

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

**COMMISSIONER OF COMPETITION'S RESPONSE TO
RESPONDENT'S NOTICE OF MOTION
(Rule 85 of the *Competition Tribunal Rules*)**

1. The Commissioner seeks a remedy for the Respondent's abuse of its dominant position in the supply of natural gas and electric water heaters and related services to residential consumers. The Respondent has abused its dominant position by engaging in a practice of anti-competitive acts that has prevented and lessened competition substantially. The Respondent has done this by preventing customers from switching suppliers and by preventing competitors from returning the Respondent's water heaters and replacing these water heaters with their own.
2. The Commissioner's Application relies on detailed pleadings that set out the material facts to establish the relevant product and geographic markets and a concise statement of economic theory that is consistent with these material facts. Therefore, no basis exists for striking out the Application.
3. Accordingly, the Respondent's motion is really a motion for particulars. When the Application is read in its entirety, however, it is apparent that the Respondent may properly respond to the Commissioner's pleadings. The information the Respondent seeks is evident on the face of the pleadings, in the nature of evidence, or within the Respondent's knowledge because it knows its own water heater business. For these reasons, therefore, this demand for particulars is designed to limit at the pleadings stage the scope of the Respondent's conduct at issue and the Commissioner's ability to advance his case through discovery and ultimately trial; and therefore, neither particulars nor an amendment to the pleadings is warranted.
4. The Respondent's motion has also delayed the date for the Respondent to file its response. The Respondent brought this motion 6 days before the Respondent's response was due. Eleven days before filing this motion, the Respondent contacted the Commissioner seeking clarification of the

relevant geographic markets. The Commissioner promptly responded with this clarification. The Respondent's request for clarification dated 18 January 2013 and the Commissioner's response dated 22 January 2013 are attached as Exhibits "A" and "B".

5. The Respondent's motion should be dismissed in its entirety with costs on a solicitor and client basis.

A. The Commissioner's Pleadings Are Sufficient

6. The Commissioner has pleaded the material facts to establish the relevant product and geographic markets.

(i) Relevant Product Markets

7. The relevant product markets are sufficiently defined. The relevant product markets are (i) the supply of natural gas water heaters and related services; and (ii) the supply of electric water heaters and related services.
8. The relevant product markets include services related to natural gas and electric water heaters. As explained in paragraph 10 of the Application, most residential consumers who rent or purchase natural gas or electric water heaters also receive services that are related to their water heaters. Thus, the services that are connected to or associated with the supply of natural gas or electric water heaters to residential consumers are within the relevant product markets. The Application lists these services as including installation, repair, maintenance, and disconnection of the water heater. The Respondent knows if there are any additional services it provides to residential consumers that are connected to or associated with electric or natural gas water heaters. Parenthetically, the Respondent's complaint that the material facts are insufficient because it is unclear

whether furnaces are part of the relevant market is answered by the pleadings. Water heaters are not furnaces.

(ii) Relevant Geographic Markets

9. Similarly, the relevant geographic markets are sufficiently defined. The Application is clear that the relevant geographic markets are local in nature. Further, when read in its entirety, the Application identifies the relevant geographic markets as (i) the local markets in Ontario where Union Gas Ltd. supplies natural gas and (ii) the local rural markets in Ontario where there is no natural gas supplied. Paragraph 9 of the Application explains that most residential consumers use electric water heaters in the local rural areas of Ontario as natural gas is generally not available there. The Respondent knows all the local markets in Ontario where Union Gas Ltd. supplies natural gas and where there is no natural gas available.

(iii) Concise statement of economic theory

10. The Commissioner's concise statement of economic theory is also sufficiently pleaded. It sets out the economic theory in support of the Commissioner's case. It also addresses the material facts that establish the relevant product and geographic markets.
11. In short, therefore, no basis exists for striking the Commissioner's Application, as the Respondent seeks to do on the basis of the definition of relevant product and geographic markets. Further, no basis exists for striking the Commissioner's application on the basis that the Commissioner has not provided a concise statement of economic theory.

