ontario are powered by natural gas. The next most common energy source for water heaters is electricity.
9. Residential consumers are limited in their choice of energy source for heating water by where they live and the infrastructure constraints of their residence. In rural areas, most residential consumers use electric water heaters as natural gas is generally not available in these areas. In contrast, in areas where natural gas is available, residential consumers commonly use natural gas instead of electric water heaters. Natural gas water heaters generally cost less to operate than electric water heaters.

10. Residential consumers may rent natural gas and electric water heaters from a utility company, if available, or from a rental water heater provider. Residential consumers may also purchase natural gas and electric water heaters from retailers, such as home improvement centres and hardware stores, or from heating, ventilation and air conditioning contractors. Most residential consumers who rent or purchase a water heater also obtain related water heater services, including installation, repair, maintenance and disconnection. When a customer renting a water heater switches providers, the original rental water heater provider generally requires customers to return the water heater.

**(ii) Development of Ontario's Rental Water Heater Industry**

11. Ontario's two largest natural gas suppliers, Enbridge, Inc. ("**Enbridge**") and Union Gas Limited ("**Union Gas**"), developed the rental water heater industry in the 1950s to expand the use of natural gas in the distinct areas of Ontario where they each had a monopoly in distributing natural gas. Both natural gas suppliers were also regulated by the Ontario Energy Board (the "**OEB**").
12. In 1999, Enbridge transferred its rental natural gas water heater assets to Enbridge Services Inc., which is now Direct Energy Marketing Limited ("**Direct Energy**"). Similarly, Union Gas transferred its rental natural gas water heater assets to Union Energy Inc., which is now Reliance. The transfer of these water heater assets to Direct Energy and Reliance effectively removed the OEB's oversight and regulation of Ontario's rental gas water heater industry.
13. Since this transfer of natural gas water heater assets in 1999, Reliance has been the dominant supplier of natural gas water heaters in those areas of Ontario where Union Gas distributes natural gas; namely, the area corresponding generally to parts of the following: Northern Ontario, from the Manitoba border to the North Bay/Muskoka area; Southwestern Ontario,

from Windsor to west of the Greater Toronto Area; and Eastern Ontario, not including Ottawa.

14. Reliance has also become the dominant supplier of electric water heaters in certain other areas in Ontario, owing in part to Reliance's acquisition of existing rental electric water heater assets.

**C. RELIANCE'S EXCLUSIONARY WATER HEATER RETURN POLICIES AND PROCEDURES**

15. Since at least 2009, Reliance has implemented various exclusionary water heater return policies and procedures as an integrated strategy to exclude competitors in the Relevant Market. These exclusionary policies and procedures relate to Reliance's water heater removal process, its return depot operations, and its exit fees and charges, as described below.

**(i) Reliance Imposes An Exclusionary Removal Reference Number ("RRN") Return Policy**

16. On 17 May 2010, Reliance imposed a new water heater return policy on competitors and customers (the "**RRN Return Policy**"). Before Reliance implemented this policy, Reliance's competitors regularly disconnected and returned Reliance rental water heaters on behalf of customers.
17. Under the RRN Return Policy, Reliance creates significant barriers to the return of its water heaters by, among other things:
  - i prohibiting the customer or competitor from returning a water heater unless the customer first obtains a RRN from Reliance and has signed and fully completed to Reliance's satisfaction a "Water Heater Return Form";
  - ii prohibiting competitors from obtaining a RRN on behalf of customers;

- iii refusing to provide a RRN to customers who contact Reliance with a competitor on the call; in such cases, Reliance regularly prevents these competitors from joining in on customer calls, notwithstanding that customers have agreed to have competitors on these calls; and
  - iv refusing to recognize agency agreements between customers and competitors that give competitors the authority on behalf of the customer to disconnect and return Reliance rental water heaters.
18. Furthermore, Reliance uses its RRN Return Policy to deter, impede, and prevent customers from terminating their Reliance rental agreements and switching to a competitor by, for example, keeping customers and competitors on hold for lengthy periods of time, imposing lengthy call-service periods, intentionally dropping calls, and intimidating customers with unwarranted fees and charges.
- (ii) Reliance Imposes Exclusionary Return Depot Policies and Procedures**
19. Through its exclusionary water heater return policies and procedures aimed at return depot operations, Reliance has created additional barriers for customers and competitors attempting to return their Reliance water heaters.
20. Reliance imposes arbitrary restrictions on the return process at its return depots and frequently changes these restrictions. These restrictions enable Reliance to reject at will attempts by customers and competitors to return water heaters, including by arbitrarily limiting return depot hours of operation and the number of water heaters that may be returned to such depots on a given day. Reliance also regularly fails to notify competitors and customers of changes to depot locations and hours of operation.

21. Where Reliance prevents, impedes or deters competitors from returning Reliance's water heaters through its restrictive return depot operations or its RRN Return Policy, competitors are forced to store these water heaters.

**(iii) Reliance Levies Exclusionary Exit Fees and Charges**

22. Further, Reliance levies multiple and unwarranted exit fees and charges to impede, prevent and deter customers from switching to competitors and to penalize customers and competitors. These exit fees and charges include damage; account closure; drain, disconnection and pick-up; as well as extra billing charges. Competitors need to assume these exit fees and charges on behalf of customers to facilitate customer switching.

**(a) Damage Fees**

23. Reliance regularly charges unwarranted damage fees by levying such fees:
- i in excess of the value of the damage or the costs of repair to the water heater; and
  - ii for the purported purpose of refurbishing or redeploying a returned water heater even though Reliance does not intend to or cannot refurbish the returned water heater or deploy it to another customer.
24. Further, where Reliance determines in its sole discretion that there has been significant damage, it requires customers to pay an unwarranted buy-out price to purchase the ostensibly damaged water heater, which Reliance nevertheless retains. Reliance also does not publish its buy-out prices; accordingly, customers may be unaware of the buy-out price.

**(b) Account Closure and Drain, Disconnection and Pick Up Charges**

25. Similarly, Reliance regularly imposes on customers unwarranted account closure charges as well as drain, disconnection and pick-up charges to



impede, deter, and prevent customers from switching to competitors. Competitors need to assume these exit fees and charges on behalf of customers to facilitate customer switching.

**(c) Extra Billing of Customers**

26. Additionally, Reliance regularly continues to charge customers the Reliance rental rate after customers have switched to a competitor and Reliance has prevented the customer or the competitor from returning the Reliance water heater. Consequently, customers are extra billed rental rates by Reliance, in some cases for up to several months. These additional costs place a significant financial burden on customers that competitors need to assume.
27. Reliance employs internal and external collection processes to harass customers into paying these multiple and unwarranted exit fees and charges. To avoid this harassment and the potential effects on customers' credit ratings, customers pay these unwarranted charges, and competitors also need to assume these costs.

**III. SECTION 79 OF THE ACT: RELIANCE HAS ABUSED AND CONTINUES TO ABUSE ITS DOMINANT POSITION**

28. By imposing its various exclusionary water heater policies and procedures, Reliance has abused and continues to abuse its dominant position in the Relevant Market.

**A. RELIANCE SUBSTANTIALLY OR COMPLETELY CONTROLS THE RELEVANT MARKET**

**(i) Relevant Market**

29. Two distinct product markets can be identified: (i) the supply of natural gas water heaters and related services; and (ii) the supply of electric water heaters and related services. These related services include installation, disconnection, maintenance and repair of water heaters. For the purpose of this application, these product markets have been aggregated. The relevant

product market is thus the supply of natural gas and electric water heaters and related services to residential consumers.

30. For the majority of residential consumers, no reasonable substitutes exist for natural gas or electric water heaters.
31. The geographic market for the supply of natural gas and electric water heaters and related services to residential consumers is local in nature. The relevant geographic markets are (i) the local markets of Ontario where Union Gas distributes natural gas and (ii) certain other local rural markets in Ontario. For the purpose of this application, these geographic markets have been aggregated.
32. The Relevant Market is thus the supply of natural gas and electric water heaters and related services to residential consumers in the local markets of Ontario where Union Gas distributes natural gas and in certain other local rural markets of Ontario.

**(ii) Reliance's Market Power**

33. Reliance substantially or completely controls the Relevant Market.
34. Reliance's market power is indirectly indicated by its market share and by barriers to entry. Reliance controls at least 76% of the Relevant Market, based on annual revenues. Reliance's exclusionary policies and procedures create significant artificial barriers to entry in the Relevant Market, which would otherwise be characterized by ease of entry.
35. Reliance's market power is additionally and directly indicated by, for example, its ability to increase and maintain high prices. Since 2005, Reliance has maintained substantially high gross profit margins from renting water heaters to residential consumers in the Relevant Market. Indeed, through the rental payments it receives on its installed base of water heaters in the Relevant Market, Reliance has recovered and continues to recover a

significant multiple of the capital cost of a water heater installed for residential use in the Relevant Market.

36. Since at least 2009, Reliance has preserved and enhanced this market power through its various exclusionary water heater return policies and procedures.

**B. RELIANCE'S WATER HEATER RETURN POLICIES AND PROCEDURES ARE A PRACTICE OF ANTI-COMPETITIVE ACTS**

37. Through the various water heater return policies and procedures described above, Reliance has engaged and is engaging in a practice of anti-competitive acts. Reliance has imposed and continues to impose its water heater return policies and procedures with the purpose of having an intended negative effect on competitors that is exclusionary.
38. Reliance imposed these policies and procedures with the intended purpose of eliminating and preventing the entry or expansion of competitors and of making competitors less effective in competing against Reliance in the Relevant Market.
39. Furthermore, Reliance imposed and continues to impose these water heater return policies and procedures knowing of their negative exclusionary effects. Reliance knew that, pursuant to a 2002 Consent Order, the Tribunal prohibited Direct Energy (then Enbridge Services Inc.) from implementing similar exclusionary water heater return policies and procedures in the local markets of Ontario where Enbridge distributes natural gas (the "**Direct Energy Consent Order**"). In particular, the Direct Energy Consent Order prohibited Direct Energy from preventing competitors from disconnecting and returning water heaters and from imposing on customers a commercially unreasonable and discriminatory buy-out schedule. Indeed, Reliance provided information to the Bureau explaining the positive effects of the prohibitions of the Direct Energy Consent Order on competition.

