Competition Tribunal Tribunal de la Concurrence

Reference: *The Commissioner of Competition v. Reliance Comfort Limited Partnership,* 2013 Comp. Trib. 4
File No.: CT-2012-002
Registry Document No.: 25

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

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

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

B E T W E E N:

The Commissioner of Competition
(applicant)

and

Reliance Comfort Limited Partnership
(respondent)

Date of hearing: 20130221
Before Judicial Member: Rennie J. (Chairperson)
Date of Reasons for Order and Order: March 12th, 2013
Reasons for Order and Order signed by: Justice Donald J. Rennie

REASONS FOR ORDER AND ORDER DISMISSING RESPONDENT'S MOTION TO STRIKE NOTICE OF APPLICATION

I. INTRODUCTION

[1] Reliance Comfort Limited Partnership ("Reliance") moves to strike out the Notice of Application ("Application") filed by the Commissioner of Competition ("Commissioner") on the basis that it discloses no reasonable cause of action upon which an order under section 79 of the *Competition Act*, R.S.C., 1985, c. C-34 (the "Act") can issue. Alternatively, it seeks an order requiring the Commissioner to amend the Application so as to clearly and completely define the geographic and product markets at issue as well as the exact conduct that is alleged to constitute a practice of anti-competitive acts. In the further alternative, Reliance seeks an order requiring the Commissioner to provide further and better particulars.

II. BACKGROUND

[2] On December 20, 2012, the Commissioner filed an application with the Tribunal pursuant to section 79 of the Act in which he alleges that Reliance has abused and continues to abuse its dominant position in the supply of natural gas and electric water heaters and related services to residential consumers in certain local markets in Ontario. Reliance served the Commissioner with a demand for particulars in respect of the Application on January 25, 2013. Reliance considered that it had received no satisfactory response to its demand, and on January 29, 2013, filed a notice of motion seeking the above noted relief.

III. ISSUES

[3] The issues on this motion are as follows:

1. Should the Application be struck out for failing to disclose a reasonable cause of action pursuant to section 79 of the Act?

2. In the alternative, should the Commissioner be required to amend the Application? and

3. In the further alternative should the Commissioner be required to provide particulars with respect to the Application?

[4] I will deal with each of these issues in turn.

1. Should the Application be struck out for failing to disclose a reasonable cause of action pursuant to section 79 of the Act?

[5] By reason of Rule 34 of the *Competition Tribunal Rules*, SOR/2008-141 ("*CTR"*), Reliance's motion to strike the Application for disclosing no reasonable cause of action is brought pursuant to Rule 221 of the *Federal Courts Rules*, SOR/98-106. Rule 221 states that:

221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	**221.** (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(a) discloses no reasonable cause of action or defence, as the case may be,	a) qu'il ne révèle aucune cause d'action ou de défense valable;
[…]	[…]
and may order the action be dismissed or judgment entered accordingly.	Elle peut aussi ordonner que l'action soit rejetée ou qu'un jugement soit enregistré en conséquence.

[6] The test for striking out pleadings is whether it is plain and obvious, assuming the facts pleaded to be true, that the claim discloses no reasonable cause of action. In *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42, [2011] 3 S.C.R. 45, the Supreme Court considered the proper approach to motions to strike:

> [17] […] A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735.
>
> […]
>
> [22] A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: r. 19(27) of the *Supreme Court Rules* (now r. 9-5(2) of the *Supreme Court Civil Rules*). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to

> prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

[7] The onus on the moving party to show that it is plain and obvious, or beyond doubt that the application discloses no reasonable cause of action, is a heavy one (see, for example, *Pharmaceutical Partners of Canada Inc. v. Faulding (Canada) Inc.*, 2002 FCT 1010, 21 C.P.R. (4th) 166).

[8] The statutory cause of action in this case is defined by section 79 of the Act. Pursuant to this section, the Commissioner must establish the following three elements: (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business; (b) that person or those persons have engaged in, or are engaging in, a practice of anti-competitive acts; and (c) the practice has had, is having, or is likely to have the effect of preventing or lessening competition substantially in a market.

