CT-2012-002

THE COMPETITION TRIBUNAL

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

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

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

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

RELIANCE COMFORT LIMITED PARTNERSHIP

Respondent

MEMORANDUM OF FACT AND LAW
OF THE
COMMISSIONER OF COMPETITION

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OVERVIEW

1. Reliance Comfort Limited Partnership ("**Reliance**"), the Respondent in this proceeding, supplies water heaters and their related services to residential consumers. In many local markets of Ontario Reliance is the dominant supplier of electric or natural gas-powered water heaters and the services related to those water heaters. As claimed by the Commissioner of Competition ("**Commissioner**") in the Notice of Application[1], Reliance has abused and continues to abuse its dominant position in these markets. Reliance does this by imposing policies and procedures that have the purpose and effect of preventing its customers from replacing its water heaters with those of its competitors and of significantly raising its competitors' costs of doing business. Reliance's practice of anti-competitive acts has lessened and prevented competition substantially in the relevant markets.

2. In this motion Reliance seeks to strike out the Commissioner's Application on the basis that the relevant product and geographic markets, and the concise statement of economic theory of the case, are so insufficiently pleaded that Reliance cannot be expected to defend against the Application. Alternatively, Reliance seeks amendments to the relevant product and geographic markets and to the Commissioner's economic theory of the case. In the further alternative, Reliance seeks extensive particulars of much of what the Commissioner has pleaded.

3. The motion should be dismissed. The relevant product and geographic markets are identified in a manner that meet the statutory requirements of section 79(1)(a) of the *Competition Act*, R.S.C. 1985, c. C-34, as amended (the "**Act**"). The Commissioner's concise statement of economic theory is consistent with the material facts pleaded in the Application, and thus

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1 Commissioner's Notice of Application, 20 December 2012, CT-2012-002. [Notice of Application]

conforms with Rule 36(2)(d) of the *Competition Tribunal Rules*. For these reasons, there is no basis for striking or amending the Application. Furthermore, no additional particulars of the Commissioner's case are required. Reliance knows its own water heater business, the products and services it supplies, the locations of its customers, and how it conducts its business. Reliance can therefore defend itself against the Commissioner's claim of abuse of dominance.

PART I ~ STATEMENT OF FACTS[2]

A. Reliance is a dominant supplier of natural gas and electric-powered water heaters in Ontario

4. Reliance has operated its rental water heater business in Ontario for approximately 14 years. Reliance entered this business after Union Gas Ltd. transferred all its rental natural gas water heater assets to Reliance, then known as Union Energy Inc.[3]

5. Union Gas Ltd. is one of Ontario's largest natural gas distributors. It has a monopoly in the distribution of natural gas in certain areas of Ontario. Union Gas Ltd. and Enbridge, Inc. developed the rental water heater industry in the 1950s to expand the use of natural gas in the areas where they had distribution monopolies. Union Gas Ltd. transferred its natural gas rental water heater assets to Reliance in 1999. The transfer effectively removed the Ontario Energy Board's oversight and regulation of the rental gas water heater industry in the areas of Ontario where Union Gas Ltd. distributes natural gas.[4]

6. Since the transfer of Union Gas Ltd.'s natural gas rental water heater assets to Reliance, Reliance has been the dominant supplier of natural gas water heaters in those areas of Ontario where Union Gas Ltd. distributes natural gas. These areas correspond generally to parts of the following regions: Northern Ontario, from the Manitoba border to the North Bay/Muskoka area;

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2 For the purpose of this motion, the facts set out in the Commissioner's Application are deemed to be true. See *Burns Lake Native Development Corp. v. Canada (Commissioner of Competition)*, [2006] C.C.T.D. No. 16 at para. 57 (QL), Commissioner's Book of Authorities, Tab 1 [Burn]; and *Merck & Co. v. Apotex Inc.*, [2012] F.C.J. No. 483 at para. 28 (QL), Commissioner's Book of Authorities, Tab 2. [Merck]

3 Notice of Application, *ibid.* at para. 12.

4 *Ibid.* at para. 11.