40. Notwithstanding the above, Reliance subsequently implemented certain of the water heater return policies and procedures prohibited by the Direct Energy Consent Order. Reliance sought to impose similar water heater return policies and procedures to those prohibited under the Direct Energy Consent Order on the basis that the Direct Energy Consent Order did not apply to Reliance, despite knowing that the Commissioner had concerns about the anti-competitive effects of such water heater return policies and procedures.
41. Moreover, as it relates specifically to Reliance's RRN Return Policy, Reliance implemented this policy after it had expressed concerns to the Bureau about the anti-competitive effects of a similar policy adopted by Direct Energy. Direct Energy implemented a "Return Authorization Number" ("**RAN**") policy on 30 April 2010, while the Direct Energy Consent Order was still in effect (the "**Direct Energy RAN Policy**"). The Direct Energy RAN Policy prohibited customers from returning a water heater unless the customer had first obtained a RAN from Direct Energy. Direct Energy also prohibited third parties from obtaining a RAN on behalf of customers. Following several complaints the Bureau received, the Bureau expressed its concerns to Direct Energy. Direct Energy suspended this RAN policy in June 2010. Shortly after Reliance expressed its concerns to the Bureau about the anti-competitive effects of the Direct Energy RAN Policy, Reliance implemented its similar RRN Return Policy in May 2010. Reliance continued to impose its RRN Return Policy after Direct Energy suspended its RAN Policy.
42. The exclusionary water heater return policies and procedures imposed by Reliance are intended to, and do, exclude and prevent competitors from entering or expanding in the Relevant Market. Reliance's water heater return policies have the exclusionary effect of imposing significant costs on competitors and preventing customers from switching to those competitors.

43. Reliance's RRN Return Policy and its frequent and arbitrary changes to return depot operations, along with its other exclusionary water heater return policies and procedures, have caused competitors to incur significant additional and unwarranted costs. These include transportation and labour costs, as well as the costs of storing the significant backlog of Reliance water heaters that Reliance has refused to accept or has prevented competitors from returning. These significant costs imposed by Reliance limit competitors' ability to compete effectively against Reliance.
44. Reliance's exclusionary water heater return policies and procedures also result in significant transactional costs for customers that deter, impede or prevent customers from switching to competitors. To facilitate customer switching, competitors need to assume the unwarranted exit fees and charges imposed by Reliance on customers during the water heater return process. Additionally, Reliance uses its RRN Return Policy to intimidate customers to continue their Reliance rental agreements despite their intentions and preferences to switch to competitors.
45. In some cases, competitors have declined to replace Reliance water heaters with their own water heaters given the significant costs of the unwarranted exit fees and charges they need to assume to facilitate customer switching. In these cases, Reliance customers must continue their Reliance rental agreements despite their preference and intentions to terminate these agreements and to switch to competitors.
46. Consequently, Reliance's exclusionary water heater return policies and procedures have caused at least two competitors to exit the Relevant Market. They have also impeded and prevented several competitors from entering or expanding in the Relevant Market; however, these same competitors had been able to enter other local markets where and while the prohibitions of the Direct Energy Consent Order were in effect.

47. In summary, Reliance has imposed and continues to impose its water heater return policies and procedures with the intended negative effect of excluding competitors. Moreover, given the aforementioned exclusionary effects, it was and is reasonably foreseeable that Reliance's water heater return policies and procedures would have a negative exclusionary effect on competitors.

**C. RELIANCE'S EXCLUSIONARY WATER HEATER RETURN POLICIES AND PROCEDURES SUBSTANTIALLY LESSEN AND PREVENT COMPETITION**

48. The exclusionary water heater return policies and procedures imposed by Reliance have substantially lessened and prevented and will continue to substantially lessen and prevent competition in the Relevant Market. But for Reliance's exclusionary water heater return policies and procedures, competitors would likely enter or expand in the Relevant Market and consumers would likely benefit from substantially greater competition.

49. Reliance's exclusionary water heater return policies and procedures establish significant artificial barriers to entry and expansion in the Relevant Market. These exclusionary policies and procedures have caused at least two competitors to exit and prevented and impeded the entry or expansion of several competitors in the Relevant Market.

50. In the absence of Reliance's practice of anti-competitive acts, barriers to entry would be low and substantially greater competition would likely emerge in the Relevant Market from rental providers as well as retailers of residential water heaters.

51. Further, in the absence of Reliance's practice of anti-competitive acts, customer switching in the Relevant Market would likely be substantially greater, and consumers would likely benefit from lower prices and greater product quality and choice.

#### **IV. CONCLUSION**

52. Reliance has abused and continues to abuse its dominant position by imposing exclusionary water heater return policies and procedures.
53. Reliance implemented its exclusionary water heater return policies and procedures as an integrated strategy with the purpose and effect of excluding and preventing the entry or expansion of competitors. Reliance achieves these negative exclusionary effects by imposing significant costs on competitors and preventing customers from switching to those competitors. Reliance thus relies on its exclusionary water heater return policies and procedures, not superior business performance, to retain customers.
54. Reliance's practice of anti-competitive acts has lessened and prevented and continues to lessen and prevent competition substantially in the Relevant Market.

#### **V. RELIEF SOUGHT**

55. The Commissioner seeks an Order from the Tribunal pursuant to subsections 79(1), 79(2), and 79(3.1) of the Act:
- (i) prohibiting Reliance from directly or indirectly implementing any exclusionary water heater return policies or procedures;
  - (ii) directing Reliance to accept valid agency agreements between customers and competitors for return of Reliance water heaters;
  - (iii) prohibiting Reliance from charging customers unwarranted exit fees and charges upon termination of a rental water heater agreement;
  - (iv) directing Reliance to provide customers a fixed and commercially reasonable buy-out price schedule upon entering into a rental water heater agreement with Reliance;

- (v) directing Reliance to provide copies of its buy-out price schedule to customers and to make it readily available on its website;
  - (vi) directing Reliance to pay the amount of \$10,000,000 as an administrative monetary penalty;
  - (vii) directing Reliance to pay the costs of this proceeding;
  - (viii) granting all other orders or remedies that may be required to give effect to the foregoing prohibitions, to restore competition in the Relevant Market, or to reflect the intent of the Tribunal and its disposition of this matter; and
  - (ix) granting such further and other relief as this Tribunal may consider appropriate.
56. In determining the amount of an administrative monetary penalty, the Tribunal should take into account the following aggravating factors:
- i Over at least the past three years, and as a result of its exclusionary water heater return policies and procedures, Reliance has caused at least two competitors to exit the Relevant Market and impeded and prevented several others from entering or expanding in the Relevant Market. Further, competitors have incurred significant costs and lost substantial revenue as a result of Reliance's exclusionary water heater return policies and procedures;
  - ii Reliance has financially benefited from its continued abuse of its dominant position. Since 2009, Reliance has generated substantial gross revenue while engaging in the practice of anti-competitive acts described above;



- iii Since 2009, Reliance has also generated substantially high gross profits while engaging in the practice of anti-competitive acts described above.
- iv For at least the past three years, Reliance has implemented its various exclusionary water heater return policies and procedures knowing the negative exclusionary effect they would have on competitors and competition in the Relevant Market. Moreover, Reliance implemented its various exclusionary water heater return policies and procedures knowing that similar water heater return policies and procedures had been prohibited under the Direct Energy Consent Order;
- v The practice of anti-competitive acts has not been self-corrected and is unlikely to be self-corrected; and
- vi Any other relevant factor.

## VII. PROCEDURAL MATTERS

- 57. The Applicant requests that this application be heard in English.
- 58. The Applicant requests that this application be heard in the City of Ottawa.
- 59. For the purpose of this Application, service of all documents on the Applicant may be effected on:

**Department of Justice**  
**Competition Bureau Legal Services**  
 50 Victoria Street, 22<sup>nd</sup> Floor  
 Gatineau, Quebec  
 K1A 0C9

**David R. Wingfield (LSUC #28710D)**  
**Executive Director and Senior General Counsel**  
 Tel: (819) 994-7714  
 Fax: (819) 953-9267

**Josephine A.L Palumbo (LSUC #34021D)**  
**Senior Counsel**  
Tel: (819) 953-3902  
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**Parul Shah (LSUC #55667M)**  
**Counsel**  
Tel: (819) 953-3889  
Fax: (819) 953-9267

**Counsel for the Applicant**

**AND COPIES**

**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 (LSUC #25529R)**  
Tel: (416) 367-6256/Fax: (416) 361-7060

**AND TO: The Registrar**  
**Competition Tribunal**  
Thomas D'Arcy McGee Building  
90 Sparks Street, Suite 600  
Ottawa, Ontario  
K1P 5B4

**DATED AT** Gatineau, Quebec, this 20th day of December 2012.



John Pecman  
Interim Commissioner of Competition

**Schedule "A"**  
**CONCISE STATEMENT OF ECONOMIC THEORY**

1. Since at least 2009, Reliance has implemented various exclusionary water heater return policies and procedures as an integrated strategy to exclude competitors in the Relevant Market. These exclusionary policies and procedures relate to Reliance's water heater removal process, its return depot operations, and its exit fees and charges.
2. Reliance's exclusionary water heater return policies and procedures impose significant costs on competitors and prevent customers from switching to those competitors.
3. Reliance's exclusionary policies and procedures have substantially lessened and prevented, and will continue to substantially lessen and prevent, competition in the Relevant Market.

**Market Power in the Relevant Market**

4. The relevant product markets are: (i) the supply of natural gas water heaters and related services to residential consumers, and (ii) the supply of electric water heaters and related services to residential consumers. Related services include installation, disconnection, maintenance and repair of water heaters.
5. The relevant geographic markets for the supply of natural gas and electric water heaters and related services to residential consumers are local in nature. The relevant geographic markets are (i) the local markets of Ontario where Union Gas distributes natural gas and (ii) certain other local rural markets of Ontario. Reliance's water heater business is concentrated in these relevant geographic markets.
6. The relevant product and geographic markets can each be aggregated. Thus, the Relevant Market is the supply of natural gas and electric water

heaters and related services to residential consumers in the local markets of Ontario where Union Gas distributes natural gas and in certain other local rural markets of Ontario.

7. Reliance substantially or completely controls the Relevant Market. Reliance's market power is indicated by its high market share, barriers to entry and its ability to increase and maintain high prices.

**Practice of Anti-competitive Acts**

8. The water heater return policies and procedures imposed by Reliance create significant artificial barriers for Reliance customers to return their water heaters and switch suppliers. These barriers raise competitors' costs significantly and impede Reliance's competitors from successfully winning customers based on the quality and price of their products and services.
9. Reliance uses its RRN Return Policy to deter, impede, and prevent customers from terminating their Reliance water heater rental agreements, from returning Reliance water heaters and from switching to competitors.
10. In addition, Reliance regularly imposes arbitrary restrictions on the return process at its return depots and frequently changes these restrictions. Reliance uses these restrictions to enable it to reject at will attempts by customers and competitors to return water heaters. These restrictions impose additional costs on competitors and make it more difficult for them to compete effectively against Reliance.
11. Further, Reliance regularly levies multiple and unwarranted exit fees and charges on customers to deter, impede and prevent customers from switching to competitors and to penalize customers and competitors. To successfully win a new customer from Reliance, competitors need to assume these exit fees and charges on behalf of customers, further increasing their costs and diminishing their ability to compete effectively against Reliance. In some cases, where a competitor is unable to absorb

these significant additional costs, Reliance rental customers are prevented from switching to a competing water heater provider.

