THE COMPETITION TRIBUNAL

CT-2012-003

IN THE MATTER OF the *Competition Act*, RSC. 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 Direct Energy Marketing Limited.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

AND

DIRECT ENERGY MARKETING LIMITED

Respondent

RESPONSE OF DIRECT ENERGY MARKETING LIMITED TO REQUEST FOR LEAVE TO INTERVENE OF NATIONAL ENERGY CORPORATION

PART I – OVERVIEW

1. The respondent Direct Energy Marketing Limited ("**Direct Energy**") opposes National Energy Corporation's ("**National**") request for leave to intervene on the basis that:

(a) National is attempting to raise new issues and broaden the issues raised in the Application;

(b) National has failed to establish that it has a unique or distinct perspective on the issues raised by the Commissioner; and

(c) National seeks to use the Competition Tribunal as a forum to advance its private litigation agenda against Direct Energy.

2. Direct Energy therefore requests that National's application for leave to intervene be denied.

3. Alternatively, if National is granted leave to intervene, the manner in which it may intervene and the topics on which it may intervene ought to be far more restricted than as outlined in National's Request, and ought to be limited to the matters addressed at paragraphs 24-26 below.

PART II – THE TEST FOR LEAVE TO INTERVENE

4. A person may apply for intervenor status in accordance with section 9(3) of the *Competition Tribunal Act*:

> Any person may, with leave of the Tribunal, intervene in any proceedings before the Tribunal, other than proceedings under Part VII.1 of the

> *Competition Act*, to make representations relevant to those proceedings in respect of any matter that affects that person.

5. In order to obtain intervenor status, National must demonstrate that:

   (a) it is directly affected;

   (b) the matter alleged to affect National is legitimately within the scope of the Tribunal's consideration or is sufficiently relevant to the Tribunal's mandate;

   (c) all representations made by National are relevant to an issue specifically raised by the Commissioner; and

   (d) National brings to the Tribunal a unique or distinct perspective that will assist the Tribunal in deciding the issues before it.[1]

6. The Tribunal must also consider subsection 9(2) of the *Competition Tribunal Act* which states:

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

7. The overriding consideration on an intervention application is whether or not the proposed intervention is likely to be of assistance to the Tribunal in determining the issues raised by the Commissioner. As Noël J. stated in *Canadian Pacific Ltd.*, even if the intervenor is directly affected by the matter, "the Tribunal must also be convinced that the representations that the intervenor will make, if leave is granted, will be relevant

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[1] *Canada (Commissioner of Competition) v Toronto Real Estate Board*, [2011] CCTD No 22 at para 21 [*TREB*] (Brief of Authorities, Tab 1).

[2] *Competition Tribunal Act*, R.S.C., 1985, c. 19 at s. 9(2).

to and will assist the Tribunal in deciding the issues before it."[3] In making this determination, it is crucial that the Tribunal assess whether a proposed intervenor will fulfill its intended role to "supplement the case of a party by bringing to the Tribunal their own and distinct perspective of the subject matter in dispute."[4] Moreover, the Tribunal should "consider very seriously to what extent intervenors should be allowed to prolong and complicate the process."[5]

8. As explained in detail below, National has failed to establish at least three prongs of the four-part test. Moreover, it has failed to establish that its participation as an intervenor will likely assist the Tribunal. There is no need for or benefit to National's intervention, which is likely to simply lengthen and complicate the proceedings.

(a) National is attempting to raise new issues and broaden the issues raised in the Application

9. National seeks to broaden the scope of issues and remedies through its request to intervene.

10. More specifically, National acknowledges that it will support the position of the Commissioner but states that it takes a different position on the scope of anti-competitive conduct that it alleges ought to be addressed in the Application and the sufficiency of the relief sought by the Commissioner (the "**New Allegations**").[6] In so

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[3] *Canada (Competition Act, Director of Investigation and Research) v. Canadian Pacific Ltd.*, [1997] CCTD No 14 at para. 3 [*Canadian Pacific*] (Brief of Authorities, Tab 2) [emphasis added]. See also *Canada (Commissioner of Competition) v Visa Canada Corp.*, [2011] CCTD No 2 at para. 15 [*Visa Canada Corp.*] (Brief of Authorities, Tab 3).

[4] *Southam Inc. et al. v Director of Investigation and Research* (1997), [1997] CCTD No 47 at para. 13 [*Southam*] (Brief of Authorities, Tab 4) [emphasis added]. See also *Visa Canada Corp.* at para. 16 (Brief of Authorities, Tab 3).

[5] *Canada (Director of Investigation and Research, Competition Act) v Air Canada*, [1992] CCTD No 24 at 4 (Brief of Authorities, Tab 5).

[6] See National's Request to Intervene at para 30.

doing, National is attempting to broaden the scope of the Application. This is entirely inappropriate. It is well established that intervenors may only intervene on topics defined by the Commissioner in the Application.

11. As explained by the Tribunal in *Tele-Direct*:

> We agree with the respondents that intervenors are restricted to making representations on issues that are relevant to the proceedings as defined by the pleadings. We do not dispute that all the acts alleged by White and NDAP/DAC might be relevant to the general question of abuse of dominant position; however, if the Director has chosen not to put them in issue in his application, then they are not relevant to the instant proceeding before the Tribunal. In fairness to the respondents, the anti-competitive acts on which the Director relies must be pleaded with sufficient particularity to give adequate notice of the case that will be brought against them.[7]

12. Similarly, in *Visa Canada Corporation and MasterCard International Incorporated*, the Tribunal refused to allow the intervenor to expand the scope of the issues in the Application:

> The Commissioner's case does not center on the business of issuing credit cards. However, the Bank's Affidavit shows that it seeks to expand the hearing to have the Tribunal consider all aspects of the business including its costs and the services it provides to cardholders. As well, the Association says that the Tribunal must consider the competitiveness of the payments system because the Proposed Order will affect the system as a whole.
>
> I have concluded that it is not appropriate to permit the Proposed Intervenors to expand the hearing to deal extensively with matters which are not the subject of allegations by the Commissioner. Accordingly, the Proposed Intervenors will not be given leave to adduce general broad-based evidence about the business of issuing credit cards or about the operation of the Canadian payments system...[8]

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[7] *Canada (Competition Act, Director of Investigation and Research) v Tele-Direct (Publications) Inc.*, [1995] CCTD No 4 at 3 [*Tele-Direct*] (Brief of Authorities, Tab 6).

[8] *Visa Canada Corp.*, at paras. 45-46 (Brief of Authorities, Tab 3) [emphasis added].

13. The New Allegations are not raised by the Commissioner in the Application and do not form part of the Application. In accordance with the jurisprudence and principles of procedural fairness, National should not be permitted to intervene in topics that are not raised in the pleadings.

(b) National has failed to establish that it has a unique or distinct perspective

14. Apart from the new issues that National seeks to raise, its perspective on all issues raised in the Application align with the perspective of the Commissioner. As the apparent complainant in this matter, National has already prevailed upon the Commissioner to put forward its perspective on these issues. National has nothing to add as an intervenor which cannot be adduced by the Commissioner by calling a representative of National as a witness.

15. The jurisprudence is clear that an intervenor cannot intervene on issues where its position is the same as the position of one of the parties. In *Southam*, the Tribunal explained:

> This application is indeed most unusual in that the interests of the intervenor and of Southam are entirely the same. Both will seek to establish that Mr. Delesalle's plans provide for an effective remedy and that the Tribunal which heard the original application would not have made the order which it made if the current remedy had been before it at the time. I do not believe that the rules respecting intervention contemplate that an intervenor be called upon to make the very case that an applicant is called upon to make.
>
> In this instance, Southam, as the applicant, bears the burden of proving every element necessary to support the variation application, failing which it will fail. It cannot delegate this task to someone else in whole or in part. Intervenors 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. Here nothing of the sort would be achieved by granting Mr. Delesalle intervenor status as Southam has already assumed the task of

providing the Tribunal with Mr. Delesalle's contribution to the matter in issue.[9]

16. In the case at hand, National itself acknowledges that it "intends to support the position of the Commissioner generally".[10] National has provided no examples of topics on which its position differs from that of the Commissioner other than the New Allegations, which are topics outside of the scope of the pleadings and therefore cannot be considered.

17. In *Canadian Real Estate Assn.*, the Tribunal denied the request of the person seeking leave to intervene on the basis that the intervenor acknowledged that he was generally supportive of the Commissioner's case and provided no examples of topics on which their position differed.[11]

18. Like any other person with relevant information, National's representative can be called by the Commissioner as a witness to provide evidence to the Tribunal.

(c) National seeks to intervene to advance its private litigation agenda against Direct Energy

19. It is evident that National seeks to intervene in this case in order to advance and further its private litigation agenda against Direct Energy. This is an exploitation of the Tribunal process that may detract from its legitimate fact finding exercise. In addition, there is a real risk that granting National intervenor status will unnecessarily lengthen and complicate the proceedings.

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[9] *Southam*, *supra* at paras 12-13 (Brief of Authorities, Tab 4) [emphasis added].

[10] See National's Request to Intervene at para. 30.

[11] *Canada (Commissioner of Competition) v Canadian Real Estate Assn.*, [2010] CCTD No 11 at paras 13-14 (Brief of Authorities, Tab 7).

20. National and Direct Energy have an acrimonious and litigious history which has resulted in many findings of fault against National. For example:

(a) In August 2008, National commenced proceedings against Direct Energy alleging that Direct Energy had engaged in anti-competitive and unlawful conduct. Direct Energy brought a counter-application asserting that National's door-to-door salespeople had been making misrepresentations to consumers. Both parties then began further proceedings alleging misrepresentation. All litigation between the parties was settled pursuant to the Order of Justice Strathy which was entered into on consent on May 11, 2009 (the "**Consent Order**").[12]

(b) In March 2012, in an arbitration pursuant to the Consent Order, National was found to have breached the Consent Order four times by making misrepresentations to consumers.[13]

(c) On July 17, 2012, Justice O'Neill, of the Ontario Superior Court of Justice, released a decision finding that promotional materials which National had printed and disseminated were "false and misleading representations about [Direct Energy's] services and products"; that the "clear purpose of the misleading and inaccurate brochure was to draw customers away from Direct Energy"; and that the dissemination was "more directed at misleading consumers with respect to Direct Energy or discrediting the company than informing fairly and fully the consumer with information he

[12] Order of the Honourable Mr. Justice Strathy dated May 11, 2009, Court File No. CV-08-360464, Appendix A.
[13] Arbitration Decision of William Kaplan, dated March 19, 2012, at p. 18, Appendix B.

or she required to make an informed decision" (the "**O'Neill Decision**").[14] As a result, it was held that National had breached sections 7(a), 22 and 53.2 of the *Trade-Marks Act* and section 52 of the *Competition Act*.

(d) In September 2012, National moved to have the O'Neill decision set aside on the basis that new evidence had been discovered. The motion was dismissed with costs to be awarded against National.[15] National has now appealed this decision and, as part of the appeal, is also attempting to resurrect a previously unperfected appeal of the O'Neill decision itself.[16]

21. After realizing defeat in the above-referenced proceedings, National launched additional lawsuits against Direct Energy, including:

(a) In June 2012, National issued a Notice of Action in the Ontario Superior Court against a number of defendants, including Direct Energy, alleging conspiracy and numerous other torts.[17] A Statement of Claim was not filed within the time prescribed by the *Rules of Civil Procedure* and that action is consequently defunct;

(b) In May 2013, National commenced a lawsuit against the same defendants in the Federal Court in which National again alleged conspiracy and a variety of other wrongdoing, including breaches of the *Competition Act*.[18]

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[14] *Direct Energy Marketing Limited v National Energy Corp.*, 2012 ONSC 4232 at paras. 22 and 25, Appendix C.

[15] *Direct Energy Marketing Ltd. v National Energy Corp.*, 2013 ONSC 5024, Appendix D.

[16] National Energy Corporation, Notice of Appeal re: Order of the Honourable Mr. Justice O'Neil dated July 30, 2013, Court File No. CV C57568, August 30, 2013, Appendix E.