Southwestern Ontario, from Windsor to west of the Greater Toronto Area; and Eastern Ontario, excluding Ottawa.[5]

7. Reliance has also become the dominant supplier of electric water heaters in some of Ontario's rural areas where natural gas is not available, owing in part to its acquisition of existing rental electric water heater assets.[6]

B. Reliance knows the negative effects that its conduct can have on competition in the rental water heater business

8. Reliance knows that preventing customers from switching suppliers, and prohibiting competitors from disconnecting and returning water heaters and replacing those water heaters with their own, has negative effects on competitors and on competition.[7]

9. In 2002 this Tribunal prohibited Direct Energy Marketing Limited ("**Direct Energy**") from imposing exclusionary water heater policies and procedures on its customers and competitors in the local markets of Ontario where Enbridge Inc. distributes natural gas (the "**Direct Energy Consent Order**"). In particular, the Direct Energy Consent Order prohibited Direct Energy from preventing its competitors from disconnecting and returning Direct Energy's water heaters. Reliance knows the conduct that Direct Energy was prohibited from engaging in – and that Reliance now engages in – is anti-competitive because it has provided information to the Competition Bureau explaining how the Direct Energy Consent Order has had positive effects in the local markets of Ontario where Enbridge Inc. distributes natural gas.[8]

10. Reliance also knows that, while Direct Energy was still under the Consent Order, Direct Energy implemented a "Return Authorization Number" ("**RAN**")

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5 *Ibid.* at para. 13.
6 *Ibid.* at para. 14.
7 *Ibid.* at paras. 39-42.
8 *Ibid.* at para. 39.

Policy prohibiting customers from returning water heaters unless the customers first obtained a RAN from Direct Energy ("**Direct Energy RAN Policy**"). Under the Policy, Direct Energy also prohibited third parties from obtaining a RAN on behalf of customers. Reliance expressed its concerns to the Bureau about the anti-competitive effects of the Direct Energy RAN Policy in the local markets where Enbridge Inc. distributes natural gas.[9]

C. Reliance imposes its own exclusionary water heater return policies and procedures on customers and competitors

11. Since at least 2009 Reliance has imposed water heater return policies and procedures that have the purpose and effect of impeding its competitors from returning Reliance's water heaters on behalf of the competitor's new and Reliance's former customers.[10] On 17 May 2010 Reliance implemented a removal reference number policy (the "**RRN Policy**") similar to that used by Direct Energy. Reliance implemented this Policy on the basis that it was not bound by the Direct Energy Consent Order. It also implemented this Policy knowing that the Commissioner was concerned about the anti-competitive effects of this type of water heater return policy.[11]

12. Before Reliance implemented its RRN Policy, Reliance's competitors regularly disconnected and returned Reliance's rental water heaters on behalf of the competitor's new, and Reliance's former, customers.[12]

13. Under the RRN Policy, Reliance creates significant barriers to the return of its water heater. Reliance does this, amongst other ways, by:

    (i) prohibiting the customer or competitor from returning a water heater unless the customer first obtains a RRN from Reliance

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9 *Ibid.*at para. 41.
10 *Ibid.*at para. 15 and 38, 42-47.
11 *Ibid.*at para. 40.
12 *Ibid.*at para. 16.

and has signed and fully completed to Reliance's satisfaction a "Water Heater Return Form;"

(ii) prohibiting competitors from obtaining a RRN on behalf of customers;

(iii) refusing to provide a RRN to customers who contact Reliance with a competitor on the call; and

(iv) refusing to recognise agency agreements between customers and competitors that give competitors the authority on behalf of the customer to disconnect and return Reliance's rental water heaters.[13]

14. Reliance also uses the RRN Return Policy to deter, impede, and prevent customers from terminating their Reliance rental agreements and from switching to a competitor, for example, by keeping customers and competitors on hold for lengthy periods of time, imposing lengthy call-service periods, intentionally dropping calls, and intimidating customers with unwarranted fees and charges.[14]

15. In addition to the RRN Policy, Reliance has imposed arbitrary restrictions on the water heater return process at its return depots to enable Reliance to reject returns made by Reliance's customers and competitors. Where Reliance prevents, impedes or deters competitors from returning Reliance's water heaters, competitors are forced to store these water heaters.[15]

16. Similarly, Reliance also levies multiple and unwarranted exit fees and charges to impede, prevent, and deter customers from switching to

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13 *Ibid.* at para. 17.
14 *Ibid.* at para. 18.
15 *Ibid.* at paras. 20-21.

competitors and to penalize customers and competitors. For example, Reliance levies the following exit fees and charges: damage fees; account closure fees, drain, disconnection and pick-up charges; and extra billing charges. Reliance has also employed internal and external collection processes to harass customers into paying these multiple and unwarranted exit fees and charges.[16]