**Substantial Lessening and Prevention of Competition**

12. The exclusionary water heater return policies and procedures imposed by Reliance have substantially lessened and prevented and will continue to substantially lessen and prevent competition in the Relevant Market. But for Reliance's exclusionary water heater return policies and procedures, competitors would likely enter or expand in the Relevant Market and consumers would likely benefit from substantially greater competition.
13. Reliance's exclusionary water heater return policies and procedures establish significant artificial barriers to entry or expansion in the Relevant Market. In the absence of Reliance's practice of anti-competitive acts, barriers to entry would be low and substantially greater competition would likely emerge in the Relevant Market from rental providers as well as retailers of residential water heaters.
14. Further, in the absence of Reliance's practice of anti-competitive acts, customer switching in the Relevant Market would likely be substantially greater, and consumers would likely benefit from lower prices and greater product quality and choice.

**COMPETITION TRIBUNAL**

**B E T W E E N:**

THE COMMISSIONER OF COMPETITION

**(Applicant)**

**-AND-**

RELIANCE COMFORT LIMITED PARTNERSHIP

**(Respondent)**

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**NOTICE OF APPLICATION**

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**DEPARTMENT OF JUSTICE CANADA  
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**Counsel to the Commissioner of Competition**

# TAB 4

**THE COMPETITION TRIBUNAL**

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

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

**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

---

**RESPONSE OF RELIANCE COMFORT LIMITED PARTNERSHIP  
TO THE NOTICE OF APPLICATION**

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**PART I: OVERVIEW**

1. The Application filed by the Commissioner of Competition (“**Commissioner**”) against Reliance Comfort Limited Partnership (“**Reliance**”) is premised upon a fundamentally flawed market definition and assessment of Reliance’s market position.
2. The relevant market for the purposes of the Application is the market for the supply of residential water heater products or services in the province of Ontario (“**Relevant Market**”), not the undefined and artificially disaggregated markets proposed by the Commissioner.



3. Reliance does not substantially or completely control the Relevant Market. With a market share estimated at less than 25% in 2012, Reliance's share of annual sales in the Relevant Market is well below the market share threshold of dominance. Consumers can and do elect to own, rent or finance water heaters from a diverse range of suppliers across Ontario: ranging from plumbers, heating, ventilation and air conditioning contractors, rental supply companies (such as Reliance), retailers (including Sears, Canadian Tire, Home Depot, RONA and Lowes), local utility companies and resource and energy suppliers (such as Imperial Oil). Further, consumers regularly switch suppliers.

4. Reliance's return policies and procedures do not constitute a practice of anti-competitive acts and have not and are not likely to substantially lessen or prevent competition. In fact the return processes and procedures that the Commissioner takes issue with were in part introduced by Reliance to protect and educate consumers against the dishonest behavior of some rival firms to Reliance who seek to compete not on price, service and quality, but rather through the use of false and misleading door-to-door sales practices, a consumer protection issue that is well-documented, is the subject of legislation currently before Ontario's legislature (namely, *Bill 55, Stronger Protection for Ontario Consumers Act, 2013*).

5. All of Reliance's Union Gas legacy customers can terminate their rental agreement with Reliance at any time and are not subject to any minimum term contract.

6. In the circumstances, the Commissioner is unable to discharge the applicable statutory burden under either subsection 79(1) or subsection 79(2) of the *Competition Act*.

7. Reliance has at all times cooperated with the Competition Bureau, including by responding to voluntary information requests. The imposition of an administrative monetary penalty in these circumstances is both unwarranted and an over-extension of the objectives of the *Competition Act*.

## **PART II: ADMISSIONS AND DENIALS**

8. Except as expressly admitted below, Reliance denies all allegations contained in the Application and puts the Commissioner to the strict proof thereof.

9. Reliance admits paragraphs 5 and 11 of the Application.

10. Reliance generally admits paragraph 6 of the Application, other than to state that it is indirectly wholly owned by investment funds managed by Alinda Capital Partners I Ltd.

11. Reliance generally admits paragraph 10 of the Application, but states further that residential consumers are increasingly adopting solar, ground and alternative energy sources to heat water and, in addition to natural gas and electric water heaters, may choose to purchase or rent a combined space and water heater or water heaters fueled by propane, oil, solar power, ground source or some other alternative fuel source.

## **PART III: MATERIAL FACTS ON WHICH RELIANCE RELIES**

### **A. Industry background**

12. In Ontario, the business of renting water heaters was created in the 1950s by the natural gas distributors Consumers Gas and Union Gas as a way of encouraging the retail consumption of natural gas. Rentals of both electric and gas water heaters were later made available through other companies, including many utilities large and small such as Ontario Hydro, North Bay Hydro and Collingwood Utility Services. While consumers could always purchase their water heaters, water heater rental businesses were tied to the suppliers' distribution and utility networks.

13. As part of the deregulation of the Ontario energy industry in the late 1990s, Consumers Gas and Union Gas unbundled their water heater portfolios from their gas distribution businesses, which prior to this time had been tied to these regulated monopolies for natural gas supply. Consumers Gas (by then renamed Enbridge Gas) sold its water heater portfolio to what is now Direct Energy Marketing Limited ("**Direct Energy**"), while Union Gas sold its water heater portfolio to Union Energy Inc. (now Reliance). As the predictable result of this history, a

large number of Reliance and Direct Energy's customers are located in areas where the regulated monopoly markets for natural gas distribution had existed prior to deregulation.

14. The unbundling process initiated greater competition in the market for the supply of residential water heaters: rental suppliers could operate inside and outside the regulated boundaries of the gas distributors. These new suppliers range in size from small independent contractors to wholly owned subsidiaries of large multinational energy providers such as National Energy Inc., doing business as National Home Services ("**National**"). National is a wholly owned subsidiary of Just Energy, Inc., one of the largest retail energy and home comfort suppliers in North America serving over 1.8 million customers and listed on both the New York and Toronto stock exchanges.

15. Today homeowners can own, rent or finance a water heater from a number of sources, including: retailers such as Sears, Canadian Tire, RONA, Lowes and The Home Depot; heating, ventilation and air conditioning contractors; plumbers; rental suppliers (such as Reliance, Direct Energy and National), local utility companies and resource and energy suppliers (such as Imperial Oil).

16. Apart from warranty replacements, water heaters sales result from:

- (a) a consumer electing to replace their water heater (whether for reasons of age, tank size, fuel type, or energy efficiency); and
- (b) the installation of water heaters into newly constructed homes.

17. Many new entrants seek to acquire new sales by driving demand through door-to-door sales activity. Unfortunately, this door-to-door sales activity has also corresponded with a significant and well documented increase in marketplace abuses. Since 2009 the use of misleading door-to-door sales practices by certain suppliers of residential water heaters has continued to rise. The prevalence of the problem has been well documented by the media, the Better Business Bureau, and Ontario's Ministry of Consumer Services ("**Ministry**"). In fact, the Ministry has reported that water heater rentals were the third most frequent source of consumer complaints in 2010 and the second most frequent source of complaints in both 2011 and 2012.

18. Examples of the false and misleading sales practices that have become prevalent in the water heater industry (particularly through the door-to-door sales channel) include sales representatives:

- (a) falsely identifying themselves as working for a customer's existing supplier in order to create the impression that replacement of their water heater would not entail a change of suppliers or termination of their existing rental agreement;
- (b) falsely identifying themselves as a representative of a utility or government agency responsible for inspection of household appliances;
- (c) falsely claiming to be upgrading water heaters for efficiency purposes on behalf of a utility or government agency;
- (d) falsely claiming to be authorized to replace the water heaters throughout a neighbourhood or development;
- (e) falsely claiming that the customer's existing supplier assigned their contract to the salesperson's company;
- (f) falsely claiming that the customer's existing water heater is substandard, beyond its useful life, not installed pursuant to applicable building codes and/or generally unsafe;
- (g) falsely overstating the energy or costs savings that might be realised by switching suppliers;
- (h) misleading or failing to explain fully to the customer their existing supplier's return policies;
- (i) misrepresenting or failing to disclose the term of the contract to which the customer is committing; and
- (j) misrepresenting the actual costs of the regular monthly payments and other charges.

19. That consumers are being misled by door to door sales tactics is borne out by the fact that the majority of Reliance Customers who switch as a result of a door-to-door sales approach are locked into contracts with higher monthly rates. It was also the subject of an independent study funded in part by Industry Canada.

20. Another type of marketplace abuse involves the circumvention of the provisions of Ontario's *Consumer Protection Act, 2002* ("CPA"). The CPA generally provides consumers with a 10 day cooling off period during which they can rescind their contract with a new supplier without penalty. However, certain suppliers seek to negate the statutory protection under the CPA by immediately replacing a switching customer's water heater and then attempting to protect against the original supplier getting notice of the removal by delaying the return of the removed water heater until after the 10 day cooling off period has expired. These competitors are aware that should the consumer contact their existing supplier they will be made aware of their statutory rights and they therefore take all steps to prevent the consumer from contacting their current provider.

21. *Bill 55, Stronger Protection for Ontario Consumers Act, 2013* is currently before Ontario's legislature and has provisions directly intended to address some of the misleading sales tactics that are directly relevant to the Commissioner's allegations against Reliance and have been designed to help ensure consumers approached by door-to-door salespersons of water heaters are properly informed and benefit from a meaningful statutory cooling off period. Reliance was actively involved in the Ministry's consultation process that preceded the introduction of Bill 55.

## **B. The Relevant Market**

22. Residential consumers in Ontario either rent or own their water heaters for the purpose of providing their residence with hot water. Ontario is unique in Canada and in North America generally with very limited exceptions, in that a majority of homeowners have historically rented rather than owned their water heaters.

23. However, like most of Canada and North America, residential consumers in Ontario have a number of options with respect to heating water, including:

- (a) owning or renting a storage water heater;
- (b) owning or renting a tankless water heater (also known as “instantaneous” or “on-demand” water heaters); or
- (c) owning or renting a combination boiler that combines central heating with the domestic water heater.

24. The average useful life of a natural gas or electric residential water heater is approximately 13 to 17 years. During the term of its useful life, a water heater will require very limited maintenance. Whether a water heater is rented or purchased it is typically accompanied by a lengthy warranty or service guarantee from the rental provider or seller as the case may be.

25. While natural gas and electric water heaters are the most common type of water heaters used by urban residential consumers, consumers, particularly those in rural areas, also acquire water heaters that use alternative fuel sources including propane, oil, solar and ground source heating. There is no basis or facts alleged by the Commissioner to support the contention that the product market for the supply of residential water heaters should be disaggregated based on fuel source. Reliance states that water heaters utilizing various fuel sources are substitutes that should be included in the relevant product market.

26. Reliance denies the product markets proposed by the Commissioner and states instead that the relevant product market is the market for the supply of residential water heater products and services.

27. The Commissioner purports to define the relevant geographic market as “(i) the local markets of Ontario where Union Gas distributed natural gas and (ii) certain other local rural markets in Ontario”.

28. Reliance denies that it is appropriate to define the relevant geographic market by reference to the distribution area of a third party to which Reliance has no relationship and in respect of which the boundaries of the markets served have changed since Reliance acquired the

water heater rental business from Union Gas in 1999. Furthermore, the Commissioner has stated no facts to support this market definition and has failed to state any economic theory to support the contention that these areas of Ontario, which were previously regulated natural gas supply monopolies, are relevant or appropriate markets for the purposes of analyzing current competitive interaction.