[9] Pursuant to Rule 36(2)(*c*) of the *CTR*, the Commissioner must plead the material facts to establish the aforementioned elements. Additionally, pursuant to Rule 36(2)(*d*) of the *CTR*, the Commissioner must plead a concise statement of economic theory ("CSET"), if any. Accordingly, in order to strike the Commissioner's Application, Reliance must demonstrate that the Commissioner has failed to plead the material facts to support each element of the claim and thus failed to disclose a reasonable cause of action under Rule 221(1)(a) of the *Federal Courts Rules*. As mentioned above, the test is a stringent one and the moving party must establish that it is plain and obvious that the claim cannot succeed.

[10] Reliance submits that the Application fails to plead material facts, including economic facts, sufficient to establish any of the elements of subsection 79(1) of the Act. Reliance also states that the Commissioner's CSET is insufficient and that it is nothing more than a restatement of the bald allegations contained in the Application. For these reasons, it states that the Application should be struck.

[11] Reliance also makes several arguments regarding the appropriate content of a notice of application before the Tribunal. It states that the requirements regarding the content of pleadings may be different than those of civil courts based on the wording of rule 36(2) of the *CTR*. Reliance states that the prohibition against evidence in pleadings found in the *Federal Courts Rules* and the rules of other civil courts is notably absent from the *CTR*. For example, rule 174 of the *Federal Courts Rules* states that "[e]very pleading shall contain a concise statement of the material facts on which the party relies, but shall not include evidence by which those facts are to be proved". Reliance thus states that there is nothing in the *CTR* which would prohibit the inclusion of evidence as part of a pleading. It also states that this omission in the *CTR* makes it clear that an application before the Tribunal should be fulsome because of the complexity and the economic facts involved. Reliance adds that bare allegations of grounds are insufficient to meet the requirements of the *CTR*, that the pleadings should not be exceedingly general and that the Commissioner's case should be in final form at the time of filing.

[12] Reliance also submits that, in determining the standard of pleading, regard must be given to its right to a fair hearing and to the fairness of the entire process. It further argued that the

Commissioner should now be held to a higher standard of pleading given the 2009 amendments to the Act which provided the Tribunal with the power to order substantial administrative monetary penalties ("AMPs") in abuse of dominance cases, which Reliance states are penal in nature.

[13] The Commissioner argues that its obligation at this juncture is to plead sufficient material facts with respect to the statutory framework of the Act and that it has done so. It also submits that it has sufficiently pleaded a CSET. The Commissioner states that what Reliance is seeking through this motion is actually evidence which is not appropriate for a motion to strike.

[14] In my view, the Tribunal rules in respect of pleadings were not intended to be a departure from the principle which generally prevails in civil proceedings in Canada, which prohibits evidence from being asserted in an originating notice of application, response or reply. The Tribunal has a formal process and evidence is adduced following discovery. Thus evidence should not form part of a pleading before the Tribunal. However, as previously stated, material facts that establish the constituent elements of an application must be pleaded. Compliance with the *CTR* at this stage requires the applicant to plead sufficient material facts in respect of every element under the provision of the Act under which the application is made. With regard to the penal nature of the AMPs, that argument is premature as this point.

[15] I will now examine the Application under each of the elements of section 79 of the Act to determine whether or not sufficient material facts have been pleaded. As stated by Justice Noël in *AstraZeneca Canada Inc. v. Novopharm Ltd*., 2010 FCA 112, 83 C.P.R. (4th) 241, "one must not confuse material facts, which must be pleaded […] and the evidence by which those facts may be proven." In *Premakumaran v. Canada*, 2003 FCT 635, at para 9, the Federal Court offered the following insight into the boundaries between particulars and evidence:

> A lay litigant and indeed some of us in the profession, can become uncertain about dividing particulars from evidence. Broadly speaking, particulars are to explain what one party is going to try to prove against the other: how a party intends to prove his or her case is a matter of evidence. Justice of Appeal McQuaid, writing for the court in Kay Aviation b.v. v. Rofe (2001), 202 D.L.R. (4th) 683 at 687 (P.E.I. C.A.) said 'It is not always easy to distinguish between what constitutes "material facts", evidence" and "particulars" in the context of pleadings.'. He then went on to refer to what Master Sandler had to say in Copland v. Commodore Business Machines Ltd. (1985), 52 O.R. (2d) 586 (S.C.)at 588:
>
>> Material facts must be pleaded; evidence must not be pleaded. In between the concept of "material facts" and the concept of "evidence", is the concept of "particulars". These are additional bits of information, or data, or detail, that flesh out the "material facts," but they are not so detailed as to amount to "evidence".
>
> He then went on to note that it was -
>
>> ... necessary, in any specific type of action, to determine the minimum level of material fact disclosure required for any particular pleading, in

order to determine if the pleading is or is not regular. This is not an easy task by any means, and much common sense must be brought to bear in this endeavour. As well, the purpose and function of pleadings in modern litigation must be kept constantly in mind. It is often difficult to differentiate between, and articulate the difference between material facts, particulars, and evidence.