17. Reliance's water heater return policies and procedures constitute an integrated strategy to exclude competitors.[17] Over at least the past three years, Reliance has financially benefitted – and continues to benefit – from imposing the aforementioned exclusionary policies and procedures on customers and competitors.[18]

D. The Commissioner files an Application before this Tribunal

18. On 20 December 2012 the Commissioner filed a detailed Application seeking a remedy pursuant to section 79 of the Act for Reliance's abuse of its dominant position. In the Application, the Commissioner pleads the following:

(1) Reliance substantially or completely controls the supply of water heaters powered by natural gas and electricity and the services related to those water heaters (i) in the local markets of Ontario where Union Gas Ltd. distributes natural gas; and (ii) in the local rural markets of Ontario where no natural gas is available;

(2) Reliance has engaged and continues to engage in a practice of anti-competitive acts; and

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16 *Ibid.* at paras. 22-27.
17 *Ibid.* at para. 15.
18 *Ibid.* at para. 56(ii).

(3) this practice of anti-competitive acts has lessened and prevented and is lessening and preventing competition substantially.

E. Reliance brings a motion to strike the Commissioner's Application

19. On 18 January 2013 Reliance contacted the Commissioner seeking clarification of the relevant geographic markets and demanding a response within two business days.[19] The Commissioner provided this response on 22 January 2013.[20]

20. On 29 January 2013 Reliance served and filed this motion.

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19 Commissioner's Response to Respondent's Notice of Motion, Exhibit A.
20 Commissioner's Response to Respondent's Notice of Motion, Exhibit B.

PART II ~ STATEMENT OF POINTS IN ISSUE

21. This motion challenges the sufficiency of the Commissioner's Application. The issues are:

(i) Whether the relevant product and geographic markets are sufficiently pleaded in accordance with the statutory requirements of s.79(1)(a) of the Act;

(ii) Whether the Commissioner's concise statement of economic theory is sufficiently pleaded in accordance with Rule 36(2)(d) of the *Competition Tribunal Rules*;

(iii) In the alternative, whether the Commissioner should be required to amend the Application; or

(iv) In the further alternative, whether the Commissioner should be required to provide further particulars.

PART III ~ SUBMISSIONS

A. The Commissioner's pleadings are sufficient

22. The statutory cause of action in this case is defined by section 79 of the Act. This section permits the Commissioner to seek a remedy against firms who abuse their dominant positions.

23. Pursuant to this section of the Act, 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.

24. Pursuant to Rule 36(2)(c) of the *Competition Tribunal Rules*, the Commissioner must plead the material facts to establish the aforementioned elements. Additionally, pursuant to Rule 36(2)(d) of the *Competition Tribunal Rules*, the Commissioner must plead a concise statement of economic theory, if any.

25. The Commissioner has fulfilled these statutory requirements. The Commissioner's Application contains a concise statement of the material facts that establish the elements under section 79 of the Act. In addition to pleading the relevant geographic and product markets, the Commissioner has also pleaded a concise statement of economic theory.

1. Material facts are sufficiently pleaded to establish "class or species of business" pursuant to section 79(1)(a) of the Act

26. Pursuant to section 79(1)(a) of the Act, the Commissioner must plead the material facts to establish "a class or species of business." The Tribunal has interpreted "a class or species of business" in abuse of dominance cases to mean a product market.[21]

27. The Commissioner has pleaded two distinct product markets. The first is the supply of water heaters that use natural gas as their energy source and services related to those water heaters. The second is the supply of water heaters that use electricity as their energy source and services related to those water heaters.[22]

28. Electric and natural gas water heaters are discernable products. The services that are related to water heaters are also discernable. They are the services residential consumers receive that are associated with or connected to their water heaters. The Application lists such services as including disconnection, installation, repair, and maintenance.[23]

29. Accordingly, the Commissioner has sufficiently pleaded the material facts to establish the "class or species of business" that Reliance substantially or completely controls.