29. Further, Reliance notes that no facts have been pleaded to support the boundaries of the Commissioner's proposed geographic market or explain the areas purported to be captured by the reference to "certain other local rural markets in Ontario". These alleged markets are undefined and unknown.

30. Reliance denies the market definition proposed by the Commissioner and states that the relevant market is the market for the supply of residential water heater products and services in the province of Ontario ("**Relevant Market**"). Reliance competes throughout the province of Ontario with a myriad of large and small competitors. The competitiveness of the market is in part evidenced by the fact that Reliance has experienced an ongoing erosion of its customer base due to the large number of new competitors that have entered the market. In fact this erosion or attrition rate has increased since Reliance adopted the return policies and procedures in respect of which the Commission bases his allegation of abuse of dominance.

### **C. The correct approach to measuring market share**

31. Contrary to the approach adopted by the Commissioner, the size of Reliance's existing customer base relative to other suppliers (whether measured by units or derived revenue) is not an appropriate basis for measuring or establishing market power.

32. The appropriate and typical measure of market share is share of sales. The number of households with a Reliance water heater installed in their home says nothing about Reliance's current share of the market for the supply of residential water heaters. This is especially so in circumstances where the bulk of Reliance's customers were inherited from a regulated monopoly or acquired from other third parties.

33. By analogy, the number of General Motors vehicles currently under existing leases provides no insight into General Motors' current competitiveness or the state of competition in

the automotive market. Rather an analysis of competitiveness in the market would study the number of vehicles sold or leased by General Motors as a percentage of the total number of vehicles sold in the market in a given year. To the extent that market share reflects the competitiveness of a market it is a question of current sales activity or success among rivals that would typically and appropriately be considered.

34. In 2012, Reliance’s share of the Relevant Market’s annual sales was estimated at less than 25% - well below the threshold for dominance. The Commissioner states no facts or basis other than the percentage of Reliance’s installed based to support the contention that Reliance is in a dominant position in the market place. In fact, since at least 2008, both Reliance and Direct Energy have experienced annual increases in the number of customers leaving its residential rental program in favour of competitors. The table below sets out as a percentage of total customers, the percentage of customers who left Reliance’s and Direct Energy’s residential rental programs year on year since 2007:

	2007	2008	2009	2010	2011	Sept. 2012
Reliance	2.4%	2.4%	3.1%	3.9%	4.0%	4.5%
Direct Energy	2.1%	3.2%	8.0%	6.4%	6.0%	6.1%

35. For the period 2007 to 2011, 16.0% of Reliance’s customers and 25.5% of Direct Energy’s customers switched suppliers. For the period January 1, 2012 to September 30, 2012, 4.5 % of Reliance’s customers and 6.1% of Direct Energy’s customers switched suppliers. This represents a dramatic shift in market share particularly in light of the fact that water heaters have a 13 to 17 year lifespan, meaning that only a small proportion of Reliance’s customers would typically be acquiring a new water heater at any given time.

36. Reliance states that it is not dominant in the Relevant Market, nor is it dominant in any market as alleged by the Commissioner in the Application. To the contrary, the competitiveness of the market is indicated by the successful entry of new competitors and the erosion of the customer bases of incumbent rental providers such as Reliance and Direct Energy. Further the



introduction in May 2010 of the return policies and procedures cited by the Commissioner has not deterred the success of Reliance's rivals. There are absolutely no facts nor evidence to suggest that there has been a negative impact on competition whatsoever. In fact, Reliance's policies and procedures have increased competitiveness and supported consumer choices by enabling consumers to avoid unlawful sales practices and permit competition between competitors.

**D. Low barriers to entry**

37. As acknowledged by the Commissioner at paragraph 50 of the Application, the Relevant Market is characterised by no or very low barriers to entry:

- (a) as demonstrated by the range in the size of suppliers supplying the market, the supply of residential water heaters is commercially viable with or without scale.
- (b) new entrants can begin supplying residential water heaters with minimal upfront capital investment;
- (c) new entrants can finance growth through readily available financing options, including in the case of National, MorEnergy, LivClean and Ontario Consumers Home Services, through securitization;
- (d) supply of water heaters is not, and never has been, regulated.

**E. Reliance's residential water heater business**

38. Reliance's principal lines of business: are (i) its water heater business through which it rents water heaters to both residential and commercial customers; (ii) its heating, ventilation and air conditioning business; and (iii) its security and monitoring business. Reliance also engages in the business of financing consumer purchases of heating, venting and air conditioning and ancillary home comfort equipment, as well as consumer purchases of boilers, water heaters, water treatment equipment and fireplaces.

39. Operating under the "Reliance Home Comfort" brand, Reliance rents natural gas and electric water heaters to approximately 1.2 million residential customers in approximately 400 communities across Ontario. Reliance owns the water heaters it rents. It manages the sale,

rental, maintenance and service of its products both directly and through the use of independent contractors.

40. While Reliance's customer base was originally concentrated in the regulated monopoly territories of Union Gas, it has expanded its rental water heater business beyond these areas into new communities in Ontario.

41. Reliance rents the following types of water heaters:

- (a) natural gas fueled storage water heaters – conventionally vented, direct vented and power vented models;
- (b) electric storage water heaters;
- (c) gas fuelled tankless residential water heaters; and
- (d) propane water heaters in rural areas of Ontario.

42. In Ontario, Reliance acquires new customers by reason of:

- (a) a customer deciding to switch from his or her current rental supplier to Reliance;
- (b) a customer deciding to rent rather than own their water heater (for example, when their currently installed water heater reaches the end of its useful life);
- (c) a customer purchasing a new home from a builder in which a Reliance rental water heater has been installed;
- (d) acquisition of a third party's rental water heater assets.

**F. Reliance's rental terms and conditions**

43. All of Reliance's Union Gas legacy customers can terminate their rental agreement at any time by simply returning Reliance's water heater and paying any applicable account closure charge. As at January 2013, only an insignificant number amounting to approximately 7% of Reliance's total customer base may be required to buy out their water heater.

44. The applicable fees and account closure charges to be paid upon termination of a Reliance rental arrangement are based on the age of the water heater being returned and whether or not the terminating customer has requested Reliance carry out some or all of the services required to be performed in order to facilitate the return of the water heater.

***Account closure fees***

45. All Union Gas legacy customers can terminate their rental agreement with Reliance subject only to the payment of the applicable account closure fee.

46. For customers with a water heater that is over 10 years old, no account closure fee is payable. For customers with a water heater that is between one to ten years old, an account closure fee of \$40 is payable. For customers with a water heater that is less than one year old, an account closure fee of \$200 is payable.

***Disconnect and removal fees***

47. Suppliers that rent residential water heaters each have policies and procedures (whether arising from their contractual arrangements with customers or otherwise) that govern the way in which their water heaters may be drained, disconnected, removed and returned to them following a customer's decision to terminate their rental agreement.

48. Reliance allows customers leaving its rental program to drain, disconnect, remove and return their Reliance water heater. Therefore Reliance customers are not obligated to pay any fees for these services to Reliance upon termination of their water heater rental agreement. This is in distinct contrast to most other providers of rental water heaters, such as National that specifically prohibit customers from disconnecting, removing and returning rental water heaters. These competitors require their customers to pay fees to them to carry out those services. For example, National charges some of its customers \$337.50 for removal and return of conventional or electric tanks and \$472.50 for removal and return of a power vented tank.

49. By comparison, if a switching customer chooses to have Reliance drain, disconnect, remove and pick up its water heater, Reliance charges that customer \$125.00 (regardless of the

type of water heater). The \$125 charge offsets, but does not cover, Reliance's actual costs of sending a fully licensed contractor to the customer's home to:

- (a) drain the water from the tank;
- (b) disconnect the water heater from the home's water supply;
- (c) where applicable, disconnect the water heater from the home's gas and/or electric supply;
- (d) remove the water heater from the customer's home; and
- (e) return the water heater to a Reliance return location.

***Damages charges***

50. Consistent with general leasing practices, customers are liable to incur a damage charge if Reliance's water heater is returned with damage beyond normal wear and tear. Until recently it was Reliance's policy and practice to charge the lower of the fair retail value of the cost of the necessary repair or the buy-out cost of the water heater. Effective January 2013, Reliance's policy and practice is to charge the lower of Reliance's average calculated cost of the necessary repair or the buy-out cost of the water heater.

51. Only an insignificant number of customers who returned their water heater during the period 2009 to end of year 2012 were charged a damages charge by Reliance.

**G. Reliance's termination and return policy**

52. Effective May 17, 2010 Reliance implemented the following termination and return policy ("**RRN Policy**"):

- (a) Customers must call Reliance directly in order to initiate the process of terminating their rental agreement;
- (b) If after speaking with a Reliance representative, the customer still wants to terminate their rental agreement, the customer will be provided with a unique

tracking number – called a “Removal Reference Number” (“RRN”) and details of their nearest return location;

- (c) The RRN is to be recorded on a Reliance form (available to competitors or customers at Reliance drop-off locations) which records certain identifying information regarding the water heater, the customer and the person returning the water heater (if different from the customer). The water heater and form is to be returned to the nearest return location (as communicated to the customer in the manner set out above);
- (d) Reliance will recognize as customer agent any third party to whom the customer has chosen to provide their RRN;
- (e) For the purpose of arranging for the removal or return of Reliance’s water heater, Reliance will only deal with the customer or any third party agent to whom the customer has provided the RRN.
- (f) Reliance will refuse to accept a removed water heater from any person who is unable to either:
  - (i) identify themselves as Reliance’s customer; or
  - (ii) quote the applicable RRN and thereby provide Reliance with assurance that they have been authorised by the customer to effect the return.

53. The RRN Policy initiates the termination process, allows for the tracking of returns, processing of billing and accounting changes and provides customers with a simple means through which to appoint a third party agent to undertake the replacement of their water heater and the return of the water heater to Reliance. This policy is similar to the typical and ordinary return procedures adopted by many commercial enterprises.

54. Contrary to the allegations made by the Commissioner, Reliance does not through its RRN Policy refuse to recognize agency agreements that give competitors the authority on behalf of the customer to disconnect and return Reliance rental water heaters. As pleaded above,

Reliance will recognize as customer agent any person to whom a customer has provided their RRN.

