

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:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT	
October 10, 2013 CT-2012-02	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 55

THE COMMISSIONER OF COMPETITION

Applicant

- and -

RELiance COMFORT LIMITED PARTNERSHIP

Respondent

SUPPLEMENTARY RESPONSE OF THE RESPONDENT TO THE MOTION OF NATIONAL ENERGY CORPORATION FOR LEAVE TO INTERVENE

A. Background

1. National Energy Corporation's ("National") Request for Leave to Intervene included the Affidavit of Gord Potter sworn August 20, 2013 (the "Potter Affidavit"). By Order dated September 13, 2013, the Competition Tribunal ("Tribunal") provided Reliance Comfort Limited Partnership ("Reliance") with the

opportunity to cross-examine Mr. Potter and file any supplemental materials by October 9, 2013.

B. National should not be permitted to intervene regarding the product and geographic markets (Proposed Topic (e))

2. National does not offer a unique or distinct perspective regarding the appropriate geographic market. The Commissioner of Competition (“Commissioner”) defines the relevant geographic markets as “(i) the local markets of Ontario where Union Gas distributes natural gas and (ii) certain other local rural markets in Ontario”.

Canada (Commissioner of Competition) v Reliance Comfort Limited Partnership, CT-2012-002 (Notice of Application at para 31)
[*Commissioner’s Application*]

3. Mr. Potter expressly admitted on cross-examination that National’s view of the geographic market echoes that of the Commissioner, stating “[f]rom our perspective, the Relevant Market is the Union Gas territory”. Mr. Potter, through his counsel, also added that this “might include other local rural markets as well”.

Transcript of the Examination of Gord Potter on his Affidavit sworn August 20, 2013 (1 October 2013) at Qs 86-133 [*Potter Transcript*]; Appendix A

4. National also refers to Reliance’s “principal operating region” (for example at paragraph 19 of the Potter Affidavit), but Mr. Potter confirmed on cross-examination that this simply equated to the Relevant Market, namely the Union Gas territory.

Potter Transcript at Qs 112-115; Appendix A

5. The Tribunal has held that “[i]ntervenors are intended to supplement the case of a party by bringing to the Tribunal their own and distinct perspective of the subject matter in dispute”. In *Southam Inc v Canada (Competition Act, Director of Investigation and Research)*, the Tribunal denied a request for leave to intervene as the Applicant had “already assumed the task of providing the Tribunal with [the intervener’s] contribution to the matter in issue”.

Southam Inc v Canada (Competition Act, Director of Investigation and Research), [1997] CCTD No 47 at paras 13, 15 [*Southam*]; Reliance's Supplementary Brief of Authorities ("Authorities") Tab 1

6. Additionally, where the Tribunal may obtain the proposed intervener's evidence in the ordinary course of the application, intervener status should be denied. In *The Commissioner of Competition v The Canadian Real Estate Association*, the Tribunal held, as an alternative ground of dismissing the proposed intervener's motion:

In any event, the Tribunal will have the benefit of Mr. Dale's evidence. During oral argument, counsel for Mr. Dale and counsel for the Commissioner indicated that the Commissioner will be calling Mr. Dale as a witness.

The Commissioner of Competition v The Canadian Real Estate Association, 2010 Comp Trib 11 at para 14; Authorities Tab 2

7. Motions for leave to intervene brought before the Federal Court of Appeal ("FCA") are similar to intervener motions before the Tribunal in that they must establish that the proposed intervener "will bring a different perspective to the proceedings". The FCA has denied applications for leave where the intervener is repeating arguments of the parties. For example, in *Li v Canada (Minister of Citizenship and Immigration)*, leave was denied because:

What the Council proposes to do is support the position of the appellant by repeating in its own words the arguments that the appellant has already placed before the Court. That type of contribution, if it can be labelled as such, is incompatible with a proper intervention.

Abbott v Canada (TD), [2000] 3 FC 482 at para 5; Authorities Tab 3
Li v Canada (Minister of Citizenship and Immigration), 2004 FCA 267 at para 9; Authorities Tab 4

8. Similarly, in *Ferroequus Railway Co v Canadian National Railway Co*, the FCA dismissed the application with costs as the proposed intervener did "not demonstrate that it would bring to the appeal anything beyond what has already been made available to the Court by the parties". The FCA held that:

[t]his assistance must not merely be a reiteration of the position taken by a party, but rather must provide a different perspective. What is required is a 'relevant and useful point of view which the initial parties cannot or will not present'.

Ferroequus Railway Co v Canadian National Railway Co, 2003 FCA 408 at paras 13, 15, 20; Authorities Tab 5

9. National does not offer a unique or distinct perspective to this Tribunal's consideration of the geographic market. Rather, National is seeking to file significant additional material, including an expert report, which simply re-iterates the exact same positions as the Commissioner. To the extent National has particular evidence that may assist the Commissioner in advancing that position (which it has not yet provided to the Commissioner as part of its complaint), the Commissioner may call a representatives of National as witnesses.

C. National's participation should be limited to where it clearly has first-hand experience

10. As noted at paragraphs 30 to 33 of Reliance's Response to National's Request for Leave to Intervene, National's participation should be restricted to matters in which it has direct, first-hand experience. As set out above, a proposed intervener should be denied leave to intervene where a party has "already assumed the task of providing the Tribunal with [the intervener's] contribution to the matter in issue".

Southam at paras 13, 15; Authorities Tab 1

11. On cross-examination, Reliance repeatedly made inquiry as to whether National had provided various categories of information to the Commissioner, for the specific reason of determining whether the Commissioner had already assumed the task of providing the Tribunal with National's contribution to the matter. National repeatedly refused to answer these questions and provide any such information, taking the position that "to the extent the [C]ommissioner is basing their position on information provided by National and [their positions'] similarities" was not relevant to the motion to intervene.

Potter Transcript, Q.157-158, 209-210 and 313-316; Appendix A

12. There was no basis for National's blanket refusal to produce any of its communications with the Commissioner. In making such refusal, National has eliminated a full inquiry into whether the Commissioner has assumed the task of providing the Tribunal with National's contribution.

13. To the extent National claims public interest privilege over such correspondence, such privilege is not absolute. The Tribunal is not required to undertake an analysis of whether privilege exists if other means may satisfy the rationale underlying it, such as through the imposition of a confidentiality order. In *Canada (Commissioner of Competition) v Sears Canada Inc*, the Tribunal held:

[I]t is not necessary for me to reach a final conclusion on the existence of public interest privilege in this case because I am satisfied that even if the two exhibits are subject to public interest privilege this is a suitable case for such privilege to be over-ridden on condition that the documents be protected by a confidentiality order.

Canada (Commissioner of Competition) v Sears Canada Inc, [2003] CCTD No 16 at para 39; Authorities Tab 6

14. This is clearly an instance where it would have been appropriate for National to produce the limited information requested by Reliance, subject to a confidentiality order, so as to enable this Tribunal to determine whether or not the Commissioner had already assumed the task of presenting it with National's perspective.

15. Therefore National's position, that the information it supplied to the Commissioner is irrelevant to this motion, is inconsistent with its request for leave to intervene. As such, it should generally be presumed that National's position is identical to that of the Commissioner, except where National clearly has unique first-hand experience with respect to the proposed topic.

D. National should not be permitted to intervene regarding impacts on customers or potential customers (Proposed Topic (c))

16. In proposing the topic of intervening regarding the “impacts on customers or potential customers”, National seeks to “address the confusion or anger or frustration that consumers have felt being bounced back and forth between Reliance and National in attempting to try to execute a switch.” Mr. Potter indicated that National would accomplish this by “[s]peaking for our customers or from what we have heard from our customers and potential customers”.

Potter Transcript at Qs 349-358; Appendix A

17. National is not a consumer and is a wholly inappropriate candidate to speak for consumers. In addition to the reasons set out in paragraphs 38 and 39 of the Response of Reliance to the Motion of National for Leave to Intervene, Mr. Potter admitted that National is the subject of an outstanding alert from the Better Business Bureau, which alert states:

BBB files indicate that this business has a pattern of complaints concerning misleading sales practices. Consumer complaints allege that door to door salespersons are misleading consumers, providing false information and using high pressure sales tactics. This company was notified of our concerns on June 7, 2011. They have failed to correct the underlying reason for the complaints....

Potter Transcript at Qs 362-370; Appendix A

18. National is also the subject of an investigation under s 52 of the *Competition Act* for the criminal offence of making false or misleading representations to the public, and also under s 74 of the *Competition Act* for making false and misleading representations. In furtherance thereof, the Commissioner has obtained search warrants against multiple National locations.

Potter Transcript at Qs 380, 389; Appendix A

19. As such, National's proposal to speak on behalf of consumers in this application is inappropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: October 9, 2013



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APPENDIX A



Court File No. CT-2012-002

THE COMPETITION TRIBUNAL

TC/sr

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Competition pursuant to section 79 of the *Competition Act*;

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Reliance Comfort Limited Partnership

B E T W E E N:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

RELIANCE COMFORT LIMITED PARTNERSHIP

Respondent

This is the Cross-Examination of GORDON POTTER, on
his Affidavit sworn the 20th day of August, 2013, taken at
the offices of VICTORY VERBATIM REPORTING SERVICES, Suite
900, Ernst & Young Tower, 222 Bay Street, Toronto-Dominion
Centre, Toronto, Ontario, on the 1st day of October, 2013.

A P P E A R A N C E S:

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BRENDAN Y.B. WONG	}	--	for the Respondent
JENNIFER HEFLER	}		
ADAM F. FANAKI	}	--	for National Energy
DEREK D. RICCI	}		Corporation

A L S O P R E S E N T:

Jonah Davids

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1 GORDON POTTER, sworn

2 CROSS-EXAMINATION BY MR. WONG:

3 1. Q. Good morning, Mr. Potter.

4 A. Good morning, sir.

5 2. Q. Would you for the record please
6 state your full legal name and spell it as well?

7 A. It is Gordon Edward Potter. G-O-R-
8 D-O-N. Middle name Edward, E-D-W-A-R-D. And last
9 name Potter, P-O-T-T-E-R.

10 3. Q. And could you briefly canvas your
11 background, your education and titles with National
12 or Just Energy?

13 A. Yes. I have an electronics
14 technician degree. I worked for Bell Canada for
15 about 10 or 11 years. Initially in the field in
16 field services, warehousing, distribution,
17 installation and repair of assets. I was promoted
18 into their main Ontario district office and was the
19 assistant to the director for Ontario for the
20 control centre in customer services for telecom
21 installation and repair.

22 In the late nineties, the market
23 deregulated. I was asked to go to Sprint as they
24 were entering the deregulated market to create a
25 competitive market in Canada. I was assigned to

1 work with the CRTC at that time on behalf of Sprint
2 in, I guess, structuring and drafting the market
3 rules for customer transfers and switching. And I
4 was quickly appointed as chair of that committee,
5 which oversaw developing the rules for customer
6 transfers and switching between suppliers.

7 Shortly after that, the vice-chair asked me
8 if I would chair two other committees in Canada
9 which oversaw those activities. So, I have got a
10 lot of experience in that at the competitive market
11 in that regard.

12 I entered energy around 2000/2001. Worked
13 for Direct Energy. And launched the deregulated
14 market in Ontario with them. Was asked by the
15 Ontario Energy Board to sit on their advisory
16 council overseeing rules regarding customer
17 switching and switches between suppliers and other
18 market design roles. And worked with Just Energy
19 since 2003. And as we expanded across Canada and
20 the U.S., I guess we opened up or I opened up 16
21 markets in that position across North America and
22 sat on various advisory boards for customer
23 switching and deregulated market rules. And then I
24 joined National last October, 2012.

25 4. Q. And just for the record, "National"



1 refers to National Energy Corporation; you will
2 agree?

3 A. That is correct, yes.

4 5. Q. And your current title is, just to
5 repeat it for the record?

6 A. Chief operating officer.

7 6. Q. And you will agree that you have
8 been authorized by the company and that your answers
9 bind the company today?

10 A. That is correct.

11 7. Q. And you said you came over to
12 National last year in October of 2012?

13 A. That is correct.

14 8. Q. And prior to that, when you were at
15 Just Energy, were you involved with National's
16 business at all?

17 A. I had a general understanding of
18 National's business or some activities that
19 occurred.

20 MR. FANAKI: Sorry to interrupt. Not to
21 quibble, but despite what perhaps Mr.
22 Potter's perspective is on this, he is here
23 in his capacity as an affiant of an
24 affidavit that has been filed before the
25 Competition Tribunal. So when you are



1 asking whether or not his answers bind the
2 corporation itself, National Energy
3 Corporation, that is something we will have
4 to advise you on depending on the response.

5 9. MR. WONG: Well, I think it is safe
6 to...can we assume that his answers bind
7 the company absent a specific comment from
8 you?

9 MR. FANAKI: Yes, that is fine.

10 10. MR. WONG: Okay. I am just trying to
11 get a sense of whether he was involved
12 prior to formally being with National, as
13 you will agree that Just Energy Group is
14 National's parent company?

15 THE DEPONENT: It is the parent company,
16 yes.

17
18 BY MR. WONG:

19 11. Q. And you have reviewed your affidavit
20 prior to today's examination?

21 A. I have.

22 12. Q. And I understand there may be at
23 least one correction you would like to make. Would
24 you please advise of that and any others that you
25 would like to make to your affidavit?

1 MR. FANAKI: Perhaps if I could just do
2 it. It is in paragraph 52 on page 17 of
3 the affidavit. There is a reference to the
4 date April 30th, 2012. And that is the
5 date when the consent order issued by the
6 Competition Tribunal expired for Direct
7 Energy. That date should, in fact, be
8 February 21, 2012.

9 13. MR. WONG: Are there any other changes
10 you would like to make to your affidavit?

11 THE DEPONENT: I have no other changes.

12
13 BY MR. WONG:

14 14. Q. So, there are a number of topics we
15 will be getting into today. We will be bumping
16 around through it. So, let us start with paragraph
17 39 of your affidavit. And just having a chance to
18 read that there, you will agree that paragraph 39...

19 MR. FANAKI: Just give him a second.

20 15. MR. WONG: Sure.

21 THE DEPONENT: Okay, I have read it.

22
23 BY MR. WONG:

24 16. Q. So that paragraph describes
25 instances where there has been what you describe as

1 double billing to customers. Is that fair?

2 A. That occurs as a result, yes.

3 17. Q. Right. And in the first sentence of
4 paragraph 40, you say:

5 "...National often has to incur the cost of
6 these additional rent charges to
7 homeowners..."