2. Material facts are sufficiently pleaded to establish "any area thereof" pursuant to section 79(1)(a) of the Act

30. Under section 79(1)(a), the Commissioner must also plead the material facts to establish that Reliance substantially or completely controls a class or species of business "throughout Canada or any area thereof." The Tribunal

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21 *Canada (Director of Investigation and Research) v. D&B Companies of Canada Ltd.*, [1995] C.C.T.D. No. 20 at p. 14 (QL), Commissioner's Book of Authorities, Tab 3. [D&B]

22 Notice of Application, *supra*, at para. 29.

23 Notice of Application, *supra*, at para. 29.

has interpreted "throughout Canada or any area thereof" in abuse of dominance cases to mean a geographic market.[24]

31. The Commissioner has pleaded that the geographic market is local in nature. The Commissioner has identified the relevant geographic markets as: (i) the local markets in Ontario where Union Gas Ltd. distributes natural gas and (ii) the local rural markets in Ontario where no natural gas is available.[25] As the Application explains, in the rural areas of Ontario most residential consumers use electric water heaters because natural gas is generally not available there.[26] The relevant geographic markets the Commissioner has pleaded are therefore discernable.

32. Reliance's complaint, in essence, is that the relevant geographic markets are not sufficiently pleaded because the Commissioner has not delineated an exact boundary for these geographic markets. Section 79(1)(a) does not, however, require the Commissioner to delineate an exact boundary for the geographic markets. As the Tribunal has recognised, as represented by the cases cited below, such precision is generally not feasible.

33. In *Director of Investigation and Research v Laidlaw,*[27] the Tribunal stated:

> One does not expect to be able to define the geographic dimensions of a market with precision. The boundaries will necessarily overlap with adjacent markets and be indistinct from those adjacent markets at many points.

34. Similarly, in *The Director of Investigation and Research v Hillsdown (Canada Limited),*[28] the Tribunal stated:

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24 D&B, *supra.*
25 Notice of Application, *supra,* at para. 31.
26 *Ibid.* at para. 9.
27 *Director of Investigation and Research v Laidlaw,* [1992] C.C.T.D. No. 1 at p. 31 (QL), Commissioner's Book of Authorities, Tab 4.
28 *The Director of Investigation and Research v Hillsdown (Canada Limited),* [1992] C.C.T.D. No. 4 at p. 19 (QL), Commissioner's Book of Authorities, Tab 5.

> It is important to emphasize, however, that market boundaries cannot and will not in many instances be precise. They can only be approximations. As long as market share statistics are not taken as the only indicators of the existence of market power, the exact locations of those boundaries becomes less important. Restraints on a merged firm's (alleged) market power can come from both inside and outside the market as defined.

35. More recently, in *The Commissioner of Competition v CCS Corporation et al.*,[29] the Tribunal confirmed this approach:

> The Tribunal and the courts have traditionally considered it necessary to define a relevant market before proceeding to assess the competitive effects of the mergers under the Act [footnotes omitted]. However, they have cautioned against losing sight of the ultimate inquiry, which is whether the merger being assessed prevents or lessens, or is likely to prevent or lessen competition substantially [footnotes omitted]. With this admonition in mind, it is the Tribunal's view that, in this case, the Tribunal may evaluate the competitive effects of the Merger without precisely defining the relevant geographic market.
>
> This conclusion is important because...the evidence that has been adduced does not permit the Tribunal to delineate the exact boundaries of the geographic market.

36. The Commissioner is therefore not required to plead the relevant geographic markets with the precision as contended by Reliance.

37. Accordingly, in setting out the relevant geographic markets as the Commissioner has done in the Application, the Commissioner has sufficiently 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.

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29 *The Commissioner of Competition v CCS Corporation et al.*, [2012] C.C.T.D. No. 14 at paras. 92-93 (QL), Commissioner's Book of Authorities, Tab 6.

3. The concise statement of economic theory is sufficient

38. As discussed above, the Commissioner has pleaded the material facts to establish the relevant product and geographic markets. The Commissioner's statement of economic theory is consistent with these material facts and with the simplicity of the case: Reliance is dominant in the relevant product and geographic markets; Reliance has abused and continues to abuse its dominant position by creating significant artificial barriers for Reliance's customers to return their water heaters and switch suppliers; and Reliance's practice of anti-competitive acts has lessened and prevented competition substantially in the relevant product and geographic markets. The Commissioner has also, therefore, sufficiently pleaded a concise economic theory.

B. Reliance has failed to meet the test to strike

39. Rule 36(2)(c) of the *Competition Tribunal Rules* requires the Commissioner to plead the material facts on which he relies. Pleadings must not, however, include evidence by which those facts are proved.[30]

40. Rule 36(2)(d) of the *Competition Tribunal Rules* requires the Commissioner to plead a concise statement of economic theory, if any. In accordance with the general principles of pleading, the concise statement of economic theory must be consistent with the material facts pleaded and must also state the economic theory concisely and in summary form. As previously noted, the Commissioner must not plead evidence by which the economic theory is to be proved.

