CT-2012-002

THE COMPETITION TRIBUNAL

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

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

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
(Responding Party)

and

RELIANCE COMFORT LIMITED PARTNERSHIP

Respondent
(Moving Party)

MEMORANDUM OF FACT AND LAW OF RELIANCE COMFORT LIMITED PARTNERSHIP

(Motion to Strike the Notice of Application)

PART I: STATEMENT OF FACT

1. Reliance Comfort Limited Partnership ("**Reliance**") supplies water heaters to residential consumers across Ontario.

2. On December 20, 2012, the Commissioner of Competition ("**Commissioner**") filed a Notice of Application alleging that Reliance is dominant in the supply of gas and electric

residential water heaters and related services and is abusing that dominance in contravention of section 79 of the *Competition Act* ("**Act**").

3. Since January 18, 2013 Reliance has sought clarification from the Commissioner with respect to the allegations contained in the Notice of Application. Receiving no satisfactory response from the Commissioner, on January 25, 2013 Reliance served the Commissioner with a Demand for Particulars. To date Reliance is yet to receive a substantive response to that demand.

Affidavit of E Penney sworn February 15, 2013, para. 6.

4. Contrary to the claims made by the Commissioner, Reliance does not know, and is unable to identify with any degree of certainty, the boundaries of the geographic market proposed by the Commissioner.

Affidavit of E Penney sworn February 15, 2013, para. 14.

5. This motion is brought pursuant to Rule 34 of the *Competition Tribunal Rules* and Rule 221 of the *Federal Courts Rules* to strike out the Notice of Application for disclosing no reasonable cause of action upon which an Order under section 79 of the Act can issue.

6. In the alternative, Reliance seeks an Order requiring that the Commissioner amend the Notice of Application so as to clearly and completely define each of the geographic and product markets at issue in the proceeding as well as the exact conduct alleged for the purpose of the Notice of Application to constitute a practice of anti-competitive acts.

7. In the further alternative, Reliance seeks an order requiring the Commissioner to provide the further and better particulars sought by the Demand for Particulars served by Reliance on the Commissioner on January 25, 2012.

PART II: STATEMENT OF THE POINTS IN ISSUE

8. The issues on this motion are:

   (a) Should the Notice of Application be struck out for failing to disclose a cause of action pursuant to section 79 of the Act?

(b) In the alternative should the Commissioner be required to amend the Notice of Application to conform to the rules of pleading prescribed by the *Competition Tribunal Rules*?

(c) In the further alternative should the Commissioner be required to provide particulars with respect to the Notice of Application?

PART III: STATEMENT OF SUBMISSIONS

9. The Tribunal has jurisdiction to hear this motion and to order the requested relief.

> *Competition Tribunal Act*, RSC 1985 (2nd Supp), c 19, sections 8 and 9(2).
> *Competition Tribunal Rules*, SOR/2008-141, Rule 34(1).
> *Federal Courts Rules*, SOR/98-106, Rule 221.
> *Canada (Competition Act, Director of Investigation and Research) v Canadian Pacific Ltd*, [1997] CCTD No 7.

A. Applicable pleading requirements

10. A notice of application must comply with the rules of pleading prescribed by Rule 36(2) of the *Competition Tribunal Rules*. Among other things it must set out:

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

(b) "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".

> *Competition Act*, (RSC 1985, c C-34), section 79(1).
> *Competition Tribunal Rules*, SOR/2008-141, Rules 36(1) and 36(2).

11. A proper pleading is a statement of material facts, not bald allegations or legal conclusions. A pleading that does no more than state the conclusions the Tribunal must determine is improper and should be struck. Further, the material facts must be complete and stated with precision. The opposing party is entitled to know the case against it. As noted by Mr. Justice Stone in the Federal Court of Appeal in *Weatherall v. Canada*, quoting from Williston and Rolls, it is trite law that the "principal functions" of pleadings are to:

(a) "define with clarity and precision the question in controversy between litigants"; and

(b) "give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issues disclosed by them".

> *Weatherall v Canada (Attorney General), [1988] FCJ No 593, 65 CR (3d) 27 at para. 14, there referring to both Williston and Rolls, The Law of Civil Procedure, vol 2, (Toronto: Butterworths, 1970) at page 637 and to Esso Petroleum Co Ltd v Southport Corporation, [1956] AC 218.*

B. The relevant test on a motion to strike

12. The test on a motion to strike, as held by Mr. Justice Thackray of the British Columbia Court of Appeal in *Skybridge Investments v. Metro Motors* is whether it is "plain and obvious" that the Notice of Application discloses no reasonable cause of action or has no chance of success, based on the facts pleaded.

> *If <u>insufficient</u> material facts have been pleaded to support every element of a cause of action, then beyond a doubt that cause of action is bound to fail ..."*

> *Skybridge Investments Ltd v Metro Motors Ltd,* [2006] BCJ No 2892, 2006 BCCA 500 at para. 11.
> *Imperial Tobacco Inc v Canada (AG),* 2011 SCC 42 at paras. 17, 22 and 25.

13. A pleading that contains insufficient material facts to stand against a motion to strike cannot be saved by an order for particulars. As noted by Mr. Prothonatary Lafreniere, Esq.:

> *When dealing with a motion involving the sufficiency of a pleading, the Court should bear in mind that the purpose of pleadings is to define the matters at issue between the parties. The purpose of particulars is somewhat different, in that they are meant to provide the opposing party with sufficient information of the allegations being advanced so that it might know the case to be met at trial and be able to prepare a full and meaningful pleading in response. Particulars are given to make clear what is unclear, and to allow a party to determine whether the pleading discloses a cause of action, or whether it might be characterized as embarrassing.* ***If the pleading is not good as a matter of law, the particulars cannot save it. If it is not good as a matter of pleading, the particulars will not improve it.***

> *Chen v Canada (Minister of Citizenship and Immigration)* 2006 FC 389, para 8, cited with approval by Russell J., in *Sivak v Canada* 2012 FC 272 at para 23.

14. The Commissioner seeks an order from the Tribunal requiring Reliance to pay a penalty of $10 million. In these circumstances, considerations of procedural justice require that the Commissioner be held to a higher standard of pleading. Rules of pleading should be applied in harmony with the *Canadian Charter of Rights and Freedoms* and paragraph 2(e) of the *Canadian Bill of Rights*; the Tribunal has expressly recognised that the latter requires it to interpret the *Competition Tribunal Act* and the *Competition Tribunal Rules* "*so as not to deny the respondent 'a fair hearing in accordance with the principles of fundamental justice'*".

> *Canadian Charter of Rights and Freedoms,* 1982, c 11 (UK), Schedule B, ss 7, 11 and 24
> *Canadian Bill of Rights,* SC 1960, c 44, para. 2(e).
> *Canada (Director of Investigation and Research, Competition Act) v Nutrasweet Co,* [1990] CCTD No 17 at page 47.
> *Grant v Torstar,* [2009] 3 SCR 640 at para. 44.