8 I would like to get some clarity on that. When you
9 say "additional rental charges" there, you are
10 talking about monthly rental charges as opposed to
11 account closure fees and any other such charges or
12 fees?

13 A. In this case, in paragraph 40, I am
14 referring to the additional rental charges.

15 18. Q. Right. And are you saying that
16 National always pays these monthly rental charges
17 when a customer switches from Reliance to National?

18 A. What I am saying is that in the case
19 where the customer has been double billed or
20 continues to be billed by Reliance and has a billing
21 issue, in which case they have been continued to be
22 billed by Reliance as well as ourselves, we will as
23 policy hold that customer harmless from those
24 charges.

25 19. Q. And when you say "hold them

1 harmless", you are saying you will pay on behalf of
2 the customer...you as National will pay you behalf
3 of the customer all the rental charges that are
4 incurred following their switch to National?

5 A. For clarity, we have reimbursed the
6 customer. So we don't pay Reliance on their behalf.
7 We will reimburse the customer the charge Reliance
8 has been billing them.

9 20. Q. Right. And that is for all the
10 monthly bills they would receive after that time
11 from Reliance?

12 A. That is correct.

13 21. Q. And would that also be for all the
14 other charges they may receive, for example account
15 closure charges, damage charges, things like that?

16 A. As a policy, that is correct.

17 22. Q. So, whether it is damage fees, the
18 account closure fee, the drain and disconnect fee,
19 National will reimburse a customer for all those
20 charges; is that correct?

21 A. We will review those charges and we
22 will reimburse the customers as a policy. Quite
23 often, we receive customers who are concerned
24 because they continue to get billed by Reliance in
25 the interim and by us. They also...we receive



1 damage claim forms from Reliance on very old tanks
2 which we believe are not fair charges. So, in order
3 to ensure that that customer is satisfied and happy,
4 we manage those issues with the customer so that
5 they are not left in a position of an ongoing
6 dispute with Reliance. So it is my customer, it is
7 a new customer, and we want to make sure that
8 regardless of practices employed by Reliance, we try
9 to make sure that that customer remains happy and
10 satisfied.

11 23. Q. I guess I am not so much concerned
12 about the client satisfaction portion of it so much
13 as getting some clarity on when it is that National
14 reimburses for those charges. Because, just to be
15 fair, as I am understanding you are saying that you
16 don't always pay those charges.

17 A. We generally pay them, yes.

18 24. Q. You generally do pay them?

19 A. Yes.

20 25. Q. In the instances you don't, is there
21 a formal policy that determines when you do and do
22 not pay?

23 A. No, we generally pay. If the
24 customer, in our view, has been harmed unnecessarily
25 by Reliance in the fact that they continue to bill



1 them charges or additional charges, we pay those
2 charges.

3 26. Q. If you wouldn't mind just speaking
4 up a little just for the reporter, if that might
5 help.

6 A. Okay.

7 27. Q. Do you have a sense of how much,
8 then, National is paying or reimbursing customers
9 with respect to double bills per month?

10 A. I couldn't give you a monthly fee,
11 but in aggregate over the last several years I
12 believe that we are...it is very substantial amounts
13 of money. Not only for the costs of the fact that
14 we are reimbursing customers these fees, but also in
15 the fact that we are stuck holding and warehousing
16 large numbers of tanks which cause me to expand my
17 warehouses. To pay for that storage as well as the
18 labour involved in the additional resources we have
19 had to hire internally to manage the billing
20 disputes or issues that the customers are faced with
21 by Reliance. So those fees or those costs I would
22 estimate in the millions.

23 28. Q. I am not so much talking about the
24 storage fees. I am talking about how much...every
25 month, you cut a proverbial cheque to customers to



1 reimburse them for monthly rental charges and other
2 fees. Could you give me an estimate of that amount?
3 You have said it is significant and your affidavit
4 says it is often, but I think some clarity on that
5 would be appropriate.

6 A. I don't have a specific figure, but
7 I would...I recognize that over time it is a very
8 large amount of money but I couldn't give you an
9 exact monthly figure. Sometimes we sell in Reliance
10 territory in different areas. We have customers who
11 we...depending on the number of installs we do in a
12 month or the number of customers we gain in a month,
13 it will translate itself into that months later.

14 29. Q. Can I get an undertaking to provide
15 an estimate of some figure for that amount?

16 MR. FANAKI: I am not sure of the
17 relevance but I will take it under
18 advisement.

U/A

19 30. MR. WONG: Right, well, for the record
20 to say "often" or "significant" is fine,
21 but I think there is a big difference
22 whether it is \$10 or \$10,000,000 so I would
23 ask for that information.

24 MR. FANAKI: Not to debate it on the
25 record with you, Mr. Wong, but the witness



1 has given you a direction that indicates it
2 is a significant sum but we will take it
3 under advisement and let you know.
4

5 BY MR. WONG:

6 31. Q. At paragraph 11 of your affidavit, I
7 would direct you to that. It is a long paragraph.
8 You state that National has significant expertise,
9 and I believe that is a quote, you write:

10 "...National has significant expertise in
11 the process for disconnecting and
12 installing water heater tanks, the
13 procedures for returning older tanks among
14 a variety of other things..."

15 Is that fair?

16 A. Yes. That is what it says in the
17 paragraph.

18 32. Q. So, in terms of return processes,
19 does National use any sort of tracking number or
20 return number process?

21 A. Can you elaborate a bit, Mr. Wong?

22 33. Q. Similar to, really, the return
23 number process that Reliance has, whether it has to
24 be obtained by the customer or not, does National
25 use a tracking number process? So if a National



1 tank is taken out by a competitor, is some tracking
2 number assigned to that or other similar process and
3 used by National?

4 A. We track the tanks by serial number.

5 34. Q. Serial number only?

6 A. I believe so, that is correct. So
7 just to be clear, we remove the tank, we know the
8 serial number of that tank, we know whose tank it is
9 and we return the tank to that supplier. So the
10 serial number, I think, is your constant throughout
11 that. If that is what you are asking is how do I
12 know that tank goes to that supplier, I know it by
13 serial number which is attached to the customer
14 record.

15 35. Q. And you say how do I know that that
16 tank goes to that supplier. I am talking about tank
17 returns to National.

18 A. I apologize.

19 36. Q. Go ahead.

20 A. Finish clarifying.

21 37. Q. No, go ahead.

22 A. Can you restate the question? Maybe
23 I can...

24 38. Q. What I am really trying to get
25 clarity on National's significant expertise on



1 return processes. National, presumably, has some
2 sort of its own depot system. We are talking about
3 depots. Does National have a return depot system?

4 A. We receive tanks. Very seldom, but
5 we receive them from new suppliers, yes.

6 39. Q. And those are tracked by serial
7 number?

8 A. By serial number.

9 40. Q. And those are put back into market,
10 they are put back into new installs or are they kept
11 and destroyed by National?

12 A. Well, it depends on the age of the
13 tank or what tank it is. So, those tanks could be
14 either/or. They could be refurbished, used for
15 future repairs. They could be used for parts, they
16 could be destroyed.

17 41. Q. And in retaking possession of its
18 tank, does National use only its own technicians in
19 removing them?

20 A. No. No, we...you know, the customer
21 can return them. The customer's supplier can return
22 them. In cases where the customer wishes, we will
23 go out and pick the tank up. But primarily we
24 receive the tank bank...you know, the tank will show
25 up at a warehouse. We will receive the tank bank



1 in. We track it by serial number.

2 42. Q. All right.

3 A. Does that answer your question?

4 43. Q. Yes, what I am getting at is...I

5 guess the customer may use their own technician but
6 do you know if customers actually use their own
7 technicians or is it National's experience that it
8 is always quote-unquote National technicians who
9 retrieve their own tanks?

10 A. No, I am aware we have both.

11 44. Q. Right. And is it your knowledge
12 that customers frequently use their own technician
13 to remove their tanks?

14 A. I couldn't give you a breakdown as
15 to which way it goes. I know that we received them
16 both ways.

17 45. Q. Right. And I understand that for
18 the customer to use their own technician, they
19 require National's prior consent. Is that your
20 understanding?

21 A. As a policy, they do not. So, if a
22 customer...as I said, if a supplier returns a tank
23 tomorrow, we receive the tank back, we process the
24 cancellation.

25 46. Q. You said as a policy, but the terms



1 of the agreement require consent; is that...

2 A. Yes, the terms of the agreement
3 outline consent. But in practice or in policy, we
4 receive it from suppliers or the customer will
5 return it or they will ask us to come and remove it.

6 47. Q. Right. So, what you are saying is
7 that though the contract requires National's consent
8 to use a non-National technician, what you are
9 saying is that, in practice, that never actually
10 happens and customers use non-National technicians
11 to return tanks all the time?

12 A. In practice, both things happen and
13 we allow both things.

14 48. Q. I guess my focus is on whether the
15 consent is actually enforced or required.

16 A. No, there is no...we don't...in
17 practice, we don't force the customer to get our
18 consent. We allow the customer return as per their
19 convenience.

20 49. Q. And when we talk about National
21 technicians, are these technicians employed by
22 National or are they local technicians that are on
23 some sort of contract or agreement?

24 A. Do you mean just in general, the
25 technicians we use or the technicians who...



1 50. Q. To remove tanks.

2 A. To remove? Well, we don't have
3 any...we don't specify to use either for any
4 specific purpose. We have a body of technicians we
5 use for installation and repair.

6 51. Q. Right. And are those National
7 employees?

8 A. Most of those are contracted
9 companies.

10 52. Q. And are these the same technicians
11 who would do the installations for new sales?

12 A. The same body of technicians, yes.

13 53. Q. Right. So, if a National customer
14 terminates its account with National, you will agree
15 that National imposes a charge for physically
16 removing the tank?

17 A. Where we remove the tank, yes.

18 54. Q. Yes, where a National technician
19 removes a tank. And I will refer to this as a
20 removal charge.

21 A. Okay.

22 55. Q. As opposed to, say, an account
23 closure charge or a damage charge, et cetera. And I
24 understand that in terms of the amount of that
25 charge, National's contract indicates an electric



1 tank will require 2.5 hours...a conventional tank
2 will require 2.5 hours and a power vented tank will
3 require 3.5 hours which are charged at \$135 per
4 hour. Is that correct?

5 A. Without looking, I believe that
6 sounds accurate. We make sure in the contract it is
7 clear to the customer how much the charges would be
8 as an example so that they have an understanding
9 when they enter the contract what that would look
10 like if they chose to leave it. And I believe we
11 do, in fact, separate the electric from the PVs from
12 the CVs and there is an estimate there so the
13 customer can understand the magnitude of that charge
14 if they so choose to exercise that option.

15 56. Q. And are these reflective of the
16 actual charges imposed in practice?

17 A. I believe the estimates would have
18 been determined by our field services department as
19 to what it is that they incur as far as travel,
20 transportation, return, the administration of it, et
21 cetera from end to end. I believe that is where the
22 estimates would have come from.

23 57. Q. Right. As an estimate. But what I
24 am asking you is, in practice, is that range of
25 cost, which is about \$330 to \$470, is that the

1 amount of costs...is that the charge that National
2 imposes on customers when they terminate their
3 accounts and have a National technician obtain the
4 repossession of the tank?

5 A. It would be my understanding that
6 they are charged from whatever the cost is. So you
7 have got estimates in the contract, the technician
8 will go out, the technician will bill the company,
9 the company will pass those charges through. That
10 is what I believe happens.

11 58. Q. So in practice, the actual charges
12 could be higher or lower...significantly higher or
13 lower than the estimates in the contract itself?

14 A. I couldn't surmise. They will be
15 what they are, if that is helpful.

16 59. Q. Are there, to your knowledge, any
17 other charges relating strictly to the removal of
18 the tank aside from those that we have discussed?
19 For example, if the tank is in the basement, is
20 there an additional charge for that?

21 A. No, there is no charge that I am
22 aware of for that.

23 60. Q. Are there any other charges relating
24 to the physical removal of the tank?

25 A. Just what is outlined in the

1 contract.

2 61. Q. And does National have a buyout
3 price where a customer wishes to terminate the
4 contract prior to the expiry of its term?

5 A. We offer that option to consumers,
6 yes.

7 62. Q. And how much is that buyout charge?

8 A. That is determined based on how old
9 the tank is, the value of the tank as to how many
10 years they have had it and how much is left on it.
11 So it varies depending on the customer.

12 63. Q. Right. And is there a specific
13 formula that is available for that? Or is that
14 something that isn't publicly disclosed?

15 A. No, a consumer can find out their
16 buyout at any time by going on our website and they
17 have access and they will be able to see what their
18 buyout is. And they can call in and we...the system
19 pulls it up and it automatically generates a buyout.
20 But, again, that is an option so they can choose
21 that versus removal.

22 64. Q. And does National charge any kind of
23 account closure fee?

24 A. I do not believe we do.

25 65. Q. "Believe"? Are you sure?

1 A. I guess subject to checking the
2 terms and conditions. As I mentioned, any charge
3 that the customer is charged are outlined in the
4 terms and conditions of the contract. There are no
5 additional charges outside of that contract that are
6 applied.

7 66. Q. Okay. The contract also refers to a
8 damage charge if there is unreasonable wear and
9 tear. You will agree?

10 A. Correct.

11 67. Q. And how is this charge determined?

12 A. Well, it is a charge allowed under
13 the Consumer Protection Act. And basically there's
14 an assessment of the tank done. And if there is any
15 damage that is deemed to be not...not due to the
16 wear and tear of the unit, then they are assessed a
17 charge.

18 68. Q. And how is that charge assessed? Is
19 there an internal policy or chart or guideline?

20 A. I would imagine. It would be my
21 belief that in field services, they look at what the
22 damage is and whether or not, for example, the part
23 that is damaged is a reusable part and what the cost
24 would be and there will be a table put together to
25 determine those damage fees.



1 69. Q. And is there a specific table that
2 is used in all instances as a reference point? Or
3 is it discretionary in each case?

4 A. I couldn't answer that. As I said,
5 we have had so few tank returns. I don't think
6 there is a...there is nothing that I am aware of
7 where we don't get a number...a large number of tank
8 returns to determine. So I would imagine field
9 services reviews those tank returns and since a
10 number of our tanks are fairly new, I don't believe
11 we have charged damages to any great degree.

12 70. Q. I guess as a percentage of returns,
13 how often is a damage charge applied?

14 A. I couldn't provide that number to
15 you.

16 71. Q. Would you have a sense of it, an
17 estimate?