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30 *Federal Courts Rules,* (SOR/98-106), Rule 174.

41. In order to strike the Commissioner's Application, Reliance must demonstrate that the Commissioner has failed to plead the material facts to support his claim, and has thus failed to disclose a reasonable cause of action under Rule 221(1)(a) of the *Federal Courts Rules*. The test for striking out pleadings is a stringent one and the onus on the moving party is necessarily high. The moving party must establish that it is "plain, obvious" and "beyond doubt" that the claim cannot succeed.[31]

42. For the reasons stated above, Reliance has failed to meet this test. The Commissioner has sufficiently pleaded the material facts to establish the relevant product and geographic markets. The Commissioner has not filled the Application with the evidence the Commissioner will seek to rely on at the hearing to prove these material facts. The Commissioner's statement of economic theory is also consistent with these material facts and pleaded concisely.

C. The Application does not need to be amended

43. What Reliance seeks through its request that the Commissioner amend the Application is evidence by which the Commissioner intends to prove the facts pleaded.

44. 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 Commissioner's Application.

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31 Burns, *supra*, at para. 57; Merck, *supra*, at para. 28.

D. Reliance does not require further particulars

45. In the alternative, Reliance seeks particulars pursuant to Rule 181(2) of the *Federal Courts Rules*. The purpose of particulars under this Rule is to enable the requesting party to know the case to be met at trial and to avoid allowing parties to be taken by surprise.[32] The case law recognises that particulars are not required in the following circumstances:

i. where the information sought is not necessary to delineate the issues;[33]

ii. where the information sought is within the knowledge of the party seeking it;[34]

iii. where the information requested is in the nature of evidence as to how an issue in litigation would be proved;[35]

iv. where it would have the effect of hampering the plaintiff in advancing its claim and preventing the plaintiff from obtaining full discovery.[36]

46. Consistent with the above principles, Reliance does not require particulars in the circumstances of this case. The Commissioner's pleadings are sufficient to enable Reliance to determine the case to be met. The Commissioner provides detailed reasons for opposing each of Reliance's demands at

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32 *Embee Electronic Agencies v Agence Sherwood Agenices Inc.* [1979] F.C.J. No. 1131 at para. 3 (QL), Commissioner's Book of Authorities, Tab 7. [Embee]

33 *Canadian (Competition Act Direction of Investigation and Research) v Canadian Pacific Ltd.,* [1997] C.C.T.D No. 5 at para. 9 (QL), Commissioner's Book of Authorities, Tab 8. [Canadian Pacific]

34 *International Business Machines Corp. v Printech Ribbons,* [1994] F.C.J. No. 568 at paras. 33 and 54 (QL), Commissioner's Book of Authorities, Tab 9.

35 Canadian Pacific, *supra,* at para. 16.

36 *Canada v Island Challenger (The),* [1956] Ex.C.R. 334 (QL) at paras. 12-14, Commissioner's Book of Authorities, Tab 10; Embee, *supra,* at para. 8; and *Canada Pacific, supra,* at para. 9.

paragraph 12 of his Response. These reasons are reproduced at Schedule "A" of this Memorandum of Fact and Law.

47. In summary, the Application is clear and unambiguous in setting out the Commissioner's case pursuant to section 79 of the Act. Reliance is able to deny or accept the Commissioner's allegations as pleaded. Further, the information Reliance seeks is within its own knowledge because it knows its own water heater business; is in the nature of evidence; or is evident on the face of the pleadings.

48. What Reliance seeks by requesting these particulars is to limit artificially, and at this early stage, the Commissioner's case against it. Reliance's demands for particulars are designed to narrow the Commissioner's pleadings with respect to the relevant product and geographic markets and the scope of Reliance's anti-competitive conduct. Accordingly, Reliance's demands for particulars prevent the Commissioner from exploring on discovery the full extent of Reliance's practice of anti-competitive acts. By hampering the Commissioner from fully advancing his case in this way, Reliance's demands for particulars also limit the fact-finding role of the Tribunal.

49. For these reasons, particulars are not required.

PART IV ~ ORDER SOUGHT

50. The Commissioner respectfully requests that the motion be dismissed in its entirety with costs on a solicitor and client basis, and that pursuant to section 9(2) of the *Competition Tribunal Act,* Reliance be ordered to produce its response forthwith.