Material Facts

15. Material facts are the facts that establish the constituent elements of a claim or defence.

> *Skybridge Investments Ltd v Metro Motors Ltd,* [2006] BCJ No 2892, 2006 BCCA 500 at para. 9, citing with approval *Delaney & Friends Cartoon Productions Ltd v Radical Entertainment Inc,* [2005] BCJ No 573, 2005 BCSC 371.
>
> *Philco Products v Thermionics* [1940] SCR 501 at 505.
> *Union Carbide Canada Ltd v Canadian Industries Ltd,* [1969] 60 CPR 223 at para 9.

16. Bald allegations or conclusions of law are not material facts capable of disclosing a cause of action. As noted by Mr. Justice Dickson:

> *The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.*
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> *Operation Dismantle v The Queen,* SCC [1985] 1 SCR 441 at 455.
> *Dow Chemical Co v Kayson Plastics & Chemicals Ltd,* [1967] 1 Ex C R 71, 47 CPR 1 at para. 12.
> *Vojic v Canada (MNR),* [1987] 2 CTC 203, [1987] FCJ No 811 (CA) at para. 3.
> *Chavali v Canada,* 2001 FCT 268 at para. 21, aff'd in *Chavali v Canada,* 2002 FCA 209.

17. In anti-trust matters material facts include 'economic facts' which are necessary to support the constituent elements of anti-trust offences. Mr. Justice Scirica of the United States Court of Appeals for The Third Circuit in *Queen City Pizza, Inc. v. Domino's*

Pizza, Inc. described the circumstances in which a claim such as that brought by the Commissioner will be found to lack material facts including economic facts:

> *Where the plaintiff fails to define its proposed relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff 's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.*
>
> *Queen City Pizza, Inc. v. Domino's Pizza, Inc*., 124 F.3d 430, 436 (3d Cir.1997).

18. In *Director of Investigation and Research v. Canada Pacific Ltd.* the Tribunal considered a motion by the Commissioner regarding the failure of the Respondent Canadian Pacific ("**CP"**) to properly plead the material facts with respect to its claims of efficiencies pursuant to Section 96 of the Act. CP had asserted efficiency gains of $20 million in cost savings and efficiencies. It further alleged service improvements which it claim contributed to the alleged efficiencies. Mr. Justice McKeown held:

> *The Director argues that he requires details. The Director argues that he requires details of any efficiency gains in order to intelligently reply to those allegations. CP argues that the Director knows or ought to know what the efficiency gains referred to are both as a result of the inquiry into this matter and because the efficiencies alleged are the same as those which were argued before the NTA. Further, CP argues that this is the type of information which is more appropriately obtained through discoveries...In my view, the Director's request for particulars is reasonable. Under the Act, the existence of efficiencies essentially constitutes a defence to the Director's application.* ***Just as it is improper for the Director to plead bald allegations without pleading the material facts upon which he relies, so too must the respondents plead the material facts which form the basis of a "defence" of efficiency gains****. Accordingly, CP will be required to provide the Director with a list of the categories or types of efficiency gains arising from the merger on which they rely*.(emphasis added)
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> *Canada (Competition Act, Director of Investigation and Research) v Canadian Pacific Ltd*, [1997] CCTD No 7 at paras. 16, 17.

19. There is no substance to the Commissioner's claim that certain of Reliance's demands for particulars are in reality a request for evidence. Evidence is something that goes to the proof of the material facts as alleged. As noted by Mr. Justice Noël in the Federal Court of Appeal:

> *one must not confuse material facts, which must be pleaded and which in this case were pleaded, and the evidence by which those facts may be proven.*
>
> *Astrazebeca Canada Inc v Novopharm Ltd, 2010 FCA 112 at para. 5.*

20. The distinction between material facts, particulars and evidence was considered in the frequently cited decision of Master Sandler of the Ontario Supreme Court in *Copland v Commodore Business Machines Ltd.*:

> *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".*
>
> *Copland v Commodore Business Machines Ltd*, 52 OR (2d) 586 at para. 11. Cited in *Janssen-Ortho Inc v Amgen Canada Inc*, [2005] OJ No 2265, 256 DLR (4th) 407 at para. 89 (Ont CA); *Premakumaran v R*, 2003 FCT 635 at para. 9.

21. It is submitted that the Notice of Application fails to plead the minimal material facts, including economic facts, that the Commissioner sets out in his own *Enforcement Guidelines* on *The Abuse of Dominance Provisions* ("**Abuse of Dominance Guidelines**").

> Competition Bureau Canada, *Enforcement Guidelines: The Abuse of Dominant Position Provisions* (September 20, 2012).

Completeness

22. The Commissioner has commenced this Notice of Application after 12 years of inquiry and collection of detailed industry information. In May 2001, the Commissioner commenced a formal inquiry into the rental water heater return policies and procedures of Enbridge Services, Inc. ("**Enbridge**"), which is now Direct Energy Marketing Limited. In February 2002, pursuant to section 79 and 105 of the Act, the Tribunal issued a ten year Consent Order against Enbridge which gave the Commissioner express rights to request and obtain information relating to its water heater rental program and which, as issued by consent, was issued without any adjudication as to the Commissioner's allegations of abuse or market definition.

23. In the Statement of Grounds and Material Facts relied upon in seeking the Consent Order against Enbridge, it is noted that Commissioner obtained information relevant to the inquiry voluntarily from complainants and industry participants and "*obtained information and analysis from an external industry expert and an external economic expert*". Additionally, during the period from at least 2002 to 2012, Reliance has provided the Commissioner, both voluntarily, and in August 2012 under the compulsion of an Order pursuant to section 11 of the Act, with detailed information relating both to the supply of water heaters generally and Reliance's individual practices and experience.

24. As noted by Mr. Justice Blanchard, sitting as the Presiding Judicial Member of the Tribunal, in *Commissioner of Competition v. Canada Pipe Company*, the *Competition Tribunal Rules* are intended to ensure:

> *"that the Commissioner's investigation is completed and that the case is in final form at the time an application is filed with the Tribunal".*
>
> *Commissioner of Competition v. Canada Pipe Company*, [2003] CCTD No 24, 2003 Comp Trib. 15 at para. 13.

25. Pleadings that are "exceedingly general" are liable to be struck.

> *Where a statement of claim is exceedingly general and bereft of specifics so as to present the defendant from either proper investigation or proper response, it may well be struck out ... such statements of claim (are) fundamentally vexatious for they reveal insufficient facts to demonstrate the basis for the claim, thus making it impossible for the defendant to answer the claim or, indeed for a court to regulate the proceedings.*
>
> *Pellikaan v Canada*, 2002 FCT 221 at para 15, citing *Murray v Public Service Commission of Canada* (1978) 21 NR 230 (FCA) at page 236.

26. A pleading should not be left open-ended. Terms "*includes*", "*including*", "*among other things*", "*generally corresponding to*" and "*certain other*" are improper forms of pleading. As held by the Supreme Court of Canada in *Imperial Tobacco Inc. v Canada (A.G.)*:

> *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.*
>
> *Imperial Tobacco Inc v Canada (AG)*, 2011 SCC 42 at para. 22.
> *Doris Hosiery Mills Ltd v Victoria's Secret Stores Inc, (1994), 58 CPR (3d) 62 at 67 (FCTD).*

27. The Commissioner makes open-ended allegations with respect to all of the constituent elements of a claim under Section 79 of the Act. In fact, the Commissioner confirms that his pleadings are "*not intended to be exhaustive*". He justifies this approach on the basis that it would be inappropriate to limit the Commissioner's rights at discovery by limiting the scope of the pleadings.