55. What Reliance does through its RRN Policy is refuse to recognize agency agreements that give competitors the authority to terminate a customer's agreement with Reliance. This element of Reliance's RRN Policy has been the subject of judicial consideration in the Ontario Superior Courts:

- (a) In *Weller v. Reliance Home Comfort Limited Partnership*, 2011 ONSC 3148, Justice Strathy found (such finding undisturbed on appeal):

*The amendment being introduced by Reliance is, from the consumer's point of view, entirely innocuous. It imposes no additional burden on the consumer, other than the burden of picking up the telephone and informing Reliance that he or she wishes to terminate the contract and have the water heater removed – and perhaps the additional burden of being subjected to questions about the reasons for the termination and possibly a sales pitch as to why the customer should continue to do business with Reliance. If, as Reliance asserts and this proceeding suggests, the amendment is impeding National's efforts to convert Reliance's customers, it may not be a bad thing, from a consumer protection perspective, to provide some counter-balance to the entreaties of the "door knockers".* (emphasis added)

- (b) In *MacGregor v. Reliance Comfort Limited Partnership*, 2010 ONSC 6925, Justice Enchin, in considering the nature of the contractual amendment that introduced the RRN Policy found:

*I find that the requirements advised by Reliance to MacGregor on May 5, 2010 were reasonable and, given the structure of the relationship between the parties, as evidence by the contract, do not amount to an amendment or variation. I can find no term that has been modified. Rather, the method of termination and return of the tank has been clarified in a contractual arrangement that did not contain all of the specifics.* (emphasis added)

56. Reliance's primary reasons for implementing and maintaining the RRN Policy were and are:

- (a) to provide Reliance with an opportunity to speak with its customer prior to removal of its water heater to ensure given the prevailing marketplace abuses that its customer:
  - (i) understood they were switching rental suppliers and terminating their agreement with Reliance;
  - (ii) was basing his or her decision to switch on accurate information about Reliance's products and services; and
  - (iii) was aware of their rights under the CPA including their right to a 10 day cooling off period;
- (b) to provide Reliance with an opportunity to attempt to compete to retain the customer;
- (c) to protect its customer's privacy as well as Reliance's potential liability by providing a means of ensuring Reliance was only dealing with a customer's authorised representative;
- (d) to provide a means of tracking water heaters assets during the removal and return process; and
- (e) to allow processing of accounts and adjustment of the outgoing customer's rental charges in a more timely manner.

**H. Returns of Reliance's water heaters by third parties (including other suppliers)**

57. As set out above, customers can provide any third party of their choosing with details of the RRN and return depot location provided to them by Reliance. Additionally, if a third party is able to quote a valid RRN, Reliance's policy and practice is to provide that contractor or competitor with the return location closest to the address at which the related Reliance water heater had been installed. Reliance's experience, however, is that third parties that routinely seek

to return Reliance's water heaters to it are aware of both the locations and hours of operation of Reliance's return locations.

58. On occasion, certain competitors have made attempts to return dozens, and in some instances, hundreds, of stockpiled water heaters to Reliance in bulk. When faced with competitors seeking to return an unreasonable volume of water heaters in bulk without notice, Reliance has on occasion refused to accept any water heaters beyond the volume that a return location can safely and reasonably accommodate. However, where Reliance is provided with advance notice of bulk returns, it has accommodated these returns to the extent possible.

**PART IV: STATEMENT OF THE GROUNDS ON WHICH THE APPLICATION IS OPPOSED**

59. The Commissioner bears the burden of establishing that:

- (a) Reliance substantially or completely controls the Relevant Market;
- (b) Reliance's return policies and procedures constitute a practice of anti-competitive acts; and
- (c) Reliance's return policies and procedures have had, are having or are likely to have the effect of preventing or lessening competition substantially in the Relevant Market.

60. For the reasons set out below, the Commissioner cannot satisfy any one of the elements required by section 79. Therefore the application must necessarily fail.

**Reliance does not substantially or completely control the relevant markets**

61. Reliance does not substantially or completely control the market for the supply of residential water heater products or services, regardless of how such market is ultimately defined. Barriers to entry are low and consumers benefit from numerous competitive supply options.

62. Reliance's percentage of annual sales in the Relevant Market was estimated to be less than 25% in 2012. During the period 2009 through 2012 inclusive, Reliance has experienced



year on year increases in customers leaving its rental program for the purpose of either switching suppliers or purchasing its water heater.

**Reliance has not and is not engaged in a practice of anti-competitive acts**

63. The conduct impugned by the Commissioner does not constitute a practice of anti-competitive acts for the purpose of subparagraph 79(1)(b) of the Act.

64. Contrary to the Commissioner's allegations, Reliance's return policies and procedures:

- (a) do not have the nature or character of anti-competitive acts;
- (b) are not objectively predatory, exclusionary or disciplinary; and
- (c) are reasonable commercial practices.

65. Reliance's RRN Policy was designed and implemented to provide Reliance with an opportunity to speak with its customer prior to removal of its water heater, to provide a means of tracking water heaters during the removal and return process, and to allow processing of accounts and adjustment of the outgoing customer's rental charges in a more timely manner.

66. Reliance's RRN Policy:

- (a) is procompetitive in that it permits consumers to benefit from competition between competitors;
- (b) encourages competition on the merits, rather than through the use of false and misleading sales tactics and to ensure consumers are fully informed during the decision making process;
- (c) ensures that consumers are apprised of their rights under Ontario's *Consumer Protection Act*, 2002 and are provided with the opportunity to exercise their statutorily protected cooling off period without any negative consequence, as intended by the Ontario legislature;
- (d) protects Reliance against any liability for inadvertently breaching its obligations to customers by relying on invalid agency appointments;

- (e) ensures Reliance's customers understand their ongoing contractual obligations in order to ensure they are benefiting from the competitive process;
- (f) preserves customers' privacy; and
- (g) provides an efficient means for switching customers to appoint a third party to arrange for the removal and return of Reliance's water heater.

67. Reliance's policies and procedures with respect to the times, locations and numbers of returns it will accept at any one time are a legitimate and reasonable commercial response to the need for Reliance to balance its ability to accept, store and process returned water heaters with other legitimate operational, logistical and occupational health and safety concerns. Any such restrictions on the number of water heaters returnable by competitors at one time are reasonable and do not present any barrier or obstacle to competition.

68. The majority of Reliance's fees and charges are avoidable. The only unavoidable fee on termination is the account closure fee which for virtually all of Reliance's customers who decide to switch providers is \$40 or less. Where other charges do apply, those charges are low by industry standards and are commercially fair and reasonable.

**There has not, is not and is not likely to be a substantial lessening or prevention of competition**

69. In any event, in circumstances where:

- (a) Reliance enjoys less than 25% of sales of residential water heaters;
- (b) all of Reliance's Union Gas legacy customers are free to terminate their water heater rental agreement at any time;
- (c) Reliance has continued to experience an increase in the number of residential customers leaving its rental program, notwithstanding the introduction of the RRN Policy;

(d) Reliance's account closure charges and disconnect and return fees will generally have no impact on a customer's decision to switch suppliers and in any event have remained unchanged since 2005; and

(e) new entrants have been rapidly gaining market share,

there is absolutely no basis for the Commissioner's allegation that "but for" certain of Reliance's return policies and procedures, there would likely be greater entry or expansion of the market and consumers would likely benefit from substantially greater competition.

**An administrative monetary penalty is not warranted**

70. Reliance has at all times cooperated with and been responsive to requests from the Competition Bureau.

71. Counsel to the Commissioner was carbon copied multiple times on letters of correspondence received by Reliance from certain of its competitors that specifically related to the RRN Policy. At no time did the Competition Bureau or the Commissioner make enquiries of Reliance with respect to this correspondence.

72. In August 2010, after the implementation of Reliance's RRN Policy, counsel for Reliance was advised by a representative of the Competition Bureau to the effect that the Competition Bureau saw increasing competition for the supply of residential water heater services and while it continued to watch the market, had no concerns. It was not until June 2012, when the Commissioner obtained *ex parte* an order against Reliance under section 11 of the Act that Reliance first became aware that the Commissioner had any concerns about Reliance's conduct. Reliance had absolutely no contact from the Commissioner after complying with the section 11 order until late November 2012, at which time it was notified by the Commissioner that the Commissioner had concluded that Reliance was engaged in conduct in breach of section 79 of the Act.

73. The marketplace abuses that the RRN Policy is in part designed to combat are well documented including by various provincial police services, the Ministry and the press. In fact,

as pleaded above, there is currently legislation before the Ontario legislature specifically designed to address such conduct. Further, in July 2012, National (one of Reliance's competitors) was found guilty of breaching section 52 of the Act by the Ontario Superior Court.

74. The Commissioner is under a statutory duty to conduct an inquiry whenever he believes on reasonable grounds that grounds exist for the making of an order under Part VII.1 of the Act (relating to deceptive marketing practices including the making of false or misleading representations) or an offence under Part VI of the Act (including the offence of knowingly or recklessly making a false or misleading representation) has been or is about to be committed. It is inconceivable in the circumstances that the Commissioner was unaware of the marketplace abuses. Despite this and despite being advised by Reliance that the RRN Policy was in part designed to combat the problem of marketplace abuses, the Commissioner made no attempts to investigate the problem prior to commencement of the Application.

75. On December 19, 2012 the Commissioner received a six resident complaint pursuant to section 9 of the Act specifically requesting that he commence an investigation with respect to the marketplace abuses occurring within the Relevant Market. Notwithstanding the direct relevance of that complaint and the now ongoing inquiry pursuant to section 10 of the Act, the Commissioner commenced the Application. In the circumstances, there is no basis upon which the Tribunal should issue an order requiring Reliance to pay any administrative monetary penalty, let alone a penalty in the amount of \$10 million.

76. Further, Reliance says that the Tribunal has no jurisdiction to order an administrative monetary penalty in the amount sought by the Commissioner as the order of such a penalty would be unconstitutional in circumstances where Reliance has not been afforded protection under section 11 of the *Canadian Charter of Rights and Freedoms* and section 2(e) of the *Bill of Rights*.

#### **PART V: STATEMENT OF ECONOMIC THEORY**

77. Reliance's Concise Statement of Economic Theory is set out in Schedule "A" to this Response.

**PART VI: RELIEF SOUGHT**

78. Reliance requests an Order dismissing the Application with costs payable to Reliance.

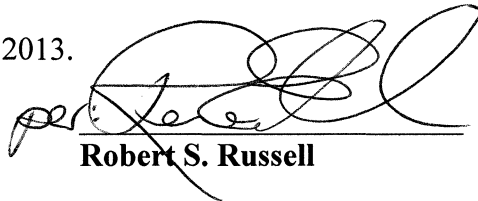
79. Reliance submits that the circumstances surrounding the commencement of this Application warrant the awarding of costs to Reliance on a full indemnity basis.

**PART VII: PROCEDURAL MATTERS**

80. Reliance agrees that the Application be heard in English and confirms its intention to use English in the proceedings.

81. Reliance requests that the Application be heard in the City of Toronto.

DATED AT Toronto, this 12<sup>th</sup> day of August, 2013.



**Robert S. Russell**

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**AND TO:**   **THE REGISTRAR**  
Competition Tribunal  
Thomas D'Arcy McGee Building  
90 Sparks Street, Suite 600  
Ottawa, ON K1P 5B4

## SCHEDULE A

### CONCISE STATEMENT OF ECONOMIC THEORY

#### I. INTRODUCTION AND SUMMARY

1. Most residential water heaters in Ontario are provided to consumers as rentals through either a utility company or through a rental water heater provider. Additionally, a growing number of consumers own their own water heaters. Sales and rentals are made to owners of existing homes and construction companies. The relevant product market is thus the market for the supply of residential water heater products and services.