DATED AT GATINEAU, QUÉBEC on 15 February 2013.

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SCHEDULE - A -

Demand 1: Reliance pleads that the definition of the relevant product markets is insufficient because by using the term "includes" the Application fails to identify all the related water heater services that are associated with or connected to electric and natural gas water heaters. As stated above, the Commissioner's definition of the relevant product markets is sufficiently particularised. The Application is clear that services connected to or associated with natural gas or electric water heaters are within the relevant product markets. The Commissioner's use of the term "includes" is not intended to be exhaustive. Reliance knows what additional water heater related services it provides. Reliance can therefore plead as to whether this list of related services is complete or incomplete. Accordingly, it would be inappropriate to limit the Commissioner from exploring on discovery the extent to which Reliance provides other services connected to or associated with water heaters by limiting the scope of the pleadings as Reliance proposes.

Demand 2 and 3(a): Reliance pleads that the definition of the relevant geographic markets is insufficient because the pleadings do not list each of the local markets or where all the local markets are located. As stated above, the Application is clear that the relevant geographic markets are the local markets in Ontario (i) where Union Gas Ltd. supplies

natural gas and (ii) where there is no natural gas supplied. The definition of the relevant geographic markets is sufficiently particularised. Reliance knows and can 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. Reliance can thus accept or deny this definition of the relevant geographic markets as pleaded. To the extent that Reliance requests further details, this is in the nature of evidence, not particulars.

Demand 3(b): Reliance asks whether "in areas that are not supplied by natural gas there are no substitutes for electric water heaters." The response to Reliance's query is evident on the face of the pleadings. Paragraphs 9 and 31 make clear that in those local rural markets that are not supplied natural gas, there are no reasonable substitutes for the supply of electric water heaters and related services.

Demand 4: Reliance pleads that by using the phrase "among other things" the Commissioner has not stated all the ways in which Reliance's RRN Return Policy creates significant barriers to the return of water heaters. The Commissioner's pleading is sufficiently particularised. The Commissioner's use of the phrase "among other things" is not intended to be exhaustive in describing the significant barriers to return created by the RRN Return Policy. Reliance knows its own RRN Return Policy. Reliance is able to deny or accept whether the RRN Return Policy is exclusionary as it is pleaded. Further, to

the extent that Reliance requests further details, this is in the nature of evidence, not particulars. For these reasons, it would be inappropriate to limit the Commissioner from exploring on discovery the full extent to which Reliance's RRN Return Policy creates significant barriers to the return of Reliance's water heaters by limiting the scope of the pleadings as Reliance proposes.

Demand 5: Reliance pleads that by using the term "including" the Commissioner fails to identify all the arbitrary restrictions Reliance imposes on the return process at its return depots that prevent customers and competitors from returning Reliance's water heaters. The pleading is sufficiently particularised. The Commissioner's use of the term "including" is not intended to be exhaustive. Any additional restrictions Reliance imposes on the return process at its return depots are within Reliance's knowledge. Reliance is able to deny or accept whether Reliance's restrictions on the return process at its return depots are exclusionary. For these reasons, it would be inappropriate to limit the Commissioner from exploring on discovery the full extent to which Reliance's restrictions on the return process at its return depots create barriers to return by limiting the scope of the pleadings as Reliance proposes.

Demand 6: Reliance pleads that by using the term "including" the Commissioner fails to identify all the unwarranted exit fees and charges Reliance imposes to impede, prevent and deter customers from switching to competitors and to

penalize customers and competitors. The pleading is sufficiently particularised. The Application lists the unwarranted exit fees and charges as including damage, account closure, drain, disconnection and pick-up, as well as extra billing charges. The Commissioner's use of "including" is not intended to be exhaustive. Any additional exit fees and charges Reliance imposes are within Reliance's knowledge. Reliance is able to deny or accept whether its exit fees and charges are exclusionary. For these reasons, it would be inappropriate to limit the Commissioner from exploring on discovery the full extent to which Reliance's exit fees and charges impede, prevent and deter customers from switching to competitors, and also penalize customers and competitors, by limiting the scope of Reliance's pleadings as Reliance proposes.

Demand 7: Reliance demands information relating to annual revenues and corresponding market shares in the relevant market. The information Reliance seeks is not in the nature of particulars, but evidence. The Application is clear that Reliance substantially or completely controls the relevant market. Reliance can accept or deny the Commissioner's position. Reliance does not need the requested information to make a proper defence.