> Commissioner's Response to the Notice of Motion, paras. 3, 12a., 12d., 12e., and 12f. Notice of Application: paras. 10, 13, 14, 17, 20, 22, 29, 31, 32, 43; Schedule A paras. 4, 5, 6.

28. The Commissioner's position is entirely inconsistent with the rules of pleading. The Respondent is entitled to know the case it must meet. In addressing a similar situation in which a party sought to defend the use of an open-ended allegation, Mr. Justice Zinn of the Federal Court held in *Throttle Control Tech Inc. v. Precision Drilling Corporation* that:

> *The assertion of [the Defendant] that it has pleaded in this manner in order to "rely on further particulars which may become known through the discovery process" illustrates exactly why this is an improper pleading. First, the discovery process is to be limited to the allegations and material facts pleaded and no others. Second, the party opposite is entitled to know the case that it must meet, not the case as it may develop, unless the pleadings are amended after obtaining an order on motion that seeks that relief.*
>
> ***In my view, particulars cannot cure this improper pleading; it ought to be struck.*** (emphasis added)
>
> *Throttle Control Tech Inc v Precision Drilling Corporation*, 2010 FC 1085 at para. 26.
> See also *Cat Productions Ltd v Macedo*, (1984), 1 CPR 517 (FCTD) at para. 8 and *Gulf Can Ltd v "Mary Mackin" (The)*, [1984] 1 FC 884 (FCA) at pages 5-6.

C. Concise Statement of Economic Theory

29. In addition to pleading the material facts that support the Notice of Application, the Commissioner is required to file a concise statement of "economic theory" pursuant to

Rule 36(2)(d). In order for Rule 36(2)(d) to be given meaning, the requirement to set out a concise statement of the economic theory of the case must be interpreted as additional to or distinct from the requirements of Rule 36(2)(c). That an application filed in the Tribunal should require directed economic thought is consistent not only with the stated purposes of the Act but also the composition of the Tribunal itself.

> *Competition Act*, (R.S.C. 1985, c. C-34), section 1.1.
> *Canada (Director of Investigation & Research) v Southam Inc*, 1 SCR 748, paras. 47 to 53.

30. In competition or anti-trust matters a party's economic theory of the case is a critical ingredient that informs the nature of the case to be met.

> *In antitrust enforcement and litigation the use of economic methods helps focus the attention of decision-makers and litigants on the connection between the economic theory of the case and the evidence. Economic methods help clarify what hypotheses are in dispute and what evidence can help test them. …* ***Careful articulation of the theory can clarify thinking by laying bare key assumptions and reasoning steps, and by structuring the collection of evidence.*** (emphasis added)
>
> Baker, Jonathan B. and Bresnahan, Timothy F., "*Economic Evidence in Antitrust: Defining Markets and Measuring Market Power*" Stanford Law and Economics Olin Working Paper No. 328 (2006). Available at SSRN: http://ssrn.com/abstract=931225, pages 3 to 4.

31. It is an incontrovertible principle that "*no legislative provision should be interpreted so as to render it mere surplusage*". It is to be presumed that "*in preparing the material to be enacted into law the legislature seeks an orderly and economical arrangement. Each provision expresses a distinct idea*."

> *R v Proulx*, [2000] 1 SCR 61 at para. 28.
> *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para. 27.
> R. Sullivan, *Sullivan on the Construction of Statutes*, Markham, LexisNexis Canada, 2008, at page 209.

32. The Commissioner claims, in his Response filed on February 6, 2013 to Reliance's Notice of Motion, that his Statement of Economic theory is "sufficiently pleaded" and "sets out the economic theory in support" of his case. However, the Commissioner's statement of economic theory is nothing more than a restatement of the bald allegations contained in the Notice of Application and therefore fails to meet the standard of pleadings prescribed by the *Competition Tribunal Rules*.

D. The Notice of Application does not plead material facts sufficient to support the necessary elements of an application under section 79 of the Act

33. A claim pursuant to subsection 79(1) of the Act requires the following three elements to be established:

    (i) Dominance in respect of a defined product market and geographic market;

    (ii) A practice of anti-competitive acts; and

    (iii) Anti-competitive effect – either a substantial lessening or prevention of competition in the defined market.

34. The Notice of Application fails to plead material facts, including economic facts, sufficient to establish any of the elements of subsection 79(1).

Product Market

35. The Commissioner pleads only the following bald allegations and statements with respect the definition of the relevant product market:

- *"**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".*
- *"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."*
- Supply includes both rental and purchased water heaters from a "**utility company**", "**rental water heater providers**" (such as Reliance) and "***retailers**, such as home improvement centres and hardware stores, or from heating, ventilation and air conditioning **contractors***".

Notice of Application, paras. 10, 29, Schedule A, para. 4.

36. These are pronouncements based at most on bald allegations or legal conclusions rather than material facts, including economic facts, upon which the Tribunal could rely upon to make a determination as to the appropriate definition of relevant product market for the purposes of analyzing the claim pursuant to section 79. In fact, the pronouncement that

the markets should be aggregated for the purposes of the Notice of Application usurps the adjudicative determination of the Tribunal.

37. Further, the alleged product market is incompatible with the alleged geographic market. In response to a request by the Respondent to clarify what was meant by "certain other local rural markets", the Commissioner redefined those markets as areas where "natural gas is unavailable". If there is a single product market which includes both natural gas and electric water heaters, as stated in the Notice of Application, how could this product market coincide with geographic markets where no natural gas is available? If no natural gas is available is the Respondent to assume that it is the Commissioner's statement of fact that substitutes for electrical water heaters are not available in these local rural markets? This incompatibility of the alleged product markets and geographic markets further illustrates the need for material facts regarding the substitutes available to consumers in the markets alleged.

38. To establish a relevant product market, the Notice of Application must plead material facts which show that the proposed product market is not too narrow:

> *The complaint in an antitrust case must allege a basis for finding that commodities which are in some way unique, such as the educational 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.*
>
> *Re-Alco Industries, Inc. v. National Center for Health Education, Inc.,* 812 F. Supp. 387, 391 (SDNY 1993) at page 391.

39. A tenable relevant product market definition must be supported by material facts, including economic facts, with respect to all reasonably interchangeable products and material facts as to why they should be included or excluded from the relevant product market:

> *Because a relevant market includes all products which are reasonably interchangeable, "plaintiff's failure to define its market by reference to the rule of reasonable interchangeability is, standing alone, valid grounds for dismissal." (Internal citation omitted).*
>
> *B.V. Optische Industrie De Oude Delft v. Hologic, Inc., 909 F. Supp. 162, 172 (S.D.N.Y. 1995), citing E & G Gabriel v. Gabriel Bros., Inc., 1994 U.S. Dist. LEXIS 9455, *10*

(S.D.N.Y. July 13, 1994), citing Ford Piano Supply Co. v. Steinway & Sons, 1988 U.S. Dist. LEXIS 523 (S.D.N.Y. Jan. 13, 1988).