[16] With these principles in mind, I turn to the Application to determine if sufficient material facts have been pleaded under each element of abuse of dominance.

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business;

[17] Three elements must be established under the first part of the abuse of dominance provision, the product market, the geographic market and control (see, for example, *Commissioner of Competition v. Canada Pipe*, 2005 Comp. Trib. 3 aff'd 2006 FCA 236, 268 D.L.R. (4th) 238, leave to appeal to SCC refused, 31637 (May 10, 2007))

i. Market definition

[18] In the Application, the Commissioner defines the product market as follows:

> 29. Two distinct product markets can be identified: (i) the supply of natural gas water heaters and related services; and (ii) the supply of electric water heaters and related services. These related services include installation, disconnection, maintenance and repair of water heaters. For the purpose of this application, these product markets have been aggregated. The relevant product market is thus the supply of natural gas and electric water heaters and related services to residential consumers.

[19] Reliance takes issue with the fact that the Application in respect of product market does not set out an economic theory supporting the market nor a discussion with regards to substitutability. Reliance's counsel argued that a tenable relevant market must be supported by material facts, including economically significant facts with respect to all interchangeable products. Reliance cites a number of decisions from the United States to support its proposition that material facts in respect of interchangeable products must be pleaded. For example, in the decision of *Re-Alco Industries, Inc. v. National Center for Health Education*, *Inc.* 812 F Supp 387 (SDNY 1993), the United States District Court for the Southern District of New York stated that:

> The complaint in an antitrust case must allege a basis for finding that commodities which are in some way unique, such as the education materials in question here, are a market unto themselves. Plaintiff must explain why the market it alleges is in fact the relevant, economically significant product market. If a complaint fails to allege facts regarding substitute products, to distinguish among apparently comparable products, or to allege other pertinent facts relating

> to cross-elasticity of demand, as the complaint here fails to do, a court may grant a [motion to dismiss the complaint].

[20] The Commissioner states that it has pleaded two discernible product markets and that issues relating to functional interchangeability or the willingness of consumers to switch goes to evidence and is ultimately a matter for trial.

[21] I am not persuaded by the arguments of Reliance. It is difficult to adopt principles in respect of pleadings from other jurisdictions where rules or processes which govern proceedings before the courts may be entirely different. In the present matter, the Commissioner has set out his position on the appropriate product markets, namely the supply of electric water heaters and natural gas water heaters and related services, and has stated that "[r]esidential consumers are limited in their choice of energy source for heating water by where they live and the infrastructure constraints of their residence" and that " [f]or the majority of residential consumers, no reasonable substitutes exist for natural gas or electric water heaters." In my view these are material facts with respect to substitutability. Economic evidence which will be used to prove the product market and the reasons why there are no reasonable substitutes should not be included in the pleadings. Such evidence usually forms part of expert reports delivered later in the proceedings.

[22] However, I agree with Reliance that there is some confusion with respect to the aggregation of the two product markets. Thus, as part of the particulars to be provided to Reliance I will order that the Commissioner clarify as to what is meant by aggregated and why the product markets have been aggregated.

[23] I now turn to the geographic market. In the Commissioner's application the geographic market has been defined as follows:

> 31. The geographic market for the supply of natural gas and electric water heaters and related services to residential consumers is local in nature. The relevant geographic markets are (i) the local markets of Ontario where Union Gas distributes natural gas and (ii) certain other local rural markets in Ontario.

[24] The Application also outlines the areas of Ontario where Union Gas distributes natural gas; namely, the area corresponding generally to parts of the following: Northern Ontario, from the Manitoba border to the North Bay/Muskoka area; Southwestern Ontario, from Windsor to west of the Greater Toronto Area; and Eastern Ontario, not including Ottawa.