[17] National Energy Corporation, Notice of Action in Ontario Superior Court of Justice, Court File No. CV 1245735, Appendix F.

[18] National Energy Corporation, Statement of Claim in Federal Court, Court File No. T-55-13, May 9, 2013, Appendix G.

22. It is clear that part of National's business strategy is to advance unfounded allegations of anticompetitive conduct and other wrongdoing against Direct Energy in various fora. Its complaint to the Commissioner and request to intervene are evidently part of that strategy. Direct Energy respectfully submits that National's request to intervene should be denied.

PART III – IF NATIONAL'S REQUEST TO INTERVENE IS GRANTED, THE SCOPE OF ITS INTERVENTION OUGHT TO BE RESTRICTED

23. If National is granted intervenor status, the scope of its intervention should be strictly limited in order to provide some protection against National unnecessarily lengthening and complicating the proceedings.

(a) Appropriate Topics

24. National must be "restricted to making representations on issues that are relevant to the proceedings as defined by the pleadings".[19] National must therefore not be permitted to raise the New Allegations. Moreover, National should only be permitted to intervene on relevant topics for which it has a unique or distinct perspective. Although, as explained above, Direct Energy submits that this precludes National from intervening on any of National's proposed topics, in the alternative, it should be limited to intervening on:

(a) the impact of Direct Energy's water heater return policies and procedures and other alleged anti-competitive conduct as raised in the Commission's Application on National's ability to effectively compete and expand;

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[19] *Tele-Direct*, *supra* at 3 (Brief of Authorities, Tab 6).

(b) National's interactions with Direct Energy with respect to the matters at issue in the proceeding; and

(c) the statements made and conclusions drawn by Direct Energy concerning National in the Response of Direct Energy filed in this proceeding.

(collectively, the "**Appropriate Topics**").

25. If National is permitted to intervene on the Appropriate Topics, its ability to do so must be limited to ensure that National is not simply repeating the Commissioner's case.

(b) Terms of Intervention

26. National does not require all of the rights that it is seeking in order to appropriately participate as an intervenor in this proceeding. Given its position as a competitor of Direct Energy and the litigious history between these parties, National's role ought to be strictly limited in accordance with the following terms:

(a) National should only be permitted to intervene on the Appropriate Topics;

(b) National should be given the right to attend at motions, pre-hearing conferences, and the hearing of the Application and the right to make oral and/or written legal arguments and submissions, but only to the extent that these are relevant to the issues on which it is permitted to intervene and are not duplicative of the Commissioner's submissions;

(c) National should be required to produce an Affidavit of Documents with all documents relevant to the issues as defined by the pleadings;

(d) The parties should be permitted oral discovery of National's representative;

(e) National should not be entitled to conduct oral examinations for discovery;

(f) National should not be permitted to inspect any documents produced by the parties or review discovery transcripts or any exhibits thereto, except in accordance with a confidentiality Order made by the Tribunal that restricts disclosure of such documents and transcripts to: (i) the topics on which National has been permitted to intervene; and (ii) external counsel for National, after having signed an appropriately worded confidentiality agreement, insofar as the information to be disclosed has been determined by the producing party to be competitively sensitive and/or proprietary;

(g) At the hearing of the Application, National should be permitted to deliver the relevant, non-repetitive evidence of one witness with respect to the issues on which National is permitted to intervene;

(h) National should not be permitted to cross-examine witnesses at the hearing of the Application;

(i) National should not be permitted to lead expert evidence at the hearing of the Application; and

(j) National should be subject to the costs provisions in section 8.1 of the *Competition Tribunal Act*.[20]

PART IV – ORDER REQUESTED

27. Direct Energy requests an Order that National's request to intervene be denied.

28. In the alternative, Direct Energy requests an Order that National be subject to the terms outlined in Part III(b).

PART V – PROCEDURAL MATTERS

29. Direct Energy requests that the hearing of this motion be heard in Toronto.

Dated this 19 day of September, 2013

Donald B. Houston

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Counsel for Direct Energy Marketing Limited

[20] The panel hearing this Application ought to have the discretion to make an adverse costs award if it deems such an award is appropriate and therefore its discretion ought not be fettered at this time: *TREB* at para 43 (Brief of Authorities, Tab 1).

TO: **DEPARTMENT OF JUSTICE CANADA**
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AND TO: **The Registrar**
Competition Tribunal
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APPENDIX A

Court File No. CV-08-360464-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE Mr.	) **MONDAY, THE 11TH DAY**
JUSTICE GREGRATHY	) **OF MAY, 2009**

B E T W E E N:

NATIONAL ENERGY CORPORATION

Plaintiff/
Defendant by counterclaim

- and –

DIRECT ENERGY MARKETING LIMITED

Defendant/
Plaintiff by counterclaim

ORDER

THIS MOTION, made by Direct Energy Marketing Limited for a permanent injunction, was heard this day at 393 University Avenue, Toronto, Ontario.

ON READING the consent of the parties, filed,

1. THIS COURT ORDERS that National Energy Corporation, its servants, agents, representatives, successors, assigns, and all persons under its control ("National Energy") are enjoined from using, either directly or indirectly, the trade-marks DIRECT ENERGY and DIRECT ENERGY logo, and any other trade-marks confusingly similar therewith, in association with the business of the sale, rental, maintenance or repair of water heaters.

2. THIS COURT ORDERS that National Energy is enjoined from passing off its wares, services or business as and for the wares, services or business of Direct Energy or otherwise directing public attention to its wares, services or business in such a way as to

cause or be likely to cause confusion with the wares, services or business of Direct Energy.

3. THIS COURT ORDERS that National Energy is enjoined from stating directly or indirectly, any of the following:

   (a) National Energy has any business relationship, past or present, with Direct Energy;

   (b) National Energy is an agent of Direct Energy;

   (c) Direct Energy has ceased or is about to cease operating in the gas-fuelled water heater business;

   (d) Direct Energy is going out of business;

   (e) any gas-fuelled water heaters supplied by Direct Energy are unsafe;

   (f) any gas-fuelled water heaters supplied by Direct Energy do not meet required safety standards; and

   (g) any gas-fuelled water heaters supplied by Direct Energy that are more than five years old are inefficient.

4. THIS COURT ORDERS that Direct Energy Marketing Limited, its servants, agents, representatives, successors, assigns, and all persons under its control ("Direct Energy") is enjoined from making, in writing or orally, directly or indirectly, expressly or implicitly, to any person, any or all of the following statements:

   (a) National Energy is making false or misleading statements regarding Enbridge Gas Distribution Inc. or its business operations;

   (b) National Energy is making false or misleading statements regarding Direct Energy or its business operations;

(c) National Energy is claiming that Direct Energy is no longer in the water heater rental business;

(d) National Energy is claiming that it is associated with Direct Energy or representing Direct Energy;

(e) National Energy is making false or misleading statements regarding National Energy or its business operations; and

(f) National Energy is making false or misleading statements.

5. THIS COURT ORDERS that Direct Energy is enjoined from making, in writing or orally, directly or indirectly, expressly or implicitly, to any person, that any water heater rental provider is making false or misleading statements unless (i) Direct Energy specifically identifies the name of the water heater rental provider (or providers) in the written or oral statement and (ii) Direct Energy does not name, mention or refer expressly or implicitly to National Energy in the written or oral statement.

6. THIS COURT ORDERS that this order is effective March 7, 2009, *nunc pro tunc,* until further order of the court.

7. THIS COURT ORDERS that the relief granted in paragraphs 1 to 6 survive the dismissal of this action.

8. THIS COURT ORDERS that this action be and is hereby dismissed without costs.

9. THIS COURT ORDERS that the time for service and filing of the notice of motion and motion record be and is hereby abridged.

10. THIS COURT ORDERS that the requirement for serving and filing a factum be and is hereby dispensed with.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

MAY 1 1 2009

AS DOCUMENT NO.:
À TITRE DE DOCUMENT NO.:
PER / PAR:

Gilleathy J.

NATIONAL ENERGY CORPORATION
Plaintiff/
Defendant by counterclaim

- and -

DIRECT ENERGY MARKETING LIMITED
Defendant/
Plaintiff by counterclaim
Court File No.: CV-08-360464-0000

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto

ORDER

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Plaintiff by counterclaim

APPENDIX B

IN THE MATTER OF AN ARBITRATION conducted pursuant to the provisions of the *Arbitration Act*, 1991, S.O. 1991, c. 17 and in accordance with the Arbitration Agreement executed by the parties on March 6, 2009 and amended June, 2010.

BETWEEN:

Direct Energy Marketing Limited

and

National Energy Corporation

Before:	William Kaplan Arbitrator
Appearances	
For Direct Energy:	Brennagh Smith Stockwoods Barristers & Solicitors
	Paul Le Vay Stockwoods Barristers & Solicitors
For National Energy:	Brad Teplitsky Teplitsky Colson Barristers & Solicitors

This arbitration proceeded to a hearing in Toronto on March 8, 2012.

Introduction

Direct Energy Marketing Limited (hereafter "Direct") and National Energy Corporation (hereafter "National") are competitors in the water heater business. By court order ("the order"), they are enjoined from making certain misrepresentations about each other. When the alleged misrepresentations are not intended to reach a large audience, they are dealt with under an Arbitration Agreement ("the Agreement") entered into by the parties. The parties are in agreement that I have to jurisdiction to determine whether a breach of the order has occurred and to award the relief set out in the Agreement.

This is the second claim by a party under the Agreement asserting a breach of the order, which is as follows:

3. THIS COURT ORDERS that National, its servants, agents, representatives and all persons under its control are enjoined from stating directly or indirectly, any of the following:

(a) National has any business relationship, past or present, with Direct Energy;
(b) National is an agent of Direct Energy;
(c) Direct Energy has ceased or is about to cease operating in the gas-fuelled water heater business;
(d) Direct Energy is going out of business;
(e) any gas-fuelled water heaters supplied by Direct Energy are unsafe;
(f) any gas-fuelled water heaters supplied by Direct Energy do not meet the required safety standards; and
(g) any gas-fuelled water heaters supplied by Direct Energy that are more than five years old are inefficient.

4. THIS COURT ORDERS that Direct Energy, its servants, agents, representatives, and all persons under its control are enjoined from making, in writing or orally, directly or indirectly, expressly or implicitly, to any person, any or all of the following statements:

(a) National is making false or misleading statements regarding Enbridge Gas Distribution Inc. or its business operations;

(b) National is making false or misleading statements regarding Direct Energy or its business operations;
(c) National is claiming that Direct Energy is no longer in the water heater rental business;
(d) National is claiming that it is associated with Direct Energy or representing Direct Energy;
(e) National is making false or misleading statements regarding National or its business operations; and
(f) National is making false or misleading statements.

This arbitration involves four separate claims by Direct that National has breached paragraph 3 of the order. As a matter of convenience, these claims, Robertson, Szabo, Giliberti and Butchernice, were consolidated into one proceeding. Both parties filed affidavits setting out (Direct) and denying (National) the alleged breaches (except for Butchernice where only a reply affidavit was filed responding to a telephone recording/transcript). Recordings/transcripts of telephone conversations with both the Direct and National call centers were also introduced. One affidavit, filed by National, was not considered on the basis that it was completely unresponsive to the particular claim (Giliberti) as the affiant made it apparent that he could not recall Ms. Giliberti, and his affidavit was based on surmise rather than recollection. As was the case when the first consolidated claim proceeded to a hearing, evidence in this consolidated claim was adduced by affidavit and by recordings/transcripts of calls made to both the Direct and National call centers.

National counsel sought an adjournment at the outset of the proceedings, claiming that National was disadvantaged because Direct filed written submissions when the arbitration commenced. National counsel also asserted that he had been provided with inadequate notice of the claims that were being

made. Direct contested the adjournment request. After hearing the submissions of the parties, I refused the adjournment request for the reasons that follow.