40. The Commissioner's Abuse of Dominance Guidelines state:

> *In general, the smallest set of products in which the price increase would be sustained is defined as the relevant product market. This approach seeks to define the universe of products over which a firm could be found to exercise market power, focusing on demand responses (i.e., buyer substitution) to relative price changes.*

Competition Bureau Canada, *Enforcement Guidelines: The Abuse of Dominant Position Provisions* (September 20, 2012) at section 2.1.

41. The Notice of Application contains no material facts which would establish the functional interchangeability, or lack thereof, of various types water heater products (electric, natural gas, propane, oil, geothermal or solar water heaters). The Tribunal has held functional interchangeability is:

> "***a necessary but not sufficient condition*** *to be met before products will be placed in the same* [product] *market*". (emphasis added)

Canada (Competition Act, Director of Investigation and Research) v Tele-Direct (Publications) Inc, [1997] CCTD No 8 at para. 86 quoting *Canada (Director of Investigation & Research) v Southam Inc*, [1995] 3 FC 557 at para. 17.

42. Further, the Notice of Application contains no material facts with respect to the willingness of customers to switch between various types of water heaters such as the views, strategies and behaviours of residential consumers, switching costs (including differences in fuel costs) and price relationships and price levels. The Commissioner's Abuse of Dominance Guidelines acknowledge the importance of these facts. The guidelines have been cited with approval by both the Tribunal and the Federal Court of Appeal.

Canada (Competition Act, Director of Investigation and Research) v Tele-Direct (Publications) Inc (1997), 73 CPR (3d) 1 at 33 and 76, quoting *Canada (Director of Investigation & Research) v Southam Inc*, [1995] 3 FC 557 at para. 161.
Commissioner of Competition v Canada Pipe, 2005 Comp. Trib. 3 at para. 66.
Canada (Commissioner of Competition) v Canada Pipe Co, 2006 FCA 236 at paras. 15, 16.
Competition Bureau Canada, *Enforcement Guidelines: The Abuse of Dominant Position Provisions* (September 20, 2012) at section 2.1.

43. In *Bayer Schering Pharma AG v. Sandoz, Inc*., a claim was struck for insufficient factual pleadings regarding the definition of the relevant product market. The claimant sought to define a relevant product market as a specific type of contraceptive drug. It claimed that only two drugs in the proposed relevant market could provide the unique therapeutic combination that they did. The court found that the allegation of a lack of substitutable products was simply a bald allegation, and was thereby not sufficient for purposes of defining a relevant product market. It explained that although the claimant did not need to "address every conceivable, far-fetched alternative" to the occupants of the proposed market, it was required to "demonstrate that there is no combination of drugs that [could] serve as a functional substitute" for the drugs in the alleged product market.

> *Bayer Schering Pharma AG v. Sandoz, Inc., 813 F. Supp. 2d 569, 575 (S.D.N.Y. 2011), citing Hack v. President & Fellows of Yale College, 237 F.3d 81, 86 (2d Cir. 2000).*

44. The only statements pleaded with respect to potential substitutes are as follows:

- "*Residential consumers are **limited in their choice** of energy source for heating water by where they live and the infrastructure constraints of their residence*."
- "*In rural areas, **most** residential consumers use electric water heaters as natural gas is generally not available in these areas*."
- "*In contrast, in areas where natural gas is available, residential consumers **commonly** use natural gas instead of electric water heaters*."
- "*Natural gas water heaters **generally** cost less to operate than electric water heaters."*

45. These generalizations are not statements of material facts, are imprecise by their very wording, are completely devoid of any economic facts and could not reasonably support a conclusion by the Tribunal that the alleged relevant product market is the appropriate construct for consideration of the Commissioner's claim pursuant to Section 79. For example:

- The use of the terms **"most", "commonly" and "generally"** does not support any conclusion regarding the relevant product market and in fact suggests nothing more than a potential preponderance of types of water heaters of some unknown magnitude or importance.

- The statement that residential consumers are **limited in their choice** of energy source for heating water by where they live and the infrastructure constraints of their residence" clearly suggests there are choices, even if based on these factors. However, there is no attempt whatsoever to plead any facts with respect to substitutes based on energy source or facts that indicate why, or why not, the Tribunal should include these undisclosed substitutes in the relevant product market.

46. While the Commissioner need not address every "conceivable, far-fetched alternative" that could be functionally interchangeable, in order to state a reasonable cause of action he must at minimum "allege sufficient facts" about other apparently functionally interchangeable alternatives, including but not limited to propane, oil, geothermal or solar water heaters, to determine that they are or are not in the same product market. Without this minimal level of pleading the Notice of Application fails to disclose a reasonable cause of action.

47. Although there have been no prior cases before this Tribunal seeking to strike a Notice of Application, the failure to plead material facts to support an allegation of relevant product market in anti-trust matters has consistently been held by American courts as sufficient to dismiss an action for failure to disclose a claim:

> *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 Rule 12(b)(6) motion* [being a motion to dismiss].
>
> *Re-Alco Industries, Inc. v. National Center for Health Education, Inc.*, 812 F. Supp. 387, 391 (SDNY 1993) at page 391.
> See also *B.V. Optische Industrie De Oude Delft v. Hologic, Inc.*, 909 F. Supp. 162, 172 (SDNY 1995) and *Bayer Schering Pharma AG v. Sandoz, Inc.*, 813 F. Supp. 2d 569, 575 (SDNY 2011).

48. The failure to plead material facts that would permit the Tribunal to determine the relevant product market is cause for dismissal.

Where the plaintiff . . . alleges a proposed relevant market that clearly does not encompass all interchangeable substitute products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient and a motion to dismiss may be granted.

Linzer Products Corp v Sekar, 499 F Supp 2d 540, 554 (SDNY 2007).
Bayer Schera Pharma AG v Sandoz Inc, 08 Civ 03710 190.

49. The Respondent submits that the Commissioner's failure to plead the minimal material facts, including economic facts, that would support the alleged product market, demonstrates that the Commissioner cannot satisfy this element of the claim pursuant to section 79 of the Act. Therefore, the Notice of Application discloses no reasonable cause of action and should be struck.

Geographic Market

50. The Commissioner pleads only the following with respect to the definition of relevant geographic market:

- "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 **the local markets of Ontario where Union Gas distributes natural gas** and"
- "certain **other local rural markets** in Ontario"
- "For the purpose of this application, these geographic markets have been **aggregated**."
- "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."
- The Commissioner attempted to redefine the "other local rural markets" as "the local markets of Ontario where Union Gas distributes natural gas and certain other local rural markets of Ontario **[that are not supplied natural gas**]."
- Supply includes both rental and purchased water heaters from a "**utility"** "**rental water heater provider(s)**" (such as Reliance) and "**retailers**, such as home improvement centres and hardware stores, or from heating, ventilation and air conditioning **contractors**".

Notice of Application paras. 10, 13, 31, 32 supplemented by Ms. Palumbo's letter of January 22, 2013, being Exhibit B to the Commissioner's *Response to the Notice of Motion*.

51. In essence the relevant geographic market alleged in the Notice of Application is made up of :

- **Local markets** where Union Gas supplies natural gas
- **Local rural markets** where there is no natural gas supplied
- These multiple markets **"correspond generally to parts of"** a loosely stated area which conceivably includes almost all of Ontario, the only specific exclusion being Ottawa.
- These multiple markets are then stated to be **aggregated**.