18 A. As I mentioned, we get very few
19 returns and I don't believe we have any significant
20 number of damage charges applied to customers.

21 72. Q. Just lastly in terms of charges, I
22 understand that a customer who terminates their
23 account prior to the fifth anniversary of their
24 contract must pay quote-unquote installation and
25 other charges.



1 A. Correct.

2 73. Q. Is that...okay. It might be easier
3 just to put in the agreement as an exhibit, if that
4 is all right. Put in the current terms...why don't
5 you take a look and see if those are...

6 MR. FANAKI: Could you just advise how
7 you obtained it, just so we can
8 understand...

9 74. MR. WONG: These were off the Internet
10 yesterday. National terms and conditions
11 PDF.

12 MR. FANAKI: Can I suggest we mark this
13 as an exhibit for identification and we
14 will review the terms and conditions?

15 75. MR. WONG: Sure.

16 MR. FANAKI: It is quite lengthy.

17 76. MR. WONG: The quote-unquote
18 installation and other charges I am
19 referring to are in section 9. Maybe I can
20 refer Mr. Potter to that.

21 MR. FANAKI: Okay.

22 MR. RICCI: Mr. Wong, do you have any
23 other copies of the terms and conditions?
24 Thank you.



1 --- EXHIBIT A: National Home Services Terms and
2 Conditions PDF
3

4 BY MR. WONG:

5 77. Q. You have had a chance to take a look
6 at that section?

7 A. Yes.

8 78. Q. Do you have a list of these quote-
9 unquote installation and other charges?

10 A. The installation and other charges
11 are on the contract on the front page.

12 79. Q. So they are on a cover sheet, is
13 that correct?

14 A. It is not a cover sheet. The
15 agreement includes the detailed terms and conditions
16 on the front page, which is the signature page that
17 outlines the cost of the equipment, and the
18 installation charges are all there for the customer.

19 80. Q. Right. And those installation
20 charges will reflect the time \$135 per hour, et
21 cetera, for the labour of installing the tank; is
22 that fair?

23 A. What it references is the
24 installation charge. It is on the front page of the
25 contract.

1 81. Q. Right. And what are the other
2 charges, then?

3 A. The other charges could be other
4 additional charges as far as any other charges found
5 by the technician, whether it is additional piping
6 or other types of accessories or requirements needed
7 to install the unit. They are captured on the front
8 of the contract.

9 82. Q. Right. So that would include, for
10 example, replacing the PVC piping on the top of the
11 tank?

12 A. The installation includes
13 replacement of piping required by TSSA, that's
14 right.

15 83. Q. In your affidavit, you have referred
16 to the Relevant Market, and I don't have the
17 specific paragraph with me. Fairly early on,
18 you...and I say Relevant Market...

19 A. Sorry.

20 84. Q. No worries. Is that a fair comment,
21 you refer throughout to the Relevant Market?

22 A. That is correct.

23 85. Q. And you have stated that the term is
24 as defined in the commissioner's notice of
25 application filed in this proceeding; correct?

1 A. Correct.

2 86. Q. And do you have a copy of the notice
3 of application handy? I don't think we need to get
4 into it but just in case. So, you have referred to
5 the Relevant Market. How did you go about
6 determining the Relevant Market?

7 A. Well, my view of the Relevant Market
8 is historically been developed and defined as being
9 generally the Union Gas service territory.

10 87. Q. And so is your reference to the
11 Relevant Market throughout your affidavit limited to
12 what you describe as the quote-unquote Union Gas
13 territory?

14 A. Yes, generally.

15 88. Q. And it doesn't include any other
16 areas?

17 A. That is correct.

18 89. Q. And the Union Gas territory, how did
19 you determine that specific...the specific metes and
20 bounds, if you will, of that area?

21 A. Because the boundaries of that area
22 are, in essence, the utility serving territory.
23 Which for the last 50 or 60 years has been defined,
24 developed and built to accommodate a large rental
25 market for water heaters.



1 90. Q. And by utility serving territory, I
2 guess what I am getting at is is there a list of
3 municipalities, for example, that you used when
4 assessing the Relevant Market?

5 A. That is the Union Gas territory to
6 which you could get a list of FSAs or municipalities
7 which are defined within that market.

8 91. Q. And where did you obtain that list?

9 A. I got it from Union Gas' website.

10 92. Q. Right. So you use the list on the
11 website and your definition of the Relevant Market
12 geographically is confined to those areas listed on
13 the Union Gas website?

14 A. Yes.

15 93. Q. Right. And did you use, for
16 example, any other descriptors? I believe it's the
17 list of municipalities and counting but do you use
18 any other descriptors, for example postal codes,
19 concession...sorry, census tracts, things like that
20 in defining the geography of the Relevant Market?

21 A. Well, we defined it as Union Gas'
22 territory so I think you can determine postal codes
23 under that or FSAs or counties and municipalities.

24 94. Q. Okay. So I guess I do need to refer
25 to the notice of application. At paragraph 31 of



1 the notice of application, the commissioner defines
2 the Relevant Market as including "certain other
3 local rural markets in Ontario". What is your
4 understanding of these quote-unquote certain other
5 local rural markets in Ontario?

6 A. Well, I can't...I don't understand
7 what they are referring to. What the bureau is
8 referring to. From our perspective, the Relevant
9 Market is that Union Gas territory. Which in and of
10 itself covers some local rural areas which may be
11 served through the local distribution of gas as
12 opposed to on a pipeline. But they are generally
13 areas that have been served, in our view...that
14 Relevant Market is areas that are served by
15 historically and now Union Gas.

16 95. Q. Right. So, what you are saying is
17 that your understanding or view of the relevant
18 geographic market incorporates the first part of the
19 definition in paragraph 31. So the local markets in
20 Ontario where Union Gas distributes natural gas; is
21 that fair?

22 A. That is correct generally.

23 96. Q. But does not incorporate the second
24 part, certain other local rural markets?

25 A. Well, I can't comment on that. I



1 know what my definition of it is of what I believe
2 the Relevant Market is and I...the other local rural
3 markets is not defined.

4 97. Q. I am only asking your...National's
5 perspective.

6 A. Yes. So our perspective is the
7 Union Gas serving territory.

8 MR. FANAKI: Just so it is clear on the
9 record, which he did say might include
10 other local rural markets as well.

11 98. MR. WONG: Well, hold on. Let's be
12 clear here. Paragraph 31 has two parts.
13 It has Union Gas territory and then quote-
14 unquote certain other local rural markets.
15 If I heard correctly, Mr. Potter said that
16 the Union Gas areas may have some local
17 rural markets.

18 THE DEPONENT: Well, correct. There are
19 some smaller towns or areas where they will
20 distribute gas through a...and basically
21 instead of through a direct pipeline supply
22 they have it stored and serving locally.
23 But they are small little pockets which are
24 close to or aggregated or beside or
25 adjacent to other smaller towns where they



1 actually distribute through pipeline.

2
3 BY MR. WONG:

4 99. Q. And those would be listed on the
5 website?

6 A. It would be, yes.

7 100. Q. Right. So, I think there is
8 evidently a distinction being made there between (i)
9 and (ii) in terms of the certain local rural markets
10 here. As I read these certain other local rural
11 markets, those are outside the Union Gas territory.
12 And if you might clarify, Mr. Potter, you are saying
13 you don't know what those are. But to the extent
14 they are rural areas that are in Union Gas
15 territories, those do fit within your definition?

16 A. They do. And if there are adjacent
17 local towns right beside it or close to it where
18 they are served through storage as opposed to
19 direct, yes. So, I can't comment on what the bureau
20 is saying or what their definition of certain other
21 local rural markets are. I know what our view is.

22 101. Q. And your view is really the list on
23 the Union Gas website?

24 A. Generally.

25 102. Q. Generally?



1 A. Yes.

2 103. Q. What would not fit within that
3 general description?

4 A. Well, there will be areas in
5 northern Ontario or in mid Ontario where you have
6 got small pockets of small towns. And there are
7 adjacent small towns to those.

8 104. Q. And where are those areas?

9 A. And those areas would be, I
10 guess...I can't list all the municipalities but
11 usually you will find in the northern Ontario areas,
12 Fort Frances area as well. The extension of the
13 utility goes out beyond that specific FSA and they
14 may have customers that are served on tank through
15 storage.

16 105. Q. So you are saying that these are
17 areas not listed on Union Gas' website that form
18 part of the Relevant Market?

19 A. I would say that our view is that
20 generally is the Union Gas market. Just to keep it
21 simple. I can't list for you every single small
22 town that may be adjacent or close to it. But
23 generally where Union Gas has historically
24 established a rental customer base is where we
25 believe is the Relevant Market. And that Relevant



1 Market is primarily or mostly made up of its
2 distribution area in Ontario.

3 106. Q. Right.

4 A. Maybe that helps to define it.

5 107. Q. To the extent you are saying there
6 may be adjacent markets, I am assuming you did not
7 incorporate those into your calculation in your
8 affidavit of the 6 percent market share that you say
9 is National's share?

10 A. Where is that in the affidavit? Can
11 I just take a quick look at it?

12 108. Q. Paragraph 21.

13 A. So that Relevant Market would be
14 basically Union Gas footprint.

15 109. Q. Right. And you will agree that in
16 paragraph 21, you say that National has secured 6
17 percent of the Relevant Market?

18 A. That is our estimate. That is my
19 estimate.

20 110. Q. And in coming to that estimate, you
21 did not include any areas outside what is listed on
22 the Union Gas website?

23 A. That is generally correct, yes.

24 111. Q. Is that correct or generally
25 correct?



1 A. Yes, we just...we look at the Union
2 Gas footprint. That is basically the Relevant
3 Market for us.

4 112. Q. Okay. And in estimating that 6
5 percent market share...well, sorry, let me focus on
6 the geographic description you have used. Paragraph
7 19, you refer to a quote-unquote principal operating
8 region.

9 A. Yes.

10 113. Q. And you say that it generally
11 consists of southwestern Ontario, northern Ontario
12 and eastern Ontario.

13 A. Correct.

14 114. Q. And you say that it is defined as a
15 Relevant Market in the commissioner's application.
16 Is that to say, then, that what you mean by the
17 quote-unquote principal operating region is
18 identical to the Relevant Market?

19 A. Yes.

20 115. Q. Right. And so this is a principal
21 operating region of Reliance; yes?

22 A. Yes, that's right.

23 116. Q. So, then, are there secondary
24 operating regions of Reliance?

25 MR. FANAKI: Do you understand the



1 question?

2 THE DEPONENT: Maybe if you could
3 explain a little bit.
4

5 BY MR. WONG:

6 117. Q. Well, you have used this term
7 principal or primary, if you will, operating region
8 of Reliance.

9 A. Yes.

10 118. Q. And what I am trying to get some
11 clarity on is what then is the secondary operating
12 region of Reliance?

13 A. Yes, and I can't tell you where it
14 is. I understand where their principal operating
15 region is, which we have discussed a few times. As
16 far as where they go outside of that as a secondary
17 or a tertiary operating area is not a question I can
18 answer.

19 119. Q. Well, let's be clear here. All I am
20 taking is from your word that you are suggesting
21 there are some other areas.

22 A. Well, we are aware that they operate
23 in other areas of Ontario.

24 120. Q. And what are these areas?

25 A. Primarily the Enbridge or the Direct



1 Energy operating territory. But I couldn't tell you
2 specifically where everywhere is that they operate.
3 As you say, the secondary operating area.

4 121. Q. And in the secondary operating areas
5 you have referred to them as being within the Direct
6 regions or Direct territory?

7 A. You could say...yes.

8 122. Q. So they would compete with Direct in
9 those other areas?

10 A. Correct.

11 123. Q. So, as far as Ontario goes, are you
12 saying that it is comprised of Reliance territories,
13 Direct territories and is it just those two or are
14 there other territories as well?

15 A. Those are primarily the two
16 operating markets in Ontario.

17 124. Q. Right.

18 A. Between the two of them, they
19 primarily encompass most all of natural gas rental
20 market areas in Ontario.

21 125. Q. Just for clarity, are you saying all
22 of Ontario can be parsed into either Reliance
23 territory or Direct territory?

24 A. No, I am saying that the Relevant
25 Market or that market where there is most natural



1 gas served consumers in an established rental market
2 are those two areas primarily in Ontario.

3 126. Q. And what would be the third or other
4 area? How would you describe it? If it is not a
5 Reliance territory or a Direct territory, how would
6 you describe it?

7 A. There are other areas across Ontario
8 where people are fed by different fuels or are not
9 set up...or primarily or historically in a position
10 where they have rented water heaters. So it could
11 be an array of different customer situations.

12 127. Q. Right. So are you saying that these
13 other areas are areas that are not serviced by
14 natural gas and therefore people are relying on
15 solar or geothermal or oil or whichever?

16 A. Well, I am saying there are other
17 smaller pockets of Ontario that may have access to
18 natural gas. But primarily outside of those two
19 operating regions, you are correct, people are
20 served by various different fuel sources.

21 128. Q. But as far as natural gas supply
22 goes, it is either a quote-unquote Reliance
23 territory, in your view, or a Direct quote-unquote
24 territory?

25 A. As a Relevant Market for us, yes.



1 129. Q. Right. But then because there are
2 the secondary markets, Reliance therefore does
3 compete in some of the Direct territories and would
4 it be fair to say that Direct also comes into some
5 of the quote-unquote Reliance territories?

6 A. I am not familiar with the latter,
7 but I am aware that Reliance does go into Direct
8 Energy's territory to compete.

9 130. Q. And so the secondary regions are
10 really then outside the Relevant Market?

11 A. Correct.

12 131. Q. And you have said you are aware of
13 some of these regions. Could you advise of them?
14 These areas outside of the Relevant Market where
15 Direct and Reliance are both in the market.

16 A. I am just aware that Reliance goes
17 into Direct Energy's territory.

18 132. Q. Right. And I am asking where.

19 A. Just in the Enbridge Utilities
20 serving territory.

21 133. Q. Are there particular localities that
22 you are aware of?

23 A. Not that I am personally, no.

24 134. Q. So, we had touched briefly on
25 paragraph 21. If I may get back to paragraph 21.



1 A. Okay.

2 135. Q. In that paragraph, you state that
3 National has obtained 69,100...approximately 69,100
4 customers or approximately 6 percent of the
5 approximately 1.2 million available water heaters
6 located in the Relevant Market there.

7 A. Yes.

8 MR. FANAKI: Just to be clear, Mr. Wong,
9 it's 1.2 million available water heater
10 rental customers located in the Relevant
11 Market.