2. The geographic market consists of all the areas in which Reliance serves customers, competes for customers, or could potentially serve customers. The geographic market also consists of the service areas of all retail and rental operations that serve these same current and potential customers. For the purposes of the Application, the relevant geographic market is the province of Ontario.

3. The relevant market for the purpose of the Application is therefore the market for the supply of residential water heater products and services in the province of Ontario. Reliance is not dominant in this market.

4. Reliance owns the water heaters it rents, and like any rental company (including its competitors), contracts with its customers. Any rental contract involving a durable good must involve some terms, if only to ensure the safe return of the owner's property at the expiration of the rental contract. The requirement for the renter to contact Reliance directly in order to obtain a return number is not onerous and is not a significant switching cost.

5. The vast majority of Reliance's customers have open-ended rental agreements and are able to switch suppliers at any time. For the small percentage who are under a minimum term rental contract (currently approximately 7%), all are able to switch suppliers before the expiration of the contract by buying out their rental unit or with a small fee. These terms are similar to (and often more favourable than) terms offered by other water heater rental companies and are comparable to the approach adopted by suppliers of other long term consumer contracts, for example car leases and home mortgages.

6. Competition takes place for new customers, for customers whose rental agreements are expiring and for customers who have open-ended agreements. Such competition is fierce and vigorous, and consists of both retaining current customers as well as winning new customers. Reliance's share of annual new agreements (including renewals) is less than 25% in the relevant geographic market, a small market share in a competitive market that is too small for Reliance to exercise market power, and too small for Reliance to be identified as a dominant firm.

## II. RELEVANT MARKET

7. Residential water heaters are designed to heat water for purposes of bathing and washing dishes and clothes. Most commonly, the water heater is a tank that is constantly filled with ready-to-use hot water. The water is heated through gas, electricity, and in some cases, oil or alternative fuels. Although additional types (such as tankless water heaters) also exist in a limited number of homes, they all serve the same function. Water heaters are considered an essential good in almost every home, and last approximately 13 to 17 years.

8. The relevant product market is the market for water heater products and services, whether obtained through the rental of a water heater or through the purchase of a water heater. Essentially, the market ensures that customers have hot water when they need it. The precise technology that underlies the water heater system is not necessarily relevant for the vast majority of customers. Customers may switch between heat sources, model type and functionality, and between renting and buying – further supporting the importance of the overall service of hot water on demand rather than the precise contractual and physical means by which the water is supplied. As with any other durable good, competition occurs at the margin of new sales, so a measure of competition can be obtained from the share of new sales and rental agreements obtained by each of the market participants.

9. Consider by analogy the assessment of competition in automobiles – another durable good where new vehicles are both sold and rented (leased). The structure of the market from a competition perspective is defined in terms of market shares of new vehicles by different manufacturers, not with reference to the “installed base” of existing vehicles (i.e. those on the road or parked in driveways). This conclusion would hold even in an extreme case where all vehicles were leased, and even if those leases contained exit payments. Moreover, even if one



manufacturer, say General Motors, had produced a large percentage of the cars currently on the road, no one would suggest that this fact implied market power for General Motors, particularly if its share of new car sales was small.

10. The relevant geographic market is at least as large as the entire area served by Reliance and all its competitors in these areas, as well as in the areas Reliance could potentially serve. First, other than adjusting for water hardness, Reliance charges the same price for water heater rental services to all its customers. Reliance does not price discriminate between different groups of customers who are geographically dispersed. Moreover, the rental rates are published and publicly available on the webpages of many water heater suppliers, demonstrating that Reliance's major competitors do not price discriminate between customers. This fact alone is sufficient to define the geographic market as the province of Ontario.

11. Second, the geographic market includes the location of all suppliers who compete for the business of consumers of water heater products and services. In every municipality of greater than a few thousand inhabitants there are many suppliers who are willing and able to offer a water heater or a water heater contract to builders of new homes and existing homeowners who are interested in changing suppliers. Even assuming that the markets are "local" – the overlapping "local" areas of competitor water heater rental firms and water heater retailers extends the market beyond the narrow boundaries described in the Application. A geographic market that is constructed along the boundaries of legacy gas utility markets creates artificial boundaries of no practical relevance. Union Gas, for example, lists both Direct Energy and Reliance as water heater rental suppliers on its website, along with Sears and the Home Depot as places to purchase a water heater. Enbridge lists six water heater rental providers in its 2011 Builder Guide, including both Direct Energy and Reliance. Many residences (newly constructed and existing homes) purchase their water heaters and all retailers who can potentially sell water heaters to Reliance customers are included within the geographic market. Prominent examples would be the large hardware chains, such as Home Depot, Canadian Tire, Rona and Lowes; and smaller hardware chains. Local plumbing contractors also supply water heaters, either on a rental or purchase basis. There are suppliers in each of these categories who compete with Reliance, and with the other rental companies, and in many cases are willing to offer either contracts to purchase and install a water heater or a contract to install a rental water heater,

depending on the choice of the customer. The location of these suppliers must also be included in the geographic market, supporting the conclusion that the geographic market is the province of Ontario.

### III. BARRIERS TO ENTRY AND SWITCHING COSTS

12. The barriers to entry in the water heater rental or retail business are low; a fact acknowledged by the Commissioner in his Application and supported by the number of small suppliers, together with the number of new entrants.

13. No Exclusionary Contracts. Only a small fraction (approximately 7%) of Reliance's customers have minimum term contracts and the vast majority of customers face no contractual penalties should they wish to switch to an alternative provider or purchase their own water heater (whether by buying out their water heater or acquiring a water heater from a retailer). Moreover, the fees associated with contract termination are minimal and do not have the effect of preventing customers from switching to a more competitive source of supply, if one were offered. Taken together, the minimal cancellation fees and the contract conditions, to the extent they apply at all, have an insignificant competitive impact.

### IV. MARKET POWER

14. The supply of water heater products and services, whether rented or purchased, is an industry with intrinsically low barriers to entry. As discussed above, competition takes place on a continuous basis, to both gain and retain customers.

15. Given that low switching costs that have already been identified, it is not possible that Reliance could possess market power. It is a fundamental principle of industrial organization economics that market power cannot be exercised in an industry with low barriers to entry and low switching costs for customers. Any attempt to exercise market power by restricting supply or raising prices would be met with more competitive offers from rival suppliers, and with a rapid erosion of the market share of a firm attempting to increase its price.

## V. NO PRACTICE OF ANTI-COMPETITIVE ACTS

16. The policies adopted by Reliance to ensure the safe return of their equipment, and to prevent customers from being exploited by deceptive door-to-door sales practices are not anti-competitive acts. To the contrary, their net effect is likely to enhance competition by improving transparency and information available to the consumer and allowing the consumer to make a clear choice between the services offered by competing suppliers. Reliance has a valid and legitimate business purpose for seeking to prevent its customers from making an ill-informed decision to switch their business away from Reliance.

17. The Commissioner identifies the Removal Reference Number (RRN) policy as “exclusionary”. The policy is designed to facilitate a secure transfer of a Reliance water heater back to Reliance should the customer make a choice to switch suppliers. In addition, by insisting on communicating directly with the customer, Reliance is ensuring that the customers’ wishes are clearly communicated and that the customer is making an informed decision.

18. Judged as a switching cost, the requirement to obtain an RRN number is negligible. It amounts to the requirement to make a single phone call.

19. The business practices of Reliance identified by the Commissioner as anti-competitive are informed by a legitimate business purpose and in fact serve to strengthen competition by improving transparency of the actual terms offered by rival suppliers of water heater products and services. They are designed to strengthen the relationship between Reliance and its customers and make future customers more likely to choose Reliance as their supplier.

## VI: NO SUBSTANTIAL LESSENING OR PREVENTION OF COMPETITION

20. Reliance has evolved an efficient business model and has taken advantage of scale and network economies to remain a low cost supplier in the Ontario industry.

21. The market for water heater products and services in Ontario is highly competitive, and increasingly so. During the time period put in issue by the Application, Reliance’s market share has been steadily eroded by competitors.

22. Reliance is not dominant in the Relevant Market. Moreover, given the extremely low barriers to entry and negligible switching costs, even if Reliance were dominant, it would not be possible for Reliance to exercise its market power or likely that any of the practices challenged by the Commissioner could lead to a substantial lessening or prevention of competition.

**COMPETITION TRIBUNAL**

**BETWEEN:**

THE COMMISSIONER OF COMPETITION

Applicant

and

RELIANCE COMFORT LIMITED  
PARTNERSHIP

Respondent

---

**RESPONSE  
TO THE NOTICE OF APPLICATION**

---

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Counsel for the Respondent, Reliance Comfort Limited Partnership

# TAB 5

**THE COMPETITION TRIBUNAL**

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

**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

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**REQUEST FOR LEAVE TO INTERVENE  
ON BEHALF OF NATIONAL ENERGY CORPORATION**

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National Energy Corporation (operating as National Home Services) (“National”) requests leave of the Competition Tribunal pursuant to subsection 9(3) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19, as amended, and section 43 of the *Competition Tribunal Rules*, to intervene in this proceeding. In support of this request, National relies on the Affidavit of Gord Potter, sworn August 20, 2013 (the “Potter Affidavit”).

**A. Name and Address of Proposed Intervenor**

The name and address of National is:

National Energy Corporation  
25 Sheppard Avenue West  
Suite 1700  
Toronto, Ontario  
M2N 6S6

Attention: Gord Potter

Phone: 416.673.4765

Fax: 416.747.5872

The address for service for National is:

Davies Ward Phillips & Vineberg LLP  
155 Wellington Street West  
Toronto, ON M5V 3J7

Attention: Adam Fanaki

Phone: 416.863.5564

Fax: 416-863-0871

**B. National**

1. National operates under the name "National Home Services" and supplies natural gas and electric water heaters for rental and related services to new and existing homeowners in Ontario and Québec.
2. National is a wholly-owned subsidiary of Just Energy Group Inc. ("Just Energy"), a corporation arranged pursuant to the *Canada Business Corporations Act* that is publicly traded on the Toronto Stock Exchange and the New York Stock Exchange with its head office in Mississauga, Ontario. Just Energy has operations in Canada, the United States and the United Kingdom.