52. The Respondent submits that this concept of unidentified markets that are then aggregated for anti-trust analysis is completely untenable. The Notice of Application includes a plurality of unidentified markets fraught with inconsistencies and imprecision. The importance of this deficiency is highlight by the fact that the Commissioner seeks a probation order from the Tribunal in respect of a multitude of aggregated markets that it has not identified. The suggestion of aggregation in and of itself is fatal to the pleading, as it suggests that an order should issue for all of these aggregated markets even where an offence under section 79 of the Act may not be established in any given market.

53. The Tribunal has described the "critical question" regarding geographic market as:

> *"whether an area is sufficiently insulated from price pressures emanating from other areas so that its unique characteristics can result in its prices differing significantly for any period of time from those in other areas".*
>
> *Canada (Director of Investigation and Research, Competition Act) v Nutrasweet Co,* [1990] CCTD No 17 at page 13.

54. In Laidlaw, Madam Justice Reed, writing as the Presiding Judicial Member for the Tribunal posed the question this way:

> *[W]hat are the boundaries of the geographic area within which competitors must be based if they are to provide effective competition to [the respondent]. Effective competition means that the competitor provides a significant restraint on [the respondent's] ability to raise prices above the competitive level.*

> *The Director of Investigation and Research v Laidlaw Waste Systems Ltd*, [1992] CCTD No 1 at page 22.

55. While it is true that "*[o]ne does not expect to be able to define the geographic dimensions of a market with precision*", the Tribunal must have available to it sufficient material facts, including economic facts, to support some degree of legal and economic analysis.

> *The geographic boundaries of a market cannot be glibly defined by reference to a certain kilometre or mileage distance. A more careful analysis is required.*
>
> *The Director of Investigation and Research v Laidlaw Waste Systems Ltd*, [1992] CCTD No 1 at page 27.

56. The Commissioner purports to describe the various local markets in Ontario where Union Gas distributes natural gas. However, not only is the description qualified as being only "g*enerally part of*" the geographic area, the geographic area described is unintelligible. For example, while the "*North Bay/Muskoka area*" is the purported border of Northern Ontario, Muskoka is in fact part of Central Ontario and the cities of North Bay and Muskoka are at least 200 kilometres apart. Furthermore there is no publically available information which would delineate these markets.

57. In addition, the local rural markets, also sought to be aggregated into the relevant geographic market, are stated to be those "local rural markets where there is no supply of natural gas". It is therefore impossible to determine by reference to Union Gas distribution areas what "local rural markets" are being referred to.

58. Another notable deficiency is that although the Commissioner states that suppliers include "rental water heater providers" and "retailers, such as home improvement centres and hardware stores, or from heating, ventilation and air conditioning contractors" there are no facts pleaded as to which of the multitude of aggregated markets these various competitors supply water heaters in. Retail markets are typically examined by considering the location of competing sellers and defining relevant markets based on the competitive intersection of the sellers. Again there is nothing stated whatsoever about the location of the suppliers or which suppliers are in which markets.

59. Further, while the Commissioner refers to potential suppliers at paragraph 10 of the Notice of Application, no facts are pleaded as to whether some or all of those suppliers actually supply residential consumers in one or more of the proposed "local" or "local

rural" markets, or act as a competitive constraint on the prices charged in those markets. Are prices uniform in these multitude of markets or are they differentiated? Do fluctuations in pricing in one location impact the pricing in other locations? Do the various suppliers, rental companies, retailers and contractors price discriminate amongst locations? No facts have been pleaded at all as to the identity or relative pricing of the various competitors to substantiate the relevant geographic market definition.

60. Although there have been no prior cases before this Tribunal seeking to strike a Notice of Application, the US case law is replete with cases which were dismissed for failing to plead material facts, including the necessary economic facts, with respect to geographic market. As noted by the United States Court of Appeals for The Second Circuit "[t]he goal in defining the relevant market is to identify market participants and competitive pressures that restrain an individual firm's ability to raise prices or restrict output.

> *Geneva Pharma Tech Corp v Barr Laboratories Inc*, 386 F 3d 485, 485 (2d Cir 2004).
> *AD/SAT, Div of Skylight Inc v Associated Press*, 181 F 3d 216, 227 (2d Cir 1999) (quoting *Tampa Elec Co v Nashville Coal Co*, 365 US 320, 327-28 (1961)).)).
> *PepsiCo Inc v Coca-Cola Co*, 315 F 3d 101, 105 (2d Cir 2002) (per curiam) (quoting *United States v EI du Pont de Nemours & Co*, 351 US 377, 404 (1956)).

61. The Respondent submits that the Commissioner's failure to plead material facts which identify the aggregated local markets, or the economic facts which would support the relevant geographic, demonstrates that the Commissioner cannot satisfy this necessary element of section 79 of the Act. Therefore the Notice of Application discloses no reasonable cause of action and should be struck.

Dominance

62. The following factors must be taken into account in considering whether Reliance is dominant:

(a) The market share of the alleged dominant firm and the overall concentration in the market measured by the CR4 or Herfindahl–Hirschman Index, or HHI ;

(b) the number and relative success of competitors in the relevant market;

(c) barriers to entry;

(d) how easily a new firm can establish itself as a competitor; and

(e) The dominant firm's ability to charge supra-competitive prices.

> *Canada (Director of Investigation and Research, Competition Act) v Nutrasweet Co.* [1990] CCTD No 17 at page 17.
> *The Director of Investigation and Research v Laidlaw Waste Systems Ltd.*, [1992] CCTD No 1 at page 32.
> *Canada (Competition Act, Director of Investigation and Research) v Tele-Direct (Publications) Inc*, [1997] CCTD No 8 at para. 86.
> *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 236 at para. 6.

63. The Respondent submits that while the Notice of 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.

64. The Commissioner makes only the following allegations with respect to Reliance's dominance of the purported relevant market:

- Competing Suppliers include "**rental water heater providers**" (such as Reliance) and "**retailers**, such as home improvement centres" (such as Home Depot, Rona, Lowes and Canadian Tire) and "hardware stores" (such as Home Hardware and other local hardware stores), "or from heating, ventilation and air conditioning **contractors**"
- That it controls **at least 76%** of the purported relevant market based on **annual revenues**;
- That its **exclusionary policies and procedures** create significant artificial barriers to entry in the purported relevant market, which would otherwise be characterized by ease of entry;
- That since 2005 it has maintained **substantially high gross profit margins** from renting water heaters to residential consumers in the purported relevant market; and
- That through the rental payments it receives on its installed base of water heaters in the purported relevant market, **Reliance has recovered and continues to recover a significant multiple of the capital cost of such water heaters**;
- That supply includes both rental and purchased water heaters from "**rental water heater provider(s)**" (such as Reliance) and "**retailers**, such as home improvement centres and hardware stores, or from heating, ventilation and air conditioning **contractors**"

> *Notice of Application*, paras. 10, 34 and 35.

65. The Tribunal in *Tele-Direct* explained that "market power is generally considered to mean an ability to set prices above competitive levels and to maintain them at that level

for a significant period of time without erosion by new entry or expansion of existing firms."