B. The Commissioner's Pleadings Do Not Need to Be Amended or Require Particulars

12. The Commissioner responds as follows to each of the Respondent's demand for particulars:

a. **Demand 1:** The Respondent 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. The Respondent knows what additional water heater related services it provides. The Respondent 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 the Respondent provides other services connected to or associated with water heaters by limiting the scope of the pleadings as the Respondent proposes.

b. **Demand 2 and 3(a):** The Respondent 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. The Respondent 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. The Respondent can thus accept or deny this definition of the relevant geographic markets as pleaded. To the extent that the Respondent requests further details, this is in the nature of evidence, not particulars.

- c. **Demand 3(b):** The Respondent asks whether “in areas that are not supplied by natural gas there are no substitutes for electric water heaters.” The response to the Respondent’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.

- d. **Demand 4:** The Respondent pleads that by using the phrase “among other things” the Commissioner has not stated all the ways in which the Respondent’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. The Respondent knows its own RRN Return Policy. The Respondent is able to deny or accept whether the RRN Return Policy is exclusionary as it is pleaded. Further, to the extent that the Respondent 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 the Respondent's RRN Return Policy creates significant barriers to the return of the Respondent's water heaters by limiting the scope of the pleadings as the Respondent proposes.

- e. **Demand 5:** The Respondent pleads that by using the term "including" the Commissioner fails to identify all the arbitrary restrictions the Respondent imposes on the return process at its return depots that prevent customers and competitors from returning the Respondent'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 the Respondent imposes on the return process at its return depots are within the Respondent's knowledge. The Respondent is able to deny or accept whether the Respondent'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 the Respondent's restrictions on the return process at its return depots create barriers to return by limiting the scope of the pleadings as the Respondent proposes.

- f. **Demand 6:** The Respondent pleads that by using the term "including" the Commissioner fails to identify all the unwarranted exit fees and charges the Respondent 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 the Respondent imposes are within the Respondent's knowledge. The Respondent 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 the Respondent'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 the Respondent's pleadings as the Respondent proposes.

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

- h. **Demand 8:** The Respondent demands that the Commissioner identify the specific return policies and procedures implemented by the Respondent that were prohibited by the Direct Energy Consent Order. The response to the Respondent'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 the Respondent's exclusionary water heater return policies and procedures that

prevent competitors from disconnecting and returning the Respondent's water heaters.

- i. **Demand 9:** The Respondent demands information relating to specific competitors in each local market. The information the Respondent seeks is in the nature of evidence, not particulars. The Respondent does not need the requested information to make a proper defence.
13. For the foregoing reasons, the Respondent's motion should be dismissed in its entirety with costs on a solicitor and client basis.
 14. The following documentary evidence will be used at the hearing of the motion:
 - a. The Notice of Application filed on 20 December 2012;
 - b. The Memorandum of Fact and Law of the Commissioner of Competition; and
 - c. Such further and other material as counsel may advise and this Court may Permit.

DATED AT GATINEAU, QUÉBEC on 6 February 2013.

**Department of Justice
Competition Bureau Legal Services
50 Victoria Street, 22nd Floor
Gatineau, Quebec
K1A 0C9**

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Counsel for the Applicant

AND COPIES

TO: Reliance Comfort Limited Partnership

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AND TO: The Registrar
Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, Ontario
K1P 5B4

COMPETITION TRIBUNAL

B E T W E E N:

THE COMMISSIONER OF COMPETITION

(Applicant)

-AND-

RELIANCE COMFORT LIMITED PARTNERSHIP

(Respondent)

**COMMISSIONER OF COMPETITION'S RESPONSE TO
RESPONDENT'S NOTICE OF MOTION
(RULE 85 OF THE *COMPETITION TRIBUNAL RULES*)**

**DEPARTMENT OF JUSTICE CANADA
COMPETITION BUREAU LEGAL SERVICES
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Josephine A. L. Palumbo (LSUC #34021D)
Parul Shah (LSUC #55667M)**

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Counsel to the Commissioner of Competition

Palumbo, Josephine: LEG-DROIT

From: Pedota, Catherine [CPedota@blg.com]
Sent: Friday, January 18, 2013 11:35
To: Palumbo, Josephine: LEG-DROIT
Cc: Wingfield, David: CB-BC; Shah, Parul: LEG-DROIT
Subject: The Commissioner of Competition v. Reliance Comfort Limited
Attachments: TOR01-#5096447-v4-Draft_letter_to_Josephine_Palumbo_regarding_definition_of_geographic_market.DOCX

EXHIBIT/PIÈCE "A"

Hello Josephine,

Please see the attached letter which I am sending on behalf of Rob Russell.