12 136. MR. WONG: Right.

13
14 BY MR. WONG:

15 137. Q. And by that 1.2, you are talking
16 about the installed water heaters; is that correct?

17 A. Yes, that is correct.

18 138. Q. So water heaters physically
19 installed in a household or residence?

20 A. Water rental...water heater rental
21 installations, correct.

22 139. Q. Right. Does that include commercial
23 customers?

24 A. No, that...that includes consumers.

25 140. Q. Right. So, we are talking houses.

1 Are we talking any other sorts of residence...
2 residential dwellings?

3 A. Yes. Residential dwellings, but
4 primarily just for clarity consumer. So it is a
5 consumer market.

6 141. Q. Right. Well, I am trying to get a
7 sense of...we are talking apartment complexes,
8 townhouse complexes?

9 A. Where there are single family
10 dwellings, yes.

11 142. Q. Single family dwellings, is that
12 fair?

13 A. Yes. Where single family dwellings
14 are served by a water heater.

15 143. Q. Right.

16 A. So, for clarity, that wouldn't be a
17 large apartment building with a big boiler or a
18 large industrial unit in a basement. It would be a
19 multi-unit dwelling where each customer is served
20 with a water heater.

21 144. Q. And up to a...what is the largest
22 size, 70?

23 A. Generally...

24 145. Q. Seventy gallon...

25 A. ...the largest is 70.

1 146. Q. Right. Water heater. Right. And
2 in that paragraph, you say that the market share is
3 6 percent. Is that correct?

4 A. That is correct.

5 147. Q. Right. And in calculating that
6 figure, it seems you only refer to the 69,100
7 customers. Is that correct? In terms of
8 installed...tanks that National has installed.

9 A. Correct.

10 148. Q. Right. So, that 6 percent has not
11 incorporated, for example, current sales, monthly
12 sales today or within the past year?

13 A. As of the date of the affidavit,
14 that reflects the number of customers I have in the
15 Relevant Market today.

16 149. Q. Right. I guess what I am saying is
17 it is not looking at current sales. It is not
18 looking at National's share as a percentage of
19 current sales happening today. As opposed to
20 historic accumulation of sales.

21 A. Well, for clarity, that wouldn't
22 be...that is not actually a measure that has any
23 relevance to market share. So, if I could
24 understand what you are saying, I have a market
25 which is based on the number of available potential



1 consumers. It is not...market share is not based on
2 how many sales you are making. It is how many of
3 those customers do you have. So as of...when I
4 drafted the affidavit, we had almost 70,000...69,000
5 customers in that Relevant Market. How many I
6 forecast to sell or lose or any attrition is not a
7 relevant figure as it pertains to market share.

8 150. Q. Right.

9 A. Does that help answer?

10 151. Q. Yes.

11 A. Okay.

12 152. Q. Just for clarity, you are saying
13 that if National sold five tanks and Reliance sold
14 five tanks tomorrow or next month, that would not be
15 reflective of a 50/50 market share?

16 A. No.

17 153. Q. Rather, you would be looking at what
18 they have accumulated since 2008, I guess?

19 A. Well, it would be whatever your
20 customer base is of that available market at that
21 point in time.

22 154. Q. Right. And if I may refer to
23 paragraph 34 of the Notice of Application, you will
24 agree that the commissioner states:

25 "...Reliance controls at least 76 percent

1 of the Relevant Market based on annual
2 revenues..."

3 A. Correct. Yes.

4 155. Q. Your estimate is that Reliance
5 controls 92 percent of the market; is that fair?

6 A. That is what my estimate is, yes.

7 156. Q. And have you provided any of your...
8 the information you used in calculating the Relevant
9 Market to the commissioner?

10 MR. FANAKI: Objection on the basis of
11 relevance.

/R

12 157. MR. WONG: I think the distinction or
13 uniqueness between the positions of
14 National and the commissioner are relevant
15 to this application or motion for leave to
16 intervene.

17 MR. FANAKI: Yes, and you have been
18 examining on the distinctions in those
19 positions now for quite some time. And so
20 we are not objecting to your line of
21 examination. Whether information was
22 provided to the commissioner is not
23 relevant to that issue.

24 158. MR. WONG: Well, to the extent the
25 commissioner is basing their position on

1 information provided by National and its
2 similarities, would you not agree that is
3 relevant to the motion?

4 MR. FANAKI: No, I would not.

5
6 BY MR. WONG:

7 159. Q. Regarding the 69,100 customers that
8 you say are in Reliance's quote-unquote Relevant
9 Market, I understand that National has another
10 roughly 170,000 customers. Is that correct?

11 A. That is correct.

12 160. Q. And that is, I think, included in
13 your annual report; right?

14 A. I believe so, yes.

15 161. Q. Are the balance of these 170,000
16 customers located in Ontario?

17 A. Primarily, most of those customers
18 are located in Ontario, yes.

19 162. Q. Primarily?

20 A. Yes. There is a small number
21 located outside of Ontario, but generally most of
22 those customers are in Ontario.

23 163. Q. And those other customers are in
24 Quebec?

25 A. A very small amount, yes.

1 164. Q. And only Quebec?

2 A. Correct.

3 165. Q. We are not talking about other
4 provinces. And by "small amount", are you talking
5 about a couple hundred, a couple thousand?

6 A. Yes.

7 166. Q. Okay. Just for clarity, your
8 position will be that these roughly 170,000 other
9 customers are in Direct's quote-unquote Relevant
10 Market?

11 A. Correct.

12 167. Q. And of the 69,100 customers, were
13 all of these customers, prior to becoming National
14 customers, were they customers of Reliance?

15 A. The majority of them were, yes.

16 168. Q. By "majority", are we saying 51
17 percent or 90-some percent?

18 A. I would estimate it probably closer
19 to 90 percent.

20 169. Q. And is that the full extent of the
21 customers taken from Reliance by National?

22 A. The customers are in Reliance's
23 principal operating area. As I mentioned, about 90
24 percent or better of those were, in fact, previously
25 Reliance customers. So I am not sure the difference



1 in your last question.

2 170. Q. Well, I am trying to get your
3 information on whether this reflects all of the
4 attrition that National has caused with respect to
5 Reliance over the years.

6 A. So the answer to that would be, you
7 know, notwithstanding the barriers that Reliance has
8 put in place, it should have been more. But, yes,
9 that would probably be about...

10 171. Q. You just had to include that in
11 there.

12 A. Because it is true.

13 172. Q. I am really just trying to get the
14 figures.

15 A. Yes, so that would be in their area
16 and that would be pretty much any attrition that
17 they have seen from us with respect to their water
18 heater base.

19 173. Q. Right. Now, does National track who
20 it takes its customers from?

21 A. We have that information, yes.

22 174. Q. And so you could tell year over year
23 how many customers you took from Reliance?

24 A. Yes, I could.

25 175. Q. Do you have that information on you



1 here?

2 A. I do not.

3 176.

Q. Could you obtain that for us?

4 MR. FANAKI: I don't believe it is
5 relevant, Mr. Wong, to the issues that are
6 in place in the motion between us. I think
7 what you have to appreciate is that there
8 is a fairly narrow scope of issues that are
9 outstanding between National and Reliance
10 at this point in time, given that Reliance
11 has conceded that National is an
12 appropriate intervenor and a lot of the
13 questions that you are asking are more
14 directed at the overall merits of the
15 proceeding as opposed to the motion between
16 us. And I think if National is granted
17 leave to intervene, we can deal with those
18 issues at another time. But I will take
19 the question under advisement but I have to
20 tell you that I have serious doubts about
21 the relevance of the information that you
22 are asking for.

U/A

23 177.

MR. WONG: Well, just by reference to
24 our response, we did provide a specific
25 paragraph, I believe it is 20, where we

1 indicated we didn't believe that many of
2 the statements made in Mr. Potter's
3 affidavit were accurate. And Mr. Potter
4 has described a whole host of different
5 matters in his affidavit, I am sure you
6 will agree. And this is really part of,
7 sort of, testing that information.

8 MR. FANAKI: I don't believe there is
9 any statement in Mr. Potter's affidavit
10 that relates to the identity of specific
11 customers and where they came from and who
12 they were...who they chose to switch from
13 previous to joining National. So I don't
14 see that being within the scope of the
15 affidavit. It is certainly not in the
16 scope of the issues that are between us.
17 But we will take it under advisement and we
18 will inform you of our position.

19 178. MR. WONG: Well, I think specifically in
20 that paragraph we have been talking about,
21 paragraph 21, in terms of obtaining
22 customers in the Relevant Market it
23 pertains to that. So, we will leave it on
24 the record and ??? **file 9 begin**

1 MR. FANAKI: Would this be a good time
2 for a short break?

3 179. MR. WONG: Sure.

4
5 --- A BRIEF RECESS

6
7 GORDON POTTER, resumed

8 CONTINUED CROSS-EXAMINATION BY MR. WONG:

9 180. Q. So, we are on paragraph 21. And you
10 refer there to all available water heater rental
11 customers, right?

12 A. Correct.

13 181. Q. So in terms of the market, do you
14 not agree that these same consumers or households,
15 as you describe them, may elect to purchase their
16 water heater tank as well?

17 A. Yes, consumers have a choice to
18 purchase water heaters in Ontario.

19 182. Q. And following the termination of
20 their contract, they may elect to do so as opposed
21 to renewing with National; is that correct?

22 A. They may, yes, make that choice.

23 183. Q. And similarly, an individual who has
24 purchased may elect to rent instead; right?

25 A. That is true.

1 184. Q. So, is it fair to say, then, that
2 the customers you are looking at are not per se
3 rental customers but rather simply all households
4 that require a water heater?

5 A. The Relevant Market is, in my view,
6 more defined to that rental market. So there is a
7 historical utility area that has been built up,
8 established, piped and set up and those consumers
9 historically are rental consumers. And so that
10 market, in my view, is the Relevant Market. It
11 doesn't include or wouldn't include, you know,
12 various different options a customer could have,
13 whether or not...what fuel they are fed by. There
14 is a market that has been built between the
15 utilities in that area for a residential rental
16 market base within that area. And of those areas, I
17 would define that market as being those customers
18 who historically and currently rent as their product
19 type or their service type.

20 185. Q. Do you know how many renters are
21 purchasing, the rate at which renters are purchasing
22 or vice versa?

23 A. I don't know the rate. I do know
24 that we come across very, very few people that
25 currently own a water heater. Most every door we



1 knock on and most every single consumer except for a
2 very small number are rental, existing rental
3 customers. They are not people that purchase.

4 186. Q. And do you...just to be clear, are
5 you aware of any inquiries that National has made
6 into the rate at which renters become purchasers or
7 vice versa? Do you or National have any information
8 in that regard?

9 A. I don't have any information in that
10 regard. What I do know is that, as I mentioned, we
11 don't run across...it is a negligible number of
12 consumers that we run across that, in fact,
13 currently buy or own their water heater in that
14 Relevant Market.

15 187. Q. By "negligible"?

16 A. Less than a percent. A tiny number
17 of customers.

18 188. Q. And by "come across", do you mean
19 having your door knockers attend at the residences
20 and reporting that they are a purchaser as opposed
21 to a renter?

22 A. Just from feedback from the field
23 and from those salespeople, they very seldom ever
24 come across somebody that is not currently renting
25 their water heater in that market.



1 189. Q. Right. But otherwise you don't have
2 information as to how many are going to become
3 purchasers or...

4 A. I do not. I can say, though, that
5 from our own manufacturers, they sell very limited
6 numbers of tanks to retail stores for purchase.

7 190. Q. Right.

8 A. Compared to the number of tanks...

9 191. Q. By retail store, you mean?

10 A. Rona, Home Depot.

11 192. Q. Right. And those manufacturers, I
12 understand National use GWS?

13 A. GSW.

14 193. Q. Sorry, GSW.

15 A. Right.

16 194. Q. Any other manufacturers?

17 A. Primarily GSW. Rinnai for tankless.

18 Navien.

19 195. Q. Sorry, Navien?

20 A. Navien.

21 196. Q. And these suppliers, are there any
22 other than those three?

23 A. Those are the primary for water
24 heaters.

25 197. Q. Sorry, you said they are the primary

1 ones. Are there any other brands that...or
2 suppliers that National purchases water heater tanks
3 from?

4 A. Those are the primary suppliers we
5 use for water heaters.

6 198. Q. I guess I am getting at that word
7 "primary". Is that it or are there others?

8 A. That is it.

9 199. Q. Okay, that's it. All right. And
10 that includes electric water heaters?

11 A. That is correct.

12 200. Q. And how many water heaters does
13 National purchase each year?

14 MR. FANAKI: Just to interrupt, I don't
15 know if you are able to answer the
16 question. This might be a confidential
17 statement so just to flag it for you. I
18 don't know if you are able to answer it.

19 THE DEPONENT: Well, I couldn't answer
20 exactly how many we...I don't have that
21 number with me.

22
23 BY MR. WONG:

24 201. Q. And can you provide it to us?

25 MR. FANAKI: I will take it under

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advisement.

U/A

202. MR. WONG: And I will ask that you provide that both as a gas and electric divided up, and CV/PV And I will also ask by supplier, just to be clear.

MR. FANAKI: Same answer.

U/A

BY MR. WONG:

203. Q. And I understand your sales, and when I refer to sales I mean your rentals, are primarily via door knockers, door to door sales, and also to new home builds. Is that correct?

A. Those are two sales channels we have, yes.

204. Q. Are there other sales channels?

A. We also telemarket.

205. Q. And aside from that, are there any other sales channels?

A. No.

206.





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BY MR. WONG:

207.



208. Q. Right. And maybe just for the record, Mr. Fanaki and I have an understanding that National will be provided with the opportunity to address any confidentiality issues. Prior to the filing of this transcript or sending it to our own client, Reliance.

MR. FANAKI: That is correct.

THE DEPONENT: Thanks.

BY MR. WONG:

209. Q. And has National provided any information regarding its tank purchase to the Competition Bureau?



1 MR. FANAKI: Objection on the basis of
2 relevance.

3 210. MR. WONG: Same as before?

4 MR. FANAKI: Same as before.

5
6 BY MR. WONG:

7 211. Q. We were talking about the available
8 water heater rental customers. When you say
9 "available", are you simply making no distinction
10 between, sort of, installed tanks and any other, I
11 guess...are you equating that with the installed
12 base...available being the installed base?

13 A. Correct.

14 212. Q. So, as I understand it, the average
15 tank life is 15 years; is that fair?