> *Canada (Competition Act, Director of Investigation and Research) v Tele-Direct (Publications) Inc*, [1997] CCTD No 8 at paras. 86, 225.

66. No facts are pleaded describing the pricing of any water heaters and/or related services. There are no material facts that are alleged with respect to Reliance's pricing, or how such pricing compares with that of Reliance's competitors in any market. Notably absence is any allegation that Reliance has, or is able to, charge supra-competitive prices.

67. The Commissioner's bald assertions regarding Reliance's allegedly 'high' gross profit margins and capital cost recovery is at best a pleading of evidence. It does nothing to establish, or even reasonably infer, that Reliance is able to charge supra-competitive prices. In fact, without a comparison to other competitors these statements do not support any finding of dominance whatsoever. No facts are alleged by which it could be determined, or even inferred, that Reliance's profit margins or capital cost recovery are "higher" than a competitive level in any market.

68. The Commissioner's claim that Reliance possesses a 76% market share is also a bald and imprecise allegation. The Notice of Application notes that Reliance sells other products and services that are not within the purported relevant product market. The annual revenue cited does not indicated whether these annual sales are Reliance's alleged overall sales or only with respect to water heaters and related services.

69. Further, the Notice of Application does not indicate whether these gross revenue numbers are confined to sales revenue. Is the market share as alleged intended to include both rental revenue as well as sales revenue? If so how is this revenue number used to allege a market share when some competitors are 'renting' water heaters while other competitors are 'selling' water heaters? This is a fundamental and import distinction in this matter. It appears by both the approach to geographic market definition and the reference to this general revenue number that the Commissioner is relying on revenue from Reliance's installed base of rental customers and attempting to define markets based on this installed base of customers rather than reviewing sales or new rental of units per year as compared to other competing sellers in the market. This would be a novel and inappropriate measure of market share. It would be akin to looking at how many leased vehicles

General Motors has parked in consumers driveways rather than comparing how many vehicles General Motors sold or lease in the previous year.

70. It is submitted that this approach would be wholly inconsistent with the approach to market share under the Act, the Regulations and the Commissioner's own Enforcement Guidelines.

> *Competition Act*, (RSC 1985, c C-34), section 109.
> *Notifiable Transactions Regulations*, SOR/87-348, section 5.

71. Furthermore, the Notice of Application pleads no material facts to support a conclusion that new entry or expansion would not constrain any such ability to charge supra-competitive prices, even if such facts had been alleged. Although the Notice of Application baldly asserts that the impugned practices "have caused at least two competitors to exit the Relevant Market [and] have also impeded and prevented several competitors from entering or expanding in the Relevant Market", there are no material facts regarding the circumstances of these apparent exits and preventions which could link them to the impugned practices.

> Competition Bureau Canada, *Enforcement Guidelines: The Abuse of Dominant Position Provisions* (September 20, 2012) at section 2.3.2.
> Competition Bureau Canada, *Enforcement Guidelines: Merger Enforcement Guidelines* (October 6, 2011) at part 7.
> Competition Bureau Canada, *Enforcement Guidelines: Competitor Collaboration Guidelines* (December 23, 2009) at section 3.4.3.

72. The Respondent submits that the Commissioner's failure to plead material facts which would support a finding of dominance, demonstrates that the Commissioner cannot satisfy this necessary element of section 79 of the Act. Therefore the Notice of Application discloses no reasonable cause of action and should be struck.

Abusive Practices

73. The Commissioner makes only the following allegations with respect to abusive practices:

- The Respondent's Removal Reference Number ("RRN")policy whereby a customer is required to call Reliance in order to cancel rental service and obtain a number to return the water heater is **"exclusionary";**

- The Respondent's Return Depot Policies are **"exclusionary**" and "deters competitors from returning Reliance's water heaters";
- The Respondent's Damage Fees are **"unwarranted";**
- The Respondent's account closure and drain, disconnect and pick up charges are **"unwarranted**"
- The Respondent " regularly continues to bill customers after customers" after the customers have switched to a competitor

  The Respondent's "**exclusionary** water heater policies and procedures" are an abuse of dominance .

Notice of Application, paras. 37-47.

74. Referring to the Tribunal's decision in *Tele-Direct*, the Madam Justice Desjardins of the Federal Court of Appeal held in *Canada (Commissioner of Competition) v. Canada Pipe* that:

> *Relevant factors to be considered and weighed to determine this overarching "purpose" include the reasonably foreseeable or* ***expected objective effects*** *of the act …,* ***any business justification****, and any evidence of subjective intent, if available … [emphasis added]*

Canada (Commissioner of Competition) v Canada Pipe Co, 2006 FCA 233 at para. 67.

75. The use of adjectives such as "exclusionary" or "unwarranted" does nothing more than negatively characterize the Respondent's policies. There are no material facts pleaded that even touch upon the factors outlined by the Federal Court of Appeal. There is no allegation of "expected objective effects", nor does the Commissioner refute that there are any "business justifications" for the policies in question. Finally, no facts have been pleaded by the Commissioner linking Reliance's alleged anti-competitive acts to the requisite intended negative effect on a competitor.

Canada (Commissioner of Competition) v Canada Pipe Co, 2006 FCA 233 at para. 67.
C*anada (Director of Investigation & Research) v Southam Inc*, 1 SCR 748, paras. 43 to 45.
Application, paras. 2, 15, 19, 25, 28, 34, 36, 37, 38, 42, 43, 44, 46, 47, 48, 50, 51, 53, 54, 56iii and 56iv.

76. An objective anti-competitive purpose for each impugned act said to constitute a practice is *"a 'necessary ingredient' of a claim under section 79 of the Act*." Further, there must

be evidence linking the impugned practice to the requisite intended negative effect on a competitor or impacting the choices and switching behaviour of consumers.

> *Canada (Director of Investigation and Research, Competition Act) v Nutrasweet Co,* [1990] CCTD No 17 at pages 20 and 21.
> *Canada (Commissioner of Competition) v Canada Pipe Co,* 2006 FCA 233 at para. 78.

77. The Commissioner pleads no material facts that establish Reliance's return policies are a practice of anti-competitive acts. No facts are pleaded as to how Reliance's impugned return policies and procedures differ from the return policies and procedures in place prior to May 17, 2010. Further there are no material facts pleaded to refute that there is a legitimate business purpose for the practices and policies in question contrary to the Commissioner's own Abuse of Dominance guidelines:

> *An additional factor in the determination of whether an act is anti-competitive is whether it was in furtherance of a legitimate business objective. A business justification is not a defence to an allegation that a firm has engaged in anti-competitive conduct, but rather an alternative explanation for the overriding purpose of that conduct, if and as required, that a firm can put forward where the Bureau believes that purpose to be anti-competitive.*
>
> Competition Bureau Canada, *Enforcement Guidelines: The Abuse of Dominant Position Provisions* (September 20, 2012) at page 11.