Turning first to the assertion of inadequate notice: all of the affidavits and telephone recordings/transcripts were filed in advance of the hearing. These materials, together with the claim notices, leave no doubt whatsoever as to the breaches of the order that are alleged and the facts to be relied upon. Ample and timely notice as required by paragraph 16 of the Agreement was provided. Not every fact must be specifically pleaded. Accordingly, there was no lack of notice and certainly no unfairness or prejudice to National. Under no circumstances could National be said to have been taken by surprise by references to the recordings/transcripts. It too relied on telephone recordings/transcripts. As well, the Agreement anticipates the claims process will be efficient, effective, timely and summary.

National also sought an adjournment because Direct submitted a factum. In the event, these written materials merely mirrored Direct counsel's oral submissions. There was nothing that precluded National from filing written materials had it wished to do so. Absent some kind of agreement or understanding between the parties, the fact that one of them files a factum at the beginning of a case cannot be the basis for a successful adjournment request by the other party.

The Four Claims

1. Sarah Robertson (Paragraph 3 (c), (f), & (g))

Ms. Robertson deposed that on March 11, 2011, a National sales representative named Hassan Abseh came to her house and looked at her water heater:

Hassan led me to believe that he was visiting my Property as part of a special Provincial government program and that I would get a bonus for upgrading my water heater.

He then told me that my tank was installed in 1997 by Direct Energy and that I was overdue for a new one. He further stated to me that Direct Energy was getting out of the water heater business and that his company, National…had taken over the water heater business from Direct Energy.

At that point, he presented me with a contract and told me that I would be able to receive a brand new water heater, either later that same day or the next day.

On account of my belief that National was taking over the water heater business from Direct Energy and that this gentleman had appeared at my door as part of a Provincial government program, I signed the contract. Nonetheless, I still wanted to make certain that the information was entirely accurate as I did not feel totally comfortable.

Ms. Robertson advised Mr. Abseh that she wished to double-check with Direct. According to Ms. Robertson, Mr. Abseh then ripped up the signed contract and left her house. Ms. Robertson then made two telephone calls to Direct that were recorded and later transcribed.

Call #1

SR: And he's saying that their taking over the contract for all the water heaters um over Direct Energy and Enbridge or Enbridge is out of this and whatever…

…

SR: …you know he kept on saying he was from the government. I'm retired and older and so anyway he started to write it up and he sounded very official….

…

SR: …but when he came I thought oh well he sounded so convincing that he was taking over..you um…Direct Energy were getting out of water heaters.

…

SR: …he just said that this water tank had been put in 1998 and I remember because I was with Enbridge but I have this agreement with you, like water heaters, that I rent and then heating protection plan and I said to him well I've been paying this so why would

they have me pay this if they are getting out it. And I twigged on that oh well he was lying.

…

SR: …He just led me to believe that this tank was no good that they should be…by government standards they don't allow you to put that tank anymore in your home.

Call #2

SR: …Now I had someone from National Home Services in and he looked at the hot water tank and he was giving me false information that you had gone out of business and whatever. That you weren't doing this part of the area. That you only did furnaces and so anyway, I phoned a neighbour who got down it was just a ploy.

…

SR: He was leading me to believe that the type of water heater that I have is, that you, because of new laws that have been put into effect, that you can't put, install that water heater again. It has to be of this new technology. Is that correct?

…

SR: Well the young man came to my door and he led me to believe that Direct Energy was getting out of any services to do with water heaters. And he was a Canadian government, or Canadian agent that was taking over all these contracts for Direct Energy.

…

SR: …but he was saying that you were, Direct Energy was getting out of that side of the business. That you were only dealing with furnaces…and not water heaters.

Mr. Abseh responded to Ms. Robertson's affidavit. He is a former National sales person. His affidavit does not indicate that he has any recollection of his sales call on Ms. Robertson; rather, it speaks to what were his common practices. He denied stating that Direct was going out of business, or that National was taking over Direct's business. He further denied saying that there was a government program involving water heaters. He suggested that Ms. Robertson might have been confused because he did tell prospective customers that National installed Energy Star rated water heaters, and those water heaters were recognized by the government. His affidavit concluded, "Regarding Ms. Robertson's statement that

I ripped up the contract, we are not permitted to leave contract paperwork with a customer if they decide not to complete the agreement."

Submissions

In Direct's view, the evidence was clear, cogent and convincing that National violated the order by indicating that Direct was out of the water heater business and by suggesting that Ms. Robertson's water heater was unsafe and inefficient. Ms. Robertson had no reason to lie, and her affidavit was corroborated by two telephone conversations with Direct that were recorded immediately following Mr. Abseh's departure. Mr. Abseh's blanket denials, in contrast, were not compelling and his affidavit only indicated his normal practices, and did not respond to the specific assertions raised by Direct. The evidence established a breach of paragraphs 3 (c), (f) and (g).

In National's view, there was no reason not to prefer the evidence of Mr. Abseh. He was a former National sales person with no reason to be anything but truthful about the manner in which he conducted himself during sales calls. Direct had, National argued, the onus of proving that there had been a breach. There was no prohibition on advising customers that they were overdue for a new water heater, and there was ample reason to believe that Ms. Robertson was confused about the references to the more energy efficient products now available. In addition, National asserted that a negative inference should be drawn from the fact that Ms. Robertson's sister was in attendance at the time but had failed to file a corroborating affidavit. National asked that the claim be dismissed.

Analysis (Robertson)

The order prohibits the making of certain statements. Direct bears the burden of proof of breach on the balance of probabilities. In general, one can readily appreciate the difficulty a door-to-door salesperson would have in recollecting the details of a particular sales call months after it took place. In these circumstances, one could understand why it would be difficult to respond, other than through generalized observations about standard practices. However, that reality must be placed in context, and the context in this case is a very specific detailed account of a particular sales call, one where multiple breaches of the order have been alleged, together with a specific allegation of unusual behaviour – tearing up the contract at the end of the call – all of which, in my view, required both a direct and a particularized response from National.

The evidence is compelling that Mr. Abseh advised Ms. Robertson that Direct was ceasing to operate in the water heater business. Ms. Robertson's evidence in her affidavit is logical, internally consistent, precise and replete with detail. The affidavit evidence is also completely corroborated by her two recorded telephone conversations made immediately following Mr. Abseh's departure. Simply saying in his affidavit that he would not make false claims about Direct is insufficient in the face of Ms. Robertson's specific recollection, made even more credible by the unusual circumstances of Mr. Abseh's departure. Mr. Abseh's affidavit is particularly compelling in this regard. He does not deny ripping up the contract, but he does confirm that he is not allowed to leave paper work with a customer if they choose not to complete the agreement. I accept that as soon as Ms. Robertson indicated her intention to confirm the information that Mr. Abseh

provided, he retrieved and then destroyed the signed contract and left her house. The inference is inescapable that he knew that his misrepresentations were about to be discovered.

Quite clearly, Ms. Robertson, who has no interest in the outcome of this case, realized during the course of the sales call that what Mr. Abseh was telling her – that Direct was getting out of the water heater business – was completely inconsistent with the reality of her ongoing commercial relationship with the company and, her suspicions aroused, decided to confirm what she had been told. But before doing so, Mr. Abseh departed. The conversations that Ms. Robertson then had with the Direct call center reinforces her affidavit. The fact that Direct did not file an affidavit from Ms. Robertson's sister who witnessed these events, given the other overwhelming evidence, is irrelevant. The evidence that was tendered establishes a breach of paragraph 3 (c) of the Order.

The evidence – the Robertson affidavit and the two recorded calls – also establishes a breach of paragraph 3 (f) and (g). The order is not limited to direct statements. It can include indirect statements as well, and it is clear from Ms. Robertson's affidavit, and the call transcripts, that Mr. Abseh insinuated or implied not only that her water heater was due to be replaced, that water heaters should be replaced every five years, that her water heater was "no good" and that it was not compliant with existing standards, inefficient and/or unsafe, all under the rubric of suggesting that he was from the government or was participating in some kind of government program. While it is true that Mr. Abseh is a former salesperson for National, and has no ongoing relationship with

his former employer, it is also the case that his evidence falls completely short of addressing the specific and credible factual narrative advanced by Direct in support of its assertion of multiple breaches of the order by National.

Disposition: The Agreement provides, in the event of a determination of a breach, in the case of the first breach, monetary damages of not less than $1000 and not more than $5000 and, in the case of each subsequent breach, damages of not less than $2500 and not more than $10,000. Direct argued that the maximum damages should be ordered for each specific breach of the order of which there were three, while National took the position that no damages were appropriate.

In my view, given that this is the first time that a claim has been upheld, it would not be appropriate to award the maximum amount provided for in the Agreement. However, given the seriousness of the matter, and the conduct in question, it would, likewise, not be appropriate to award at the bottom end of the range. Accordingly, for the first breach of the order, National is to pay Direct $2500 in damages and for each of the subsequent breaches, $5000. Accordingly, National is directed, forthwith, to pay Direct $12,500 on account of these three specific individual breaches of paragraph 3 of the order.

2. Bela Szabo (Paragraph 3 (c) & (d))

Mr. Szabo deposed that on April 19, 2011, National Sales representative Romeo Issacs came to his house:

He told me that Direct Energy had gone out of business and that National had been given the contract to take over from Direct Energy.

He then told me that my water heater was an old unit and that he would be replacing it with a newer unit. I agreed to the replacement on the understanding that he was a representative of the company that was taking over my water heater from Direct Energy.

…

…he had explained that Direct Energy had gone out of business and that National was taking over the business from Direct Energy. As such, National would be providing me with a new upgraded water heater. I did not know at the time that what he told me was not accurate and that Direct Energy was still, in fact, in the water heater business separate and apart from National.

…

I did not read the rental contract or any of the other documents given to me before I signed them (or afterwards) because English is my second language and I have difficulty understanding documents written in official language unless they are read out loud and explained to me. I signed the documents believing that the information they contained was the same information that the sales representative had been telling me.

Mr. Szabo signed a contract with National, and National installed a new water heater in his house. Several months later, Mr. Szabo received a bill from Direct (which bills through Enbridge) and was confused for two reasons: first, he had been told that Direct was out of the business, and second, he had been promised two months of free water heater rental. He called Direct. The transcript of that call makes it clear that it took some time for Mr. Szabo to understand what exactly had transpired.

BS: They told me it was the same company.

DE: Well, they are not the same company. Direct Energy and National Home Services have no affiliation at all. We are not affiliated with each other at all.

BS: You mean they lied.

…

BS: The showed up here and he said Direct Energy was sold to that new company.

…

BS: I never wanted to change it and the salesman told me that Direct Energy is not exist anymore.

…

BS: They said it's the same company.

…

BS: It was twice they came in one month. Two different guys and the second one told me I have to change it because my water heater was almost 10 years old and Direct Energy was sold…I mean…an English company bought it and from now on I have to billing with them. He lied. I can see it now.

…

BS: He had uniform and everything. He said Direct Energy not exist anymore. That company is gonna take over.

In his affidavit. Mr. Issacs, a former National salesperson, simply states: "I have never told a member of the public that Direct Energy is going out of business or that National is taking over Direct Energy's business." Mr. Szabo did sign a contract with National that included a specific acknowledgement that "National Home Services is not owned by or affiliated with Direct Energy Marketing Ltd or any of their affiliates." A similar message was delivered to Mr. Szabo by a National call center operator when he signed up with National and confirmed his intention to switch water heater providers.

Submissions

In Direct's submission, the detailed, particularized evidence of Mr. Szabo should be preferred over Mr. Issacs's bald denial for a number of reasons. When Mr. Szabo received a bill from Direct he was in a state of shock, having been told that Direct was out of the business. The transcript of the telephone conversation with the Direct call center indicated as much. While it was true that Mr. Szabo signed a contract with an acknowledgement and disclaimer, and similar information

was conveyed to him by a National operator when his order was confirmed, that was not, in Direct's view, material to the determination that paragraphs (c) and (d) of the order had been breached. The fact was that the evidence established that National told Mr. Szabo that Direct was out of business and that was sufficient to establish a breach of the order.