16 A. Yes, generally, that is correct.

17 213. Q. And the term of National's contract
18 is 15 years; is that correct?

19 A. It is more specifically for the life
20 of the asset.

21 214. Q. Sorry, yes, for the quote-unquote
22 useful life of the tank. Right. So, is the
23 suggestion that irrespective of what your customer
24 is in the life of the contract, they are available
25 quote-unquote?



1 A. Yes, correct.

2 215. Q. So, a National customer who is,
3 let's say, in year four, just to be clear, if they
4 want to terminate they must pay the installation and
5 other charges; correct?

6 A. Correct.

7 216. Q. So that is typically several hundred
8 dollars?

9 A. It can be, yes.

10 217. Q. They would pay any damage fees,
11 correct?

12 A. If there was any excessive damage,
13 yes.

14 218. Q. Right. Would they pay any other...
15 would they have to pay a buyout price for the tank
16 to terminate the contract?

17 A. They would have an option to buy
18 out.

19 219. Q. If they wanted to retain it?

20 A. If they wanted to retain it or they
21 could return it to us or they could pay us to come
22 and remove it.

23 220. Q. Right. So they would have to pay
24 the installation and other charges, which is
25 typically several...is it fair to say several

1 hundred dollars?

2 A. It is on the front of the contract,
3 but yes.

4 221. Q. But when you say the front of the
5 contract, it is filled in, is it not, by hand?

6 A. No, it is actually on the contract.

7 222. Q. It is a static amount?

8 A. Yes.

9 223. Q. So, for CV, it is \$450 and for...
10 sorry, conventional venting it is \$450 and for power
11 vented it is \$600?

12 A. Correct. I believe that is what it
13 says.

14 224. MR. WONG: Maybe I'll...and we are
15 entering that as Exhibit 2.

16 MR. FANAKI: Identification, then?

17 225. MR. WONG: For identification, yes.

18 That is, I believe, a 2012 version of the
19 National agreement.

20 MR. FANAKI: Could you tell us where it
21 came from again, Mr. Wong?

22 226. MR. WONG: A folder in my office. You
23 will...

24 MR. FANAKI: You will give us a copy of
25 that, then?



1 227. MR. WONG: Maybe I will leave it with
2 you and you can verify for identification
3 purposes.

4 MR. FANAKI: And just for the record, I
5 am going to mark it for identification
6 purposes as Exhibit B because I marked the
7 prior document as Exhibit A.

8 228. MR. WONG: Sure, that's fine.

9 MR. FANAKI: That is what confused me
10 when you said "2".

11 229. MR. WONG: Okay.

12
13 --- EXHIBIT B: 2012 version of National Water
14 Heater Rental Agreement

15
16 BY MR. WONG:

17 230. Q. So, a customer cancelling would have
18 to pay the \$450 or \$600. Do you know what the
19 installation and other charges would be for an
20 electric tank?

21 A. No, I don't have it with me.

22 231. Q. But at least let's say for a
23 customer with a gas tank, the fee would be \$450 or
24 \$600. So, a National customer in year four would
25 have to pay that charge. Are there other charges

1 that they would have to pay if they wanted to return
2 the tank to National and cancel their contract and
3 switch to another supplier?

4 A. None other than you covered that was
5 in the contract.

6 232. Q. So those are the total extent of the
7 charges. So you would consider them to be part of
8 the quote-unquote available customers?

9 A. Correct. I think, similarly, the
10 customers that are in the install base and whether
11 they are in a Reliance seven-year that has a similar
12 concept or similar terms or conditions or a customer
13 that has a different contract with a supplier with
14 different exit fee or termination fee structures,
15 any customer that is in the...that market that is
16 installed and renting is considered part of that
17 available market.

18 233. Q. Okay.

19 A. Did that help?

20 234. Q. That helps clarify. Fairly early on
21 in your affidavit, paragraph 7, you say that
22 National currently employees approximately 220
23 people in 23 locations in Ontario and Quebec.

24 A. That is correct.

25 235. Q. Where are they? Sorry, where

1 precisely are these 23 locations?

2 A. You want me to list off every
3 address? Is that what you are asking me?

4 236. Q. Yes, absolutely.

5 MR. FANAKI: I just don't understand why
6 that is relevant.

7 237. MR. WONG: Well, he has it in his
8 affidavit. I am entitled to cross-examine
9 him on the contents.

10 MR. FANAKI: I recognize that.

11 238. MR. WONG: I don't need addresses, but I
12 would like...

13 THE DEPONENT: General locations?

14
15 BY MR. WONG:

16 239. Q. Municipalities or cities, et cetera.
17 Regions.

18 A. Well, I can give them to you to the
19 best of my knowledge. And I apologize if I am close
20 on a few. There is Toronto. There is two offices
21 in Toronto, one at Dundas and Etobicoke. One in
22 Ottawa. One in Ajax. One in Weston. There is, I
23 apologize, two in Ottawa. There are two in Ottawa.
24 One in Scarborough. One in Kitchener. One in
25 London. One in Windsor. One in Niagara Falls.



1 North Bay, Sault St. Marie, Hamilton. In Quebec, we
2 have one in Gatineau. Three in Montreal. Sorry,
3 six locations in Montreal and Quebec City area.
4 Those are the main ones. How many did I get there?

5 240. Q. Pretty good on a pop quiz.

6 A. Well, I was going to say I can
7 get...I mean, I have all the locations. I believe
8 they are the main ones and then some cities we have
9 a warehouse and a sales office.

10 241. Q. Right. In some of these cities
11 listed here?

12 A. Yes. So, in Quebec City and
13 Montreal area, we have three...we have five
14 locations, sorry, not six. I think I told you six.

15 242. Q. So you have got, what, seven
16 locations in Quebec out of the 23 locations?

17 A. That is correct. Sorry, six
18 locations in the province of Quebec.

19 243. Q. Okay.

20 A. Is that what I told you?

21 244. Q. I had seven here. I had one in
22 Gatineau...

23 A. You have one in Gatineau, four in
24 Montreal, one in Quebec City.

25 245. Q. Right. And the...are we off on the



1 arithmetic here?

2 MR. FANAKI: That's 23.

3
4 BY MR. WONG:

5 246. Q. So, these various offices, what...I
6 am assuming all of them have a service area that
7 they operate, market and sell to? As opposed to
8 being simply storage locations.

9 A. Well, I will leave this on this
10 potentially competitive. Some of those locations
11 are sales locations. Some of them are warehouse
12 locations.

13 247. Q. So not all of them are sales bases?

14 A. No.

15 248. Q. And in terms of the ones in Ontario,
16 are all of them sales areas or are some of those
17 just storage or other purposes as well?

18 A. Some are sales offices. Some are
19 warehouses.

20 249. Q. Are most sales?

21 A. No, I think most are warehouses
22 actually.

23 250. Q. Okay, so which of these then are
24 sales offices?

25 A. Scarborough. One in Toronto. One



1 in Etobicoke. One in Ottawa. One in Hamilton. One
2 in London and Kitchener.

3 251. Q. And are the sales areas or the areas
4 to which National markets and sells, is it
5 determined in relation to the physical locations of
6 these sales offices or is there no correlation?

7 A. No, they are not located...there is
8 no correlation.

9 252. Q. In these different sales offices,
10 are the regions in which they...so, if there are
11 sales offices, do they supply the staff for sales in
12 that area? Is that fair?

13 A. No. So...and, again, subject to
14 competitive info. There are offices, but the
15 salespeople that work out of those offices do not
16 just work in those areas. They work in the Relevant
17 Market, in the other Relevant Market. They move
18 from area to area. So they may have a home base or
19 there is an office there for sales, but they don't
20 only work in that geographic area around the office.

21 253. Q. Right. Okay.

22 A. Did that help answer what you were
23 asking?

24 254. Q. Yes. So they may work between
25 different, as you said, quote-unquote Reliance



1 territories and Direct territories, et cetera?

2 A. Correct.

3 255. Q. And they are not tied, say, within a
4 50-mile sales radius of those offices?

5 A. That is correct.

6 256. Q. Okay. At paragraph 60(a) of your
7 affidavit, just take a moment to read that.

8 A. Okay, I read (a).

9 257. Q. It is fair to say that you allege
10 that there is...that Reliance has engaged in price
11 discrimination?

12 A. Correct.

13 258. Q. And where is it that you allege that
14 this price discrimination has occurred?

15 A. It occurs as part of one of the
16 activities...the anti-competitive activities
17 Reliance employs, they will follow our sales people
18 around within a subdivision and immediately approach
19 the customer after we have to influence them to
20 cancel our switch. And one of the means by which
21 they do that is to offer them a reduced rate or some
22 other benefit that they wouldn't otherwise be
23 offering to their general customers specific to the
24 customers that we have signed up or sold rental
25 services to.



1 259. Q. And is there any other form of price
2 discrimination that you are alleging there?

3 A. It either happens in person or they
4 do outbound call campaigns into those areas to
5 contact those customers. To my knowledge, those are
6 the main two.

7 260. Q. And how do you know this?

8 A. Because we speak to our customers
9 and our customers tell us. Because we see them
10 follow behind us on the street and we have
11 information direct from customers to that effect.

12 261. Q. Is there any other price
13 discrimination that you are including in that
14 allegation?

15 A. I think that is the primary point.

16 262. Q. You will tell me if there is
17 anything else?

18 A. Yes.

19 263. Q. Is that a "yes"?

20 A. That is a "yes".

21 264. Q. Nodding doesn't get picked up on the
22 transcript.

23 A. Okay.

24 265. Q. In terms of (ii) there, you say that
25 reliance has refused to permit National to act as



1 agent for its customers with respect to the process
2 for obtaining the RRN.

3 A. Correct.

4 266. Q. That's the return number.

5 A. Yes.

6 267. Q. Right. And I believe it is your
7 evidence earlier that you say customers request
8 National to act as agent; is that correct?

9 A. Can you point me to where that is?
10 I believe it is correct, I just want to re-read it.
11 Paragraph 34.

12 268. Q. Right.

13 A. Yes, and that is correct.

14 269. Q. Right. And by request at 34, can
15 you clarify what you mean? Is this verbal? Is this
16 through some written request, by telephone call?

17 A. Well, in each of the cases the
18 customer provides us agency to deal on their behalf
19 with the current supplier. In many cases, we have
20 customers who plead with us on the phone because of
21 the issues or the barriers that have been created
22 between the two suppliers to please resolve any
23 outstanding billing issues or double billing or to
24 receive the return tank number from Reliance because
25 it has been their experience and ours that the



1 Reliance representatives use that opportunity to
2 either defame our company or to find some reason to
3 convince the customer to cancel their switch. So we
4 have consumers who have asked us to please contact
5 Reliance on their behalf to get the number.

6 270. Q. And by saying "request to act as
7 agent", are you saying...are you referring to a
8 form?

9 A. We have within our contract it
10 provides agency. The customer allows us to act on
11 their behalf. It is currently Reliance refuses to
12 accept the agency, but we also have in verbal form
13 where a customer has contacted us and asked us to
14 either be on the phone to help them through the
15 discussion with Reliance or to call on their behalf.

16 271. Q. Right. And you are saying that as
17 part of your terms and conditions, it is...National
18 is appointed as agent; is that correct?

19 A. I believe that...

20 272. Q. There is not a separate agency form?

21 A. I don't believe it is separate
22 currently.

23 273. Q. Was it at any time?

24 A. It may have been. I would have to
25 check. But we attain agency regardless, whether it



1 is separate or not.

2 274. Q. So it is simply a function of
3 signing with National that they also would assign as
4 agent...or appoint National as agent?

5 A. Yes, that is correct.

6 275. Q. You say that paragraph 60, both (a)
7 and (b), represent the matters that...where you
8 differ from the commissioner; is that correct?

9 MR. FANAKI: To be fair, it says some
10 examples of where the perspective of
11 National and the commissioner appear to be
12 different. Bearing in mind that the
13 pleadings haven't closed.

14
15 BY MR. WONG:

16 276. Q. Right, so paragraph 60 says some
17 examples.

18 A. Yes.

19 277. Q. Actually, if you flip the paragraph
20 to the page before it says:

21 "...Although the pleading have not closed,
22 based upon the allegations made in the
23 commissioner's application some examples
24 where the perspective of National and the
25 commissioner appear to be different include

1 the following..."

2 A. Yes.

3 278. Q. Are there any further examples or
4 any further items where National's perspective
5 differs from that of the commissioner?

6 A. At this point, these are the key
7 areas we have from what I understand from the
8 application.

9 279. Q. And at this time, these are the only
10 areas that you differ from the commissioner?

11 A. At this point in time, yes.

12 MR. FANAKI: I think you had asked if
13 there were any circumstances where the
14 answers weren't to be considered binding on
15 the company and I will highlight that
16 response.

17 280. MR. WONG: I think, then, in the
18 circumstances would you...I will ask you to
19 undertake to advise well prior to the
20 hearing if there are any further examples.

21 MR. FANAKI: Fair enough.

U/T

22
23 BY MR. WONG:

24 281. Q. In terms of that paragraph 60(a) and
25 the price discrimination, you have referred to



1 reduced pricing being offered or any benefits. So
2 you have indicated there I think you said outbound
3 calls and tailers or people who follow the agents
4 and they offer reduced pricing or other benefits
5 that wouldn't otherwise be offered. Is that your
6 position?

7 A. That is correct.

8 282. Q. Does National discriminate in its
9 pricing? Does it have a similar practice?

10 A. No, we don't employ those practices.

11 283. Q. And does National discriminate in
12 its pricing in any fashion, whether those or
13 otherwise? Whether by tailing Reliance door
14 knockers or making its own outbound calls.

15 A. No, we don't do that.

16 284. Q. And does it discriminate in terms of
17 its pricing by region?

18 A. Our pricing is based on costs within
19 wherever the areas are that we deliver. So, there
20 would be no price discrimination. But is it
21 possible that I have a different price per unit in a
22 different part of the province? That is possible.
23 Depending on the unit and the cost to deliver and
24 install. Is that your question, Mr. Wong?

25 285. Q. Yes, the answer I find a little



1 confusing though. So there is an installation
2 charge; right?

3 A. Right.

4 286. Q. And that may fluctuate depending if
5 there is someone far out...off the highway, that
6 will increase?

7 A. Correct.

8 287. Q. But there is also a monthly charge?

9 A. Yes.

10 288. Q. Does that differ by region within
11 Ontario or within any of the two markets we have
12 talked about?