3. In 2008, National began supplying water heater rentals to residential customers located in certain parts of the principal operating territory of Direct Energy Marketing Limited ("Direct Energy") in Ontario.
4. When National entered into the principal operating region of Direct Energy in 2008, Direct Energy was a party to a Consent Order issued by the Competition Tribunal that prohibited Direct Energy from, among other things, preventing competitors from disconnecting and returning water heaters or engaging in other forms of anti-competitive conduct.
5. In 2010, National began supplying water heater rentals to residential customers located in the principal operating region of the Respondent, Reliance Comfort Limited Partnership ("Reliance"), consisting of southwestern Ontario, northern Ontario and eastern Ontario (defined as the "Relevant Market" in the Notice of Application filed by the Commissioner of Competition (the "Commissioner's Application")).
6. When National entered into the Relevant Market in 2010, Reliance – unlike Direct Energy – was not operating under a Consent Order from the Competition Tribunal or similar remedy that prohibited Reliance from engaging in anti-competitive conduct.
7. As described in further detail below, immediately after National entered into the Relevant Market, Reliance began to engage in a number of anti-competitive acts to prevent National from effectively competing and expanding in the Relevant Market.
8. As a result of Reliance's anti-competitive conduct, National's ongoing attempts to expand in the Relevant Market have been constrained or impeded.
9. Since 2010, National has secured approximately 69,100 customers or approximately 6% of the approximately 1.2 million available water heater rental customers located in the Relevant Market. Reliance remains the dominant supplier of water heater rentals in the Relevant Market, with more than 1,100,000

water heater rental customers or approximately 92% of all available water heater rental customers.

10. Although National holds a relatively small share of the Relevant Market, National is the largest competitor to Reliance for the supply of water heater rental services in the Relevant Market. National is also the only competitor to Reliance for water heater rentals with operations in several regions throughout Ontario and Quebec.

**C. Test For Intervention**

11. National satisfies all of the criteria for intervenor status in this proceeding. In particular:
  - (a) National has been and continues to be directly affected by Reliance's anti-competitive acts, including the exclusionary water heater return policies and procedures implemented by Reliance;
  - (b) The matters alleged to affect National are within the scope of the Tribunal's consideration and are matters sufficiently relevant to the Tribunal's mandate;
  - (c) The representations to be made by National are relevant to issues specifically raised in the Commissioner's Application; and
  - (d) National will bring to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it.
12. Each element of the test for intervention is outlined more specifically below and in the Potter Affidavit that forms part of this Request for Leave to Intervene.

**D. Matters Required to be Addressed in a Motion for Leave to Intervene**

13. Subsection 43(2) of the *Competition Tribunal Rules* (the "Rules") requires a person making a motion for leave to intervene to set out:

- (a) the title of the proceedings in which the person making the motion wishes to intervene;
  - (b) the name and address of that person;
  - (c) a concise statement of the matters in issue that affect that person and the unique or distinct perspective that the person will bring to the proceeding;
  - (d) a concise statement of the competitive consequences arising from the matters referred to in subparagraph (c) with respect to which that person wishes to make representations;
  - (e) the name of the party, if any, whose position that person intends to support;
  - (f) the official language to be used by that person at the hearing of the motion and, if leave is granted, in the proceedings; and
  - (g) a description of how that person proposes to participate in the proceedings.
14. The title of the proceedings and the name and address of National are set out above. The concise statements referred to in Rules 43(2)(c) and (d) are set out below.

**E. Matters in Issue that Affect National**

- 15. National is directly affected by the matters identified in the Commissioner's Application.
- 16. National is a competitor to Reliance for the rental of natural gas and electric water heaters and the supply of related services to residential customers in the Relevant Market.

17. Reliance has engaged in anti-competitive conduct that constrains or prevents National from securing new customers and expanding in the Relevant Market, including the following:
- (a) The vast majority of homeowners in the Relevant Market are existing customers of Reliance. When an existing customer of Reliance decides to switch to National, the Reliance water heater tank located in the customer's home will be disconnected by National and replaced with a new water heater tank. The old Reliance water heater is returned to one of Reliance's depots by National.
  - (b) Historically, Reliance's competitors and customers routinely disconnected and returned old Reliance rental water heater tanks to Reliance without any form of pre-authorization.
  - (c) However, shortly after National entered into the Relevant Market in 2010, Reliance began to impose arbitrary restrictions to prevent National from being able to return water heater tanks from former Reliance customers in a timely and efficient manner.
  - (d) Specifically, Reliance began to impose on its customers a new requirement that prohibited customers or competitors from returning water heater tanks without first obtaining a "Removal Reference Number" or "RRN" from Reliance.
  - (e) Reliance has used, and continues to use, the RRN policy to attempt to prevent customers from switching to National or other competitors. For example, Reliance requires customers to contact Reliance by telephone to obtain the RRN, Reliance often keeps customers that are seeking an RRN on hold for an excessive period of time, and Reliance threatens to apply additional charges to customers who elect to continue with their request to terminate the rental agreement with Reliance.

- (f) National has attempted to assist its customers through the RRN process by attempting to obtain an RRN on behalf of the customer or by participating with the customer on calls with Reliance. Reliance has refused to permit National to obtain an RRN on behalf of its customers or even to permit National to join in on calls by customers attempting to obtain an RRN, notwithstanding that such customers have requested that National participate in these calls.
- (g) Reliance also began to impose limitations on the process for returning tanks to Reliance's return depots. These restrictions include limiting the number of tanks that National can return at any given time, restricting the return of tanks to only certain days or hours within a day, restricting the locations at which National may return tanks, including refusing to accept tanks at locations where Reliance previously accepted tanks from National, and imposing other restrictions that frustrate National's efforts to return Reliance water heater tanks in an efficient manner.
- (h) Reliance also charges excessive "damages fees" for scratches and dents to tanks that are returned with ordinary wear and tear, as well as for tanks that are clearly outside of their useful life and that will simply be disposed of by Reliance.
- (i) Reliance is constantly changing the policies applicable to its return depots and applying different policies at different return depot locations without providing any advance notice. These restrictions make it even more difficult for National to effectively compete.
- (j) As a result of Reliance's restrictions on the return of water heater tanks, National is currently storing more than 2,100 tanks that it has not been able to return to Reliance. National has been required to expand its warehouse facilities to store water heater tanks that Reliance will not accept on a timely basis.

- (k) In circumstances where National has not been able to return Reliance's tank to a Reliance depot, Reliance will continue to bill the homeowner, even after Reliance has been informed of the homeowner's decision to switch to National. In some cases, this can result in several months of double-billing to customers. National is often required to assume these additional charges to the customer, thereby further increasing National's costs.
18. As a result of Reliance's anti-competitive conduct, National's ability to effectively compete and to expand in the Relevant Market is impeded or constrained.
  19. Reliance's practice of anti-competitive acts has had and is having the effect of preventing and lessening competition substantially. In the absence of Reliance's water heater return policies and other anti-competitive conduct, National would expand in the Relevant Market thereby increasing competition substantially.
  20. As a competitor to Reliance and as a firm attempting to compete and expand in the Relevant Market, National has a direct and significant interest in the outcome of this proceeding and the competitiveness of this industry.
  21. Indeed, National's ability to effectively compete and operate successfully in the Relevant Market is dependent upon the outcome of this proceeding. In the absence of an appropriate remedy with respect to Reliance's anti-competitive conduct, National will continue to be constrained from effectively competing and expanding in the Relevant Market.
  22. Accordingly, National is directly and significantly affected by the outcome of this proceeding.
- F. Matters Alleged to Affect National are Within the Scope of the Tribunal's Consideration**
23. The matters that affect National are within the scope of the Tribunal's consideration and are relevant to the Tribunal's mandate to hear and determine the issues raised by the Commissioner's Application.

24. The matters that affect National relate to:
- (a) The impact or likely impact of Reliance's exclusionary water heater return policies and procedures and other anti-competitive conduct on the ability of competitors to effectively compete and expand in the Relevant Market;
  - (b) The impact of Reliance's anti-competitive acts on customers or potential customers of competitors, including the impact of this conduct on the ability of competitors, such as National, to effectively induce customers to switch suppliers;
  - (c) The impact or likely impact of Reliance's conduct upon competition in the Relevant Market generally and National, in particular;
  - (d) Barriers to entry and ease of entry into the Relevant Market, including the impact of Reliance's conduct in creating artificial barriers to entry and expansion for rivals, such as National, and raising rival's costs; and
  - (e) The impact of the Commissioner's proposed remedies on competitors, such as National, and on competition in the Relevant Market.
25. These matters are within the scope of the Tribunal's consideration of this matter and are relevant to the Tribunal's mandate to hear and determine the issues.

**G. National's Proposed Topics are Relevant to the Issues Raised by the Proceeding**

26. National's proposed topics are relevant to the issues raised by the Commissioner's Application and are relevant to the Tribunal's mandate to hear and determine the issues.
27. National's proposed topics (the "National Proposed Topics") address the matters that affect National in this proceeding and include:
- (a) the development of the Ontario rental water heater industry as it relates to National;

- (b) the issue of Reliance's anti-competitive acts as they relate to National, including the impact of Reliance's exclusionary water heater return policies and procedures and other anti-competitive conduct on the ability of National to effectively compete and expand in the Relevant Market;
  - (c) the impact of Reliance's anti-competitive acts on customers or potential customers, including the impact of this conduct on the ability of National to effectively induce customers to switch suppliers;
  - (d) National's interactions with Reliance with respect to the matters at issue in the proceeding, including dealings with Reliance regarding the water heater removal and return process;
  - (e) National's perspective as a participant in the industry on the appropriate definition of the product and geographic markets;
  - (f) the issue of Reliance's dominant position as it affects National and competition in the Relevant Market generally;
  - (g) the issue of the substantial lessening or prevention of competition as it relates to National and competition in the Relevant Market generally;
  - (h) barriers to entry and ease of entry into the Relevant Market, including the impact of Reliance's conduct in creating artificial barriers to entry and expansion for National and raising National's costs;
  - (i) the statements made and conclusions drawn by Reliance concerning National in the Response of Reliance filed in this proceeding; and
  - (j) the impact of the Commissioner's proposed remedies on National and on competition in the Relevant Market.
28. The National Proposed Topics are relevant to the issues raised by the Commissioner's Application, including, but not limited to, the following issues raised in the Commissioner's Application:



- (a) The definition of the relevant market for the supply of water heater rental services in Ontario [paras. 29 to 32 of Commissioner's Application];
- (b) Whether Reliance is the dominant supplier of water heater rental services in the Relevant Market [paras. 14, 35 and 36 of Commissioner's Application];
- (c) The history and development of Ontario's rental water heater industry [paras. 7 to 14 of Commissioner's Application];
- (d) Whether Reliance's water heater return policies and procedures have the effect of imposing significant costs on competitors and preventing customers from switching to those competitors, thereby excluding competitors in the Relevant Market [paras. 2, 42 and 43 of Commissioner's Application];
- (e) Whether Reliance's conduct has had and is having the effect of preventing and lessening competition substantially in the Relevant Market [paras. 3 and 48 to 51 of Commissioner's Application];
- (f) Whether in the absence of Reliance's water heater return policies and procedures, competitors would likely enter or expand in the Relevant Market [paras. 3, 42 and 43 of Commissioner's Application];
- (g) Whether Reliance's water heater return policies and other conduct creates significant barriers to entry [paras. 17 and 18 of Commissioner's Application]; and
- (h) The nature of the remedies required to address Reliance's conduct and specifically, whether the relief sought by the Commissioner should be granted [para. 55 of Commissioner's Application].