National viewed the case quite differently. National argued that Mr. Issacs was a former employee with no reason to lie on National's behalf. Mr. Issacs knew what he said when he made sales calls, and there was no reason to prefer the evidence of Mr. Szabo, who was not a native English speaker, over Mr. Issacs. The water heater order was confirmed with the National call center, and it was made very clear to Mr. Szabo at that time that National and Direct had no relationship. One could easily infer from that statement that Direct was still in the water heater business. Mr. Szabo decided to proceed with the National contract after receiving this information. National asked that the claim be dismissed.

Analysis (Szabo)

In my view, the evidence in this claim establishes a breach of Paragraph 3 (c). Mr. Issacs does not recall this particular sales call and so limits his response to his general practices. However, when the evidence is considered in the overall, in particular, the content and tone of the affidavit and telephone transcript of the calls with both Direct and National, there is complete plausibility to Mr. Szabo's account. It was the misleading representation that Direct was out of the water

heater business – in fact, was out of business – that led Mr. Szabo to sign a contract with National.

The sales call is firmly recalled by Mr. Szabo, and specific details are provided. While Mr. Szabo is clearly upset about what has taken place – that he was misled and duped – I cannot conclude that this influenced his account, which I find is completely truthful. National understandably relies on the signed acknowledgement, and Mr. Szabo's telephone call with the National office during which it was made clear that National and Direct had no relationship. National argues that Mr. Szabo would have had to conclude that since the two companies were not affiliated, they both must still be in business, undermining Mr. Szabo's claim that he was told that Direct was out of business.

I cannot accept this submission. Mr. Szabo's is elderly, lives alone, is a cancer patient, does not read well, and did not read the contract. This is compelling. He clearly relied on the representations that were made to him by Mr. Issacs. I cannot conclude that a person situated like Mr. Szabo, having been told by Mr. Issacs that Direct was out of the water heater business, should have then understod that something was amiss when he signed the contract with the disclaimer and when the National operator informed him that Direct and National were not affiliated. Indeed, during his conversation with the National call center, Mr. Szabo said: "You are talking too fast, I'm an old man. I'm 70 years old." He is then informed that National and Direct are not affiliated. He clearly does not understand what he has been told and states: "I'm too old. I told you

I'm slow…." The evidence unambiguously establishes that paragraph 3 (c) of the order was breached.

Disposition

As the evidence establishes a breach of paragraph 3 (c), National is ordered to pay Direct damages of $5000. Moreover, this is an appropriate case for specific damages as is provided for under Paragraph 20 of the Agreement. Accordingly, National is further ordered to rescind its contract with Mr. Szabo, if he consents, and to assign to Direct legal ownership of the water heater at the Szabo residence.

3. Dominique Giliberti (Paragraph 3 (a) & (b))

According to an affidavit filed by Ms. Giliberti, on July 6, 2011, a National salesperson came to her house.

> The National representative first stated that he wanted to confirm whether I had been upgraded to an Energy Star system. He advised that he needed to come into my house to view my current water heater in order to confirm my eligibility for the upgrade. He said that if I had not already received the upgrade, I would be eligible for it and that he could make arrangements for someone to come by and install a new upgraded water heater.
>
> I told him that my rental heater was with Direct Energy and not with National. He responded that he was aware of that but that it was not a problem because "we were bought out in 2009." I understood him to be saying that National had been bought out by Direct Energy and that National and Direct Energy were now working together.
>
> I knew this information to be false and so I challenged him to confirm again for me that National had been bought by Direct Energy. He responded simply "No" and then changed the subject back to Energy Star upgrade availability.
>
> I knew that National had not been bought by Direct Energy because my brother-in-law works for Direct Energy and I had also seen television commercials and heard radio announcements warning of competitor door to door sales campaigns.

As noted at the outset, the affidavit filed by National in response to this claim, was not considered as it was non-responsive. The affiant did not recall this encounter with Ms. Giliberti and instead described an incident that he thought might have been this encounter.

Submissions

In Direct's view, Ms. Giliberti's evidence was uncontradicted, and established that a National sales representative asserted that Direct and National were affiliated with each other. The fact that she knew this representation to be untrue because her brother-in-law worked for Direct was not something that could be used to undermine her account. In fact, in Direct's submission, the opposite was the case. Because she knew the truth, that there was no relationship between Direct and National, she was immediately alive to the false representation being made to her.

National submitted that this claim should be dismissed. It argued that Ms. Giliberti had a brother-in-law who worked for Direct. This gave her an interest in the outcome of the case. Moreover, Ms. Giliberti could not identify who came to her house, and the evidence established that she had an agenda that she pursued as soon as the unidentified National representative arrived. More importantly, National counsel asked, how could National respond to an allegation of misconduct unless it was given sufficient particulars, such as the identity of the sales person who allegedly breached the order? Obviously, it could not. Significantly, in National's submission, there was nothing in the claim, or in the

evidence advanced in support of it, that justified a finding of breach. National, therefore, asked that this claim be dismissed.

Analysis & Disposition

At its highest, the evidence establishes that a National sales representative stated that "we were bought out in 2009" in response to being advised by Ms. Giliberti that her water heater was rented from Direct. It is true that there can be a finding of a breach of the order whether the recipient of a misstatement is misled or not (and clearly Ms. Giliberti knew the correct state of affairs prior to the salesperson's call). However, it cannot be concluded that this single statement would lead a reasonable person to conclude either that National and Direct had a business relationship, or that one was the agent of the other. Ms. Giliberti, because of her prior knowledge, may have concluded that the sales person was saying that National had been bought out by Direct in 2009, but that is not a conclusion that I find the words support. Moreover, when asked a direct question about whether National had been bought by Direct, the sales person said "no." Claim dismissed.

4. Tracey Butchernice (Paragraphs 3 (c), (d), (e), (f) & (g))

There is no sworn affidavit in this case. There is a telephone recording transcription that is admissible under the common law and statutory business exceptions to the hearsay rule. However, it is understood and provided that this arbitration process is to be proceed by way of sworn affidavits, with the parties being provided an opportunity to cross-examine the affiants if they so desired. Paragraph 17 of the Agreement requires that evidence be tendered by way of

affidavit. I am not prepared to decide a case solely on the basis of a call recording, even if it is properly admissible as a business record. As Direct has not discharged its evidentiary onus, this claim is dismissed.

Conclusion

For the foregoing reasons, the Robertson and Szabo claims are allowed. On account of the Robertson claim, National to pay Direct damages in the amount of $12,500 forthwith. On account of the Szabo claim, National to pay Direct damages in the amount of $5000 forthwith. Furthermore, and as provided by paragraph 20 of the Agreement, National is directed to rescind its contract with Mr. Szabo, if he consents, and to assign to Direct legal ownership of the rental water heater at the Szabo residence. The Giliberti and Buthchernice claims are dismissed. Direct may provide to Ms. Robertson and Mr. Szabo a redacted version of this award dealing with their specific cases. If either party wishes, the matter can be reconvened by the parties, or proceed in writing, to deal with submissions with respect to costs.

DATED at Toronto this 19th day of March 2012.

"William Kaplan"

William Kaplan, Arbitrator

APPENDIX C

CITATION: Direct Energy Marketing Limited v. National Energy Corp, 2012 ONSC 4232
COURT FILE NO.: CV-11-431862
DATE: 20120717

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Direct Energy Marketing Limited Applicant	)	Paul Le Vay and Brennagh Smith, for the Applicant
– and –	)	
National Energy Corporation Respondent	)	Brad Teplitsky, for the Respondent
	)	**HEARD:** February 1 and June 27, 2012

J.S. O'NEILL

REASONS ON APPLICATION

[1] Part A: Introduction

[2] On July 29, 2011 the Applicant filed the within application and requested, in part, the following relief:

- a declaration that the Respondent, has breached s. 7(a) and 22 of the *Trade-Marks Act*;
- a declaration that the Respondent has breached s. 52 and 74 of the *Competition Act*;
- an Order requiring the Respondent to pay damages to the Applicant for breaching the *Trade-Marks Act* and the *Competition Act*, or in the alternative, an Order directing a reference with respect to the issue of damages, including an order requiring National to produce information regarding the duration and geographical scope of distribution of the Brochure;
- a permanent injunction enjoying the Respondent from distributing the Brochure to Direct Energy customers and to the public at large;

- a mandatory order requiring the Respondent to publish a formal retraction in terms acceptable to the Applicant in newspapers covering the areas affected by the Brochure and notifying customers that they should disregard the contents of the Brochure.

[3] The application was argued in Toronto on February 1 and June 27, 2012. For the reasons which follow, I would allow the application in part and award portions of the relief claimed by the Applicant.

[4] Part B: The Brochure In Question

[5] The brochure at the heart of this application can be found at Tab I of the Application Record. I am satisfied that the brochure makes certain false and misleading representations about the Applicant's services and products on the following basis:

i. The 10.4% figure included in the brochure is a non-weighted average calculation based on only seven of the thirty tank models listed in the 2010 bill insert. The seven models listed in the brochure only account for approximately 40-60% of Direct Energy's Residential Water Heater Portfolio. At the hearing before me the Respondent did not take issue with the fact that the non-weighted average rate increase for those tank models included in the 2010 bill insert was 7.18%.

ii. The brochure incorrectly lists the 2009 rate for the PDB 50/65 model as $24.99 when it was $27.41. The brochure attributes a 12% increase for that Direct Energy tank model when in fact it was only 2%.

iii. The circled words at page 1 of the brochure – non Energy Star – imply that Direct Energy's water heaters are less efficient and non compliant with the industry standard. This is inaccurate as it misleads customers into believing that none of Direct Energy's water heaters are Energy Star efficient and that Direct Energy does not offer Energy Star water heaters. The evidence on the application satisfies me that approximately 40 of Direct Energy's 50 product categories are eligible for Energy Star certification.

iv. On page 2 of the brochure there is reproduced Direct Energy's trademark and logo. This reproduction is contrary to paragraph 1 of the consent order of Justice Strathy dated May 2009 as well as the *Trademarks Act*.

[6] Part C: Justice Strathy's Consent Order

[7] Justice Strathy's consent order of May 2009 is set out at Tab F of the Application Record. Paragraph's 4 and 5 of the order are important as they prevent Direct Energy from making any statements that National Energy is making false or misleading statements regarding Direct Energy or its business operations and that any water heater rental provider is making false or misleading statements, subject to the exceptions found at paragraph 5. It is clear that the prescriptive effect of Justice Strathy's order, combined

with the wording in the brochure in question, contributed in large part to the bringing of the within application.

[8] **Part D**: **Distribution of the Brochure to the Public**

[9] The weight of the evidence leads me to conclude that the brochure in question was largely distributed to the public in the greater Toronto area (as well as in Kitchener and London) beginning in the winter and spring of 2010 and ending in the late fall or towards the very end of 2010. It is not necessary for my examination of the submissions and issues on this application to determine whether the brochure itself was further distributed in 2011. Considerable evidence was led on the application as to, information provided by Mr. Conway and about the scope and duration of the brochures distribution.

[10] Part E: The Number of Brochures Printed

[11] The precise number of brochures printed and delivered door to door by the Respondent's sales forces cannot be accurately gauged. However, at the close of submissions before me, and in furtherance of an undertaking given earlier in the litigation, counsel for the Respondent forwarded documentation confirming that the last printing order for these brochures was made in early September of 2010, for 10,000 pieces. Reference was also made to a printing invoice dated January 31, 2010 for 20,000 Direct Energy Pieces. Altogether approximately 38,000 brochures were printed and shipped to greater Toronto sales offices. Sales offices in London and Kitchener also distributed the brochure.

[12] **Part F**: **Issues on the Within Application**

[13] At paragraph 41 of its factum, the Applicant identified the three issues present on the within application. I reproduce them in full:

> I. Did the Respondent make false and misleading statements tending to discredit Direct Energy, contrary to s. 7(a) of the *Trade-Marks Act* and s. 52(1) of the *Competition Act*?
>
> II. Did the Respondent use Direct Energy's registered trade-marks in a manner that is likely to depreciate the value of goodwill attaching thereto?
>
> III. What relief is appropriate?