13 A. I think they are generally the same.
14 There may be some instances where if it is more
15 difficult to get equipment to a certain part of the
16 province, the price may change. But generally they
17 are the same.

18 289. Q. So you are saying that generally the
19 monthly rental prices for a given tank are uniform
20 across the province?

21 A. Yes, the application of the prices
22 for those rentals based on the type of unit are
23 generally consistent, yes.

24 290. Q. But you say "generally consistent".

25 A. Right.



1 291. Q. There are exceptions?

2 A. What I am pointing out is that, for
3 example, similar services with similar product types
4 will be similarly priced. But I am just saying I
5 can't tell you today but if there are some
6 differences because I have to deliver it seven hours
7 north from...

8 292. Q. Well, we are not talking about that.
9 We are not talking about that charge, the
10 installation and travel time.

11 A. Okay.

12 293. Q. We are just talking about that
13 monthly...whether it is \$12.99 or \$15.99.

14 A. Right.

15 294. Q. That monthly rental charge, does
16 that differ by region?

17 A. No.

18 295. Q. So that is uniform across Ontario?

19 A. Yes, I would have to check but I
20 think that the price of it within a region would not
21 differ. If I have a different price based on where
22 I deliver that...again, I can't give you specifics
23 today but generally within a region a price for a
24 unit is a price for a unit.

25 296. Q. Right, but we are now talking

1 about...we have two different words here, region and
2 Ontario.

3 A. Right.

4 297. Q. So are you saying that the prices...
5 are there multiple price regions within Ontario?

6 A. There are different prices in
7 different regions because the product offering
8 itself may be different. So to answer your question
9 accurately, a same similar product offering or
10 structure will have the same price in Ontario. I
11 may offer different products in different regions.

12 298. Q. Right.

13 A. So maybe that helps to clarify it.

14 299. Q. Let's keep the product uniform. So
15 is there only one model of 50-gallon CV water
16 heater...is there only one make that National
17 offers?

18 A. Yes.

19 300. Q. And that is a GSW, I am assuming?

20 A. Right.

21 301. Q. So for a 50-gallon GSW CV, is the
22 price, the rental price, the monthly charge, does
23 that differ in different areas of Ontario?

24 A. No. The same product offering would
25 be the same price.



1 302. Q. So that price is uniform across
2 Ontario?

3 A. Right. Yes.

4 303. Q. Applying that to different
5 products...

6 A. Yes, thank you. That is right...

7 304. Q. Power vented, electric, on demand,
8 does that change throughout Ontario for any given
9 product?

10 A. No. To the best of my knowledge, it
11 is the same. If it is the same product offering, it
12 will be the same price.

13 305. Q. Right. So the same...

14 A. Yes.

15 306. Q. So, if it is 70-gallon power vented,
16 everyone in Ontario the price is the same per month?

17 A. To the best of my knowledge, that is
18 correct.

19 MR. FANAKI: Mr. Wong, that whole
20 discussion is likely confidential.

21 307. MR. WONG: Right.

22 MR. FANAKI: Commercially sensitive
23 information.

24 308. MR. WONG: Right. And I will ask that
25 you undertake to correct me as soon as

1 possible if that is, in fact...I will ask
2 that you check and correct that answer if
3 it is incorrect.

4 MR. FANAKI: I want to be clear on
5 exactly what you are asking. You are
6 saying is the price for a given product,
7 say it is a 70-gallon power vented tank,
8 the same in all places across Ontario?

9 309. MR. WONG: Correct.

10 MR. FANAKI: And over what time period?

11 310. MR. WONG: Well, since you entered the
12 quote-unquote Relevant Market in 2008
13 onwards.

14 MR. FANAKI: I don't know how
15 significant this task is going to be
16 because you are talking about a number of
17 different products across a number of
18 different periods of time. So I will take
19 it under advisement and let you know
20 whether that is something that we are going
21 to do.

U/A

22 311. MR. WONG: Could we at least have the
23 undertaking on current prices? I
24 understand in 2008 you may have to sort of
25 go back...the models may be different, et



1 cetera. But I just want to see if as of
2 the 2012/2013 prices, is there any
3 discrimination there within the same
4 product...the same make and model in terms
5 of the monthly charge. We are not talking
6 about the installation but the monthly
7 charge.

8 MR. FANAKI: To be honest, I really
9 don't see the relevance of this so I want
10 to understand what is entailed in the
11 exercise, whether it is significant or not,
12 before we give any undertaking associated
13 with that. So I will take it under
14 advisement to determine what information we
15 have available and let you know what our
16 position is.

U/A

17 312. MR. WONG: Okay.

18
19 BY MR. WONG:

20 313. Q. Continuing on in paragraph 60 and
21 the price discrimination there. Has National
22 complained to the Competition Bureau about this?

23 MR. FANAKI: Objection on the basis of
24 relevance.

/R

25 314. MR. WONG: I am going to also ask for,



1 if so, what information National has
2 provided to the Bureau.

3 MR. FANAKI: We will object to that
4 question on the basis of relevance and also
5 on the basis that any information provided
6 to the Bureau may be subject to a claim of
7 privilege. /R

8
9 BY MR. WONG:

10 315. Q. Has National complained about any
11 other...any conduct generally by Reliance to the
12 Competition Bureau?

13 MR. FANAKI: Same answer. /R

14 316. MR. WONG: Well, I think it is...it
15 would be certainly relevant to the
16 different positions, whether they are in
17 fact different between National and the
18 Commissioner, to know if...what complaints
19 have been made.

20 MR. FANAKI: I disagree with that. I
21 don't think it is relevant at all. As we
22 set out here, there is obviously a
23 different position on the issue of the
24 scope of the anti-competitive conduct. It
25 is set out clearly in the affidavit.



1 Whether or not that was communicated to the
2 Bureau previously is not relevant to the
3 issue of whether there is a difference in
4 position which exists today.

5
6 BY MR. WONG:

7 317. Q. I am not asking for legal advice
8 here or any communications, but has National at all
9 times retained or had access to the Competition
10 lawyer with respect to these matters in this
11 application?

12 MR. FANAKI: I am going to object. /R

13 318. MR. WONG: And this is only with respect
14 to whether there has been access or
15 retainer of as opposed to any
16 communications.

17 MR. FANAKI: I don't know what you mean
18 by "access" but I am going to object to the
19 question.

20 319. MR. WONG: Do you know what I mean by
21 "retain"?

22 MR. FANAKI: Yes. Presumably everybody
23 has access to the Competition Bureau.

24
25 BY MR. WONG:



1 320. Q. Now, you had stated that National
2 employs some 220 people.

3 A. That is correct.

4 321. Q. And does this include the door
5 knockers or door to door salespersons that we have
6 been talking about?

7 A. No, it does not.

8 322. Q. So those 220 people are not sales
9 agents?

10 A. That is correct.

11 323. Q. Are they then call centre
12 management?

13 A. Part of that number is call centre
14 employees that do various functions.

15 324. Q. Is that the majority of them? Is
16 that a vast portion?

17 A. Well...

18 325. Q. I guess what does that number
19 comprise of?

20 A. It is your call centre, your
21 management employees, your warehouse employees,
22 administrative employees.

23 326. Q. The door knockers, then, who are
24 they employed by?

25 A. The door knockers are independent

1 contractors.

2 327. Q. Right. So, are they not paid by
3 National then?

4 A. They are paid commissions as
5 independent contractors, so they are not employees.

6 328. Q. And they are paid by commissions by
7 who?

8 A. By National.

9 329. Q. So they get a cheque from...a
10 National cheque?

11 A. That is correct.

12 330. Q. And they are trained by National?

13 MR. FANAKI: Mr. Wong, can you just
14 assist me as to how this is at all relevant
15 to the matters at issue in this motion?
16 Because, frankly, I don't see where you are
17 going with this. And it seems to me that
18 it is much more closely linked to the
19 ongoing litigation between our respective
20 clients and so I need to understand how
21 this plays into the matters at issue.

22 331. MR. WONG: Well, I think there is two
23 parts. One, he has deposed to the matter
24 in his affidavit so I am entitled to cross-
25 examine on it...



1 MR. FANAKI: He has deposed to a number
2 of employees that are employed and so I
3 think he has explained. But as comprised,
4 the nature of the relationships and the
5 details of payments and other aspects of
6 independent contractors is not something
7 which is at all relevant.

8 332.

9 MR. WONG: He has also referred to
10 National intervening to respond to the
11 various allegations made by Reliance in its
12 response. And he will agree that those
13 allegations in the response, which is
14 saying National would intervene regarding,
15 relate to misrepresentations or alleged
16 misrepresentations by National door
17 knockers. So to the extent he is saying he
18 is bringing a perspective on that, I think
19 I am entitled to examine him on the nature
20 of those door knockers and their
21 relationship with National.

22 MR. FANAKI: Well, I think you are
23 entitled to understand the nature of his
24 perspective and the kind of evidence we
25 could bring forward in the event that a
request for leave to intervene is granted.



1 But it is very different then getting into
2 the level of detail you are about the
3 nature of the relationships and how they
4 are trained and what kind of payments are
5 made.

6 333. MR. WONG: Well I think too to the
7 extent that you are suggesting or you have
8 proposed that National will provide
9 documentary discovery, the nature of the
10 relationship will affect what kinds of
11 documents and evidence may be produced.
12 Because if they are truly independent
13 contractors, then it may be that National
14 does not have access to documents relating
15 to their employment, to their complaints
16 regarding them, et cetera. So, these
17 inquiries relate to the extent of the
18 documentation that National would have
19 available to it regarding that conduct
20 which National itself has indicated it will
21 intervene on.

22 MR. FANAKI: Well, that kind of goes to
23 my point that, really, what you are talking
24 about is an issue that will arise
25 potentially during the course of



1 examination for discovery, again, assuming
2 that National is granted leave to
3 intervene. It is not an issue that goes to
4 the matters which are in dispute now
5 currently on this motion about what is the
6 appropriate scope of the intervention and
7 what are the appropriate rights of
8 participation of National.

9 334. MR. WONG: Well, it goes right to the
10 participation because if National cannot
11 produce those documents and produce
12 documents relating to these door knockers
13 because it says they are not its employees,
14 that is important in terms of determining
15 the manner of National's participation.

16 MR. FANAKI: No, I don't think it is
17 because I think what you are seeking is
18 documentary discovery. And we have agreed
19 that we will provide documentary discovery
20 on the issues that are relevant to the
21 scope of the intervention. And there is
22 nothing that is going to be responded on
23 this point that is going to affect that at
24 all.

25 335. MR. WONG: So you are refusing questions



1 relating to the nature of the relationship
2 between National and the door knockers, is
3 that correct?

4 MR. FANAKI: Well, I will hear your
5 questions. I can't recall exactly what you
6 were asking. But I am concerned about the
7 fact that you are drilling into this level
8 of detail about matters which are simply
9 not relevant to the matters at issue on
10 this motion. Putting aside whether or not
11 these issues may later become relevant in
12 the event that a request to leave to
13 intervene is granted.

14 336. MR. WONG: My questions are directed at
15 the nature of the relationship between
16 National and the door knockers and, in
17 particular, the nature of the files and
18 documents that National would be able to
19 produce depending on the terms of its
20 intervention.

21 MR. FANAKI: Yes, I am refusing that
22 question.

23 337. MR. WONG: So if I ask...I will ask Mr.
24 Potter.

/R



1 BY MR. WONG:

2 338. Q. Does National keep employee files
3 for the door knockers? Does it keep its own records
4 regarding the conduct of National door knockers?

5 MR. FANAKI: Just a second. Yes, we
6 will refuse the question. /R

7 339. MR. WONG: You can refuse the questions.
8 I will ask them.

9
10 BY MR. WONG:

11 340. Q. Will National be able to provide...
12 to produce documents relating...employee files
13 relating to the various misconduct alleged in
14 Reliance's response?

15 A. Can you give me the question again?

16 341. Q. Will National be able to produce
17 employee files or records...or any records relating
18 to complaints about the door knockers if it
19 intervenes?

20 MR. FANAKI: The trouble we are having,
21 Mr. Wong, is that obviously the scope of
22 the intervention is not defined and nor
23 does National know whether or not it will
24 be granted leave to intervene. If National
25 is granted leave to intervene, it will

1 produce documents that are relevant to the
2 topics upon which it has been granted leave
3 to intervene upon. And I think that is the
4 best answer I can provide to you.

5 342. MR. WONG: And I am asking what those
6 documents would be.

7 MR. FANAKI: And I can't answer that
8 question.

9 343. MR. WONG: Mr. Potter can.

10 MR. FANAKI: I don't know how he could
11 possibly answer that question.

12 344. MR. WONG: Sure.

13
14 BY MR. WONG:

15 345. Q. As I said, does National keep
16 employee files? Does it keep a record of complaints
17 regarding door knockers? Does it keep records of
18 complaints made to third parties regarding its door
19 knockers?

20 MR. FANAKI: These are all issues which
21 go to the scope of documentary discovery,
22 which is a matter that we will have to
23 address in the event that National is
24 granted leave to intervene and if the scope
25 of intervention granted to National

1 encompasses the kinds of documents that you
2 are seeking.

3 346. MR. WONG: I think the issue on
4 documentary discovery is whether National
5 will produce them if it, in fact, has them.
6 I am asking whether it, in fact, has them.

7 MR. FANAKI: Still, I don't see the
8 relevance to the issue of whether or not
9 National should be granted leave to
10 intervene. Because basically what you are
11 saying is if National has these documents,
12 then they should be granted leave to
13 intervene.

14 347. MR. WONG: Well, then, it will affect
15 the scope of participation because if you
16 are saying you will provide documentary
17 discovery but then say, "Well, actually,
18 they are not our employees and therefore we
19 don't have anything", I think the judge on
20 this motion needs to know that.

21 MR. FANAKI: Why?

22 348. MR. WONG: Because then the intervention
23 may be a little less meaningful if it was
24 unable to produce documents regarding
25 matters it says it would like to intervene

1 on, in other words responding to the
2 allegations by Reliance in its response.
3 MR. FANAKI: Well, from your
4 perspective. But from our perspective,
5 National will still be able to bring that
6 perspective to the issues and be able to
7 file useful submissions on those issues.
8 So I think that you are going down a road
9 which is quite a few steps too far. Much
10 further beyond this motion. And now you
11 are into documentary discovery issues. So
12 we will refuse the question on the basis
13 that it is not relevant to the issues that
14 need to be addressed in this motion. /R

15
16 BY MR. WONG:

17 349. Q. At paragraph 48(c) of your
18 affidavit...