[25] In response to a letter from Reliance seeking clarification on the geographic market, the Commissioner, by letter dated January 22, 2013, stated that "the certain other local rural markets in Ontario in paragraph 31(ii) refers to the local rural markets in Ontario that are not supplied with natural gas."

[26] Reliance submits that there are a number of deficiencies in the Commissioner's geographic market definition. It states that it is imprecise and inconsistent and that it is not supported by any material facts or economic facts. Reliance also submits that it is unable to

identify with any degree of certainty, the boundaries of the geographic market proposed by the Commissioner.

[27] The Commissioner states that paragraph 79(1)(a) does not require it to delineate the exact boundary for the geographic markets and that it has thus pleaded the material facts to establish the "area thereof" where Reliance substantially or completely controls the supply of natural gas or electric water heaters and their related services. The Commissioner also submits that the information sought by Reliance as to why such markets have been identified as relevant goes to the evidence.

[28] In my view, the geographic market set out in the Application is discernible and the Commissioner has provided sufficient material facts in respect of this element. There are thus no grounds to strike the application on this basis. I will deal with Reliance's specific demands regarding clarification of the geographic market under the demand for particulars part of these reasons.

ii. Control

[29] Reliance submits that while the Application is replete with generalized statements that Reliance is "dominant" or "substantially and completely controls" the alleged market, in every instance such pleading is either a bald allegation, a recitation of the Act or a conclusion of law. Reliance also takes issue with the lack of pricing information, with the Commissioner's calculation of market share and with the Commissioner's characterization of Reliance's high gross profit margins.

[30] Again, what Reliance is seeking, namely, the specifics with regards to indirect indicators of market power such as market share and barriers to entry, as well as the direct indicators such as profit margins is evidence and not material facts. The Commissioner has set out sufficient material facts, if taken as true, to establish dominance in the relevant market. These include the following:

> 34. Reliance's market power is indirectly indicated by its market share and by barriers to entry. Reliance controls at least 76% of the Relevant Market, based on annual revenues. Reliance's exclusionary policies and procedures create significant artificial barriers to entry in the Relevant Market, which would otherwise be characterized by ease of entry.
>
> 35. Reliance's market power is additionally and directly indicated by, for example, its ability to increase and maintain high prices.

(b) that person or those persons have engaged in, or are engaging in, a practice of anti-competitive acts;

[31] The second element which must be established by the Commissioner is that the respondent(s) have engaged in, or are engaging in, a practice of anti-competitive acts. In *Canada* (*Commissioner of Competition) v. Canada Pipe Corporation Ltd.*, 2006 FCA 233, 268 D.L.R.

(4th) 193, leave to appeal to SCC refused, 31637 (May 10, 2007), the Federal Court of Appeal dealt extensively with this element and stated that an anti-competitive act is one whose purpose is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary. The Court of Appeal added that the proof of the intended nature of the negative effect on a competitor can be established directly through evidence of subjective intent, or indirectly by reference to the reasonably foreseeable consequences of the acts themselves and the circumstances surrounding their commission, or both. The Federal Court of Appeal, at paragraph 73, also stated that "[i]n appropriate circumstances, proof of a valid business justification for the conduct in question can overcome the deemed intention arising from the actual or foreseeable effects of the conduct, by showing that such anti-competitive effects are not in fact the overriding purpose of the conduct in question."

[32] The Commissioner has outlined in detail, in the Application, Reliance's water heater return policies which it considers to be exclusionary including the removal reference number return policy, return depot policies and procedures and Reliance's exit fees and charges. The Commissioner states, *inter alia*, that Reliance imposed these policies and procedures with the intended purpose of eliminating and preventing the entry or expansion of competitors and of making competitors less effective in competing against Reliance in the relevant market. The Commissioner also pleaded that Reliance's practices have caused at least two competitors to exit the relevant market and have impeded and prevented several competitors from entering or expanding in that market.

[33] Reliance states that the Commissioner has simply characterized the above noted policies and procedures as "exclusionary" and has not pleaded any material facts linking Reliance's alleged anti-competitive acts to the requisite intended negative effect on a competitor. It also submits that the Commissioner failed to refute any business justifications despite knowing that Reliance's policies were intended to deal with the misleading practices of competitors in the market place.