[14] **Part G: Legal Principles**

[15] The legal principles on this application are governed by s. 7 and s. 53.2 of the *Trade-Marks Act*, R.S.C., 1985, c. T-13. I reproduce both of these sections below:

> Subsection 7(a) of the Trade-Marks Act provides:

> 7. No person shall (a) make a false or misleading statement tending to discredit the business, wares or services of a competitor;

Subsection 53.2 of the *Trade-Marks Act* provides as follows:

> Power of court to grant relief
>
> 53.2 Where a court is satisfied, on application of any interested person, that any act has been done contrary to this Act, the court may make any order that it considers appropriate in the circumstances, including an order providing for relief by way of injunction and the recovery of damages or profits and for the destruction, exportation or other disposition of any offending wares, packages, labels and advertising material and of any dies used in connection therewith.

[16] I accept the Applicant's submission that the combined effect of these sections is to create a statutory cause of action for which damages or injunctive relief may be awarded if a person is damaged by false or misleading statements by a competitor attempting to discredit the claimant's business, wares or services.

[17] The essential elements of a s. 7(a) breach of the Act are as set out at para. 46 of the Applicant's Factum, namely:

1. A false or misleading statement;
2. Tending to discredit the business, wares or services of a competitor; and
3. Resulting damage.

[18] I have already reviewed the brochure in question and concluded that for the reasons given, representations made in it by the Respondent are either incomplete, inaccurate or misleading. I include in this the words on page 2 of the brochure:

> Direct Energy also "promises" to increase your rate by over 10.4% this year.

[19] In all of the circumstances I find this statement "promises to increase" both inaccurate and misleading to any member of the public to whose door the brochure would be delivered.

[20] Part H: Misuse of Registered Intellectual Property

[21] S. 22(1) of the *Trade-Marks Act* states:

> No person shall use a trade-mark registered by another person in a manner that is likely to have the effect of depreciating the value of the goodwill attaching thereto.

[22] I accept the Applicant's submissions that on its face, the brochure was likely to leave the public at large or consumers with a negative impression of Direct Energy for the following reasons:

(a) Direct Energy promises ascertainable rate increases

(b) Direct Energy does not have Energy Star efficient products

(c) The Respondent alone or compared to the Applicant does have Energy Star products

(d) The brochure is more directed at misleading consumers with respect to Direct Energy or discrediting this company, then informing fairly and fully the consumer with the information he or she required to make an informed decision.

[23] **Part I**: **The Issue of Damages**

[24] On the application, counsel for the Applicant submitted that even if the Applicant has succeeded on establishing liability, it has not proven an amount of damages, or any damages loss whatsoever. The Respondent accordingly argued that it would be improper to remit this case to a Master for the purposes of conducting a damages reference.

[25] I am not able to accept this submission. The information provided on the application establishes that between 2010 and 2011 the Applicant lost over 60,000 water heater rental contracts. Further, the clear purpose of the misleading and inaccurate brochure was to draw customers away from the Applicant and bring them to the Respondent.

[26] As many as 38,000 brochures were distributed throughout the communities and cities in question. It defies logic to argue that as a result of this printing and distribution run, not a single customer or consumer of the Applicant would have been swayed by the publication, and that any such customer would not have directed his business to the Respondent or to another water heater rental provider. Changing rental contracts and moving business to another supplier clearly comes at a financial cost to the Applicant, even if at this stage of the proceedings the amount of the loss cannot be accurately verified and calculated. I am also satisfied that the distribution of the brochure was likely to have the effect of depreciating, to some extent, the value of the goodwill attaching to the Applicant's trade-mark. In short, I conclude that the Applicant has demonstrated a prima facie case of damages which on a reference will require appropriate computation and calculation.

[27] Stated differently it is reasonable to infer that it is more likely than not that Direct Energy suffered damage as a result of the distribution of the brochure, even if quantification of the damage cannot be finalized at this stage of the Application.

[28] **Part J**: **Concluding Orders and Declarations**

[29] On the Application, the Applicant requested, amongst other relief, a permanent injunction enjoining the Respondent from distributing the brochure to Direct Energy customers and to the public at large. The Applicant's position was that the Respondent (through Mr. Galbo) had no records of cease distribution orders or records with respect to return or destruction of the brochures in question. The Applicant further submitted that another agency in Toronto also distributed the brochures, but there are no existing records as to whether they were fully distributed, recalled or destroyed. For that reason, much time was spent on the application dealing with the evidence of Mr. Conway and the likelihood or non likelihood that the brochure in question was distributed to him in 2011.

[30] It is obvious that to a large extent, "the horses have left the barn" and apart from the issue of damages, there is little that a court order could achieve to stop, reverse or impede further distribution of the brochure. But having said that, it is also clear that records of distribution, knowledge of distribution plans, and ongoing distribution efforts by agents or forces of the Respondent are not known or clear at this time. In my view, this court should err on the side of caution and enjoin the Respondent from any further possible distribution activities.

[31] The request for a mandatory order requiring the Respondent to publish a formal retraction in communities or cities affected by the brochure in question raises certain difficulties. The bulk of the brochures in question were most likely largely distributed in 2010. Far fewer brochures were distributed in 2011, if at all, and likely none in 2012.

[32] Damage done to the Applicant has already occurred. A retraction in a newspaper published 12 months after a June 2011 distribution or 18 or 24 months after a December or June 2010 distribution would likely be of little benefit or help to the public at large or to any consumers affected by the brochure. Put simply, too much time has passed.

[33] Accordingly, I decline to make a mandatory order requiring the Respondent to publish a formal retraction.

[34] For the reasons herein outlined, a declaration shall issue:

i. That the Respondent has breached s. 7(a) and s. 53.2 of the *Trade-Marks Act*

ii. That the Respondent has breached s. 52 of the *Competition Act*

iii. That the Respondent has breached s. 22 of the *Trade-Marks Act*

iv. An Order shall issue directing a reference to the Master with respect to the quantification and computation of monetary damages sustained by the Applicant as a result of the said breaches by the Respondent.

v. A permanent injunction shall issue enjoining the Respondent from distributing the brochure in question to Direct Energy customers and to the public at large.

[35] The Applicant is entitled to its costs of this application on the partial indemnity scale. If those costs cannot be agreed, they shall be fixed by me following my receipt of written submissions by the parties. Accordingly, failing agreement the parties shall forward to the Trial Coordinator at Parry Sound (fax: 705-746-6189) written cost submissions not to exceed 15 pages. In the case of the Applicant, the submissions shall include a Bill of Costs and an outline of the Applicant's hourly rate, substantial indemnity rate and partial indemnity rate.

[36] Orders and declarations accordingly.

Justice J.S. O'Neill

Released: July 17, 2012

CITATION: Direct Energy Marketing Limited v. National Energy Corp, 2012 ONSC 4232

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Direct Energy Marketing Limited

Applicant

– and –

National Energy Corporation

Respondent

REASONS ON APPLICATION

Justice J.S. O'Neill

Released: July 17, 2012

APPENDIX D

CITATION: Direct Energy Marketing Ltd v. National Energy Corp., 2013 ONSC 5024
COURT FILE NO.: CV-11-431862
DATE: 2013/07/30

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
Direct Energy Marketing Limited Applicant/Responding Party	Paul Le Vay and Justin Safayeni, for the Applicant/Responding Party
– and –	
National Energy Corporation Respondent/Moving Party	Brad Teplitsky for the Respondent/Moving Party
	HEARD: July 3, 2013

O'NEILL, J

Reasons on Motion

[1] This is a motion by National Energy Corporation pursuant to Rule 59.06(2) to set aside this court's decision of July 17, 212 on the basis of newly discovered evidence.

[2] On such a motion, National must establish that the new evidence would probably have altered the outcome of the application, and that the new evidence could not have been discovered sooner with reasonable diligence.

[3] National founds its motion on "a program of illegal outbound calling to customers disparaging National", a program of calls with respect to which National was unaware.

[4] For the reasons which follow, I would dismiss National's motion with costs:

[5] i. National has cited the endorsement of Justice Roberts dated January 27, 2010 as a precedent for the ruling it is seeking. But the Robert's Order was with respect to mutual contempt motions made by both parties in relation to breaches of the Strathy Order of 2009. In that motion, there was no claim to set aside an order and no consideration of the test required for such a motion.

[6] ii. On June 26, 2012 Anila Malik swore an affidavit in support of a motion brought by National and a second plaintiff for an Anton Piller order against Enercare. That affidavit includes many of the same allegations as does the Channer-Williams affidavit, relating to door to door activities of Ecosmart and Enercare. Further, there is an outstanding Federal Court of Canada Action (May 9, 2013) seeking various orders and declarations against various parties, including Direct Energy Marketing Limited. That action includes references to the customer awareness program of 2012, as described in para. 35 of the Federal Court of Canada Statement of Claim. That claim remains before the court.

[7] iii. My order of July 17, 2012 dealt with the contents of a brochure that was published and distributed by National in 2010 and 2011. National alleges in this motion that Direct Energy committed breaches of the Strathy order and the *Competition Act* in 2012 by way of a calling campaign and a canvassing campaign. But I accept Direct Energy's submission in para. 5 of its factum that "no aspect of this court's reasoning on the application is affected by the unrelated allegations of misconduct that National" now brings against Direct Energy in the within motion to set aside.

[8] iv. A substantial ground relied on by National relates to the email exchange allegedly between Jason Frost and Mike Kowalski (May 8th and 9th, 2012). In these emails, Mr. Frost appears to ignore the Strathy Order, based on an alleged conversation between Mr. Frost and Len Dipock. On June 11, 2013, I released my reasons on the motion brought by National for an order appointing a computer forensic expert to examine the computer systems of Direct Energy and Jason Frost. In those reasons, I dealt in depth with the issue surrounding the emails of May 8th and 9th, 2012. In this regard, I accept generally Direct Energy's summary of the evidence relating to authenticity, as set out in para. 48 of Direct Energy's factum.

[9] I conclude, for the purpose of this motion, that except for a single phone call transcript, the affidavit from an employee with no relationship to Direct Energy, and the subject emails, whose authenticity remains in serious doubt, National has not persuaded me that Direct Energy has breached the Strathy Order sufficient to invoke the court's jurisdiction herein to set aside its order of July 17, 2012.

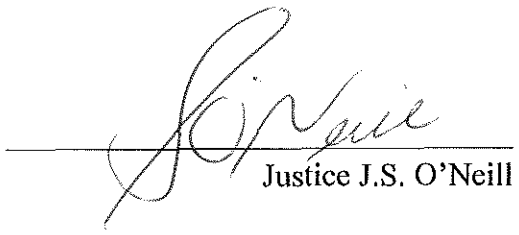
[10] v. Finally, with respect to National's submissions and reliance upon equity for the relief it is requesting, even if I accept that the doctrine of clean hands is a live consideration in this case, I accept Direct Energy's submission that it is inapplicable on this motion, for the reasons more particularly set out in para 93 of Direct Energy's factum.

[11] Accordingly, for the reasons herein set out, National's motion is dismissed, with costs to be fixed and finalized as follows:

i) Direct Energy shall file a Bill of Costs, together with cost submissions with the Trial Coordinator at Parry Sound by August 14 , 2013.

ii) National may respond to such cost submissions, by filing a response with the Trial Coordinator by August 28, 2013.

[12] Order accordingly.



Justice J.S. O'Neill

Released: July 30, 2013

CITATION: Direct Energy Marketing Ltd v. National Energy Corp., 2013 ONSC 5024

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Direct Energy Marketing Limited

Applicant/Responding Party

– and –

National Energy Corporation

Respondent/Moving Party

REASONS ON MOTION

Justice J.S. O'Neill

Released: July 30, 2013

APPENDIX E

Court File No. C57568

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

DIRECT ENERGY MARKETING LIMITED

Applicant
(Respondent)

- and –

NATIONAL ENERGY CORPORATION

Respondent
(Appellant)

NOTICE OF APPEAL

THE APPELLANT, NATIONAL ENERGY CORPORATION, APPEALS to the Ontario Court of Appeal from the Order of the Honourable Mr. Justice O'Neil dated July 30, 2013 (the "Order"), made at Toronto, Ontario, dismissing its motion to set aside the Judgment of Mr. Justice O'Neill dated July 17, 2012.