This deficiency, in failing to refute any "business justification", is particularly glaring in light of the fact that the Commissioner was well aware of the fact that these policies were intended to deal with the notorious misleading practices of competitors in the marketplace. These marketplace abuses are in fact directly related to the position and processes Reliance maintains with respect to the cancellation of contracts with its customers. The main issue in the Notice of Application against Reliance is that the Commissioner alleges that requirement that a customer obtain a RRN is an abuse because Reliance won't accept competitors acting as agents to act on behalf of Reliance customers who may want to switch suppliers.

78. The Ontario Superior Court of Justice has canvassed this issue and made findings inconsistent with the Commissioner's position. Reliance permits agents to take all necessary steps on behalf of a customer to replace the rental water heater and return it to Reliance. What Reliance does not do is permit any third party to initiate the termination of Reliance's contracts with its customers. However, a customer is required to do no

more than make a phone call to Reliance to obtain a unique identifier number ('RRN') to initiate the termination process. Any agent can then utilized this number to take any and all steps on the customer's behalf to complete the termination of the contract and return the tank, or cause Reliance to pick up the tank. There is no impediment to replace Reliance as the supplier to that customer once the customer has given notice of cancellation by obtaining the RRN. Mr. Justice Strathy of the Ontario Superior Court held, in a decision released on May 2011, that Reliance's process:

> imposes no additional burden on the consumer, other than the burden of picking up the telephone and informing Reliance that he or she wishes to terminate the contract and have the water heater removed…it may not be a bad thing from a consumer protection perspective to counter-balance to the entreaties of the "door knockers".
>
> *Weller v. Reliance Home Comfort Limited Partnership*, 2011 ONSC 3148 at para. 44, affirmed *Weller v. Reliance Home Comfort Limited Partnership*, 2012 ONCA 360 at para. 10.

79. A further decision making findings of marketplace abuses was rendered by the Ontario Court of Justice on July 17th, 2012 in which Direct Energy was awarded a permanent injunction against National Energy in respect of misleading practices found to be contrary to Section 52 of the *Competition Act.*

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

80. The fact that the Court have commented on the abuses in the marketplace and the legitimacy of the motive of consumer protection behind Reliance's RRN policy, emphasis the deficiency of the Commissioner's pleading in that it does not plead any material facts to refute the reasonable commercial objectives of this policy.

81. The Respondent submits that the Notice of Application should be struck as it fails to plead the minimal material facts to establish that the Respondent's policies constitute anti-competitive practices.

Substantial anti-competitive effect

82. The Commissioner makes only the following allegations with respect to the anticompetitive effects of Reliance's practices which it claims are abusive:

- The Respondent's "exclusionary" water heater return policies and procedures competitors prevent entry or expansion in the Relevant Market and
- In the absence of the Respondent's "exclusionary" water heater return policies and procedures, customer switching in the Relevant Market would likely be substantially greater, and consumers would likely benefit from lower prices and greater product quality;

Notice of Application, paras. 48-51.

83. The Federal Court of Appeal in *Canada Pipe* outlined the broad inquiry and material facts required to establish a finding under subsection 79(1)(c):

> *In order to achieve the inquiry dictated by the statutory language of paragraph 79(1)(c),* ***the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice, and then determine whether the preventing or lessening of competition, if any, is "substantial"****. This comparison must be done with reference to actual effects in the past and present, as well as likely future effects.* *Only through such a comparative approach can the Tribunal determine, as the statutory provision requires, whether the impugned practice "has had, is having or is likely to have the effect of preventing or lessening competition substantially".* ***First, we must establish what the conditions of entry would be without*** **[the impugned practice]** ***and, then, determine how the anti-competitive acts altered the prospects for economically feasible entry.***

Canada (Commissioner of Competition) v Canada Pipe Co, 2006 FCA 233 at para. 37.

84. The Commissioner makes only the following allegations with respect to likely anti-competitive effect of the alleged exclusionary return policies and procedures:

- "competitors would likely enter or expand in the Relevant Market"
- "establish significant barriers to entry"
- "caused two [undisclosed] competitors to exit"
- "impeded the entry or expansion of several [undisclosed] competitors"
- decreased "customer switching"

- "customers would benefit from lower prices and greater product choice"

Paragraphs 3, 48, 49, 50, 51 and 54 of the Notice of Application

85. These are bald allegations and legal conclusions. The Commissioner has not pleaded any material facts as to the past or present state of competition, nor any material facts as to substantiate his claim.

86. The Commissioner alleges Reliance's policies and procedures to have caused at least two competitors to exit the market and prevented and impeded the entry or expansion of several competitors. No material facts are pleaded as to how Reliance's policies and procedures caused such exit or impeded new entry. Further, no material facts are pleaded with respect to the size of the competitors or whether new entry would act as a competitive constraint in the relevant market.

Notice of Application, paras. 46 and 49.
Notice of Application, para. 35

87. This deficiency in the pleading is exemplified by the fact that the Commissioner has pleaded that there is a wide array of suppliers. Competing Suppliers include "rental water heater providers" (such as Reliance) and "retailers, such as home improvement centres" (such as Home Depot, Rona, Lowes and Canadian Tire) and "hardware stores" (such as Home Hardware and other local hardware stores), "or from heating, ventilation and air conditioning contractors. Not only is there no identification of the competitors allegedly impacted there are no material facts pleaded as to the type of supplier allegedly impacted. Furthermore, without identification of the number of competitors in the relevant market there is no basis to conclude that the alleged exit of two competitors had any material impact on competition.

88. Furthermore, there are no material facts pleaded as to how these competitors were impacted by the return policies and procedures. Nor are then any material facts as to how the Respondent's return policies and procedures impacted the costs of these or other competitors or to what significance any increase in costs had on the ability of competitors to compete effectively.

89. The Notice of Application provides the Tribunal with no factual basis upon which to conclude Reliance's return policies and procedures have had, are having or are likely to have a substantial anti-competitive effect.

E. Requests for relief in the alternative

90. The Respondent submits that the Notice of Application fails to plead material facts which, accepted as true, would be sufficient to establish the constituent elements of a cause of action under section 79 of the Act. In these circumstances it plain and obvious that the Notice of Application discloses no reasonable cause of action. The Respondent submits that the Notice of Application should be struck.

91. The Respondent further submits that the conditions that must be met for it to accept jurisdiction are pursuant to Rule 36 of the *Competition Tribunal Rules*, Those conditions include the requirement that a notice of application contain a concise statement of the material facts and a concise statement of the economic theory of the case. The Respondent submits that by failing to plead the relevant material and economic facts, the Commissioner has failed to satisfy the jurisdictional requirements prescribed by the Tribunal and should be struck.

92. The Respondent therefore seeks an Order that the Notice of Application filed by the Commissioner against Reliance on December 20, 2012 be struck.

93. In the alternative, the Respondent seeks an Order requiring that the Commissioner amend the Notice of Application so as to sufficiently and completely plead each of the constituent elements of a claim under section 79 of the Act. In addition, Reliance seeks an Order requiring the Commissioner amend the Notice of Application so as to set out a concise statement of the Commissioner's economic theory of the case, again with reference to each of the constituent elements of a claim under section 79 of the Act. The Respondent submits that it should have 45 days from the date of service of such amended notice of application in which to file any Response to the amended Notice of Application.