[34] I find that, if taken as true, the material facts pleaded by the Commissioner outlined above are sufficient to support the claim that Reliance has engaged in the practice of anti-competitive acts. Further, the Commissioner has no obligation to set out in its notice of application any of the possible business justifications of a respondent even if he is aware that the respondent has put forth such justifications, let alone indicate why he disagrees with them. The burden lies with the respondent to establish those as defences.

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market

[35] The last element that the Commissioner must establish is that the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market. In *Canada Pipe*, cited above, the Federal Court of Appeal stated that this analysis requires a comparative assessment of the competiveness in a market with and without the impugned practice. The Tribunal must compare the level of competitiveness with and without the practice and then determine whether the preventing or lessening of competition, if any, is "substantial".

[36] Again, Reliance submits that the Application provides the Tribunal with no factual basis upon which to make a finding of substantial lessening or prevention of competition. I disagree. Sufficient material facts have been pleaded by the Commissioner under this element of the provision and additional information sought by Reliance goes to evidence and will be provided later in the proceedings. These material facts include the following:

> 48. […] But for Reliance's exclusionary water heater return policies and procedures, competitors would likely enter or expand in the Relevant Market and consumers would likely benefit from substantially greater competition.
>
> 49. Reliance's exclusionary water heater return policies and procedures establish significant artificial barriers to entry and expansion in the Relevant Market. These exclusionary policies and procedures have caused at least two competitors to exit and prevented and impeded the entry or expansion of several competitors in the Relevant Market.
>
> 50. In the absence of Reliance's practice of anti-competitive acts, barriers to entry would be low and substantially greater competition would likely emerge in the Relevant Market from rental providers as well as retailers of residential water heaters.
>
> 51. Further, in the absence of Reliance's practice of anti-competitive acts, customer switching in the Relevant Market would likely be substantially greater, and consumers would likely benefit from lower prices and greater product quality and choice.

[37] I will now deal with the adequacy of the Commissioner's CSET. As previously noted, pursuant to Rule 36(2)(*d*) of the *CTR*, the Commissioner's application must include "a concise statement of the economic theory of the case, if any". Reliance submits that in order for this rule to be given meaning, the requirement to set out a CSET of the case must be interpreted as additional or distinct from the requirement to set out a concise statement of the grounds for the application and of the material facts. It relies on the principle set out by the Supreme Court of Canada in *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at paragraph 28, that "no legislative provision should be interpreted as to render it mere surplusage." Reliance thus submits that the Commissioner's CSET which, it states, is nothing more than a restatement of the bald allegations contained in the Application fails to meet the standard of pleadings prescribed by the *CTR*.

[38] The purpose of the CSET is to ensure that the parties set out in clear terms the economic theory of their case. It should not include the economic evidence upon which their case is to be established. The CSET should frame the case so as to prevent parties from adopting an entire new approach later in the proceedings (i.e. changing its definition of the product market). In the present matter, the Commissioner, in its CSET, has outlined its economic theory for every element under subsection 79(1). In my view, that is sufficient to satisfy the requirement found under Rule 36(2)(*d*).

[39] In summary, I find that Reliance has failed to establish that it is plain and obvious that the Application discloses no reasonable cause of action. Sufficient material facts have been pleaded under each element of subsection 79(1) of the Act and the Commissioner's CSET complies with the CTR. I also find that the pleadings are not exceedingly general and that the Commissioner's case is in the form that it should be at this point in the proceedings. For these reasons, Reliance's request for an order striking the Application is denied.

2. In the alternative should the Commissioner be required to amend the Application?

[40] As previously noted, the Commissioner has sufficiently pleaded the material facts to meet the statutory requirements set out in section 79 of the Act. Accordingly, there is no need to amend the Application.

3. In the further alternative should the Commissioner be required to provide particulars with respect to the Application?

[41] As an alternative remedy, Reliance seeks an order pursuant to Rule 181(2) of the *Federal Courts Rules* that the Commissioner provide the further and better particulars demanded in the Demand for Particulars served by Reliance on the Commissioner on January 25, 2013. Reliance states that without such particulars it cannot meaningfully respond to the Commissioner's allegations.

[42] The Commissioner submits that Reliance does not require particulars in the circumstances of this case as the pleadings are sufficient to enable Reliance to determine the case to be met. The Commissioner states that Reliance is seeking through its demand for particulars to limit artificially, and at this early stage, the Commissioner's case against it.