THE APPELLANT ASKS that the Order be set aside, that the Judgment be set aside and that it be granted its costs of the motion, the Application and this Appeal

THE GROUNDS OF APPEAL are as follows:

1. The learned Applications Judge erred in dismissing National's motion:

2. The Applications Judge erred in finding that Direct Energy had not "sufficiently" breached the Order of Mr. Justice Strathy;

3. The Applications Judge erred in failing to appreciate and consider that one of the bases for the motion was Direct Energy's misrepresentation to the Court on the hearing of the Application that it was in compliance Mr. Justice Strathy's Order;

4. The Applications Judge erred in failing to appreciate that the matters at issue in the Application were related to the matters at issue on the motion;

5. The Applications Judge erred in failing to draw an adverse inference (or even address the issue) from Direct Energy's failure to adduce evidence from a witness who is alleged to have been privy to Direct Energy's alleged intentional breach of Justice Strathy's Order;

6. The Applications Judge erred in dismissing National's motion for an Order permitting it to inspect Direct Energy's computer servers for the purpose of establishing the authenticity of an email stating that Direct Energy intended on breaching Justice Strathy's Order;

7. The Applications Judge erred in failing to consider the correct principles underlying the motion to set aside and to apply those principles to the motion; and,

8. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS: section 6(1)(b) of the *Courts of Justice Act* which provides that an appeal lies to the Ontario Court of Appeal from a final order of a Judge of the Superior Court of Justice and that leave to appeal is not required.

August 29, 2013

TEPLITSKY, COLSON LLP
Barristers
70 Bond Street, Suite 200
Toronto, Ontario
M5B 1X3

Brad Teplitsky

Tel: 416-319-7024
Fax: 416-981-7604

Lawyer for the Appellant National Energy

DIRECT ENERGY MARKETING LTD
Appellant

- and -

NATIONAL ENERGY CORP
Respondents

File No. C57568

COURT OF APPEAL FOR ONTARIO

Proceedings Commenced at Toronto

Service admitted by Paul LeVay, Stockwoods LLP, lawyers for the Respondents
per: B. Teplitsky, Aug. 29, 2013

NOTICE OF APPEAL

TEPLITSKY, COLSON LLP

Barristers and Solicitors
70 Bond Street, Suite 200
Toronto, ON M5B 1X3

Martin Teplitsky Q.C. (10647)

Tel: 416-319-7024
Fax: 416-981-7604

Lawyers for the Appellants

APPENDIX F

Court File No.:
CV-12-457735.

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

NATIONAL ENERGY CORPORATION and HOME and ENERGY MARKETING SERVICES INC.

Plaintiffs

- and -

ENERCARE INC., ECOSMART HOME SERVICES INC., ECOSMART ENERGY SAVINGS CORP., DIRECT ENERGY MARKETING LIMITED, CANCOM SECURITY INC., RONALD WELLS, STEPHEN WELLS, ANGIE WELLS, HAMID TABAEE, PATRICIA CARRARETTO, TOM COOPER, SHANNON MIRANDA and TANYA FAULDS

Defendants

NOTICE OF ACTION

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and $1,500.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and $400.00 for costs and have the costs assessed by the court.

DATE: June 27, 2012

Issued by:
Local Registrar

Address of
Court House: 393 University Ave.
10th Floor
Toronto, Ontario
M5G 1E6

TO: THE DEFENDANTS

CLAIM

1. The Plaintiffs claim:

   a) Damages in an amount to be determined prior to trial for conspiracy, intentional interference with economic relations, trespass to property, trespass to land, and misappropriation of confidential information;

   b) pre-judgment interest in accordance with provisions of the *Courts of Justice Act*, R.S.O. 1990, c.C.43 as amended;

   c) costs on a complete indemnity basis, or in the alternative on a substantial indemnity basis, or in the further alternative pursuant to the provisions of the *Courts of Justice Act*, R.S.O. 1990, c.C.43 as amended, on such basis as to this Honourable Court may deem just; and,

   d) Such further relief as this Honourable Court may deem just.

2. In 2011, the Defendants entered into a conspiracy to injure the Plaintiffs by causing illegal electronic devices to be installed on their premises and vehicles. The Plaintiffs have suffered damages as a result. The unlawful acts include the tort of deceit, misappropriation of confidential information, the crime of mischief and unauthorized surveillance under the Criminal Code and trespass.

Date of issue: June 27, 2012

TEPLITSKY, COLSON LLP
Barristers
70 Bond Street, Suite 200
Toronto, Ontario
M5B 1X3

Brad Teplitsky (37342N)

Tel: 416-319-7024
Fax: 416-981-7604

Solicitors for the Plaintiffs

NATIONAL ENERGY CORPORATION, et al
Plaintiffs

- and -

ENERCARE INC., et al
Defendants

CV-12-457135.

Court File No.:

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings Commenced at Toronto

NOTICE OF ACTION

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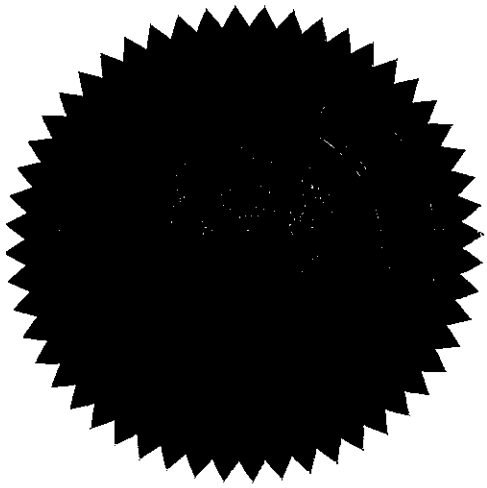
BRAD TEPLITSKY – LSUC #37342N

Tel: 416-365-9320
Fax: 416-365-7702

Lawyers for the Plaintiffs

APPENDIX G



Court File No. T-55-13

FEDERAL COURT

NATIONAL ENERGY CORPORATION

Plaintiff

and

ENERCARE INC., ENERCARE SOLUTIONS LIMITED PARTNERSHIP, ECOSMART HOME SERVICES INC., ECOSMART ENERGY SAVINGS CORP., DIRECT ENERGY MARKETING LIMITED, STEPHEN WELLS, ANGIE WELLS and HAMID TABAEE

Defendants

STATEMENT OF CLAIM TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the Federal Court Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

Date MAY 09 2013

Issued by: SHERRI ALLY
REGISTRY OFFICER
AGENT DU GREFFE

Address of local office: 180 Queen Street West, Suite 200, Toronto, Ontario M5V 3L6 / 180, rue Queen Ouest, bureau 200, Toronto, Ontario M5V 3L6

TO: ENERCARE
c/o Torys LLP
79 Wellington Street West, Suite 3000
Box 270, TD Centre
Toronto, Ontario
M5K 1N2
Canada

AND TO: DIRECT ENERGY
c/o Stockwoods LLP Barristers
TD North Tower
77 King Street West, Suite 4130
P.O. Box 140
Toronto-Dominion Centre
Toronto, Ontario M5K 1H1

AND TO: THE ECOSMART DEFENDANTS
c/o Klaiman, Edmonds
60 Yonge St.
Ste. 1000
Toronto, ON
M5E 1H5

CLAIM

PRAYER FOR RELIEF

1. The Plaintiff claims from all Defendants:

   (a) A declaration that they have breached s. 52 of the *Competition Act* and s.7(a) of the *Trade-Marks Act;*

   (b) An Order that they compensate it for the loss and damage it has suffered as a result of their breaches of the *Competition Act* and the *Trade-Marks Act;*

   (c) A permanent injunction prohibiting them from engaging in the unlawful conduct set out herein except to the extent that such unlawful conduct is already prohibited by the 2009 Consent Order (as defined herein);

   (d) The full cost of its investigation in connection with the matters at issue herein and of the proceedings including H.S.T.;

   (e) Pre and post-judgment in accordance with the provisions of the Courts of Justice Act; and,

   (f) Such further and other relief as this Honourable Court may permit.

THE PARTIES

2. The Plaintiff, National Energy Corporation ("National') operates as National Home Services and is a provider of home services, including water heater rentals, to over 225,000 Ontario consumers. It began operations in 2008.

3. The Defendants Direct Energy Marketing Limited ("Direct Energy") and EnerCare Inc. and EnerCare Solutions Limited Partnership (the "EnerCare" entities are hereinafter collectively referred to as "EnerCare") are partners in the water heater rental business and when collectively referred to herein (including EnerCare's predecessor, the "Fund", as defined herein), are

referred to as "the Partners".. The Partners share the rental income generated by their water heater rental business.

4. The Defendants Ecosmart Home Services Inc. and Ecosmart Energy savings Corp. (the "Ecosmart" entities are hereinafter collectively referred to as "Ecosmart") carry on business as ahome service provider and a door-to-door marketer.

5. The Defendant Stephen Wells is an owner and President of Ecosmart. The Defendant Angie Wells, the wife of Stephen Wells, is an officer and co-owner of Ecosmart. The Defendant Hamid Tabaee is the general manager of Ecosmart and is closely supervised by the Wells to whom he reports.

ENBRIDGE SERVICES INC. (THE PREDECESSOR TO DIRECT ENERGY)

6. The water heater rental business currently operated by the Partners was started in the 1950's by Enbridge Gas Distribution Inc. ("Enbridge") (formerly named The Consumers' Gas Company Ltd.). In or about 1999, as part of deregulation, Enbridge transferred its home services business, which included the water heater rental operations, to its subsidiary, Enbridge Services Inc. ("ESI").

ESI'S ANTI-COMPETITIVE CONDUCT

7. In February of 2000, the Commissioner of Competition (the "Commissioner") commenced an investigation of ESI into its anti-competitive water heater rental activities. The Commissioner ultimately determined that ESI had substantial control over markets for the supply of water heaters and engaged in a practice of anti-competitive acts which had resulted in a substantial lessening or prevention of competition in the relevant markets.

CENTRICA PLC BUYS DIRECT ENERGY AND ESI

8. In August of 2000, Centrica plc[1] ("Centrica") acquired Direct Energy. At the time, Direct Energy was generating over $1.3 billion in revenues and was North America's largest unregulated retailer of natural gas. The consideration for the transaction was $912M. Direct Energy was not involved in the water heater rental business at the time.

9. In January of 2002, Centrica entered into an agreement to acquire ESI for $1B (which acquisition was completed in May of 2002.[2]

THE 2002 CONSENT ORDER

10. On February 20, 2002, following the completion of an investigation which began in 2000 and subsequent inquiry regarding ESI's anti-competitive water heater rental activities, a consent Order was entered into between the Commissioner of Competition and ESI (the "2002 Consent Order"). According to its terms, the 2002 Consent Order would not expire until February of 2012. The Order provided, inter alia,

> "ESI shall not enter into or withdraw from any arrangement, agreements or transaction in regards to water heaters or make any changes to their operations that would be contrary or inconsistent with the intended purpose of this Order, namely, to eliminate anti-competitive behaviour for the ultimate purpose of promoting and protecting competition in the markets affected"; and ESI shall not "erect undue barriers to entry and to competition in the market for water heaters".

11. The Consent Order further provided that:

> "it shall bind ESI, as well as, each and every of the present and future affiliates, directors, owners, officers, shareholders, agents and employees and to any of its successors, subsidiaries, assignees and their agents, employees or other person acting for or on behalf of ESI" and "any subsequent purchaser, owner or operator of ESI's water heater rental business, whether through purchase or restructuring or a joint venture partner with ESI".

---

[1] Centrica plc, a FTSE 100 company in the United Kingdom, is the parent company of British Gas Trading Limited, the former state monopoly supplier of gas to customers in England.