Name Catherine Pedota
Title Legal Assistant to Robert Russell
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File No. 016778/000065

January 18, 2013

Delivered by Email

Ms. Josephine A. L. Palumbo
Competition Bureau - Legal Services
50 Victoria Street
Gatineau, Quebec,
K1A 0C9

Dear Ms. Palumbo:

Re: The Commissioner of Competition v. Reliance Comfort Limited
Notice of Application pursuant to s. 79 of the *Competition Act*

We refer to the Notice of Application (“Application”) filed against Reliance on December 20, 2012.

The Application fails to comply with Rule 36. (2)(c) of the *Competition Tribunal Rules*. The Commissioner purports to define the geographic market at paragraph 31 of the Application. In this paragraph, the Commissioner describes the relevant geographic markets for the supply of natural gas and electric water heaters as (i) the local markets of Ontario where Union Gas distributes natural gas and (ii) certain other local rural markets in Ontario. No material facts have been pleaded by the Commissioner with respect to the location or boundaries of these “other local rural markets”.

In the interest of dealing with this issue in an expeditious and cost effective manner, we request that the Commissioner **immediately confirm** his intention to amend the Application to properly plead both the geographic market the Commissioner alleges to be relevant as well as the material facts upon which the Commissioner relies in support of that geographic market. Failing receipt of such confirmation by close of business, **Tuesday, January 22, 2013**, we are instructed to immediately apply to the Tribunal for relief.

Yours truly



Robert S. Russell
Borden Ladner Gervais LLP

cc: David R. Wingfield, Executive Director and Senior General Counsel, Department of Justice
Parul Shah, Counsel, Department of Justice

Palumbo, Josephine: LEG-DROIT

From: Palumbo, Josephine: LEG-DROIT
Sent: Tuesday, January 22, 2013 15:42
To: 'Pedota, Catherine'
Cc: Wingfield, David: CB-BC; Shah, Parul: LEG-DROIT
Subject: RE: The Commissioner of Competition v. Reliance Comfort Limited
Attachments: RelianceRRusselltrjan22.pdf

EXHIBIT/PIÈCE

" B "

Hello Catherine,

Please see attached our response.

Thank you.

Josephine

Josephine A.L. Palumbo

Senior Litigation Counsel and Practice Coordinator
 Avocate litige conseil et coordonnatrice de pratique
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 Ministère de la Justice
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From: Pedota, Catherine [mailto:CPedota@blg.com]
Sent: Friday, January 18, 2013 11:35 AM
To: Palumbo, Josephine: LEG-DROIT
Cc: Wingfield, David: CB-BC; Shah, Parul: LEG-DROIT
Subject: The Commissioner of Competition v. Reliance Comfort Limited

Hello Josephine,

Please see the attached letter which I am sending on behalf of Rob Russell.



Name Catherine Pedota

Title Legal Assistant to Robert Russell

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VIA EMAIL**

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Attn.: Mr. Robert S. Russell

Dear Mr. Russell:

Re: The Commissioner of Competition v. Reliance Comfort Limited Partnership (CT/002)

I acknowledge receipt of your letter dated 18 January 2013 in relation to the above-noted matter and specifically your query regarding the definition of the relevant geographic markets for the supply of natural gas and electric water heaters contained in paragraph 31(ii) of the Notice of Application (the "Application").

When read in the context of the Application itself and in particular paragraph 9, we believe that the relevant geographic markets have been adequately described and therefore the Application meets the provisions of Rule 36(2)(c) of the *Competition Tribunal Rules*. Nevertheless, for the avoidance of any doubt that you might have on this point, the "certain other local rural markets in Ontario" in paragraph 31(ii) refers to the local rural markets in Ontario that are not supplied natural gas.

We trust the above responds to your query.

Yours truly,

Josephine A.L. Palumbo
Senior Counsel

cc. David R. Wingfield, Executive Director and Senior General Counsel, Department of Justice
Parul Shah, Counsel, Department of Justice

RELEASE