[43] The purpose of particulars under Rule 181(2) is to, *inter alia*, inform the party opposite of the case it has to meet and prevent any surprises at trial (see for example *Throttle Control Tech Inc. v. Precision Drilling Corp.*, 2010 FC 1085). In *Peerless Ltd. v. Aspen Custom Trailers Inc.*, 2008 FC 957, the Federal Court stated, at paragraph 10, that "an applicant for particulars is only entitled to learn the nature of the case and not the way in which it is to be proven."

[44] With these principles in mind I proceed to consider Reliance's Demand for Particulars.

[45] Reliance has 9 demand for particulars which are attached to these reasons as Schedule A. Demands for particulars 1, 4, 5, 6 and 8 deal with instances where the Commissioner has used open terminology such as "including" or "among other things" in a pleading. For example, when describing the product market, the Commissioner states that the services related to the supply of water heaters "include installation, disconnection, maintenance and repair of water heaters." Reliance's demand in each instance seeks delineation or precision with respect to the open-endedness of the Commissioner's pleading.

[46] I agree with the Commissioner that such particulars should not be provided. The Commissioner has pleaded the material facts that it has within its knowledge and where it has left open an enumeration, whether additional items should be included is within the knowledge of Reliance. In *International Business Machines Corp. v. Printech Ribbons Inc*. (1994), 55 C.P.R. (3d) 337 and *Linden Fabricating & Engineering (Prince George) Ltd. v. Équipement Hydraulique Boréal Inc*. (1994), 57 C.P.R. (3d) 89, the Federal Court refused to order that particulars be provided where the information was within the knowledge of the party seeking it. With respect to demand 8, it is clear from the Application as to which "certain water heater policies and procedures" the Commissioner is referring to. Thus, I am of the view that the use of open terminology in the context of this Application has not prevented Reliance from knowing the case it has to meet. Accordingly, the demands for particulars 1, 4, 5, 6 and 8 are denied.

[47] Reliance's demands 2 and 3 deal with the Commissioner's definition of geographic market, outlined above. Essentially, Reliance is seeking precisely which cities, towns or regions form part of the relevant market. Reliance also seeks to know whether the Commissioner takes the position that in areas that are not supplied by natural gas there are no substitutes for electric water heaters.

[48] I find it difficult to conceive that Reliance cannot identify the local markets within Ontario where Union Gas Ltd. supplies natural gas and the local rural markets in Ontario that are not supplied natural gas. Further, Reliance has failed to establish, through proper evidence, why these particulars were not within its knowledge and were necessary to reply intelligently to the Application. No affidavit was filed by an officer of the corporation detailing the limitations of its knowledge in respect of these matters. While such evidence is not determinative of the outcome, its absence, in this context, is significant.

[49] As regards to the particulars in respect of substitutes, I agree with the Commissioner that the answer to Reliance's query is evident on the face of the pleadings. It is clear from the Application that the Commissioner's position is that there are no reasonable substitutes for water heaters where gas is unavailable. Any additional information would go to the evidence. For these reasons, demands 2 and 3 are denied.

[50] Reliance's demand 7 reads as follows:

> In paragraph 34 of the Application the Commissioner pleads that Reliance controls 76% of the Relevant Market based on '***annual revenues***'. The Commissioner pleads no further facts to identify what these annual revenues represent.
>
> Please provide particulars with respect to paragraph 34 as to:
>
> (a) Is this alleged revenue based on revenue from rental customers in the aggregate or based on annual sales of water heaters?
>
> (b) Is the basis of the market share approach based on Reliance's installed base of customers or on its annual sales of water heaters?

(c) Identify which of the alleged markets to which this 76 % market share relates.

(d) Identify the specific years on which these annual revenue figures are based

[51] In my view, Reliance is entitled to know if the alleged revenue is based on revenue from rental customers in the aggregate or based on annual sales of water heaters. The balance of the particulars sought goes to the evidence. Reliance thus does not need the requested information to prepare a proper response.

[52] Demand 9 relates to allegations made by the Commissioner in paragraphs 46, 49 and 56 of the Application that Reliance's exclusionary water heater return policies (1) have caused at least "two competitors" to exit the relevant market and (2) have impeded and prevented the entry or expansion of "several competitors" in the relevant market. Reliance seeks the names of these competitors, the markets from which the competitors are alleged to have exited as well as the date of exit.