[2] In May of 2003, Centrica rebranded the ESI home services business as "Direct Energy Essential Home Services".

THE CONSUMERS' WATERHEATER INCOME FUND (PREDECESSOR TO ENERCARE)

12. In October of 2002 Centrica caused The Consumers' Waterheater Income Fund to be incorporated. The purpose of the Fund was to assume Centrica's debt obligations arising from its May 2002 acquisition of ESI[3].

13. In December of 2002, following the closing of the Fund's public offering, the Fund became ESI's partner in its water heater rental operations and Centrica caused ESI to split the water heater revenues between the Partners (ie the Fund and ESI) on a 65%/35% basis pursuant to a Co-Owners Agreement. Under the Co-Owners Agreement, ESI was responsible for administering the Partners' water heater operations in exchange for its 35% interest in the revenues. Following the closing of the financing, the Fund's units began trading on the Toronto Stock Exchange (the "TSX") and Centrica became the largest single owner of the Fund.

NATIONAL COMMENCES OPERATIONS

14. The Plaintiff was formed in 2008 to compete with Direct Energy in the water heater rental business and began operations in April of that year. An important aspect of the Plaintiff's marketing plan is the use of door-to-door sales to inform consumers of its water heater rental offer and to distinguish itself from Direct Energy. The Plaintiff's water heater rental offer included the installation of a new and more efficient water heater with free installation and removal and return of the old water heater.

DIRECT ENERGY'S INITIAL ANTI-COMPETITIVE CAMPAIGN

15. Ten weeks into the Plaintiff's initial marketing campaign, Direct Energy began a well-coordinated campaign of unlawful anti-competitive statements against the Plaintiff involving the use of mail, media and call centres. It began the campaign with a letter (the "mailer") that it sent to over 150,000 of its customers at the end of June of 2008. The letter contained inflammatory and false allegations regarding the Plaintiff's business practices. The following is an excerpt from the mailer:

[3] The Fund raised money via a public offering in order to be able to assume Centrica's debt obligations.

"Dear Rental Water Heater Customer ....We have recently been informed by some of our customers that National Home Services door-to-door representatives are providing misleading and incorrect information about the Direct Energy Rental Water Heater Business and about our residential water heaters. We felt it was important to advise our customers, address the misleading statement and confirm our commitment to you.

Specifically, we have been advised that certain National Home Services representatives are using the following tactics:

> Misrepresenting Direct Energy...National Home Services is claiming that Direct Energy is no longer in the water heater business or they are falsely claiming to be representing us...

While we cannot comment on the accuracy of other companies' statements pertaining to their equipment, we can say that our Direct Energy water heaters are built to last. Based on a number of years of experience, the lifespan of a water heater lasts an average of 16 years* with minimal changes in efficiency."

16. Direct Energy did not believe that the Plaintiff actually made the false statements referenced in the mailer prior to its dissemination (nor did it believe that a water heater only sustains minimal changes in efficiency during its useful life). Rather, the mailer was part of an elaborate scheme to create confusion in the mind of customers and cast doubt as to the legitimacy of National's operations. Direct Energy's plan in flooding the market with more than 150,000 mailers alleging fraud against National was to frighten customers, get them to call Direct Energy and inquire about National and then offer them price discounts to convince them to remain with Directly Energy. In short, Direct Energy's objective was to eliminate National as a potential competitor.

17. Direct Energy then contacted local media for the purpose of further disseminating the false allegations in the mailer and encouraging them to publish these allegations. Direct Energy also told the media that it received approximately 1,700 complaints concerning National which allegation the media published causing significant damage to the Plaintiff's marketing efforts. However, the allegation was a pure fabrication.

18. As part of its initial anti-competitive campaign, Direct Energy encouraged consumers who received the mailer or saw the media coverage to call the Direct Energy call centre. When

consumers called the call centre, its representatives repeated the false allegations and also made up their own false statements[4] in order to incite and confuse the consumers.

THE INIITAL LIGATION AND THE 2009 CONSENT ORDER

19. On August 11, 2008, the Plaintiff commenced proceedings against Direct Energy (Court File No.: CV-08-360464-0000) because of its anti-competitive and unlawful conduct as described above. The false statements by Direct Energy were particularly damaging to the Plaintiff given Direct Energy's near monopoly and name recognition. Direct Energy counterclaimed asserting that the Plaintiff's door-to-door canvassers had been misrepresenting themselves as agents of Direct Energy. Direct Energy had no proof in support of any of its allegations in its Counterclaim that the Plaintiff had done anything wrong. The litigation was ultimately settled in May of 2009.

20. On May 11th, 2009, the Plaintiff and Direct Energy entered into a consent Order (the "2009 Consent Order").

21. The 2009 Consent Order prohibits Direct Energy from publicly refuting the accuracy of statements made by Plaintiff. Paragraph 5 of the Order states:

> THIS COURT ORDERS that Direct Energy[5] is enjoined from making, in writing or orally, directly or indirectly, expressly or implicitly, to any person, that any water heater rental provider is making false or misleading statements unless (i) Direct Energy specifically identifies the name of the water heater rental provider (or providers) in the written or oral statement and (ii) Direct Energy does not name, mention or refer expressly or implicitly to National Energy in the written or oral statement.

[4] These defamatory statements included the following: "National will say anything to get in the door" and National has accepted signatures from children on their contracts.

[5] Direct Energy is defined in the 2009 Consent Order to include its "servants, agents, representatives, successors, assigns, and all persons under its control".

THE PARTNERS' BUSINESS STRATEGY AND COMMENCEMENT OF THE CONSPIRACY

22. By 2009, the water heater rental business operated by the Partners was experiencing significant attrition as a result of competition from the Plaintiff. For this reason, in or around June of 2009, the Partners devised a plan (the "conspiracy") whereby they would injure the Plaintiff by engaging in a series of anti-competitive false and misleading statements prohibited under the *Competition Act* and *Trade-Marks Act*. The false and misleading statements were intended to disparage the Plaintiff and impair the good will associated with its tradename, wares and services. These anti-competitive statements included falsely contrasting the Partners' purported business practices with those of their competitors. In particular, they falsely told consumers the following:

(a) The Plaintiff was misleading consumers into incorrectly believing that they should have their old water tanks replaced with new tanks. The Partners made this false and misleading statement in an effort to defer replacement of their own tanks beyond their fifteen year useful life, notwithstanding the fact that the Partners were aware that a majority of these tanks were energy inefficient due to age, lack of servicing and outdated technology. Further, Direct Energy encourages consumers in other provinces who own old water heaters to buy new water heaters from Direct Energy because their old water heaters operate at low efficiency;

(b) They do not engage in door-to-door marketing like their competitors do and criticized their competitors for this type of marketing even though they engage in the same form of marketing;

(c) They should not enter into fixed term rental agreements with the Plaintiff without informing consumers that they require their own customers to enter into such agreements; and,

(d) The Plaintiff's canvassers mislead consumers into believing that they are representatives of Direct Energy.

THE HIRING OF TOM COOPER

23. In June of 2009 (within a month of the making of the 2009 Consent Order), the Fund hired Tom Cooper as its Vice President of Sales & Marketing. Prior to joining The Fund, Mr. Cooper held senior operating positions at Direct Energy and ESI and had recently run a consulting practice focused on business improvement strategies. According to the Fund, Mr. Cooper was hired to lead:

> "the sales and marketing activities of...the Rentals business, including water heaters and HVAC equipment – Mr. Cooper's primary focus includes working closely with DE to support the Fund's current customer base, combat attrition and to identify and implement new growth opportunities, both organic and other."

24. The hiring of Mr. Cooper was one of the initial steps taken by the Partners in furtherance of the conspiracy. Mr. Cooper was instrumental in the formation and implementation of the conspiracy as referenced herein.

25. Mr. Cooper was aware of the substance of the 2009 Order. He believed that the Order was overly restrictive and disapproved of it. Mr. Cooper's disapproval of the Order along with the fact that, in September of 2009, an arbitrator[6] had dismissed all of Direct Energy's (eleven) complaints against the Plaintiff (regarding alleged misrepresentations by the Plaintiff's door-to-door canvassers) served as his motivation to take whatever actions he could, regardless of legality, to reduce the Fund's attrition rate. Mr. Cooper was also motivated personally because his compensation package directly tied to the efficacy of his anti-attrition programs.

THE 'KNOCK KNOCK' CAMPAIGN

26. In or around November of 2009, in furtherance of the conspiracy, the Partners ran the following false and misleading ad:

> Knock Knock..Who's there? I'VA – I'VA who? I've a got something important to tell you. Hahaha Unfortunately this is no joke. Oh. Recently some water heater service providers

[6] Direct Energy and National had agreed in 2009 that certain future disputes between them would be decided at arbitration rather than in the Courts. During the summer of 2009, Direct Energy commenced arbitration proceedings against National alleging that its door-to-door canvassers had misled eleven customers.

have convinced homeowners to unnecessarily replace their hot water heater. Now they are left with expensive cancellations fees, long term commitments and higher rental rates. Make an informed decision. Visit Hot Water Straight talk dot com or call Direct Energy at 1-866-502-0034. And remember – don't let just anyone into your home.

TANYA FAULDS HIRED BY ENERCARE

27. In March of 2010, Tanya Faulds was hired as EnerCare's Marketing Manager. Ms. Faulds, like Mr. Copper, was an active participant in all aspects of the conspiracy but in particular, the installation of the illegal surveillance devices as referenced below. At all material times, Ms. Faulds was aware of the substance of the 2009 Consent Order.

THE "IGNORE THE DOOR" CAMPAIGN

28. In or about August of 2010, in furtherance of the conspiracy, the Partners launched the well-publicized "Ignore The Door" campaign. According to the Partners, the purpose of the campaign was to "highlight the questionable sales tactics" of their competitors engaging in door-to-door water heater marketing and made "millions of customer impressions". The reference to "questionable sales tactics" was directed at the Plaintiff and was false and misleading. The campaign was conducted in English, Cantonese, Mandarin and Punjabi.

ENERCARE ACQUIRES THE FUND'S INEREST IN THE PARTNERSHIP

29. In late 2010, the Fund was dissolved and its 65% interest in the water heater partnership was transferred to EnerCare[7]. In January of 2011, EnerCare began operations as Direct Energy's new partner in the water heater business.

"DIRECT ENERGY'S WEBSITE STATEMENT"

30. In furtherance of the conspiracy, in or around 2011, Direct Energy in coordination with EnerCare posted the following false and misleading statement on its web site[8]:

[7] EnerCare was incorporated in late 2010.

[8] The words which particularly suggest that National is misleading customers are set out in bold type.

Signing a contract could jeopardize the competitive rental rates and the reliable worry-free service you've been receiving. Before signing...Direct Energy does not send door-to-door representatives to upgrade or exchange our water heaters. Nor do we authorize any Utility, Government Agency or any other company to do so on our behalf. When in doubt - call us first!...If you have already signed a contract, **you may consider taking the following corrective action:**

The Consumer Protection Act allows consumers to cancel a contract within 10 days upon receipt of the written copy of the agreement. **If you feel you have been misled**, you may want to visit the Ministry of Government and Consumer Services.

[Toronto Star Article]

Water heaters: 10 days to change your mind

September 26, 2009

A National Home Services agent came to her door and said he was replacing water heaters in the area from Sept. 14 to 16...Assuming he was with the company from which they rented the water heater, she said yes..."Twenty minutes after being asked to sign to acknowledge the change, a technician arrived to remove our water heater," the husband says...The couple read the contract later that day and decided to cancel the deal with National Home Services.

Direct Energy doesn't go door to door to replace your water heater, said spokesman Joshua Orzech. Nor does it make you sign a long-term rental contract with penalties to get out early (as competitors do)...**Another National Home Services sales agent visited the same couple yesterday and used the same misleading sales pitch**..."I said, `Shouldn't you start out by saying that you are a competitor to Direct Energy, who we deal with, and that you want our service?' He just took off," the new mother told me.