19 A. 48(c)?

20 350. Q. Yes. We will just read it for the
21 record:

22 "...National's proposed topics include: (c)
23 the impact of Reliance's anti-competitive
24 acts on customers or potential customers,
25 including the impact of this conduct on the

1 ability of National to effectively induce
2 customers to switch suppliers..."

3 My question is, what in particular do you mean by
4 "impact on consumers"? And is there an example
5 other than the one you have provided, namely the
6 impact on National's ability to induce customers to
7 switch suppliers? Could you elaborate on precisely
8 what you mean by "impact on customers or potential
9 customers"?

10 A. Yes, just we have information and we
11 have...can address the confusion or anger or
12 frustration that consumers have felt being bounced
13 back and forth between Reliance and National in
14 attempting to try to execute a switch. The monetary
15 impacts that they have received or been impacted by
16 as a result, to name a couple.

17 351. Q. So, you are suggesting to intervene
18 in relation to frustration felt by customers
19 switching? Is that...

20 A. To provide the perspective that we
21 are seeing from consumers as far as the impact on
22 them as it pertains to their ability, confusion
23 created in the marketplace or between suppliers.
24 Their frustration in attempting to try to execute
25 and complete a switch. The monetary impacts that



1 they are receiving as a result. I think those are
2 our primary areas of what is impacted on consumers.

3 352. Q. And by "this", you mean what you
4 have seen. So is this by way of calls or...calls or
5 letters to National?

6 A. Yes, we have information primarily
7 on calls from customers who we have had to deal with
8 to try to resolve issues with Reliance who have
9 identified these issues and problems that they are
10 having.

11 353. Q. So, you are suggesting...you are
12 speaking about the experience of customers, is that
13 fair?

14 A. Not just on customers in specific,
15 but the...but our perspectives on how it dissuades
16 customers from completing a switch or dissuades them
17 from completing a switch because of the
18 inconvenience and the barriers and the impacts they
19 go through to attempt to try to complete the
20 activity or the transaction.

21 354. Q. So you are suggesting, sort of,
22 aggregating your experience with your phone calls
23 with customers regarding switching; is that...

24 A. Yes, and if I could provide specific
25 examples.



1 355. Q. Sorry, if you could provide specific
2 examples?

3 A. Well, we will be providing
4 information in that way and perspectives on what we
5 are seeing and what we are hearing.

6 356. Q. From customers?

7 A. From consumers, that's right.

8 357. Q. So, sort of being a spokesperson for
9 customers?

10 A. Relaying what we are getting from
11 customers as to what we are seeing and how that is
12 impacting not just our issues or our business, but
13 how it is impacting consumers. And what we have is
14 aggregate data to that effect.

15 358. Q. Right. So, essentially speaking on
16 behalf of consumers?

17 A. Speaking for our customers or from
18 what we have heard from our customers and potential
19 customers.

20 359. Q. And would this include relaying
21 complaints that you have received from...regarding
22 National from customers?

23 A. Complaints that...it may.

24 360. Q. And you are aware that numerous
25 complaints have been made regarding National?

1 A. Regarding a specific...

2 361. Q. Regarding National, yes.

3 A. Well, I am aware that we received
4 complaints, yes.

5 362. Q. And you are aware that the Better
6 Business Bureau has issued a warning regarding
7 complaints regarding National?

8 A. I am aware that Reliance has an
9 alert on its website and I am aware that Reliance
10 actually has more BBB complaints than National does.
11 And I am also aware that National has some
12 complaints that have been filed to the BBB.

13 363. Q. And you are aware that these
14 complaints relate to...the complaints regarding
15 National relate to misleading sales tactics and
16 misrepresentations?

17 A. I am aware that there are complaints
18 that allege that, yes.

19 364. Q. Right. If I can assist your memory.
20 So I am showing you an exhibit which is a printout
21 of the Better Business Bureau or BBB Business
22 Review. And it is a page for National Home
23 Services. You will agree this relates to your
24 company, National Energy Corporation?

25 A. Well, I won't agree. I haven't seen



1 this document. I am aware we are in the BBB
2 registry and I am aware of some of the information
3 on the site, but...

4 365. Q. Do you have any reason to dispute
5 that this relates to National?

6 A. Other than I haven't seen it. I
7 assume you have pulled it from the site.

8 366. Q. If I may refer you to page 2, it
9 says:

10 "...BBB files indicate that this business
11 has a pattern of complaints concerning
12 misleading sales practices. Consumer
13 complaints allege that door to door
14 salespersons are misleading consumers,
15 providing false information and using high
16 pressure sales tactics. This company was
17 notified of our concerns on June 7, 2011.
18 They have failed to correct the underlying
19 reason for the complaints..."

20 Are you aware of any notification from the BBB as
21 referred to in that statement?

22 A. I am not.

23 367. Q. Are you aware of any complaint by
24 the BBB, period, to National regarding misleading
25 sales by National door knockers?

1 A. I am not, no.

2 368. Q. Are you aware of other complaints
3 being made, for example, in the press, in the
4 Toronto Star or other media?

5 A. Well, I am aware, you know, similar
6 to Reliance's complaint in the Windsor Star a few
7 weeks ago that from time to time suppliers have
8 consumer issues which are brought up in the media.
9 Whether it is Reliance or myself or some other
10 suppliers, there are. I am aware that,
11 surprisingly, a lot of the complaints or alleged
12 complaints that we receive about existing suppliers
13 tend to stem from Reliance service territory. And
14 we have numerous examples of consumers who have
15 identified to us that they lodged a complaint and,
16 in fact, were helped along in determining how to
17 word their complaint by Reliance themselves. Those
18 things I have evidence of. And I believe that in
19 the market, you are going to try your best to ensure
20 you have the best service but you are going to
21 receive some complaints. So I would say that most
22 suppliers tend to be subject to complaints from
23 their customers and some of those complaints were
24 provided in the media, some of them come through
25 various government organizations such as the BBB



1 and, you know, I will also note that we have a B-
2 record with the BBB as well. Which is a pretty good
3 record, as you know.

4 369. Q. Well, that wasn't the question. The
5 question was whether you were aware of complaints
6 regarding National in the media or other
7 forms...other consumer sites. Are you aware of
8 those complaints?

9 A. I am aware that we have consumer
10 complaints, yes.

11 370. Q. Right. Regarding misleading sales?

12 A. Regarding sales, yes.

13 371. Q. And has National addressed any of
14 these complaints in the media or by any other
15 consumer groups?

16 A. Well, we have...

17 372. Q. And I am not talking about, sort of,
18 individuals. I am talking about...

19 A. Just generally.

20 373. Q. Yes.

21 A. Well, if I could just for a minute,
22 we have a very clear...we have a number of quality
23 controls in the process. So all of our paperwork,
24 our contracts at the door have a very clear
25 disclosure on the bottom that says that we are not



1 affiliated with their current supplier, be it
2 Reliance or Direct Energy. The customer signs right
3 below that clear disclosure. And it is right on the
4 front page of the contract so that they can see it
5 very clearly. We also have our customer sign a
6 second acknowledgement form at the door which checks
7 off a number of things which they sign separate to
8 the contract that confirms that the salesperson was
9 wearing his badge, identified himself from National
10 Home Services. A secondary bullet, very clear, that
11 we are not affiliated with Reliance or Direct
12 Energy. They were clean, they were uniformed, were
13 badged, were wearing the proper shirt, et cetera,
14 and a few other things.

15 In addition to that, not that it is
16 required by regulation, but we also have a mandatory
17 recorded verification call. And in that
18 verification, it is clear and we once again confirm
19 a number of things about the transaction, including
20 we ask the customer specifically a question that
21 they understand we are not affiliated with their
22 current supplier or Reliance. And that customer has
23 to positively respond.

24 In addition to that, we do a verification
25 call or a welcome call. In many cases, it is an e-



1 mail that sends out and actually has a video
2 attached that is fully branded National. It talks
3 about who we are and who we are not. We contact
4 them the day before install. They go out and they
5 install the equipment. We talk to that customer
6 several times and there are a number of different
7 places where we have quality in our process to
8 ensure that there is a high level of quality in the
9 sales process.

10 So we may receive allegations with respect
11 to the sales process, we take that stuff to decide
12 whether or not we can approve our processes. But
13 more importantly, when I have a customer that has
14 called me or contacted the Ministry and says
15 that...claims that my sales agents said they were
16 affiliated with Reliance and upon further discussion
17 with the customer we find that we have a clear
18 verification call where they confirm that we
19 weren't, but also end up admitting on the phone that
20 they launched the complaint after calling Reliance
21 and Reliance urged them to file the complaint to get
22 out of their contract, those are the kind of things
23 that we work through that every day.

24 So the summary of that being, Mr. Wong,
25 every complaint or allegation that we receive, we

1 investigate every one of them. It is a competitive
2 market. I need to have good service in order to
3 continue to win new customers. And that is why I
4 put all those quality controls in place, to ensure
5 that as we receive them, there is an opportunity to
6 determine buyer's remorse versus potential
7 complaints that have been influenced by other
8 parties versus real valid complaints where we could
9 have done better.

10 374. Q. I am not asking about individual
11 incidents or the quality controls. I am asking
12 about whether National has responded to any consumer
13 groups to the BBB or to any of the stories in the
14 media regarding or complaining about misleading
15 sales by National.

16 A. You would have to be more specific.
17 I receive...

18 MR. FANAKI: Just to clarify, because I
19 am confused now. Do you mean respond to
20 the media rather than respond in the way
21 that he has described?

22 375. MR. WONG: Yes.

23
24 BY MR. WONG:

25 376. Q. So, for consumer groups it would be



1 directly to the consumer group. And in terms of the
2 media, addressed in the media, in any fashion, the
3 complaints being made.

4 A. Well, we have responded to whoever
5 has made the allegation. So if the allegation, for
6 example, comes to the BBB, we respond to the BBB.
7 If we are contacted by media, we respond to media.

8 377. Q. Well, the BBB says that...I guess
9 they say you have failed to correct the underlying
10 issue. So are you saying that there was a response
11 to the BBB?

12 A. What I am saying is when the BBB
13 forwards allegations or concerns to us, we respond
14 back to the BBB with resolutions.

15 378. Q. And are you aware of that happening
16 in this instance with respect to what is being
17 referred to on the BBB website?

18 A. Yes, I can't...I can't comment on
19 that.

20 379. Q. So you don't know?

21 A. I don't know.

22 380. Q. Right. And I understand that
23 National is being investigated by the Commissioner
24 of Competition under Section 52 of the Competition
25 Act for the criminal offence of making false or



1 misleading representations to the public as well as
2 for making false and misleading representations
3 under Section 74. Is that correct?

4 A. I understand that Reliance filed a
5 six person complaint and as a result of that
6 complaint, the Bureau has, in fact, opened up
7 inquiries on at least three suppliers in the
8 province, one of which is National, one of which was
9 Ontario Home...Ontario Consumers Home Services and
10 the other was More Energy as a result of that
11 Reliance complaint, that is correct.

12 381. Q. Right. And do you know that it is
13 directly as a result of that complaint?

14 A. I believe I do, yes.

15 382. Q. All right.

16 A. I believe Reliance press released
17 it.

18 383. Q. And is it correct that there were
19 multiple locations against which the Commissioner
20 obtained search warrants? Multiple National
21 locations, is that correct?

22 MR. FANAKI: Mr. Wong, I don't know
23 where you are going with this in terms of
24 the relevance.

25 384. MR. WONG: Well...



1 MR. FANAKI: This case is not really
2 about National's conduct, as you know. And
3 so I am not sure...we have let this kind of
4 run for a while now, so if you could help
5 me understand how this is possibly
6 relevant.

7 385.

8 MR. WONG: In our response, we
9 specifically state that National is not...
10 let me back up. Mr. Potter has essentially
11 said that he is...National intends to
12 intervene by essentially aggregating
13 customer complaints and speaking with
14 respect to these various frustrations with
15 the process, as he describes it, of
16 switching in relation to Reliance's
17 policies and conduct. We have put it
18 squarely in our response that we don't
19 believe this is appropriate, given the
20 severity of the various allegations being
21 made against National. And I would like to
22 confirm that these are extant with Mr.
23 Potter. I don't intend to get into the,
24 sort of, substance of these other processes
25 but just wanted to confirm that they are
ongoing.

1 MR. FANAKI: Well, you are getting into
2 it. That is exactly what you are getting
3 into, is the process itself. We have
4 talked about the nature of the allegation
5 and how it was started by Reliance as a six
6 resident complaint. You have talked
7 already about the nature of the allegations
8 and we have talked about what Mr. Potter
9 believes National can speak to in respect
10 of this in the event that leave to
11 intervene is granted. And clearly, as he
12 said, it is not as a spokesperson for
13 consumers but rather to provide National's
14 perspective on what the experience is that
15 customers or potential customers of
16 National have in trying to switch suppliers
17 and other...

386.

18 MR. WONG: I think the transcript will
19 read pretty clearly on that what Mr. Potter
20 said his intentions were, so we will leave
21 that at that. But as far as, you know, the
22 fact that search warrants were obtained, he
23 can either confirm or deny it. It doesn't
24 go to the merits. I am not asking what
25 his...what National's response to those

1 applications or any application by the
2 Commissioner would be. I am just asking
3 about the fact of the search warrants.

4 MR. FANAKI: Well, I think he has
5 already agreed that there was a search
6 warrant issued.

7 387. MR. WONG: That is actually where you
8 interrupted.

9 MR. FANAKI: Well, you were getting into
10 multiple locations and aspects of the
11 search...

12 388. MR. WONG: Well, no.

13
14 BY MR. WONG:

15 389. Q. Did the Commissioner obtain search
16 warrants against multiple National locations, yes or
17 no?

18 MR. FANAKI: We will allow his answer
19 and then we will see where it goes from
20 there. Go ahead.

21 THE DEPONENT: Yes.

22
23 BY MR. WONG:

24 390. Q. And this was in July, early July?

25 A. I believe so.



1 391. Q. That is all.

2 A. Can I take a break?

3 392. MR. WONG: Absolutely.

4
5 --- A BRIEF RECESS

6
7 GORDON POTTER. resumed

8 CONTINUED CROSS-EXAMINATION BY MR. WONG:

9 393. Q. So, we had been discussing, I think,
10 paragraph 48(c). I would like to take a look at
11 48(b). And just for the record, it says:

12 "...National proposed topics include (b)
13 the issue of Reliance's anti-competitive
14 acts as they relate to National including
15 the impact of Reliance's exclusionary water
16 heater return policies and procedures and
17 other anti-competitive conduct on the
18 ability of National to effectively compete
19 and expand in the Relevant Market..."