[53] I find that the information sought by Reliance relating to specific competitors is in the nature of evidence and not particulars. Accordingly, the demand for particulars is denied.

NOW THEREFORE, FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

[54] Reliance's request for an order striking the application is denied.

[55] Reliance's alternative request for an order requiring the Commissioner to amend the Application is denied.

[56] The Commissioner, shall, on or before March 19, 2013, provide Reliance with the following information:

(a) Clarify what is meant by aggregated in terms of the product market and why the product markets have been aggregated.
(b) Provide a response to Demand 7(a) of Reliance's Demand for Particulars.

[57] Reliance shall file its response to the Application on or before March 28, 2013.

[58] As success on this motion has been divided, there shall be no costs.

DATED at Ottawa, this 12th day of March, 2013.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Donald J. Rennie

[59] SCHEDULE A

Demand 1:

In paragraph 10 the Commissioner states that most residential consumers who rent or purchase a water heater also obtain related water heater services '***including***' installations, repair, maintenance and disconnection. Similarly, in paragraph 29, the Commissioner has defined the purported product market to include water heater related services. The Commissioner pleads that these related services '***include***' installation, disconnection, maintenance and repair of water heaters. By using the term 'including' and 'includes' the Commissioner has failed to identify all of the other services that fall within the ambit of "related services".

Please provide particulars with respect to paragraphs 10 and 29 as to:

(a) Identify the other services which are distinguished from "installation, disconnection, maintenance and repair of water heaters"; and,

(b) Confirm that each of these other services are contained within the alleged aggregated product market.

Demand 2:

In paragraph 31 of the Application the Commissioner purports to define the relevant geographic markets as (i) the local markets of Ontario where Union Gas distributes natural gas; and (ii) certain other local rural markets in Ontario. In paragraph 13 the Commissioner has identified the area where Union Gas distributes natural gas as the area corresponding generally to parts of Northern Ontario, from the Manitoba border to the North Bay/Muskoka area; Southwestern Ontario, from Windsor to west of Greater Toronto Area; and Eastern Ontario, not including Ottawa. The Commissioner has not pleaded any facts on the number of local markets or where in this area these local markets are located.

Please provide particulars with respect to paragraph 13 and 31 as to:

(a) Geographic identifiers such as postal codes, census tract or names of streets and roads to identify the parameters and identity of these local markets.

(b) The communities that Union Gas serves are identified on its corporate website as of January 2013 as listed in Exhibit 'A' hereto. Please confirm whether Exhibit 'A' completely and accurately defines the communities referred to as "the local markets of Ontario where Union Gas distributes natural gas".

(c) Please further confirm with reference to the list of communities identified in Exhibit 'A', whether the "local markets of Ontario where Union Gas distributes natural gas" include the totality of the communities identified. For example, Exhibit 'A' lists Peel Region as a community, which in turn includes the cities of Mississauga, Brampton and Caledon. For example, Exhibit 'A' lists Peel Region as a community, notwithstanding that Peel Region includes the cities of Mississauga, Brampton and Caledon. Please confirm wherever such

a municipal region is listed in Exhibit 'A' whether the cities, towns and communities that comprise that municipal region are intended to be included in the definition of "the local markets of Ontario where Union Gas distributes natural gas".

Demand 3:

In paragraph 31 of the Application the Commissioner purports to define the Relevant Geographic Market to include the aggregate of (i) the local markets of Ontario where Union Gas distributes natural gas; and (ii) certain other local rural markets in Ontario. The Commissioner has pled no further facts in the Application to identify or indicate where in Ontario these local rural markets are located. In a letter dated January 22, 2013, Ms. Palumbo advised that the boundaries of "certain other local rural markets in Ontario" are "those that are not supplied natural gas". A copy of that letter is Exhibit '**B**' hereto. This further confuses the stated market definition. Paragraph 29 of the Application states that the relevant product market for the purposes of the Application is the aggregated market of the supply of gas and electric water heaters and related services. If the geographic market includes "local rural markets in Ontario where natural gas is not supplied", is it the position of the Commissioner that there are no substitutes for electric water heaters in these local rural markets, as obviously gas water heaters cannot be deployed. The relevant product market as defined is inconsistent with this suggested clarification.