94. In the further alternative, the Respondent seeks an order requiring the Commissioner provide the further and better particulars sought by the Demand for Particulars served by Reliance on the Commissioner on January 25, 2012. The Respondent's Demand for Particulars seeks from the Commissioner the particulars necessary to clearly delineate for

the purpose of the Application the following critical elements: the geographic and product markets; the purported dominance of Respondent in these markets; the exact conduct alleged to constitute a practice of anti-competitive acts; and the alleged substantially anti-competitive effect of that conduct. In each case the particulars requested are necessary for the Respondent to adequately plead its response. The Respondent submits that it should have 45 days from the date of receipt of such particulars in which to file any Response to the Notice of Application.

95. In circumstances where the Notice of Application constitutes a failure not only to plead the material facts necessary to establish a claim under section 79 of the Act, but also a failure to comply with the jurisdictional conditions prescribed by the Tribunal, the Respondent seeks an Order that the Commissioner pay the Respondent's costs of the motion on a solicitor and client basis.

PART IV: LIST OF AUTHORITIES REFERRED TO

1. *AD/SAT, Div of Skylight Inc v Associated Press*, 181 F 3d 216, 227 (2d Cir 1999)
2. *Astrazebeca Canada Inc v Novopharm Ltd*, 2010 FCA 112
3. *Bayer Schering Pharma AG v. Sandoz, Inc.*, 813 F. Supp. 2d 569, 575 (SDNY 2011)
4. *B.V. Optische Industrie De Oude Delft v. Hologic, Inc.*, 909 F. Supp. 162, 172 (S.D.N.Y. 1995)
5. *Canada (Competition Act, Director of Investigation and Research) v Canadian Pacific Ltd*, [1997] CCTD No 7
6. *Canada (Competition Act, Director of Investigation and Research) v Tele-Direct (Publications) Inc*, [1997] CCTD No 8
7. *Canada (Director of Investigation & Research) v Southam Inc*, 1 SCR 748
8. *Canada (Director of Investigation and Research, Competition Act) v Nutrasweet Co*, [1990] CCTD No 17
9. *Cat Productions Ltd v Macedo*, (1984), 1 CPR 517 (FCTD)
10. *Chavali v Canada*, 2001 FCT 268

11. *Chavali v Canada*, 2002 FCA 209

12. *Commissioner of Competition v. Canada Pipe Company*, [2003] CCTD No 24, 2003 Comp Trib. 15

13. *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233

14. *Commissioner of Competition v. Canada Pipe Company*, 2006 FCA 236

15. *Copland v Commodore Business Machines Ltd*, 52 OR (2d) 586

16. *Direct Energy v National Energy*, 2012 ONSC 4232

17. *Doris Hosiery Mills Ltd v Victoria's Secret Stores Inc*, (1994), 58 CPR (3d) 62 at 67 (FCTD)

18. *Dow Chemical Co v Kayson Plastics & Chemicals Ltd*, [1967] 1 Ex C R 71, 47 CPR 1

19. *Esso Petroleum Co Ltd v Southport Corporation*, [1956] AC 218

20. *Geneva Pharma Tech Corp v Barr Laboratories Inc*, 386 F 3d 485, 485 (2d Cir 2004)

21. *Grant v Torstar*, [2009] 3 SCR 640

22. *Gulf Can Ltd v "Mary Mackin" (The)*, [1984] 1 FC 884 (FCA)

23. *Imperial Tobacco Inc v Canada (AG)*, 2011 SCC 42

24. *Linzer Products Corp v Sekar*, 499 F Supp 2d 540, 554 (SDNY 2007)

25. *Operation Dismantle v The Queen*, SCC [1985] 1 SCR 441

26. *Pellikaan v. Canada*, 2002 FCT 221

27. *PepsiCo Inc v Coca-Cola Co*, 315 F 3d 101, 105 (2d Cir 2002)

28. *Philco Products v Thermionics* [1940] SCR 501

29. *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir.1997)

30. *R v Proulx*, [2000] 1 SCR 61

31. *Re-Alco Industries, Inc. v. National Center for Health Education, Inc.*, 812 F. Supp. 387, 391 (SDNY 1993)

32. *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27

33. *Skybridge Investments Ltd v Metro Motors Ltd*, [2006] BCJ No 2892, 2006 BCCA 500

34. *The Director of Investigation and Research v Laidlaw Waste Systems Ltd*, [1992] CCTD No 1

35. *Throttle Control Tech Inc v Precision Drilling Corporation*, 2010 FC 1085

36. *Union Carbide Canada Ltd v Canadian Industries Ltd*, [1969] 60 CPR 223

37. *Vojic v Canada (MNR)*, [1987] 2 CTC 203, [1987] FCJ No 811 (CA)

38. *Weatherall v Canada (Attorney General)*, [1988] FCJ No 593, 65 CR (3d) 27

39. *Weller v. Reliance Home Comfort Limited Partnership*, 2011 ONSC 3148

40. *Weller v. Reliance Home Comfort Limited Partnership*, 2012 ONCA 360

41. *Canadian Charter of Rights and Freedoms*, 1982, c 11 (UK), Schedule B, ss 7, 11 and 24

42. *Canadian Bill of Rights*, SC 1960, c 44, para. 2(e)

43. *Competition Act*, RSC 1985, c C-34, section 109

44. *Competition Tribunal Act*, RSC 1985 (2nd Supp), c 19, sections 1.1, 8, 9(2), 79(1)

45. *Competition Tribunal Rules*, SOR/2008-141, Rules 34(1), 36(1) and (2)

46. *Federal Courts Rules*, SOR/98-106, Rule 221

47. *Notifiable Transactions Regulations*, SOR/87-348, section 5

48. Baker, Jonathan B. and Bresnahan, Timothy F., *"Economic Evidence in Antitrust: Defining Markets and Measuring Market Power"* Stanford Law and Economics Olin Working Paper No. 328 (2006).

49. Competition Bureau Canada, *Enforcement Guidelines: Competitor Collaboration Guidelines* (December 23, 2009)

50. Competition Bureau Canada, Enforcement Guidelines: *Merger Enforcement Guidelines* (October 6, 2011)

51. Competition Bureau Canada, *Enforcement Guidelines: The Abuse of Dominant Position Provisions* (September 20, 2012)

52. *Commissioner of Competition v. Enbridge Services Inc*., CT-2001-008, Statement of Grounds and Material Facts, dated December 18, 2001

53. *Commissioner of Competition v. Enbridge Services Inc.*, CT-2001-008, Statement of Grounds and Material Facts – Addendum, dated February 15, 2002

54. *Commissioner of Competition v. Enbridge Services Inc*., Consent Order, CT-2001-008, dated February 20, 2002

55. R. Sullivan, *Sullivan on the Construction of Statutes*, Markham, LexisNexis Canada, 2008

ALL OF WHICH IS RESPECTFULLY SUBMITTED

February 15, 2013

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CT-2012-02

COMPETITION TRIBUNAL

BETWEEN:

THE COMMISSIONER OF COMPETITION
Applicant (Responding Party)

and

RELIANCE COMFORT LIMITED PARTNERSHIP
Respondent (Moving Party)

MEMORANDUM OF FACT AND LAW OF RELIANCE COMFORT LIMITED PARTNERSHIP (MOTION TO STRIKE)

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