**H. National's Unique or Distinct Perspective**

29. National will bring a unique or distinct perspective to the proceeding for the following reasons:
- (a) National is Reliance's largest competitor for the supply of natural gas and electric water heater rentals and related services in the Relevant Market;
  - (b) Although National has supplied water heater rental services in Ontario since 2008, National is a relatively recent entrant into the Relevant Market having commenced operations in that region in 2010, and is therefore uniquely positioned to provide a perspective on the barriers to entry and other conditions of entry into the Relevant Market;
  - (c) National commenced supplying water heater rental services in the principal operating region of Direct Energy in 2008. At that time, Direct Energy was a party to a Consent Order issued by the Competition Tribunal that subsequently expired on April 30, 2012. National is therefore uniquely positioned to provide a perspective on the conditions of entry and expansion both in the presence of, and in the absence of, the Consent Order;
  - (d) The anti-competitive conduct of Reliance was implemented primarily or entirely as a result of National's entry into the Relevant Market;
  - (e) National began offering water heater rental services prior to the implementation of the anti-competitive conduct of Reliance, but has also attempted to enter into other local regions within the Relevant Market following the anti-competitive conduct of Reliance. National is therefore positioned to provide the Tribunal with a unique perspective on the impact of Reliance's anti-competitive conduct on barriers to entry and the costs associated with customer switching, as well as the conditions of competition generally in these regions;

- (f) Although National has a substantially smaller presence in the Relevant Market than Reliance, there is no other competitor to Reliance for water heater rental services that operates in the Relevant Market with the same scope and scale as National;
  - (g) Unlike smaller competitors to Reliance, National also supplies water heater rental services in several parts of Ontario and Quebec. National is therefore positioned to provide the Tribunal with a broader perspective on the supply of water heater rental services in areas both within and outside of the Relevant Market;
  - (h) National has been supplying water heater rental services in Ontario since 2008 and is therefore able to provide the Tribunal with a valuable perspective on the conduct of the participants and the industry generally over the longer term; and
  - (i) As recognition of National's role in the Relevant Market, National is the subject of a number of specific allegations in the Response of Reliance filed on August 12, 2013, including paragraphs 14, 48, 55 and 73 of Reliance's Response.
30. National also has a perspective that is unique or distinct from that of the Commissioner of Competition. As an experienced participant in the industry, as the target of Reliance's anti-competitive conduct and as a firm that is attempting to expand in the Relevant Market, National will bring a perspective to the issues and evidence that is distinct from the Commissioner's perspective.
31. In addition, although National intends to support the position of the Commissioner generally, based on the allegations in the Commissioner's Application, there are topics on which the position of the Commissioner and National appears to differ. For example, the following:
- (a) **Anti-Competitive Conduct:** The Commissioner's Application does not appear to address the full scope of the anti-competitive conduct of

Reliance. Additional anti-competitive conduct includes (at least) the following: (i) Reliance has engaged in price discrimination or similar forms of discriminatory promotional programs that target only those customers that are the subject of National's marketing efforts or who have recently elected to switch to National; and (ii) Reliance has refused to permit National to act as an agent for customers with respect to the process for obtaining the RRN required by Reliance for the return of a tank.

- (b) **Relief Sought:** National also does not believe that the relief sought by the Commissioner is sufficient to address the anti-competitive conduct of Reliance. For example, with respect to the tank return process, the relief sought should include (at least) the following elements: (i) Reliance should be prohibited from implementing any restrictions or limitations that would prevent National or any other licenced third party from disconnecting and returning a used water heater tank on behalf of a customer to Reliance; (ii) Reliance should be prohibited from preventing a customer of Reliance from electing to have a tank disconnected and removed by any licenced service provider (including National) or to remove their own tank; (iii) Reliance should be required to designate specific "Return Locations" where a customer or a licenced third party (including National) is entitled to return disconnected water heaters between normal business hours; (iv) Reliance should be required to identify a sufficient number of Return Locations to adequately serve customers throughout their respective service areas; (v) Reliance should be prohibited from implementing any capacity restrictions or other restraints on the number of water heaters that can be returned to any of the Return Locations in a given period of time; and (vi) Reliance should be prohibited from continuing to bill customers following the point of time at which Reliance is advised that the customer has switched to an alternate supplier.

32. National's unique position as a firm continuously attempting to expand in the Relevant Market and to enter into certain local regions within the Relevant

Market, as a target of Reliance's anti-competitive conduct, and as the most significant competitor to Reliance for water heater rental services places National in a unique position to assist the Tribunal in its consideration of relevant issues.

**I. Granting Leave to National is Consistent with Prior Decisions of Tribunal**

33. Granting leave to intervene to National is also consistent with prior decisions of the Tribunal. In *American Airlines, Inc. v Canada (Competition Tribunal)*,<sup>1</sup> Iacobucci C.J. stated as follows regarding the intent underlying the provisions of the *Competition Tribunal Act* authorizing intervenors:

It is evident from the purpose clause [of the Competition Act] that the effects of anti-competitive behaviour, such as a merger that has the result of substantially lessening competition, can be widespread and of great interest to many persons. In these matters, Parliament has provided for the Director to serve as the guardian of the competition ethic and the initiator of Tribunal proceedings under Part VII of the Competition Act; but Parliament has also provided a means to ensure that those who may be affected can participate in the proceedings in order to inform the Tribunal of the ways in which matters complained of impact on them. I would ascribe to Parliament the intention to permit those intervenors not only to participate but also to do so effectively. A restrictive interpretation of subsection 9(3) could in some cases run counter to the effective handling of disputes coming before the Tribunal.<sup>2</sup>

34. Although the principal issue considered in *American Airlines, supra*, was the scope of interventions before the Tribunal, Iacobucci C.J. also recognized that even where the position of an intervenor and the Commissioner are generally aligned, the intervenor is entitled to provide its unique perspective through broader rights of participation in the proceeding. As Iacobucci C.J. stated:

It seems to me that permitting intervenors to play a role wider than simply presenting argument is also a fairer way of treating them. Although the Director is supporting the wider

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<sup>1</sup> [1989] 2 FC 88 (FCA) [*American Airlines*].

<sup>2</sup> *Ibid* at para 25.

interpretation before us, it is not difficult to envision future situations where the Director and an intervener might disagree on some matter of fact or evidence of which the Tribunal should be apprised. It is therefore not only logical to give the Tribunal the jurisdiction to decide the issue rather than simply leaving it to the Director to decide in each case, but it is also fair.<sup>3</sup>

35. Consistent with this general principle, the Tribunal has frequently granted leave to intervene to competitors that have been or will be harmed through the anti-competitive conduct of a respondent. For example, in *Canada (Director of Investigation and Research, Competition Act) v A.C. Nielsen Company of Canada Limited*,<sup>4</sup> the Tribunal granted leave to intervene to Information Resources, Inc. ("IRI"). IRI was a potential competitor to A.C. Nielsen that intervened in the proceeding on the basis that the anti-competitive conduct of A.C. Nielsen prevented it from entering into the relevant market.

36. Similarly, in *Canada (Competition Act, Director of Investigation and Research) v Tele-Direct (Publications) Inc.*,<sup>5</sup> the Tribunal granted leave to intervene to White and NDAP/DAC, two potential competitors of Tele-Direct. The Tribunal stated, in part:

We accept that as a publisher of telephone directories, White is directly affected by these proceedings. The same is true for NDAP/DAC as a competitor or potential competitor to Tele-Direct in the provision of advertising services. We also accept that both intervenors have special knowledge and expertise that may assist the Tribunal and that, although they support the Director's position generally, their business interests are different from his public interest mandate.<sup>6</sup>

37. In *Canada (Commissioner of Competition) v Air Canada* (2001),<sup>7</sup> the Tribunal granted leave to intervene to WestJet Airlines, a competitor to Air Canada that

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<sup>3</sup> *Ibid* at para 27.

<sup>4</sup> [1994] CCTD No 2 (Request for Leave to Intervene of IRI: File No CT-94/01).

<sup>5</sup> [1995] CCTD No 4, 61 CPR (3d) 528.

<sup>6</sup> *Ibid* at p 4.

<sup>7</sup> [2001] CCTD No 5, 2001 Comp Trib 4.

was a target of the anti-competitive acts that the Commissioner alleged in the application against Air Canada.

38. More recently, in *Canada (Commissioner of Competition) v Toronto Real Estate Board*,<sup>8</sup> the Tribunal granted leave to intervene to RealtySellers, a new company that intended to expand into the relevant market, but was allegedly prevented from entering as a result of the conduct of the respondent.
39. In *Canada (Commissioner of Competition) v Air Canada (2011)*,<sup>9</sup> the Tribunal granted leave to intervene to WestJet in its capacity as a competitor or potential competitor to Air Canada on a number of the routes that were the subject of the impugned arrangement.

**J. Scope of Participation**

**(i) The Party whose Position National Intends to Support**

40. National's primary intention in seeking leave to intervene is to assist the Tribunal in understanding the impact of Reliance's anti-competitive conduct and in identifying the appropriate remedies to address such conduct. If granted leave to intervene, National will generally support the Commissioner's Application.

**(ii) A Description of the How National Proposes to Participate in the Proceeding**

41. National requests to participate in this proceeding on the following terms:
- (a) to review any discovery transcripts and access any documents of the Parties produced on discovery (subject to any Confidentiality Order issued by the Tribunal), but not participate directly in the discovery process;
  - (b) to produce an affidavit of relevant documents and to make a representative of National available for examination for discovery on the topics for which National has been granted leave to intervene;

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<sup>8</sup> [2011] CCTD No 22, 2011 Comp Trib 22.

<sup>9</sup> [2011] CCTD No 21, 2011 Comp Trib 21.

- (c) to adduce non-repetitive *viva voce* evidence at the hearing of the Commissioner's Application relating to the topics for which National has been granted leave to intervene;
- (d) to conduct non-repetitive examinations and cross-examination of witnesses on the topics for which National has been granted leave to intervene;
- (e) to file expert evidence within the scope of its intervention in accordance with procedures set out in the *Competition Tribunal Rules*;
- (f) to attend and make representations at any pre-hearing motions, case conferences or scheduling conferences; and
- (g) to make written and oral argument, including submissions on any proposed remedy.

**(iii) Hearing Request**

42. If either of the parties oppose National's Request for Leave to Intervene, National respectfully requests an oral hearing of the motion.

**(iv) Costs and Other Procedural Matters**

43. If leave to intervene is granted, National would not seek costs, and requests that it not be made liable for the costs of any party or other intervenor.
44. National undertakes to comply with the *Competition Tribunal Rules* and with any direction of the Tribunal with respect to the conduct of this proceeding.
45. National reserves its right to request further terms with respect to its intervention as it may advise and as the Tribunal may permit as the matter proceeds.



**(v) The Official Language to be used by National at the Hearing of the Motion and, if leave is Granted, in the Proceeding**

46. National intends to use English at the hearing of the Request for Leave to Intervene and, if leave is granted, in the proceeding.

DATED at Toronto, Ontario, this 21st day of August, 2013.



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Adam Fanaki

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**THE 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

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**REQUEST FOR LEAVE TO INTERVENE ON  
BEHALF OF NATIONAL ENERGY  
CORPORATION**

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