Please provide particulars with respect to paragraph 14 and 31 as to:

(a) Geographic identifiers such as postal codes, census tract or names of streets and roads to identify the parameters and identity of the '***other local rural markets***'.

(b) Whether that Commissioner takes the position as indicated by the letter from Ms. Palumbo on January 22, 2013 that in areas that are not supplied by natural gas there are no substitutes for electric water heaters.

Demand 4:

In paragraph 17 of the Application the Commissioner alleges that Reliance creates significant barriers to the return of its water heaters through the use of its RRN Return Policy. In this paragraph the Commissioner uses the phraseology '***among other things***' and therefore fails to identify all of the ways in which it is alleged the RRN Return Policy creates barriers to return Reliance's water heaters. Please provide particulars with respect to paragraph 17 as to:

(a) Identify the ways other than those listed in (i) to (iv) by which it is alleged the RRN Return Policy creates significant barriers to the return of Reliance's water heaters.

Demand 5:

In paragraph 20 of the Application the Commissioner alleges that Reliance imposes arbitrary restrictions on the return process at its return depots. In this paragraph the Commissioner uses the word '***including***' and therefore fails to identify all of the alleged arbitrary restrictions.

Please provide particulars with respect to paragraph 20 as to:

(a) Identify the other alleged arbitrary restrictions imposed by Reliance.

Demand 6:

In paragraph 22 the Commissioner alleges that Reliance levies multiple and unwarranted exit fees and charges to impede, prevent and deter customers from switching to competitors and to penalize competitors. The Commissioner alleges these charges '***include***' damage; account closure; drain, disconnection and pick-up as well as extra billing charges.

Please provide particulars with respect to paragraph 22 as to:

(a) The other alleged charges imposed by Reliance upon which the Commissioner intends to rely.

Demand 7:

In paragraph 34 of the Application the Commissioner pleads that Reliance controls 76% of the Relevant Market based on '***annual revenues***'. The Commissioner pleads no further facts to identify what these annual revenues represent.

Please provide particulars with respect to paragraph 34 as to:

(a) Is this alleged revenue based on revenue from rental customers in the aggregate or based on annual sales of water heaters?

(b) Is the basis of the market share approach based on Reliance's installed base of customers or on its annual sales of water heaters?

(c) Identify which of the alleged markets to which this 76 % market share relates.

(d) Identify the specific years on which these annual revenue figures are based.

Demand 8:

In paragraph 40 the Commissioner pleads that Reliance implemented '***certain water heater policies and procedures***' which were prohibited by the Direct Energy Consent Order, but does not plead any facts as to which policies and procedures he is referring to.

Please provide particulars with respect to paragraph 40 as to:

(a) The specific return policies and procedures implemented by Reliance which are alleged to have been prohibited by the Direct Energy Consent Order;

(b) The specific return policies and procedures implemented by Reliance which are alleged to have been similar to those prohibited under the Direct Energy Consent Order;

Demand 9:

In paragraphs 46, 49 and 56 the Commissioner alleges Reliance's exclusionary water heater return policies have caused at least '***two competitors***' to exit the Relevant Market. The Commissioner further asserts that Reliance has impeded and prevented '***several competitors***' from entering or expanding in the Relevant Market. No facts have been pled regarding these allegations.

Please provide particulars with respect to paragraphs 46, 49 and 51 as to:

(a) a complete list of the ***'two competitors'*** who have purported to leave the alleged Relevant Market due to Reliance's exclusionary water heater return policies and procedures including in each instance:

i. the name of the competitor
ii. the date on which the competitor is alleged to have exited the market
iii. each separate local market or local rural market in Ontario forming part of the Commissioner's aggregated geographic market from which the competitors are alleged to have exited.

(b) a complete list of the '***several competitors***' who Reliance have purported to have impeded and prevented from entering or expanding in the alleged Relevant Market including in each instance:
i. the name of the competitor
ii. the date on which the competitor is alleged to have exited the market
iii. each separate local market or local rural market in Ontario forming part of the Commissioner's aggregated geographic market from which the competitors are alleged to have exited.

APPEARANCES:

For the applicant:

The Commissioner of Competition

Parul Shah
Jonathan Hood

For the respondent:

Reliance Comfort Limited Partnership

Robert S. Russell
Denes Rothschild
Zirjan Derwa