20 Now, you say there "and other anti-competitive
21 conduct". I am wondering what you mean by that.
22 What are you referring to by that?

23 A. That would be the attrition fighting
24 programs that Reliance has put forward as far as
25 following my agents in the field or my technicians



1 who install. Triggering campaigns to stop customers
2 from executing transactions with us. I think those
3 would be the primary two. Some of the awareness
4 campaigns or advertising that Reliance has done and
5 is doing. I think those are the three main areas.
6 Double billing or continuing to bill even though
7 there is acknowledgement that the tank has been
8 removed.

9 394. Q. What do you mean by "acknowledgement
10 that the tank has been removed"?

11 A. When they have been notified but
12 refused to take our call even though we have told
13 them that we have removed the tank. Or we attempt a
14 three week call and they refuse to continue even
15 though on the call they have already been notified
16 the tank has been removed.

17 395. Q. Let me turn you to paragraph 6 of
18 your affidavit. It says:

19 "...National is a supplier of home services
20 including the rental of energy efficient
21 water heaters..."

22 I take it by "energy efficient water heaters" you
23 are referring to both gas and electric water
24 heaters?

25 A. That is correct.

1 396. Q. And National door knockers sell both
2 of these as well as related services, maintenance,
3 upkeep?

4 A. That is correct.

5 397. Q. And on their...when the sales
6 agents, the door knockers or salespersons attend,
7 they sell these all together, sort of, have a
8 brochure with both...they offer both electric and
9 gas heaters?

10 A. I think generally we do. As you are
11 probably aware, most Ontario residents have gas
12 water heaters. Electric is very few times that you
13 run into an electric water heater in Ontario.

14 398. Q. Right. I guess my inquiry is, when
15 you are referring to energy efficient water heaters,
16 in the actual sale of those are they sold together?
17 I understand the brochure lists both.

18 A. Yes.

19 399. Q. So a customer is offered either/or?
20 Or a potential customer, I should say.

21 A. We have the ability to sell both and
22 our collateral or our material provides for both.

23 400. Q. And are there...is there any reason
24 why one would be offered over the other for a given
25 customer or a potential customer?



1 A. Basically, whatever the customer is
2 currently renting is what we will look at to
3 replace.

4 401. Q. Is it the case that gas would go out
5 and an electric heater would go in?

6 A. Virtually never. It is most costly
7 to put an electric water heater in than a natural
8 gas water heater. What we do have is we have people
9 that will possibly take a different size tank
10 because the existing tank that they have in their
11 house is, in fact, not the right size for their
12 house or their family because the family may have
13 grown.

14 402. Q. And you are saying it is seldom that
15 it switches from gas to...switch from electric to
16 gas?

17 A. On a rare occasion, somebody will
18 pay to have gas piped in.

19 403. Q. You say it is rare that somebody
20 replaces gas with electric?

21 A. Correct.

22 404. Q. And by "rare"...

23 A. In my experience, virtually never.
24 Electricity is far more expensive than gas. I mean,
25 the fuel source to be clear.



1 405. Q. Right. Going to paragraph 11 of
2 your affidavit. We had, sort of, focused on...there
3 is a bit of a list here of items that you indicate
4 that National has experience with. And one of them
5 is, and I quote for the record:

6 "...National has experience with attempts
7 to enter and expand into local regions for
8 the supply of water heater rental services,
9 including the costs and other conditions of
10 entry for a water heater rental service in
11 Ontario..."

12 What are the costs and other conditions you are
13 referring to there?

14 A. Well, in general, the costs are
15 setting up warehousing distribution, marketing
16 collateral, offices, administration, inventory and
17 all the related sub-processes underneath those as
18 well as demographics, et cetera, and assessing the
19 ability to install and serve that customer base with
20 a technical force as well as the conditions for
21 entry and the return process, et cetera.

22 406. Q. Right. So, by cost and conditions,
23 you are referring to really just the cost of doing
24 business?

25 A. Yes.

1 407. Q. Is that fair?

2 A. That is correct.

3 408. Q. And is there a distinction between
4 your use of the word "cost" and "conditions"? It
5 seems like cost is...

6 A. Well, just for clarity, there are
7 costs. But depending on different conditions in
8 those market areas, it will affect your ability to
9 sell, to operate as well as the costs generally. So
10 if I go into an area where, as an example, I don't
11 face onerous competitive barriers within the market,
12 then my costs and my ability to operate and the
13 convenience and product I can sell to my customer
14 will probably be more well received than if I am
15 faced entering into a market where I know that there
16 is a number of anti-competitive barriers in place
17 that I have to overcome in order to establish and
18 grow my business.

19 409. Q. Right. And what kinds of...I guess
20 what categories of conditions specifically are you
21 referring to?

22 A. Well, specifically as it relates to
23 this case, things like the return process, the
24 ability to operate in a free market that is fully
25 competitive and free of barriers to switching, and



1 our ability to operate or to provide innovative
2 products to consumers in a convenient fashion for
3 them.

4 410. Q. Are there any other conditions that
5 come to mind that you are referring to there?

6 A. I think those are the main points.

7 411. Q. At paragraph 8 of your affidavit,
8 you state that National is Reliance's largest and
9 only meaningful competitor. And you have also
10 talked about attempts to grow and expand in the
11 quote-unquote Relevant Market. Are you saying that
12 there are no other meaningful competitors in the
13 Relevant Market?

14 A. From my perspective, I believe we
15 are the only meaningful competitor in our market.

16 412. Q. And who would be the next couple of
17 competitors and why would you say they are not
18 meaningful?

19 A. Well, first of all, I think there is
20 a number of smaller competitors that I think, from
21 my experience or my understanding, are not as
22 consistent or as...have the breadth and the scope
23 that National does consistently. With respect for
24 meaningful, I think it is from a perspective of
25 running a company that is well-structured and a



1 well-run company that is legitimate, that is looking
2 to build for long-term growth and can provide all of
3 the ancillary services needed to support our
4 customer base.

5 413. Q. So, you would say that Ontario
6 Consumers is not a meaningful competitor?

7 A. I think they are behind us. They
8 would be one of those few other competitors. I
9 don't believe that they are as meaningful or as
10 prominent, I guess you might say, as we are. Or as
11 well-established.

12 414. Q. And are you aware of other
13 competitors who are...who have operated in the
14 Relevant Market but who are not operating any more
15 in the Relevant Market?

16 A. No, I am not.

17 415. Q. So you are not aware of any
18 competitors who have exited the market?

19 A. Not that specific Relevant Market,
20 no.

21 416. Q. Right, the capital R capital M
22 Relevant Market.

23 A. So there has been acquisitions such
24 as More Energy has exited the market generally. And
25 I believe there has been one or two other

1 acquisitions which I can't...I don't have the names
2 of currently that have occurred.

3 417. Q. And I should clarify that exited the
4 market, I mean within the last four years or however
5 long National has also been...

6 A. Correct.

7 418. Q. In paragraph 20 of your affidavit,
8 again just reading for the record, you state:

9 "...When National entered into the Relevant
10 Market in 2010, Reliance, unlike Direct
11 Energy, was not operating under a consent
12 order from the Competition Tribunal or
13 similar remedy that prohibited Reliance
14 from engaging in anti-competitive conduct.
15 As a consequence, National's expansion in
16 the Relevant Market has been more difficult
17 than its earlier entry into the principal
18 operating territory of Direct Energy which
19 at that time was subject to a consent
20 order..."

21 And by "principal operating territory", I am
22 assuming you mean the quote-unquote Relevant Market
23 for Direct Energy?

24 A. Correct.

25 419. Q. And you are aware that Direct Energy

1 is also subject to a parallel proceeding by the
2 commissioner for alleging abuse of dominance?

3 A. Yes.

4 420. Q. And this passage, are you saying
5 that National has had a more difficult time
6 competing in Reliance's territory than in quote-
7 unquote Direct's territory?

8 A. That is correct.

9 421. Q. And are you saying that this is due
10 only to the presence of a consent order or historic
11 presence of a consent order in the Direct territory?

12 A. I am saying that it is due to the
13 anti-competitive behaviours being established and
14 enacted by Reliance, which in comparison were
15 prohibited under the consent order Direct Energy
16 has. Which meant that they were not operating...
17 attempting to do the same behaviours.

18 422. Q. So, I guess what specifically...what
19 is a differentiating conduct, if you will? You are
20 saying that Reliance and Direct are engaging in
21 different conduct; is that fair?

22 A. At this...as it pertains to this
23 paragraph.

24 423. Q. Right.

25 A. Yes, that is correct.

1 424. Q. And I understand you are saying
2 because there is no consent order or hasn't been one
3 historically in the Reliance territory, Reliance has
4 engaged in different conduct than Direct; is that
5 fair?

6 A. I would say Reliance has acted
7 differently than Direct and Direct did not operate
8 that way because they were constrained by that
9 consent order.

10 425. Q. And what is that different conduct,
11 that different way...what sort of conduct is that
12 specifically?

13 A. Well, specific, to name the main
14 ones, is the return policy and the requirement of
15 the RRN process. Refusing to acknowledge an agency
16 that the customer has provided us. The requirement
17 to maintain drop-off locations or warehouses and not
18 arbitrarily change them by week as to what days or
19 hours per day or number of tanks you are allowed to
20 return and on what conditions. I guess the delays
21 that we have received as a result of that RRN
22 process in attempting to try to mitigate or minimize
23 double billing or get the tanks returned in an
24 expedient fashion. I think those are the main ones
25 there. Those are the main...



1 426. Q. Are there any other factors, whether
2 related to the consent order or absence thereof or
3 otherwise, that have affected the relative
4 competitive levels, in your opinion?

5 A. Yes, the last one being the
6 imposition of damage fees or, in my view, onerous
7 exit fees or termination fees. Especially as it
8 relates to tanks that are very old and clearly
9 beyond its depreciated value. Which, in my view,
10 only serve to frustrate the consumer and make it
11 more costly for them to switch.

12 427. Q. And is that the extent of the
13 factors in the two markets or two principal
14 territories, as you describe them?

15 A. Yes, those are the main points.

16 428. Q. The main points. Well, I guess what
17 I am getting at is...so you are saying that other
18 factors, for example pricing, have not been a factor
19 in terms of affecting the competitive levels in each
20 of the two territories, as you have described?

21 A. No, our ability to price
22 competitively is not the issue. The issue is the
23 activities by Reliance in trying to reduce price or
24 discriminate in price as it pertains to stopping
25 somebody from accepting a sale or an agreement with



1 NHS. But pricing generally, no.

2 429. Q. Right. How about other things like
3 service level, quality of product, anything else
4 like that; have those affected the relative
5 competitive levels in your opinion?

6 A. I don't believe so.

7 430. Q. And you have stated, I think, in a
8 number of places including paragraph 23 that
9 National...in short, National has been constrained
10 in expanding its business, is that fair, due to
11 Reliance's conduct; is that fair?

12 A. That is correct.

13 431. Q. And is it correct that National has
14 acquired 240,000 customers since beginning
15 operations in 2008? Approximately 240,000
16 customers.

17 A. Approximately, yes.

18 432. Q. And what has the growth rate been
19 year over year for National?

20 A. It has actually decreased year over
21 year over the last two years.

22 433. Q. Well, what was it over the last two
23 years?

24 A. So, just rough numbers, I believe we
25 were...I think the end of this last fiscal year we



1 increased about 34,000 customers. And the year
2 before that, we had 40 some-odd thousand customers.
3 Prior to that. So what we have seen is obviously a
4 lot of constraint in the Relevant Market or the
5 Reliance territory and difficulty to expand and see
6 the same success we saw previously in the Direct
7 Energy market.

8 434. Q. Sorry, could you repeat that?

9 MR. FANAKI: Again, that is potentially
10 confidential information. Just to flag it.

11 435. MR. WONG: Right.

12
13 BY MR. WONG:

14 436. Q. How about the year prior in terms of
15 the growth rate?

16 A. I don't have it off the top of my
17 head. But what I have seen and what I know to be
18 true is that we continue to see less sales than we
19 used to see. And especially as it pertains to that
20 area in Reliance. We see more cancellations.

21 437. Q. And you don't attribute this to the
22 fact that National has been in the territory now for
23 five years?

24 A. No.

25 438. Q. And...



1 A. No. Sorry.

2 439. Q. Sorry, go ahead and answer the
3 question.

4 A. Well, we haven't been in the
5 territory for five years. We entered in 2010.

6 440. Q. I thought your affidavit evidence
7 was that you entered in 2009.

8 A. I believe...I will just refer back
9 to it.

10 441. Q. I had thought you had started in
11 2008 in Direct's territory.

12 A. That is correct.

13 442. Q. And then came into Reliance in 2009.
14 It is not 2009, it is 2010?

15 A. Correct.

16 443. Q. So, in terms of National's...
17 expanding National's business, have there been
18 internal projections in terms of growth rates for
19 the coming year or years?

20 A. Well, I have a sales forecast for
21 this year.

22 444. Q. And I am assuming that was done in
23 prior years as well?

24 A. I would imagine it would have been,
25 yes.

1 445.



2
3
4
5
6
7
8 446. Q. And do you have access to prior
9 years' forecasts?

10 A. I actually don't know.

11 447. Q. Can you obtain a copy of those for
12 me?

13 MR. FANAKI: We will take it under
14 advisement, Mr. Wong.

U/A

15 448. MR. WONG: Subject to undertakings,
16 those are my questions.

INDEX OF EXHIBITS

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B	2012 version of National Water Heater Rental Agreement	60



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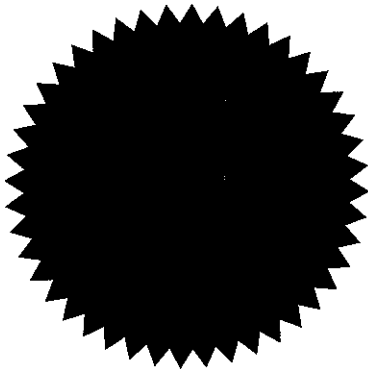
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Tracy Chu
Verbatim Reporter



COMPETITION TRIBUNAL

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

and

RELIANCE COMFORT LIMITED
PARTNERSHIP

Respondent

**SUPPLEMENTARY RESPONSE OF THE RESPONDENT TO
THE MOTION OF NATIONAL ENERGY CORPORATION FOR
LEAVE TO INTERVENE**

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