"THE ENERCARE MEDIA STATEMENT"

31. On or about June 7th, 2011, in furtherance of the conspiracy, EnerCare in coordination with Direct Energy, released the following false and misleading statement to the media and posted it on its website[9] (the "EnerCare Media Statement"):

"The results from a recent 2011 survey found that **aggressive and questionable door-to-door water heater sales tactics** have become a significant problem for Ontario residents. The report *The Truth About Door-to-Door Water Heater Sales Tactics,* commissioned by EnerCare, finds that consumers are feeling pressured by

[9] The words which particularly suggest that National is misleading customers are set out in bold type.

unsolicited door-to-door sales agents to switch providers **based on misinformation**, or lack of information, on the contract terms and the extent of the possible energy savings. To us, this is completely unacceptable".

32. The Plaintiff states that EnerCare's Director of Marketing, Barry Zeidenberg repeated the "EnerCare Media Statement" in interviews with the media.

THE PARTNERS' ATTEMPT TO AMEND THE TERMS AND CONDITIONS

33. No sooner had the 2002 Consent Order expired (on February 20, 2012) than the Partners immediately attempted to amend their water heater rental Terms and Conditions to make it more onerous for their customers to terminate their water heater rental agreements. The reaction of the public and the media to the intended change in the Terms and Conditions amendments was so negative that within a matter of weeks (by March 16, 2012), the Partners announced that they would not be proceeding with the amendments.

ECOSMART AND THE PARTNERS' "CUSTOMER AWARENESS" PROGRAM

34. In 2012, Mr. Cooper, on behalf of the Partners, and in furtherance of the conspiracy, engaged Ecosmart to canvass consumers as part of a so called "Customer Awareness Program" (hereinafter referred to as the "Program"). As referenced above, Mr. Wells is an owner and President of Ecosmart. He is also a former employee or contractor of Direct Energy who was terminated for allegedly defrauding customers. The Plaintiff asserts that the Partners were aware of this fact at the time Mr. Cooper solicited Ecosmart to assist with the Program.

35. In furtherance of the conspiracy, in or about April of 2012, the Partners, with the assistance of Ecosmart and the individuals referenced herein, launched the Program. The Program included the following:

(i) The use of Ecosmart door to door canvassers whose job it was to make false and misleading statements regarding the Partners' competitors and persuade customers who had signed rental agreements with competitors including the Plaintiff to cancel their agreements. Mr. Cooper wanted to use Ecosmart canvassers rather than employees of the Partners in order to conceal (to the extent possible) the fact that Direct Energy was behind

the canvassing and that the canvassing was being done for the benefit of Direct Energy (and EnerCare). The Ecosmart canvassers were successful in convincing many customers not to deal with the Plaintiff and to cancel rental agreements they had entered into with the Plaintiff; and,

(ii) Outbound calling by Direct Energy's call centre to customers who had recently been canvassed by the competition and whose function was to make false and misleading statements regarding the Partners' competitors.

36. The Program was designed[10] by Mr. Cooper, Ms. Faulds, the Wells and Mr. Tabaee. It was implemented by the corporate Defendants under the direction and control of these individuals. Under the Program, it was the responsibility of the Wells and Mr. Tabaee, to ensure that their door-to-door canvassers made the anti-competitive comments referenced below. Mr. Cooper, Ms. Faulds and the Wells orchestrated the Program for their own personal financial benefit.

THE FALSE AND MISLEADING STATEMENTS MADE DURING THE "CUSTOMER AWARENESS" PROGRAM IN FURTHERANCE OF THE CONSPIRACY

37. Ecosmart canvassers (who were following the Plaintiff's canvassers with the aid of global positioning system tracking devices, as referenced below) told consumers, after they had been solicited by the Plaintiff, that the Partners' competitors, including the Plaintiff, were "scamming, misrepresenting and defrauding customers". The canvassers made these false and misleading statements under the direction of the Wells and Mr. Tabaee based on instructions received from Mr. Cooper, Ms. Faulds and Direct Energy.

38. Direct Energy's reputation had been damaged by its attempt to change the Terms and Conditions which had become a public debacle. The Partners were concerned that the reputational damage would impair the success of the Program. For this reason, the Partners instructed the Wells and Mr. Tabaee to have the Ecosmart canvassers make the following false and misleading statement regarding the Plaintiff to customers if they

[10] Geoff Sharman, Jason Frost and Mike Kowalski of Direct Energy also contributed to the design and implementation of the Program.

were displeased with Direct Energy over its attempt to change the Terms and Conditions[11]:

> The fact is, **the original terms made it very easy for Door to Door agents who used questionable sales tactics at the door to switch DE customers without the customer ever realizing that they had switched**. The *new* contract that Direct Energy tried to implement was really a way to make sure that customers who *were* being switched had to make a conscious decision to change providers **instead of being, tricked into that decision**.

39. As referenced above, in addition to the Ecosmart canvassers speaking with customers, Direct Energy in coordination with EnerCare also contacted customers via its call centre to make false and misleading statements regarding the competition. During these calls, the Direct Energy representatives falsely told customers that Direct Energy does not sell door to door and that its competitors were misleading the public.

THE PARTNERS' USE OF ILLEGAL SURVEILLANCE

40. In furtherance of the conspiracy, Mr. Tabaee, with the knowledge and approval of the Wells and the Partners, surreptitiously caused global positioning system ("GPS") tracking devices to be installed in several of the Plaintiff's vehicles in order to track on a daily basis the areas in which the Plaintiff's agents were canvassing. Through a well-coordinated scheme, the intelligence garnered from the GPS tracking devices was used by the Partners to determine where the Ecosmart agents should be canvassing and which customers should be called by Direct Energy (the outbound calls). In causing the GPS tracking devices to be installed, the Defendants interfered (or caused to be interfered) with the lawful use, enjoyment or operation of the Plaintiff's property (their vehicles), and as such, violated ss.430 and 465 of the *Criminal Code*.

41. Mr. Tabaee, again with the knowledge and approval of the Wells and the Partners, also surreptitiously caused audio listening devices to be installed in the Plaintiff's offices also for the purpose of tracking its canvassers in furtherance of the conspiracy. The Plaintiff asserts that the devices were planted by persons posing as job applicants for potential employment with the Plaintiff. The Plaintiff states that in causing the illegal audio listening devices to be installed (in furtherance of the conspiracy), the Partners caused (or attempted to cause) private

[11] The words which particularly suggest that National is misleading customers are set out in bold type.

communications of the Plaintiff to be intercepted in violation of ss. 184 and 465 (or 464) of the *Criminal Code*.

42. Ms. Faulds, Mr. Tabaee and Ms. Wells were primarily responsible for implementing the use of the surveillance devices. It was the Wells who suggested the idea and Mr. Tabaee who installed them or arranged for their installation. Ms. Faulds ensured that the Partners were on side with the plan and liaised with Mr. Tabaee and Ms. Wells to ensure that the plan was implemented and that the data retrieved from the devices was provided to the Partners.

DISCLOSURE OF THE ILLEGAL CONDUCT

43. In June of 2012, Anila Malik, who was an Ecosmart employee at the time, informed the Plaintiff that certain of the Defendants had installed the GPS tracking devices on their vehicles as well as audio listening devices in their offices. She also informed the Plaintiff that Ecosmart door-to-door canvassers were disparaging the Plaintiff to the public. In late June of 2012, the Defendants were put on notice that the Plaintiff would be serving a Claim in respect of their unlawful conduct.

TOM COOPER'S RESIGNATION

44. In or about September of 2012, EnerCare announced that Mr. Cooper was resigning from the company effective October 30, 2012. The Plaintiff states that Mr. Cooper resigned at the Partners' request in order to create the appearance that the Partners were unaware of his illegal conduct. EnerCare paid Mr. Cooper in exchange for his resignation, silence and assurance that, if required to testify, he would state that he was on a frolic of his own in approving the installation of the GPS and audio listening devices. However, the reality is that the Partners were aware of Mr. Cooper's illegal conduct or were willfully blind with respect to same.

THE DEFENDANTS' BREACHES OF THE *COMPETITION ACT* AND *TRADE-MARKS ACT*

45. The Plaintiff asserts that the Defendants have breached s.52 of *Competition Act* and s.7(a) *Trade-Marks Act* by making the false and misleading regarding the Plaintiff referenced herein at paragraphs 30-32, 35 and 37-38 for which it seeks compensation for its loss. The Plaintiff states that the impugned statements were made with the Defendants' knowledge that they were false or were reckless as to whether they were true. The impugned statements discredited the business and services of the Plaintiff and were made to promote the business of the Partners. The Plaintiff pleads and relies on the provisions of the *Competition Act* and the *Trade-Marks Act.*

VICARIOUS LIABILITY

46. The corporate Defendants are vicariously liable for the unlawful conduct of their employees and agents by virtue of the fact that they were acting within the scope and course of their employment or agency when they engaged in the misconduct.

LOSS SUFFERED BECAUSE OF THE BREACHES OF THE *ACTS*

47. The Plaintiff requests that this Honourable Court grant an order requiring the Defendants to reimburse it for the losses and damages caused by their breaches of the s.52 of the *Competition Act* and s.7(a) of the *Trade-Marks Act.* The loss suffered by the Plaintiff includes its ability to fairly compete with the Partners as a result of their breaches of these statutes. The Defendants have irreparably damaged the Plaintiff's goodwill and ability to acquire customer goodwill by persuading customers that it is dishonest. As a result, the Plaintiff often does not even have an opportunity to solicit many customers with their rental water heater offer. The calculation of the Plaintiff's loss is based, in part, on the amount of the revenues the Partners have generated from their unlawful anti-competitive conduct but for which the Plaintiff would have earned. The particulars of the Plaintiff's losses and damages will be provided prior to trial and once they have received disclosure from the Defendants as to the revenue they have generated from their unlawful and anti-competitive statements.

48. The Plaintiff also requests that this Honourable Court grant it its costs of investigating the matters at issue including the issue of the Defendants' unlawful surveillance of the Plaintiff and the breach of the 2009 Order the particulars of which will be provided prior to trial.

REQUEST FOR PERMANENT INJUNCTION

49. As pleaded herein, there is a lengthy history of the Defendants repeatedly engaging in anti-competitive conduct prohibited by the *Competitions Act* and the *Trade-Marks Act*. The Plaintiff states that the false and misleading statements also constitute a breach of the 2009 Consent in that each impugned statement suggested (expressly or implicitly) that the Plaintiff was making misleading statements. At all material times, the Defendants were aware of the substance of the 2009 Consent Order. The Defendants have shown utter contempt for the rule of law. They have made a calculated decision to repeatedly breach the 2009 Order, the *Competition Act* and *Trade-Marks Act* because the financial benefits of their doing so have continuously outweighed the costs associated with their unlawful conduct. For these reasons, the Plaintiff respectfully requests that this Honourable Court grant a permanent injunction against the Defendants in respect of all unlawful conduct herein not already the subject of the 2009 Consent Order.

50. The Plaintiff requests that this proceeding be tried in Toronto.

Date: May 9, 2013

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Court File No.

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BETWEEN:

NATIONAL ENERGY CORPORATION

Plaintiff

-and-

ENERCARE INC., ENERCARE SOLUTIONS LIMITED PARTNERSHIP, ECOSMART HOME SERVICES INC., ECOSMART ENERGY SAVINGS CORP., DIRECT ENERGY MARKETING LIMITED, STEPHEN WELLS, ANGIE WELLS and HAMID TABAEE

STATEMENT OF CLAIM

(Filed this day of May, 2013)

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CT-2012-003

THE COMPETITION TRIBUNAL

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

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

AND IN THE MATTER OF certain policies and procedures of Direct Energy Marketing Limited.

BETWEEN:

THE COMMISSIONER OF COMPETITION
Applicant

- and –

DIRECT ENERGY MARKETING LIMITED
Respondent

RESPONSE OF THE RESPONDENT DIRECT ENERGY MARKETING LIMITED TO THE MOTION OF NATIONAL ENERGY CORPORATION R FOR LEAVE TO INTERVENE

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