Demand 8: Reliance demands that the Commissioner identify the specific return policies and procedures implemented by Reliance that were prohibited by the Direct Energy Consent Order. The response to Reliance's query is evident on the face of the pleadings and on a reading of

the Direct Energy Consent Order, which is publicly available. Paragraph 39 of the Application states that the Direct Energy Consent Order prohibited Direct Energy from preventing competitors from disconnecting and returning water heaters. Paragraphs 15 to 27 of the Application set out Reliance's exclusionary water heater return policies and procedures that prevent competitors from disconnecting and returning Reliance's water heaters.

Demand 9: Reliance demands information relating to specific competitors in each local market. The information Reliance seeks is in the nature of evidence, not particulars. Reliance does not need the requested information to make a proper defence.

SCHEDULE - B -

1. *Competition Act*

SECTION 79

Prohibition where abuse of dominant position

79. (1) Where, on application by the Commissioner, the Tribunal finds that

(*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,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

2. *Competition Tribunal Act*

SECTION 9(2)

Court of record

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

Proceedings

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

3. ***Competition Tribunal Rules***

RULE 36

Notice of Application

36. (1) An application shall be made by filing a notice of application.

Form and content

(2) A notice of application shall be signed by or on behalf of the applicant and shall set out, in numbered paragraphs,

(*a*) the sections of the Act under which the application is made;

(*b*) the name and address of each person against whom an order is sought;

(*c*) a concise statement of the grounds for the application and of the material facts on which the applicant relies;

(*d*) a concise statement of the economic theory of the case, if any, except in the case of an application made under Part VII.1 of the Act;

(*e*) the particulars of the order sought; and

(*f*) the official language that the applicant intends to use in the proceedings.

4. ***Federal Courts Rules***

RULE 174

Material facts

174. Every 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.

RULE 181

Particulars

181. (1) A pleading shall contain particulars of every allegation contained therein, including

(*a*) particulars of any alleged misrepresentation, fraud, breach of trust, wilful default or undue influence; and

(*b*) particulars of any alleged state of mind of a person, including any alleged mental disorder or disability, malice or fraudulent intention.

Further and better particulars

(2) On motion, the Court may order a party to serve and file further and better particulars of any allegation in its pleading

RULE 221

Motion to strike

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

(*a*) discloses no reasonable cause of action or defence, as the case may be,

(*b*) is immaterial or redundant,

(*c*) is scandalous, frivolous or vexatious,

(*d*) may prejudice or delay the fair trial of the action,

(*e*) constitutes a departure from a previous pleading, or

(*f*) is otherwise an abuse of the process of the Court,

and may order the action be dismissed or judgment entered accordingly.

Evidence

(2) No evidence shall be heard on a motion for an order under paragraph (1)(*a*).

SCHEDULE - C -

1 *Burns Lake Native Development Corp. v. Canada (Commissioner of Competition),* [2006] C.C.T.D. No. 16 (QL)

2 *Merck & Co. v. Apotex Inc.*, [2012] F.C.J. No. 483 (QL)

3 *Canada (Director of Investigation and Research) v. D&B Companies of Canada Ltd.*, [1995] C.C.T.D. No. 20 (QL)

4 *Director of Investigation and Research v Laidlaw,* [1992] C.C.T.D. No. 1 (QL)

5 *The Director of Investigation and Research v Hillsdown (Canada Limited),* [1992] C.C.T.D. No. 4 (QL)

6 *The Commissioner of Competition v CCS Corporation et al.,* [2012] C.C.T.D. No. 14 (QL)

7 *Embee Electronic Agencies v Agence Sherwood Agenices Inc.* [1979] F.C.J. No. 1131 (QL)

8 *Canadian (Competition Act Direction of Investigation and Research) v Canadian Pacific Ltd.,* [1997] C.C.T.D No. 5 (QL)

9 *International Business Machines Corp. v Printech Ribbons,* [1994] F.C.J. No. 568 (QL)

10 Can*ada v Island Challenger (The)*, [1956] Ex.C.R. 334 (QL)

CT-2012-002

THE COMPETITION TRIBUNAL

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- and -

RELIANCE COMFORT LIMITED PARTNERSHIP

Respondent

MEMORANDUM OF FACT AND LAW OF THE COMMISSIONER OF COMPETITION

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